

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of General Sessions
Donald B. Hocker, Circuit Court Judge

RECEIVED

May 06 2020

SC Court of Appeals

Appellate Case No. 2016-001220

THE STATE,RESPONDENT,

v.

PATRICK O'NEIL MCGOWAN,APPELLANT.

RESPONDENT'S PETITION FOR REHEARING

On April 22, 2020, this Court issued a published opinion in which it reversed one of Appellant's four convictions for first-degree assault and battery stemming from an incident in which he fired at and into a home. State v. McGowan, Op. No. 23118 (S.C. Ct. App. filed April 22, 2020) (Shearouse Adv. Sh. No. 16 at 21). In reversing Appellant's conviction and sentence for this offense, this Court held: (1) despite the trial judge specifically requesting trial counsel renew his motion for a directed verdict and counsel's failure to do so, the directed verdict issue was preserved for Appellate review because the trial judge "implicitly" denied Appellant's motion by asked the jury to rule on all four charges; and (2) directed verdict was appropriate as to the charge because the State did not provide evidence that Appellant knew the child victim was in the home and the State failed to provide evidence of Appellant's specific intent to harm the victim. Pursuant to Rule 221(a), SCACR, Respondent, the State, respectfully petitions for

rehearing because the State believes this Court misapprehended and overlooked the facts, law, and standard of review in reaching its rulings on both issues.

Directed Verdict

During oral argument, the Court raised, sua sponte, the argument that the trial judge, by allowing all four of Appellant's indictments to proceed to trial, "implicitly" ruled on the renewed directed verdict motion although trial counsel failed to request a specific, explained ruling for the motion on the record. Notably, this Court's opinion omits citation to any authority for this proposition. While the State agrees the concept of an implicit ruling does exist under South Carolina law, it has never been used to determine an issue involving directed verdict or been applied to situations in which a party ignored a judge's order and failed to request an on-the-record ruling on an issue or motion. Further, application has always been limited to cases in which a vague motion or ruling applied to a specific issue clearly evident in the record and open to only a single interpretation. As explained infra, the trial judge's ruling on the directed verdict issue could have been for potentially several reasons presented at trial.

Events Surrounding the Directed Verdict Motion

Trial counsel's original directed verdict motion was to the four charges of attempted murder. Said motion was based on the argument that attempted murder is a specific intent crime and that the State failed to show specific intent to harm the four victims. The State then proposed that first-degree assault and battery would an appropriate lesser-included charge as to at least two of the victims, including Child. The State argued first-degree assault and battery does not require specific intent because, in addition to attempt crimes, it includes "assault" within its purview and assault is not a specific-intent crime. Throughout the argument, trial counsel's argument focused on attempt crimes requiring specific intent. At the conclusion of the

directed verdict motion, the trial judge noted he needed to review the case law before making a final ruling on the motion the following the lunch recess. (R.p.236, line 2–R.p.237, line 7; R.p.240, line 14–R.p.251, line 25)

When court resumed, the parties discussed an additional ground for denying the directed verdict; transferred intent. Trial counsel argued transferred intent does not apply to specific intent, and the State argued the opposite. The trial judge noted he would not rely on transferred intent for the purposes of ruling on the directed verdict motion for the **attempted murder charge**. The trial judge denied the motion for directed verdict on all four indictments and announced he would likely charge first-degree assault and battery as a lesser-included offense for all four charges. Then, the trial judge announced transferred intent **could** “come into play” because he “seriously considered” the theory and it could be a part of his final charge. The trial judge informed trial counsel that if he renewed his directed verdict motion after the defense presented its case, he could “at a minimum” grant it on the charge pertaining to Child. (R.p.256, line 10–R.p.261, line 8)

After the defense rested its case, trial counsel renewed his previous directed verdict motion. Trial counsel again noted his argument pertained to specific intent. The trial judge announced he would again take it under advisement and, because court was about to conclude for the day, trial counsel should remind him in the morning to place his ruling on the record. Further, the trial judge noted he planned to charge “some general intent and some specific intent.” Trial counsel then noted he would not be sure of his objections to the specific intent and general intent issue/language “until [he] s[aw] the charges and see [how] everything is worded, exactly.” (R.p.335, line 15–R.p.336, line 15)

The following morning, the trial judge went on the record and noted that he and the attorneys had met in the morning and discussed several requests from trial counsel, two of which he denied. First, trial counsel had requested that each victim's name be added as an element to the attempted murder and first-degree assault and battery charges, and believed it was a "more clear expression of what specific intent is regarding [the] charge." Second, trial counsel requested a spoliation charge for a body cam video lost by the sheriff's office. No mention of the directed verdict motion was made. (R.p.338, line 1–R.p.339, line 9)

Implicit Rulings

In Pryor v. Northwest Apartments, LTD., 321 S.C. 524, 469 S.E.2d 630 (Ct. App. 1996), the Court of Appeals found that a party, Pryor, preserved its argument pertaining to the South Carolina Residential Landlord and Tenant Act (RLTA) because its pleadings clearly asserted the applicability of the RLTA to the facts of the case. Further, the trial judge implicitly ruled on the central issue in the case, Northwest's duty to warn Pryor of the dangerous conditions on the property, by finding the Northwest had no duty to warn of dangerous conditions existing on the property.

In State v. Oglesby, 384 S.C. 289, 681 S.E.2d 620 (Ct. App. 2009), Oglesby argued, on appeal, that the trial court erred in denying his motion to suppress an audio recording which violated his right to completeness pursuant to Rule 106, SCRE. Although Appellant did not specifically reference Rule 106, SCRE by name to the trial court, this Court found the issue was preserved for Appellate review because Appellant's arguments to the trial court were based on the rule of completeness, the basis of Rule 106, SCRE. Additionally, the trial court's denial of the motion was based on the rule of completeness. Accordingly, Oglesby's arguments pertaining to Rule 106, SCRE, were preserved for appellate review.

Similarly, in Gartside v. Gartside, 383 S.C. 35, 677 S.E.2d 621 (Ct. App. 2009), a family court found the issue of income imputation was preserved even though the first time the phrase “whether income should be imputed” appeared was in the losing party’s (Wife’s) Rule 59(e), SCRCF motion. In that situation, Wife consistently argued throughout the proceedings that Husband was voluntarily under-employed and would not look for employment outside of Charleston; South Carolina courts have found voluntarily unemployment is inextricably linked to income imputation. Additionally, the issue of income imputation was, in fact, ruled on by the family court when it justified its alimony reduction by finding there “were no comparable jobs available in the Charleston area” and there was “no compelling reason that [Husband] should be forced to leave the environment he has known for 25 years to seek employment which might pay the same as he was receiving in Charleston.”

Notably, all these cases involving implicit rulings involve issues which a party did not include the name or reference to a specific legal doctrine, but the records in those cases indicated that the parties were invoking specific legal concepts. More importantly, the judges’ rulings on these issues made specific rulings in the record applying to these legal concepts.

The instant case differs drastically from the prior opinions involving implicit rulings. First, the scope of Appellant’s motion is unclear: Appellant’s original motion was for a directed verdict on all four counts of attempted murder. The State proposed that first-degree assault and battery may be an appropriate lesser-included charge due to the inclusion of the general intent crime of assault within the offense. Trial counsel did not dispute that assault could apply to the facts of the case or that it is a general intent crime, instead trial counsel focused on his argument that “attempt” crimes require specific intent. Trial counsel also did not specifically extend his motion to the lesser-included charge. Thus, it is unclear whether trial counsel’s directed verdict

motion was extended to the charges for which Appellant was actually convicted, first-degree assault and battery.

Additionally, due to the above-cited omissions from trial counsel, a fair-reading of the record is that trial counsel implicitly withdrew his directed verdict motion. The trial judge gave trial counsel specific directions to remind him to place a final ruling on the directed verdict motion on the record because he still needed to consider the law and counsels' arguments before making a final decision. The following morning, an off-the-record conference was held, during which trial counsel made specific charge requests pertaining to specific intent and the attempted murder and first-degree assault and battery charges. Yet, despite direct reference to the requirements of specific intent, trial counsel did not make any reference to his prior motion.

Undoubtedly, the record reflects trial counsel moved for directed verdict on the four charges of attempted murder based on the requirement that the State prove specific intent for attempt crimes. However, unlike the above-cited implicit ruling cases, it is unclear whether motion also applied to the lesser-included charges, whether the trial judge actually ruled on it, and whether trial counsel implicitly withdrew his motion based on the prior arguments by the State. Accordingly, this Court should grant the petition for rehearing and apply the correct standard of review to the facts of this case.

Assault

This Court's opinion omits any recognition of an argument made by the State which was the very basis for its request to charge the lesser-included offense of first-degree assault and

battery: Appellant’s actions could also be defined as “assault” under South Carolina law.¹ In relevant part, S.C. Code Ann. § 16-3-600 provides:

(C)(1) A person commits the offense of assault and battery in the first degree if the person unlawfully:

(a) injures another person and the act: (i) involves nonconsensual touching of the private parts of a person, either under or above clothing, with lewd and lascivious intent; or (ii) occurred during the commission of a robbery, burglary, kidnapping, or theft; or

(b) offers or attempts to injure another person with the present ability to do so, and the act: (i) is accomplished by means likely to produce death or great bodily injury or (ii) occurred during the commission of a robbery, burglary, kidnapping, or theft.

....

(emphasis added).

S.C. Code Ann. § 16-3-600(C)(1)(b) differentiates “offers” to injure from “attempts” to injure. Similarly, South Carolina courts have interpreted these actions separately and noted both of them are the basis for a claim assault. See, e.g., State v. Mims, 286 S.C. 553, 335 S.E.2d 237 (1985) (defining “assault” as an unlawful attempt **or offer** to commit a violent injury upon the person of another, coupled with a present ability to complete the attempt or offer by a battery (emphasis added)); Mellen v. Lane, 377 S.C. 261, 659 S.E.2d 236 (S.C. Ct. App. 2008) (stating the elements of assault are “(1) conduct of the defendant which places the plaintiff, (2) in reasonable fear of bodily harm.”)

¹ Notably, this Court’s opinion does not reference the argument. Additionally, in its opinion the Court claimed the State “relied” on the transferred intent doctrine. State v. McGowan, Op. No. 23118 (S.C. Ct. App. filed April 22, 2020) (Shearouse Adv. Sh. No. 16 at 21, 25 n.2). As explained supra, the transferred intent doctrine was not the basis of the State’s initial argument. In fact, the State’s suggestion to charge the lesser-included offenses of first-degree assault and battery were made based on the claim of assault and general intent. Discussion of the doctrine of transferred intent was focused on its applicability to the attempted murder charges for which Appellant was not convicted.

Notably, while trial counsel consistently argued attempt crimes require specific intent, counsel was silent on the applicability of assault to Appellant’s actions and to the argument that assault is a general-intent crime. This differentiation is also supported in the common law: In re McGee, 278 S.C. 506, 299 S.E.2d 334, 334-335 (1983), the Supreme Court of South Carolina held held “[w]hile words alone do not constitute an assault, if by words and conduct a person intentionally creates a reasonable apprehension of bodily harm, it is an assault.” More recently, the Supreme Court noted that the degrees of assault and battery include “lower level[s] of intent” than the specific intent to kill required by attempted murder. See State v. King, 442 S.C. 47, n.5 810 S.E.2d 18, n.5 (2017)

In its opinion, the Court omits any reference to this argument. The State correctly argued that the crime of assault is a general intent crime. The facts presented at trial support that Appellant “offered” to injure the Child, and that a bullet passed close to Child placing him in fear of great bodily harm. Accordingly, this Court should grant the petition for rehearing and rule on this argument.

Conclusion

For the reasons stated above, Respondent petitions for rehearing pursuant to Rule 221(a), SCACR, and requests this Court reinstate Appellant’s conviction for first-degree assault and battery.

Respectfully submitted,

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May 6, 2020

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PROOF OF SERVICE

I, Caroline Collins, certify that I have served the within Petition for Rehearing on Appellant via electronic email to the address listed by the attorney in AIS, and by depositing one copy of the same in the United States mail, postage prepaid, to:

Joanna Katherine Delany, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served this 6th day of May, 2020.



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Caroline Collins

From: Caroline Collins
Sent: Wednesday, May 6, 2020 10:39 AM
To: 'jdelany@sccid.sc.gov'
Cc: 'Kasperski, Katriel'; William Blich; Bill Schumacher
Subject: The State v. Patrick O'Neil McGowan (2016-001220)
Attachments: MCGOWAN Patrick - Respondent's Petition for Rehearing - 2016-001220 (02273638xD2C78).PDF

Good Morning Ms. Delany,

Attached please find a copy of the Respondent's Petition for Rehearing in The State v. Patrick O'Neil McGowan (2016-001220). This Petition will be submitted to the Court of Appeals through the AIS system. As written in the certificate of service, in addition to this email a hard copy of this document has been deposited in today's mail.

If you will, please reply to confirm receipt of this email.

Thank you!

Caroline Collins

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