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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO THE COURT OF APPEALS
The Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2022-000051

THE STATE, Respondent,

v.

JODY RAY THOMPSON Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE ISSUE

The Court of Appeals properly found that the trial judge did not err in refusing to instruct the jury on the lesser included offense of second degree assault and battery, because the jury could not find Petitioner guilty of second degree assault and battery instead of other charged offenses.

STATEMENT OF THE CASE

Petitioner was indicted in January of 2017 for four counts of attempted murder, possession of weapon during the commission of a violent crime, and unlawful carrying of a pistol. Petitioner proceeded to a jury trial February 11-14, 2019, in Spartanburg County before the Honorable J. Derham Cole. The State was represented by Assistant Solicitors Spenser Smith and Jennifer Jordan. Clay Allen, Esquire. represented the Petitioner. The jury found Petitioner guilty of two counts of attempted murder, two counts of the lesser included offense of assault and battery of a high and aggravated nature (ABHAN) and both weapon offenses. He was sentenced to twenty years for attempted murder, ten years for the second count of attempted murder, ten years for the ABHAN, five years for the possession of a weapon during the commission of a violent crime, and one year for unlawful carrying of a pistol, with all of the sentences to be served concurrently. 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. 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 curium* opinion, the court held that 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). A petition for rehearing was timely filed and denied on December 16, 2021. (App. 3-8). A timely Petition for Writ of Certiorari was filed on January 28, 2022. This Return follows.

STATEMENT OF FACTS

In the early morning hours of June 26, 2016, a shooting occurred outside of a bar called Playoffs located in Spartanburg County. (R. 3). Four people were injured. (R. 2). Ramone Smith testified that a man, unknown to him, began pouring beer at his feet, which started an altercation. (R. 79). That man was later identified as Stephone Anderson (R. 194). Smith told Anderson "if he had a problem they can take it outside." (R. 93). The two men went outside and began arguing. (R. 93). Cassandra Rice testified she walked outside to get some fresh air, saw the altercation and attempted to diffuse it. (R. 60-61). Smith stated that Petitioner stepped in, stopped the altercation, and Petitioner and Anderson walked off. (R. 80). Rice stated that she saw Petitioner walking around pulling on his shirt, which showed a gun. (R. 61). Petitioner began arguing with those around him. (R. 62). Rice testified that Petitioner turned and shot at Corey Glenn. (R. 62). Rice testified that Petitioner fired first and that no one else had a gun at the time the initial shots were fired. (R. 62). Rice took off running and was ultimately struck by a bullet. (State`s Exhibit Nos. 157, 158, R. 63).

Smith testified he heard shots and looked up to see Petitioner with a gun. (R. 84). Smith, who has a concealed weapons permit, reached for his gun and fired back at Petitioner. (State`s Exhibit No. 60, R. 84). Petitioner took off running behind the building (R. 85). Smith then left the scene to take Glenn to the hospital. (R. 86). A few days later Smith went to the Sherriff's Office where he allowed officers to see his gun and his concealed weapons permit. (R. 87).

Renata Irby, who was also at the bar that night, was injured during the shooting. She got in her car to head home and heard gunshots. (R. 111). She felt a burning sensation in her leg and realized that she had been shot. (R. 111). She left the scene in an ambulance. (R. 112).

Daniel Gipson, an officer of the Wellford Police Department, was one of the first people on scene. (R. 169). He accompanied Jonathan Fowler, an officer of the Duncan Police

Department, in conducting a sweep to secure the scene. (R. 178). Once other officers arrived on scene, Officers Gipson and Fowler followed a blood trail that led behind the building. (R. 169, 179). At the end of the blood trail was Petitioner, who had been shot in the leg. Officer Gipson asked Petitioner if he had any weapons to which Petitioner responded, "no." (R. 169). A shirtless man (Anderson) exited the woods and Officer Fowler placed him in investigative detention. (R. 179). Officer Gipson, who had prior Emergency Medical Training (EMT), rendered aid to Petitioner until the ambulance arrived on scene. (R. 180). Once the ambulance took Petitioner, Officer Fowler searched the area near where Petitioner had been lying and found a .40 caliber handgun. (R. 172, 174, 181; State's Exhibit No. 31).

Lathier Graham, an investigator for the Spartanburg County Sherriff's Office Crime Scene Unit, was also on scene. He recovered a .22 caliber pistol in Irby's car. (R. 32; State's Exhibit No. 13). Graham testified there were no shell casings indicating that the pistol or any .22 caliber gun had been fired. (R. 33). He collected twenty-three .40 caliber fired cartridge casings from the scene. (R. 36-37, 40-41).

As far as injuries, Rice testified that the bullet "scraped" the skin near her temple. (R. 63). There were photographs taken of her wound at the hospital and were admitted at trial as State's Exhibit Nos. 157 and 158. (R. 70). Irby was shot in the right leg. (R. 111). The bullet was not removed from her leg until two months later. (R. 116). The bullet was given to law enforcement and was entered at trial as State's Exhibit No. 1. (R. 130). Sara Kruger, an officer with the Spartanburg County Sherriff's Office, testified Corey Glenn had been shot in the foot. She photographed his injuries and those photographs were admitted at trial as State's Exhibit Nos. 163, 166-68. (R. 153-54). The bullet that was removed from Glenn's foot was labeled as State's Exhibit 54. (R. 161). James Armstrong, an expert in ballistic analysis, testified that the bullet

fragments found in Irby and Glenn were not fired from State`s Exhibit 39 (Smith`s gun), but bared similar characteristics to those fired from State`s Exhibit 31 (Petitioner's gun). (R. 232).

In regard to Glenn, Rice and Irby, the jury was charged on attempted murder and the lesser included offense of assault and battery high and aggravated nature. (R. 345-46, 350). As to Ramone Smith, the jury was charged on attempted murder and assault and battery in the first degree. (R. 351). The jury was also charged on the possession of a firearm as well as unlawful carrying of a pistol. (R. 357-59). The jury found Petitioner guilty of two counts of attempted murder as to Ramone Smith and Cassandra Rice. (R. 370). Petitioner was found guilty of the lesser included offense of assault and battery of a high and aggravated nature as to Renata Irby and Corey Glenn. (R. 370). Petitioner was also found guilty of both gun charges. (R. 370).

STANDARD OF REVIEW

"In reviewing jury charges for error, Court of Appeals must consider the circuit court's jury charge as a whole in light of the evidence and issues presented at trial." State v. Williams, 427 S.C. 526, 533, 829 S.E.2d 702, 721 (2019) (citing State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003)) "When reviewing a jury charge for error, an appellate court considers the charge as a whole; the charge must be prejudicial to the appellant to warrant a new trial." State v Stukes, 416 S.C. 493, 498, 787 S.E.2d 480, 482 (2016). "But an instruction must be erroneous and prejudicial to warrant reversal" State v. Bowers, 428 S.C. 21, 28, 832 S.E.2d 623, 627 (2019).

ARGUMENT

The Court of Appeals properly found that the trial judge did not err in refusing to instruct the jury on the lesser included offense of second degree assault and battery because the jury could not find Petitioner guilty of second degree assault and battery instead of other charged offenses.

Petitioner argues the trial judge erred by refusing to instruct the jury on the lesser included offense of second degree assault and battery when there was evidence upon which a jury could have found Petitioner committed only the second degree assault and battery. Petitioner argues "the fact that an individual suffered a gunshot wound does not make that injury *per se* 'great bodily injury.'" Petitioner's argument lacks merit because shooting a person with a gun is always "likely to produce death or great bodily injury." Accordingly, such conduct constitutes assault and battery of a high and aggravated nature (ABHAN) regardless of whether great bodily injury actually occurs.

In regard to Renata Irby, Corey Glenn and Cassandra Rice, the jury was charged with attempted murder and assault and battery of a high and aggravated nature. Section 16-3-29 of the Code of Laws of South Carolina defines attempted murder:

> 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.

S.C. Code Ann. § 16-3-29 (Supp. 2019). Section 16-3-600 of the Code of Laws of South Carolina provides:

> (A) For purposes of this section
>
> (1): "Great Bodily Injury" means bodily injury which causes a substantial risk of death or which causes serious permanent disfigurement or protracted loss of impairment of the function of a bodily member or organ.

> (2): "Moderate Bodily Injury" means 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, splinters, or any other minor injuries that do not ordinarily require extensive medical care.
>
> (B)(1) A person commits the offense of assault and battery of a high and aggravated nature if the person unlawfully injures another person, and:
>
> (a) Great bodily injury to another person results; or
>
> (b) The act is accomplished by means likely to produce death or great bodily injury.
>
> . . .
>
> (D)(1) A person commits the offense of assault and battery in the second degree if the person unlawfully injures 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; or
>
> (b) The act involves the nonconsensual touching of the private parts of a person, either under or above clothing.

S.C. Code Ann. § 16-3-600 (Supp. 2019).

"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). Assault and battery in the second degree is a lesser-included offense of attempted murder, assault and battery of a high and aggravated nature, and assault and battery in the first degree. S.C. Code Ann §16-3-600(D)(3).

"The [circuit court] is to charge the jury on a lesser included offense if there is any evidence from which the jury could infer that the lesser, rather than the greater, offense was committed." State v. White, 361 S.C.407, 412, 605 S.E.2d 540, 542 (2004) "To justify charging the lesser crime, the evidence presented must allow a rational inference the defendant was guilty only of the lesser offense." State v. Geiger, 370 S.C. 600, 607, 635 S.E.2d 669, 673 (2006). The trial court should refuse to charge the lesser included offense where there has been no evidence tending to show the defendant may have committed solely the lesser offense." Id. In order for the defendant to commit solely the lesser offense, the wounds on the victims would have to be categorized as moderate bodily injury instead of great bodily injury and the defendant would have to show that the act was not accomplished by means likely to produce death or great bodily injury. SC Code §16-3-600(B)(1)(b).

A great bodily injury is described as an injury that causes a substantial risk of death. SC Code §16-3-600(A)(1). "A substantial risk of death" does not mean that the injury must result in death. Although South Carolina has not defined substantial risk, Ohio has defined it as "a strong possibility, as contrasted with a remote or even a significant possibility, that a certain result may occur, or that a certain circumstance may exist." State v. Johnson, 119 N.E.3d 914, 923, 2018 - Ohio- 3670 (2018).

Firing a deadly weapon at someone is always "likely to cause great bodily injury" and has a "substantial risk of death." Although South Carolina has not clearly ruled on this subject they have made some rulings in the danger of using a firearm. In State v. Locklair, the court held "the 'great risk of danger' aggravator was properly submitted to the jury because there was ample evidence that suggested Locklair put the lives of more than one person in danger in a public place by means of a weapon or device which would normally be hazardous to the lives of

more than one person." in reference to the Defendant shooting a gun on a public street where there were many people in the vicinity. State v. Locklair, 341 S.C. 352, 367, 535 S.E.2d 420, 427 (2000). The court in State v. Lindsey held that a reasonable person would know that shooting a gun in to the confined space of a car`s interior would create a great risk of harm to more than one person. State v. Lindsey, 372 S.C. 185, 195, 642 S.E.2d 557, 562 (2007).

A court in Florida held that "firing a firearm in the air, even as a so called 'warning shot', constitutes as a matter of law the use of deadly force, that is, the use of force likely to cause death or great bodily harm and is not, as urged, the use of force *not* likely to cause death or bodily injury." Miller v. State, 613 So.2d 530, 18 Fla. L. Weekly D377 (1993). "A firearm is by definition a deadly weapon, which fires projectiles likely to cause death or great bodily harm; whenever it is fired in the vicinity of human beings, as here, there is real danger that the fired projectile may hit someone, even if not aimed at anyone, as such projectiles are quite capable of ricocheting off nearby objects and hitting people in the area." Id.

In this case, the shooting occurred in a parking lot after Petitioner began arguing with people around him. (R. 62). Rice testified that there were a lot of people hanging around outside arguing. (R. 73). Petitioner then pulled a gun and began shooting in this crowd of people. (R. 62). Firing a bullet into a crowd of people is likely to cause or produce death or great bodily injury. Further the injuries are clearly great bodily injury. Cassandra Rice was injured by a bullet that scraped her temple and ear. (R. 63, 159, State's Exhibit Nos. 157-158). Corey Glenn was shot in the foot that resulted in a surgery to have the bullet removed. (R. 160, State's Exhibit No. 164). Sara Kruger of the Spartanburg Sherriff's Office Forensic Department, testified when collecting evidence from the hospital, she observed Glenn's sock that appeared to have small pieces of bone fragment inside. (R. 153). Renata Irby was shot in the leg and had to have the

bullet surgically removed two months later. (R. 111, 116). Glenn and Irby had to have the bullet surgically removed, which likely left scarring from the bullets and the surgery. (R. 63, 160). Although the injury to Rice was a scrape to her temple and ear, this injury constituted great bodily injury because a matter of millimeters could have resulted in death or traumatic brain injury. A gun being fired at someone is likely to produce death or great bodily injury. Under Section 16-3-600(B)(1)(b) of the SC Code of Laws there is more to the analysis than simply the injuries sustained.

Irby, Glenn and Rice were hit with bullet fired from Petitioner's gun. (R. 232). Both Irby and Glenn had to have surgery to have their bullets removed. (R. 63, 160). The actual resulting injuries support the refusal of second degree assault and battery instruction because a gun was fired and any time a gun is fired it is "likely to result in great bodily injury" and has "a substantial risk of death." Petitioner states "a gunshot wound, although caused by a deadly weapon, is not per se "great bodily injury" (Final Brief of Appellant, pg. 12). Petitioner admits that a gun is a deadly weapon. (Final Brief of Appellant, pg. 12). It would not be known as a deadly weapon if the weapon did not cause a substantial risk of death. Therefore, there is no evidence tending to show that Petitioner committed solely the lesser offense. Therefore the Court of Appeal's decision should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower courts should be affirmed.

Respectfully submitted,

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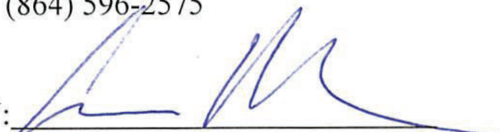

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