

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dillon County

Roger E. Henderson, Circuit Court Judge

RECEIVED

Jul 31 2020

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

TYREEK DASHAWN HAYES,

APPELLANT

APPELLATE CASE NO. 2019-001303

RETURN TO STATE'S MOTION TO STRIKE

On July 27, 2020, undersigned counsel filed an initial brief of appellant and designation of matter in the above-referenced case. Thereafter, on July 31, 2020, the state filed a motion to strike portions of initial brief of appellant and require an amended initial brief of appellant to be filed. According to the state, the brief "appears to contain inappropriate commentary and material in the procedural Statement of the Case." Appellant respectfully requests this Court deny the state's motion as the initial brief of appellant and designation of matter complies with the South Carolina Appellate Court Rules.

The state requested this Court "to strike Appellant's Initial Brief of Appellant, specifically the second paragraph of the State of the Case in which he discusses unrelated jury

instructions provided by the trial court.” According to the state, the second paragraph is not “necessary to an understanding of the appeal” and contains “contested matters.” Appellant respectfully disagrees.

In the statement of the case, undersigned counsel explained that Appellant was indicted for two counts of attempted murder, kidnapping, possession of a weapon during the commission of a violent crime, and criminal sexual conduct in the first degree. Further, counsel recounted that the judge instructed the jury on the law, which counsel explained was “confusing, at best.” Specifically, and with citations to the transcript, counsel detailed how the instruction was confusing. As explained, the judge instructed the jurors that “[a]n attempt includes a specific intent to do a particular criminal act along with an act falling short of the act intended.” Then, he told the jurors that “[i]ntent means intending the result which actually occurs.” Shortly thereafter, when instructing on attempted murder, he informed the jurors that “[a] specific intent to kill [was] not an element of attempted murder.” Instead, all that was required was for the state to prove “a general intent to commit serious bodily injury.” Then, he reminded the jurors that “[i]ntent means intending the result which actually occurs.” Finally, he permitted the jurors to infer intent for purposes of attempted murder.

No plausible argument exists, and the state failed to present one, that Appellant’s recounting of the jury instructions is inaccurate or involved a contested matter. No plausible argument exists, and the state failed to present one, that the judge’s instructions to the jury are unnecessary to an understanding of the appeal. Notably, the state failed to move to strike Appellant’s designation of the transcript pages encompassing the jury instructions to be included in the record on appeal, and Rule 209, SCACR, only permits matter which is relevant to the appeal to be designated. Also notable, the state raised no objection to Appellant’s recounting of

the jury's numerous questions and the judge's instruction to the jury pursuant to Allen v. United States, 164 U.S. 492 (1896). Presumably, the state's failure to object to this portion of the Statement of the Case is because it is accurate, necessary to an understanding of the appeal, and does not contain contested matter. Similarly, the judge's confusing instruction to the jury regarding intent for the offense of attempted murder is accurate, necessary to an understanding of the appeal, and does not contain contested matter. Contrary to the state's assertions, the jury instructions explain the procedural history of the case, including how the jury arrived at its verdicts, which is part of the "concise history of the proceedings" envisioned by Rule 208(b)(1)(C), SCACR.

Further, Appellant cited to State v. King, 422 S.C. 47, 55-56, 810 S.E.2d 18, 22 (2017), for the proposition that attempted murder requires the state prove beyond a reasonable doubt that a defendant had a specific intent to kill, when noting that trial counsel did not object to the instructions regarding attempted murder. Although the state alleged the second paragraph of the Statement of the Case contained "a matter which would *likely* be contested," the state failed to present any argument to contest the matter. (emphasis added). Quite simply, the judge instructed the jury that attempted murder does not require a specific intent to kill, but the South Carolina Supreme Court determined that attempted murder does require a specific intent to kill. There can be no contest here.

Finally, the instructions given to the jury are "confusing" from an objective view. There is nothing argumentative about the observation that the judge's instructions were "confusing" where the judge told the jurors that "[a]n attempt includes a specific intent to do a particular criminal act along with an act falling short of the act intended," that "[i]ntent means intending the result which actually occurs," and that "[a] specific intent to kill [was] not an element of

attempted murder” because it required only a showing of “a general intent to commit serious bodily injury.” On its face, and by any objective measure, this instruction satisfies the definition of “confusing.” Describing it as such is not argumentative.

In its motion to strike, the state misconstrued Rule 208(b)(1)(C), SCACR. According to the state, because Appellant did not raise an issue regarding the jury instructions in his brief, then the instructions are not necessary to an understanding of the appeal. In doing so, the state suggests that *only* matter that is necessary to an understanding of *the issue* on appeal may be discussed in the Statement of the Case. However, the rule provides that the Statement of the Case shall contain a concise history of the proceedings, insofar as necessary to an understanding of *the appeal*. The jury instructions, and the *fact* that the judge provided legally incorrect instructions, are necessary to an understanding of the appeal as the instructions explain how the jury arrived at its verdicts of guilty on the two counts of attempted murder.

Nonetheless, Appellant contends the judge’s erroneous jury instructions are necessary to an understanding of the *issue* on appeal. In the brief, Appellant challenged the judge’s erroneous admission of hearsay testimony from a police officer. Specifically, the judge allowed the officer to testify that the complaining witness identified her assailant as Appellant. In response to Appellant’s objection to the hearsay testimony, the state argued it was an excited utterance. However, the state presented no evidence to support its contention that the complaining witness was in an excited state at the time she spoke with the police officer. Despite the complete lack of evidence to support its argument at trial, the judge permitted the officer to testify, which allowed the jury to consider the improper evidence. The hearsay evidence was desperately sought to be admitted by the state because the complaining witness lacked credibility and the identity of the person who physically assaulted her was contested.

Appellant's issue on appeal strikes at the heart of the state's case – the complaining witness's believability. The jury's verdict, finding Appellant not guilty of criminal sexual conduct, demonstrated the jury's serious doubts about the believability of the complaining witness. Likewise, the jury's guilty verdicts on attempted murder and rejection of the lesser-included offenses of assault and battery of a high and aggravated nature and assault and battery in the first degree, which were provided to the jury with the state's consent, shed light on the jury's view of the complaining witness's credibility. The primary evidence of Appellant's intent was the complaining witness's testimony. According to the complaining witness, Appellant intended to kill her in order to silence her about the alleged criminal sexual conduct. If one were unaware of the judge's erroneous instruction regarding attempted murder, one would conclude the jury believed the complaining witness concerning Appellant's intent. In other words, one would determine the jury believed Appellant had a specific intent to kill based on the complaining witness's testimony. However, understanding the judge erroneously instructed the jury that a specific intent to kill was not required in order to find Appellant guilty of attempted murder provides further support that the complaining witness's credibility was in question. Thus, the legally erroneous jury instruction is necessary to an understanding of the *issue* on appeal.

Based upon the foregoing, Appellant respectfully requests this Court deny the state's motion to strike.

s/Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of July, 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 hereby certifies a true copy of the Return to the State's Motion to Strike in the above referenced case has been served upon William M. Blich, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is wblitch@scag.gov; and a copy of the Return to the State's Motion to Strike has been served on Tyreek Dashawn Hayes, #366300, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 31st day of July, 2020.

s/Susan B. Hackett

Susan B. Hackett

Appellate Defender

ATTORNEY FOR APPELLANT