STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Spartanburg County
Honorable J. Derham Cole, Circuit Court Judge

Opinion No. 2021-UP-370 (S.C. Ct. App. filed November 3, 2021)

Lower Court Case Nos. 2017-GS-42-00261, 262, 263, 263A, 265, and 266

THE STATE,

RESPONDENT,

V.

JODY RAY THOMPSON,

PETITIONER.

APPELLATE CASE NO. 2022-000051

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on December 16, 2021.

QUESTION PRESENTED

Did the Court of Appeals err by holding the trial judge correctly refused to instruct the jury on the lesser included offense of second degree assault and battery when there was evidence upon which the jury could have found Petitioner committed only the lesser offense instead of the indicted offense of attempted murder, particularly where the Court of Appeals' holding effectively precludes a charge on second degree assault and battery anytime a gun is used?

STATEMENT OF THE CASE

During the early morning hours of June 26, 2016, a shooting occurred outside Playoffs, a bar in Lyman. Four people were injured, including Petitioner, who was shot in the leg. Leading up to the shooting, there was significant tension between several patrons at the bar.

Ramone Smith testified that he was standing outside the bar when a man, who he did not know, began pouring beer at Smith's feet. R. 80, ll. 1-9. The unknown man was later identified as Stephone Anderson. Smith and Anderson were about to fight when Petitioner stood in between them and "stopped it." Anderson ultimately walked away and Petitioner followed. R. 80, ll. 10-20. Smith went inside the bar. About ten minutes later, Smith came back outside. R. 82, ll. 17-24. Once outside, Anderson approached Smith again and began asking, "What's going on? Why do you want to fight me?" R. 83, ll. 5-13. Petitioner once more intervened. He and Anderson eventually walked off toward the right side of the bar where a convenience store and gas station were located. R. 83, ll. 5-14. Smith remained outside in the parking lot in front of the bar.

While tensions were high, Cassandra Rice, who knew both Petitioner and Smith since childhood, attempted to "diffuse the situation." She told everyone to go home and "it ain't worth it" since they all had children. R. 61, ll. 1-7. Rice claimed she saw Petitioner with a gun. She said while they were all outside, Petitioner kept pulling his shirt up to reveal the pistol on his side. R. 61, l. 20 – 62, l. 1. Rice claimed she eventually saw Petitioner take his gun out and shoot Corey Glenn, Smith's friend. R. 62, ll. 2-25. Petitioner then fired towards Smith and Rice. A bullet scraped Rice's right temple, which started to bleed. R. 63, ll. 1-13.

Smith testified that while Rice was telling everyone to leave and "y'all don't need to do this," Smith "realized somebody was shooting." R. 83, l. 21 – 84, l. 1. When he turned around,

he allegedly saw Petitioner with a gun shooting in Smith's direction. R. 83, l. 21 – 84, l. 2. Smith, who had a concealed weapons permit, reached for his gun and began firing at Petitioner while walking backwards. R. 84, ll. 11-21. After Smith shot about eight or nine times, Petitioner took off running. R. 85, ll. 11-13. After Petitioner ran, Smith heard Rice say she was "hit." R. 85, ll. 16-18. After checking on Rice, Smith walked around to the side of the building where Petitioner had run and shot twice "to make sure he wasn't coming back." R. 85, ll. 16-25.

Smith then fled. He dropped Corey Glenn off at the hospital and then went home. R. 85, l. 22 – 86, l. 9. Rice tried to drive herself to the hospital but discovered one of the tires on her car had been shot and damaged. A friend named "Dang Dang" ultimately drove Rice to the hospital. R. 63, l. 18 – 64, ll. 3.

Renata Irby, who was at the bar that night, was also injured during the shooting. She did not know Petitioner, Smith, Glenn, or Rice. R. 106, ll. 17-24. She testified that while she was playing pool inside the bar, she saw a group of men in white shirts walking out the front door followed by the owner of the bar. R. 109, ll. 19-25. She went to the window to see what was going on, but one of her friends told her to back away so she did. R. 110, ll. 1-3.

About ten minutes later, Irby decided to go home. Once outside, she walked directly to her car, which was parked next to a gas pump in front of the bar. As soon as she got into her car, Irby "just felt like something wasn't right." R. 110, ll. 3-11. She opened her glove compartment and removed her gun. Immediately thereafter, "gunshots started going off." R. 110, ll. 20-25. Irby felt a burning sensation in her leg and noticed she had been shot. R. 111, ll. 1-5. She turned her hazard lights on to try to get someone's attention and let them know she had been shot. R. 111, ll. 5-10. Eventually someone pulled her out of the car and put pressure on her wound. R. 112, ll. 5-11. At some point she lost consciousness. R. 112, ll. 16-19. She was ultimately

transported to the hospital by an ambulance. R. 112, ll. 12-15. Irby did not see who fired the shots. R. 113, ll. 4-17.

After the shooting, two law enforcement officers found Petitioner in the woods behind the establishment bleeding heavily from a gunshot wound to his left calf. R. 168, l. 12 – 169, l. 14; R. 178, l. 16 – 180, l. 12; State's Exhibit No. 42 (Body Camera Footage). Anderson was with him. When first questioned, Petitioner said he did not have a weapon and did not know who shot him. R. 169, ll. 18-21; R. 170, ll. 18-25; State's Exhibit No. 42 (Body Camera Footage). After he was treated and released from the hospital, Petitioner was questioned again. He admitted he fired a gun that morning in self-defense. State's Exhibit No. 59 (DVD of Defendant's Statement).

Petitioner explained that the bar was "packed" and he knew "something was about to go down." He was trying to be a "peacemaker" and deescalate the situation. Out of nowhere, Petitioner heard shots being fired. "There were so many people shooting." State's Exhibit No. 59 (DVD of Defendant's Statement). Petitioner admitted to firing one or two shots behind him as he was running away. He ran around the right side of the convenience store into the woods behind the building. He did not realize he had been shot until he reached the woods. State's Exhibit No. 59 (DVD of Defendant's Statement). Petitioner admitted to leaving his weapon in the woods near where the police found him. He was adamant that if he had not been paying attention that morning, "he wouldn't be here today." State's Exhibit No. 59 (DVD of Defendant's Statement).

Petitioner's .40 caliber Taurus handgun, which was admitted as State's Exhibit No. 31, and Smith's .40 caliber Glock handgun, which was admitted as State's Exhibit No. 39, were submitted for testing. R. 229, ll. 17-24. Of the twenty-three .40 caliber fired cartridge casings

collected from the scene, thirteen were identified as being fired by the Glock Smith admitted to shooting and seven were identified as being fired by the Taurus Petitioner admitted to shooting. R. 233, ll. 1-9; R. 374. However, three were not fired by either the Glock or the Taurus meaning a third unidentified gun was fired that morning. R. 233, ll. 10-11; R. 374. Additionally, while the fired bullets removed from Irby and Glenn bore "similar microscopic marks" and "rifling characteristics" to bullets fired by Petitioner's Taurus, there were insufficient markings for identification. R. 232, ll. 2-25; R. 374.

Surveillance cameras at the convenience store and bar captured some of the altercation and shooting. The footage was admitted as State's Exhibit No. 57 and is on file with this Court. The footage shows at least one other person besides Smith and Petitioner with a gun. R. 214, l. 1 – 216, l. 8. However, law enforcement was never able to identify this person. R. 215, ll. 9-14.

As far as injuries, Rice testified that the bullet "scraped" the skin near her temple. R. 63, ll. 1-4. The wound "burned" and immediately began bleeding. R. 63, ll. 9-15. Photographs of her wound taken at the hospital were marked and admitted as State's Exhibit Nos. 157 and 158. R. 70, ll. 1-10; R. 377. Irby got shot in the right leg. R. 111, ll. 4-12. She claimed she lost consciousness at some point before she was transported to the hospital. R. 112, ll. 12-23. A bullet remained in her leg until July 20, 2016 when a specialist was able to remove it. R. 116, ll. 2-19; R. 126, l. 1 – 127, l. 10. Photographs of her injury were marked and admitted as State's Exhibit Nos. 159 and 160. R. 116, l. 25 – 117, l. 10; R. 379.

Glenn, who did not testify, was shot in the foot. Sara Kruger, an officer with the Spartanburg County Sheriff's Office, photographed Glenn's injuries while he was in the hospital shortly after the shooting. R. 152, l. 8 – 153, l. 17. Kruger testified that she observed two holes in Glenn's right shoe "on the toe end." R. 153, ll. 18-23. There was a black sock inside the shoe

that appeared to have "small pieces of bone fragment." R. 153, ll. 7-11. Kruger photographed Glenn lying in a hospital bed with his right foot wrapped as well as the holes in his right shoe. She also photographed what appeared to be a "graze" wound to Glenn's right arm and the shirt he had been wearing with a dark mark on the right sleeve. These photographs were marked and admitted as State's Exhibit Nos. 163, 166, 167, and 168. R. 153, l. 24 – 154, l. 21; R. 381. Glenn had surgery that same morning to remove the bullet in his foot. R. 160, ll. 1-21.

A Spartanburg County Grand Jury indicted Petitioner on January 11, 2017 for four counts of attempted murder, possession of a weapon during the commission of a violent crime, and unlawful carrying of a pistol. R. 386-395. His case was called to trial on February 11, 2019 before the Honorable J. Derham Cole, and a jury. R. 1. Assistant Solicitors Spenser Smith and Jennifer Jordan represented the state. R. 1. Clay Allen represented Petitioner. R. 1.

On February 14, 2019, the jury found Petitioner guilty of attempted murder as to Smith and Rice and the lesser included offense of assault and battery of a high and aggravated nature (ABHAN) as to Irby and Glenn. Petitioner was also convicted of both weapon offenses. R. 370, ll. 7-20. He was sentenced to twenty years for attempted murder, ten years concurrent for the second count of attempted murder, ten years concurrent for ABHAN, five years concurrent for possession of a weapon during the commission of a violent crime, and one year concurrent for unlawful carrying of a pistol. Petitioner was also sentenced to ten years suspended to five years' probation for the second count of ABHAN to be served consecutively to his twenty year sentence for attempted murder. R. 371, l. 19 – 373, l. 13.

The Court of Appeals affirmed Petitioner's convictions and sentence. State v. Thompson, 2021-UP-370 (S.C. Ct. App. filed November 3, 2021); App. 1-2. In a *per curiam* opinion, the court held the trial judge did not err by refusing to charge the jury on the lesser included offense

of second degree assault and battery "[b]ased on the evidence presented at trial regarding Thompson's [Petitioner's] use of a gun and the manner in which he fired the gun." App. 2. Petitioner filed a petition for rehearing on November 18, 2021. App. 3-7. By order filed December 16, 2021, the Court of Appeals denied rehearing. App. 8.

This petition for writ of certiorari follows.

ARGUMENT

The Court of Appeals erred by holding the trial judge correctly refused to instruct the jury on the lesser included offense of second degree assault and battery when there was evidence upon which the jury could have found Petitioner committed only the lesser offense instead of the indicted offense of attempted murder, particularly where the Court of Appeals' holding effectively precludes a charge on second degree assault and battery anytime a gun is used.

Relevant Facts

During the charge conference, Petitioner requested the trial judge instruct the jury on the lesser included offense of second degree assault and battery as to all four counts of attempted murder. R. 285, ll. 6-17; R. 293, ll. 18-20. Defense counsel explained that second degree assault and battery occurs when a person unlawfully "injuries or offers or attempts to injure [another person] with present ability [to do so] and moderate bodily injury to another person results or could have resulted." R. 285, ll. 18-22. After defining moderate bodily injury pursuant to S.C. Code Ann. § 16-3-600(A)(2), counsel argued the jury could find Petitioner guilty of this lesser offense as opposed to attempted murder. R. 285, l. 23 – 286, l. 8.

The assistant solicitor *did not object* to the judge charging the jury with the lesser included offense of second degree assault and battery. The solicitor conceded the statute "does have the part about an unlawful injury or the offers or attempts" language. R. 288, ll. 13-15. He further admitted that there was little testimony about the significance of the injuries suffered by Rice, Glenn, and Irby. R. 288, ll. 16-17. The solicitor merely maintained that the state was "proceeding mostly under the ABHAN part of accomplished by means likely to produce great bodily injury or death, and attempted murder as well." R. 293, ll. 17-20.

The trial judge denied the request. He asserted, "I find that in this case it's undisputed that . . . any offense was committed by the use of a firearm, and therefore [second degree assault

and battery is] not applicable in this case." R. 293, ll. 21-24. In so ruling, the judge maintained, "[A]ny time you use a firearm, that clearly is likely to produce death or great bodily injury." R. 292, ll. 19-22; See R. 293, ll. 6-8. Essentially, the judge concluded that anytime one uses a firearm, moderate bodily injury could never result. The Court of Appeals erroneously accepted this determination on appeal when it held the trial judge did not err.

The judge ultimately charged the jury on attempted murder as to all four individuals (Smith, Irby, Rice, and Glenn), assault and battery of a high and aggravated nature as to Irby, Rice, and Glenn, and first degree assault and battery as to Smith. R. 345, l. 2 – 351, l. 14; R. 361, l. 2 – 362, l. 10.

At the conclusion of the jury charge, defense counsel renewed his request for a charge on second degree assault and battery for all four counts of attempted murder. R. 368, ll. 19-22. The judge merely noted counsel's exception to the charge. R. 368, l. 1.

Discussion

The Court of Appeals erred by holding the trial judge correctly refused to instruct the jury on the lesser included offense of second degree assault and battery when there was evidence upon which the jury could have found Petitioner committed only the lesser offense instead of the indicted offense of attempted murder. In so holding, the Court of Appeals overlooked the proper standard of review.

In reviewing jury charges for error, this Court must examine the trial court's charge as a whole in light of the evidence and issues presented at trial. State v. Williams, 427 S.C. 148, 156, 829 S.E.2d 702, 706 (2019) (citing State v. Mattison, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010)). "The trial court is required to charge a jury on a lesser-included offense if there is *any* evidence from which it could be inferred the lesser, rather than the greater, offense was committed." Id. (quoting Suber v. State, 371 S.C. 554, 559, 640 S.E.2d 884, 886 (2007))

(internal quotation marks omitted) (emphasis added). In determining whether the evidence requires a charge on a lesser included offense, this Court must view the facts in the light most favorable to the defendant. Id. (citing State v. Byrd, 323 S.C. 319, 321, 474 S.E.2d 430, 431 (1996)).

Petitioner was indicted for four counts of attempted murder. The offense is codified in S.C. Code Ann. § 16-3-29, which states in relevant part, "A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." The "degrees of assault and battery are, in descending order of severity, assault and battery of a high and aggravated nature (ABHAN), and assault and battery in the first, second, and third degrees." State v. Middleton, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014) (citing S.C. Code Ann. § 16-3-600). "Under the statute, ABHAN is a lesser-included offense of attempted murder." Id. (citing § 16-3-600(B)(3)). "Assault and battery in the first degree is a lesser-included offense of both attempted murder and ABHAN." Id. (citing § 16-3-600(C)(3)). "Further, assault and battery in the second and third degree are each lesser-included offenses of every preceding offense." Id. (citing § 16-3-600(D)(3) and § 16-3-600(E)(3)).

Section 16-3-600(D)(1) states in relevant part, "A person commits the offense of assault and battery in the second degree if the person unlawfully injuries another person, or offers or attempts to injure another person with the present ability to do so, and: (a) moderate bodily injury to another person results or moderate bodily injury to another person could have resulted." Moderate bodily injury is defined as "physical injury that involves prolonged loss of consciousness, or that causes temporary or moderate disfigurement or temporary loss of the function of a bodily member or organ, or injury that requires medical treatment when the treatment requires the use of regional or general anesthesia or injury that results in a fracture or

dislocation. Moderate bodily injury does not include one-time treatment and subsequent observation of scratches, cuts, abrasions, bruises, burns, slinters, or any other minor injuries that do not ordinarily require extensive medical care." S.C. Code Ann. § 16-3-600(A)(2).

Unlike the trial judge concluded, the fact that an individual suffered a gunshot wound does not make that injury *per se* "great bodily injury." Stated another way, a gunshot wound, although caused by a deadly weapon, is not *per se* "great bodily injury." In the light most favorable to Petitioner, the jury could have found Irby, Rice, and Glenn's injuries merely constituted "moderate bodily injury." While there was not a great deal of testimony or other evidence concerning their injuries, it appears Rice suffered a superficial graze wound to her right temple and Glenn and Irby underwent a simple surgery to remove the bullet from their foot and leg respectively. Neither of them suffered any serious or lasting injury. As far as Smith, who was not injured, the jury could have found Petitioner "offered or attempted to injure" Smith and "moderate bodily injury" could have resulted.

Accordingly, if the jury concluded Petitioner acted without malice and without a specific intent to kill, it could have found him guilty of the lesser included offense of second degree assault and battery. Consequently, the trial judge erred by refusing to instruct the jury on this lesser included offense. Respectfully, this Court should grant certiorari, reverse Petitioner's convictions and sentence, and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Petitioner respectfully request this Court grant the petition for writ of certiorari and order full briefing on the issue presented. If this Court grants the petition, but dispenses with further briefing, Petitioner respectfully requests this Court reverse his convictions and remand for a new trial.

Respectfully Submitted,

LARA M. CAUDY
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of January, 2022.

RECEIVED
Jan 28 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA

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APPELLATE CASE NO. 2022-000051

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case have been served on Ambree M. Muller, Esquire, at the primary email address listed in the Attorney Information System (AIS), and Jody Ray Thompson, #00346145, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472; and the Court of Appeals, at 1220 Senate Street, Columbia, SC 29201, this 28th day of January, 2022.

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER