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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

PATRICK O'NEIL MCGOWAN,

APPELLANT

APPELLATE CASE NO. 2016-001220

Appeal from Laurens County

Donald B. Hocker, Circuit Court Judge

Opinion No. 5719

RETURN TO THE PETITION FOR REHEARING

On April 22, 2020, this Court issued its very logical, well-reasoned opinion affirming three of Appellant's four convictions for first degree assault and battery but reversing the remaining conviction. *State v. McGowan*, Op. No. 5719 (S.C. Ct. App. filed April 22, 2020) (Shearouse Adv. Sh. No. 16 at 21). The state petitioned for rehearing and this Court requested a return from Appellant.

Preservation

The state in its petition for rehearing argues that the issue of a directed verdict as to the indictment against Child was unpreserved because Appellant did not obtain a ruling on the record.

However, this Court's opinion correctly recognized that it was logically impossible the trial judge's ruling was anything other than a denial of Appellant's directed verdict motion, since the trial judge did not direct a verdict of acquittal but instead submitted the indictment to the jury. This Court explained the issue was preserved because "the circuit court directed the jury to determine whether Appellant was guilty or not guilty of attempted murder or first degree assault and battery *as to all four indictments*. Therefore, the circuit court implicitly denied Appellant's renewed directed verdict motion." *State v. McGowan*, Op. No. 5719 (S.C. Ct. App. filed April 22, 2020) (Shearouse Adv. Sh. No. 16 at 24) (emphasis in original).

The state in its petition concedes that implicit rulings exist. *E.g.*, *State v. Oglesby*, 384 S.C. 289, 293, 681 S.E.2d 620, 622 (Ct. App. 2009). Additional law sustaining this Court's decision is provided by Rule 19(c), SCRCrimP, which states, "Submission of any charge to the jury shall constitute a denial of any motion for directed verdict previously made by the defendant and not ruled upon." This Court's finding that the trial judge's submission of the charge to the jury was an implicit denial of Appellant's directed verdict motion was correct.

The trial court had placed on the record its ruling denying Appellant's directed verdict motion after the State had rested. Appellant subsequently renewed the motion when the defense rested, but the trial court did not re-rule. However, nothing was presented during the defense's case-in-chief which would have affected the judge's prior ruling—the defense witnesses only testified relevant to Appellant's defense of mistaken identity.

Finally, there was nothing in the record to show Appellant silently withdrew his directed verdict motion. The record was also clear that Appellant's directed verdict motion applied to both the attempted murder indictments and to the lesser-included offenses of first degree assault and battery. Appellant's trial counsel argued that in the directed verdict context, the prosecution had

to prove specific intent both as to attempted murder and as to first degree assault and battery. The trial judge questioned the parties about and discussed specific intent as it related to first degree assault and battery during the directed verdict motion.

Assault

The state argues in its petition that a directed verdict as to the charge against Child is improper because the conduct alleged could fall under the common law crime of assault. However, the General Assembly expressly abolished the common law offense of assault when it codified the offenses for which Appellant was indicted and convicted.

"In 2010, the South Carolina General Assembly passed the Omnibus Crime Reduction and Sentencing Reform Act of 2010 (the Act), which codified all assault and battery crimes into ABHAN, and first, second, and third degree assault and battery. S.C. Code Ann. § 16-3-600 (2015)." *State v. Hernandez*, 428 S.C. 257, 260, 834 S.E.2d 462, 463 (2019). "[T]he legislature abolished all common law assault and battery offenses and all prior statutory assault and battery offenses, and in place of those offenses, codified four degrees of assault and battery." *Id.* (internal quotations omitted) (quoting *State v. Middleton*, 407 S.C. 312, 755 S.E.2d 432 (2014)). The Act also provided that first degree assault and battery was a lesser-included offense of attempted murder. *Id*. *See also State v. King*, 422 S.C. 47, 63, 810 S.E.2d 18, 26 (2017) (in preamble of the Act, General Assembly evinced intent to create various levels and degrees of assault and battery offenses and to repeal certain common law assault and battery offenses). Therefore, the common law does not control the elements of the statutory offense of first degree assault and battery.

Moreover, the offense for which Appellant was convicted is a specific intent crime. The Supreme Court stated in *State v. King*, 422 S.C. at 64, 810 S.E.2d at 27, "if there is no evidence that one charged with attempted murder had express malice and a specific intent to kill, we believe

the crime would involve a lower level of intent and, thus, would fall within the lesser degrees of the assault and battery offenses codified in section 16-3-600." However, this is true because, in addition to criminalizing certain attempt crimes, § 16-3-600 also criminalizes completed crimes. Here, Appellant was not accused of causing physical injury to anyone.

A large portion of the *King* opinion was dedicated to explaining that attempt crimes require the highest level of intent—specific intent. "While it may seem counterintuitive for the attempt of a crime to require a higher level of *mens rea* than that of the completed crime, this is the majority rule and a rule that our appellate courts and General Assembly have followed." *State v. King*, 422 S.C. at 56, 810 S.E.2d at 22. Because Appellant's conduct was alleged to have fallen within subsection (C)(1)(b) of § 16-3-600, which criminalizes an offer or attempt to injure absent an actual injury, the prosecution was required to prove specific intent, not mere general intent.

This Court's opinion correctly recognized that Appellant was not alleged to have caused an injury, and he was instead convicted pursuant to a provision of 16-3-600 which criminalizes attempt, not the provision which criminalizes a completed injury. *State v. McGowan*, Op. No. 5719 (S.C. Ct. App. filed April 22, 2020) (Shearouse Adv. Sh. No. 16 at 22; 25).

Conclusion

Appellant respectfully requests this Court deny the state's petition for rehearing.

Respectfully Submitted,

s/Joanna K. Delany
JOANNA K. DELANY
Appellate Defender

This 15th day of June, 2020.

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CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's order "Re: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned attorney hereby certifies that a true copy of the Return to the Petition for Rehearing in the above-entitled case has been served upon William Schumacher, IV, Esquire, at the primary email addressed listed in the Attorney Information System (AIS); and Patrick O'Neil McGowan, at 1780 Boyd Rd, Laurens, SC 29360, this 15th day of June, 2020.

s/Joanna K. Delany
Joanna K. Delany
Appellate Defender
ATTORNEY FOR APPELLANT