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May 21 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

JOHN ERNEST PERRY,

APPELLANT

APPELLATE CASE NO. 2017-002107

Appeal from York County

Honorable Paul M. Burch, Circuit Court Judge

Opinion No. 5816

RETURN TO PETITION FOR REHEARING

Appellant John Perry makes this return to the state's petition for rehearing and asserts that this Court has not overlooked or misapprehended any pertinent or material fact or principle of law justifying a grant of rehearing. First, "the office and purpose of instructions are to enlighten the jury and to aid them in arriving at a correct verdict." It is error to give instructions which are confusing or misleading. State v. Hewitt, 205 S.C. 207, 31 S.E.2d 257, 259 (1944); State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987) .

Jury instructions therefore should not be the functional equivalent of a complex mathematical problem or an exercise in advanced logic. Yet, with all due respect, that is what

the state's petition for rehearing inadvertently is and what it erroneously urges should carry the day.

Attempted murder is a specific intent crime. S.C. Code Ann. § 16-3-29 (2015); State v. King, 412 S.C. 403, 411, 772 S.E.2d 189, 193 (Ct. App. 2015), *aff'd as modified*, State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017). There was evidence that Perry's gun "went off," accidentally in this case, as he attempted to dispose of the gun during a police chase. This Court, 3-0, correctly held the trial court erred in charging the jury – in response to its question about "what is meant by intent" – that "when the intent to do an act that violates the law exists, motive becomes immaterial." R. 229, l. 24 – 233, l. 6. State v. Perry, Op. No. 5816, Shearouse's Adv. Sh. 13, at pp. 41-42 (filed April 21, 2021). This instruction, at an absolute minimum, was going to be confusing given these facts. See, State v. Owens, 427 S.C. 325, 831 S.E.2d 126 (refiled July 10, 2019) (challenged accident instruction where it was undisputed the defendant was engaged in an illegal drug deal), *cert granted for Owens on March 12, 2020*. The state's petition for rehearing, with its advanced logic lesson here, cannot change the fact that this instruction was at a minimum going to be confusing given these facts and the jury's "intent" question where its critical attention had focused on this issue. See State v. Blassingame, 271 S.C. 44, 46-47, 244 S.E.2d 528, 529-30 (1978).

This Court in its well-reasoned opinion also aptly noted that "[S]ome principles of law should not always be charged to the jury." State v. Perry, 410 S.C. 191, 202, 763 S.E.2d 603, 608 (Ct. App. 2014); see also State v. Burdette, 427 S.C. 490, 503, 832 S.E.2d 575, 583 (2019) (stating some matters appropriate for jury argument are not proper for charging the jury). "Instructions that do not fit the facts of the case may serve only to confuse the jury." State v. Blurton, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002); see also id. at 205, 208 n.1, 573 S.E.2d

at 803, 804 n.1 (reversing a conviction even though a jury charge was a correct principle of law because it "was not warranted by the facts adduced at trial"). "The impression is sometimes gained that any language from an appellate court opinion is appropriate for a charge to any jury, but this is not always true." State v. Grant, 275 S.C. 404, 407, 272 S.E.2d 169, 171 (1980). "Oftentimes a sentence, or sentences, taken from an appellate opinion must be supplemented by additional relevant statements of the law because of the particular factual situation." Id. "The test for sufficiency of a jury charge is what a reasonable juror would have understood the charge to mean." State v. Hicks, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998). "Jury instructions by the court of irrelevant and inapplicable principles may be confusing to the jury and can be reversible error." State v. Washington, 338 S.C. 392, 400, 526 S.E.2d 709, 713 (2000); State v. Perry, Op. No. 5816, Shearouse's Adv. Sh. 13, at p. 46. (filed April 21, 2021). See, also, State v. Terrance Edward Stewart, Op. No. 28029, Shearouse's Adv. Sh. 17, at pp. 9-17 (filed May 19, 2021) (Noting the trend of the Supreme Court disfavoring instructing juries on how to interpret and use evidence which can cause confusion).

In this case, John Perry told SLED Agent Wallace that he was shot during the police chase on foot. It was undisputed that Perry suffered "a gunshot wound to his lower left side." He was taken to the hospital in an ambulance, and Agent Wallace rode with Perry in the ambulance. R. 3, l. 3 – 6, l. 2.

Perry "said that he was involved in the shooting with Officer Taylor, that he fired a weapon during the interaction, and that the officer had fired back at him and shot him in the back." R. 6, ll. 3-8. John Perry told Wallace that he could not be caught with a gun in his possession, which was why he jumped the fence and attempted to throw the gun away when "it went off." The officers "proceeded to fire their weapons at him." R. 6, ll. 3-16.

Wallace told the jury that "he [John Perry] told me that he was involved in the shooting with the police, that he had the gun, he ran because he had some unpaid warrants. He was jumping what he called the gate and *the gun went off while he was trying to get it out of his pants*." R. 173, ll. 8-12. (emphasis added).

In moving for a directed verdict, Defense Counsel Nowiki argued there was no evidence Perry had a specific intent to kill the officer as required for the attempted murder charge. The solicitor argued the disputed evidence created a jury question, and the judge denied the motion for a directed verdict. R. 185, l. 18 – 186, l. 14.

During jury deliberations, the jury requested to be re-charged on the crime of attempted murder "and various degrees of assault and battery." R. 227, l. 4 – 229, l. 7.

The jury returned again, asking, "Is malice only associated on the attempted murder or is malice also associated to assault and battery?" The judge said: "[T]he defense and the state agree that malice was not an element of assault and battery and both sides agree." R. 229, ll. 8-21.

The judge also noted there was another question, "What is meant by intent? It was not charged." R. 229, l. 24 – 230, l. 4. The judge said he was inclined to charge "when the *intent* to do an act that violates the law exists, *motive becomes immaterial*." Defense counsel objected to this instruction, saying "I don't like the end of that with motive being in there." R. 230, l. 5 – 233, l. 1. (emphasis added).

The solicitor said under the state's theory of the case "the motive of why he was shooting the officers is not an element of the case we have to prove and therefore charging the jury that would not be prejudicial in any way to the defendant. Motive versus – intent to kill versus the motive of why he intended to kill." R. 230, l. 3 – 231, l. 20.

The solicitor successfully talked the judge into giving this objectionable, confusing intent and motive charge. R. 230, l. 5 – 231, l. 20. The judge then charged the jury that "while motive is the inducement to do some act, intent is the mental resolution or determination to do it. **When the intent to do an act that violates the law exists, motive becomes immaterial**." R. 231, l. 22 – 232, l. 17 (emphasis added). This Court correctly pointed out that the jury question indicated it had focused its critical attention on this issue of intent which underscored the importance, the "special consideration," the jury would give to this supplemental instruction. See State v. Blassingame, 271 S.C. 44, 46-47, 244 S.E.2d 528, 529-30 (1978). State v. Perry, Op. No. 5816, Shearouse's Adv. Sh. 13, at pp. 46, 50 (filed April 21, 2021).

Defense counsel took exception to this instruction: "Your Honor, I just renew my objection to the intent that you just read based on about the motive being immaterial. Also my concern is that attempted murder with case law out there saying that it is a specific intent crime, I mean, in my opinion is what was read was more of a general intent type of thing so that's my -- I'm objecting to the charge." R. 232, l. 20 – 233, l. 1 (emphasis added). The judge refused to alter his instruction to the jury, noting the defense exception. R. 233, ll. 2-7.

After further deliberations, the judge gave the jury an Allen[1] charge. R. 233, l. 18 – 236, l. 10. The jury then informed the judge it wished to go home for the evening and come back in the morning. R. 236, l. 15 – 237, l. 7. Perry was ultimately convicted after these deliberations, and the Allen charge.

Again, the crime of attempted murder requires proof that the defendant had a specific intent to kill the victim. See State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017). In this case, defense counsel told the jury that Perry did not intend to kill the police officer, and that

[1] Allen v. United States, 164 U.S. 492 (1896).

attempted murder required a specific intent to kill. "He did not, he did not shoot to kill or attempt to hurt . . . Officer Dalton, absolutely not." R. 209, l. 10 – 210, l. 13.

Thus, if the jury believed John Perry that he did not intend to kill Officer Dalton Taylor, and/or that his gun "just went off," when he was running because he was a felon in illegal possession of a weapon or because of "unpaid warrants," then pursuant to a proper instruction on the law, Perry was entitled to be acquitted on the highest charge of attempted murder.

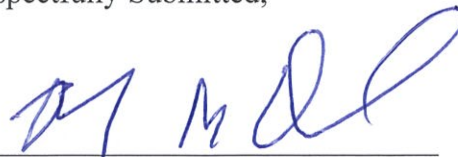
The jury continuously struggled to reach a verdict in this case, and the judge finally instructed the jury "when *the intent to do an act that violates the law exists, motive becomes immaterial.*" R. 232, ll. 3-7. (emphasis added). Defense counsel correctly argued that attempted murder was a specific intent crime and that this instruction from the judge was confusing because it made it out to be more of a general intent crime, which was the reason for defense counsel's objection. R. 230, l. 12 – 233, l. 1.

As Perry argued in his brief, his statement that the gun "went off" would seem at worst an admission that this was ABHAN rather than attempted murder. For example, in the context of a murder charge, evidence the gun "went off accidentally" would entitle the defendant to an instruction on involuntary manslaughter, a lesser-included offense, essentially criminal negligence. See State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008); State v. Brayboy, 387 S.C. 174, 691 S.E.2d 482 (Ct. App. 2010); State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (2003). In this case, the jury had the verdict options of attempted murder, assault and battery first degree, assault and battery second degree, assault and battery third degree or not guilty. R, 223, ll. 16-23.

This Court's opinion in this case was legally correct. The state's mental gymnastics in its rehearing petition go totally against the settled legal principles contained in this Court's well-

written opinion, which hold that jury instructions should aid the jury in arriving at a proper verdict, not contain unnecessary verbiage, and not be confusing. Rehearing should be denied.

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender

This 21st day of May, 2021.

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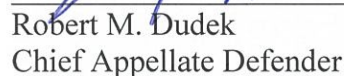
CERTIFICATE OF SERVICE

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 Petition for Rehearing in the above-referenced case has been served upon William M. Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 21st day of May, 2021.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT