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Apr 07 2022

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Lexington County

Honorable Walton J. McLeod, IV, Circuit Court Judge

BILAL S. HAYNESWORTH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001249

REPLY BRIEF OF PETITIONER

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ARGUMENT IN REPLY

In this trial for attempted murder, Petitioner demonstrated prejudice resulting from trial counsel's failure to object to the trial judge's instruction to the jury that malice may be inferred from the use of a deadly weapon because the charge as a whole failed to instruct the jury that the attempted murder charge required a finding of both express malice and a specific intent to kill.

Respondent concedes deficient performance in trial counsel's failure to object to the inferred malice charge writing, "The State agrees with Haynesworth that, because the trial judge determined there was evidence to support a charge on the lesser-included offense of first-degree assault and battery, he necessarily found there was evidence that would reduce, mitigate, justify, or excuse the attempted killing such that charge on inferring malice from the use of a deadly weapon was improper under *Belcher v. State*, 385 S.C. 597, 685 S.E.2d 802 (2009)." (BOR p. 13)(footnote omitted). Respondent argues that Petitioner failed to show prejudice from the deficient performance writing, "When viewed as a whole, the trial judge's jury instruction as presented clearly conveyed to the jurors they could *only* convict Haynesworth of attempted murder if they found he acted with the specific intent to kill the victim. Therefore, even assuming the jury did infer malice from the use of a deadly weapon, Haynesworth could not have been prejudiced because the requirement for a finding of specific intent to kill was the dispositive element that determined whether or not the jury convicted Haynesworth of the greater or lesser offense." (BOR pp. 10-11). As discussed in the brief of petitioner, attempted murder requires a finding by the jury of both express malice and a specific intent to kill. See *State v. King*, 422 S.C. 47, 810 S.E.2d 18, (2017)(footnote #5); *State v. Shands*, 424 S.C. 106, 131, 817 S.E.2d 524, 537 (Ct. App. 2018). The instruction that malice could be inferred from the use of a deadly weapon diluted the State's burden of proving express malice as an element of attempted murder.

Respondent argues that, “Stated differently, nothing precluded the jury from convicting Haynesworth of the lesser-included offense of first-degree assault and battery even if they inferred malice from the use of a deadly weapon because inferring malice would not have resolved or impacted the issue of whether Haynesworth acted with a specific intent to kill. Rather, the jury in Haynesworth’s case necessarily found express malice based on its finding of a specific intent to kill, rendering any inference of malice from the use of a deadly weapon irrelevant.” (BOR p. 11). Based on the erroneous implied malice instruction and the remainder of the ambiguous and confusing instruction, it is unclear if the jury found a specific intent to kill. The jury did not find express malice. The jury instruction as a whole failed to instruct the jury that attempted murder required both express malice and a specific intent to kill. Additionally, a finding of a specific intent to kill without express malice would result in a finding of guilt on the lesser included offense of assault and battery first degree rather than attempted murder. The inferred malice charge precluded the jury from finding guilt on the lesser included offense.

The trial judge instructed the jury as to attempted murder as follows:

Now the defendants are charged with Attempted Murder. In order to prove this crime, the State must prove the defendants attempted to kill another person with malice aforethought, either express or implied. Malice is hatred, ill will, or hostility toward another person. It is the intentional doing of a wrongful act without just cause or excuse and with the intent to inflict an injury or under circumstances that the law will infer an evil intent.

Malice aforethought does not require that malice exist for any particular time before the act is committed, but malice must exist in the mind of the defendant just before and at the time that the act is committed. Therefore, there must be a combination of the previous evil intent and the act.

Malice aforethought may be express or inferred. These terms express and inferred do not mean different kinds of malice but merely the manner in which malice may be shown to exist. That is, either by direct evidence or by inference from facts and circumstances which are proved. Express malice is shown when a person speaks words which express hatred or ill will for another, or when the person prepared beforehand to do the act which was later accomplished. For example, lying in wait for

a person or any other acts of preparation going to show that the deed was within the defendant's mind would be express malice.

Malice may be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon. A deadly weapon is any article, instrument, or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon depends on the facts and the circumstances of each case. The following are examples of instruments which may be deadly weapons: A pistol, a shotgun, a rifle, a dagger, a knife, a slingshot, metal knuckles, a razor, gasoline, or a firebomb. A gun may be a deadly weapon even if it's not operating.

If facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be considered by you, the jury, along with other evidence in this case. And you may give it whatever weight evidence in the case you decide it should receive.

A specific intent to kill is an element of Attempted Murder. Intent means intending the result which actually occurs. Not accidentally or involuntarily. Intent may be shown by acts and conduct of the defendants and other circumstances from which you may naturally and reasonably infer intent. Evidence of the character of the act, the character of the instrument used, the manner in which it was used, the purpose to be accomplished, and the resulting wounds or injuries may be considered in determining the intent with which the act was committed.

Intent may also be inferred when it is demonstrated that the defendant voluntarily and willfully commits an act, the natural tendency of which is to destroy another's life.

(App. pp. 373-375).

Malice is emphasized in the attempted murder instruction. While the judge instructed the jury that a specific intent to kill is an element of attempted murder, specific intent is only mentioned one time. The judge did not specifically instruct the jury that attempted murder requires both a finding of express malice and a specific intent to kill. Malice is not mentioned in the instruction on the lesser included offense of assault and battery in the first degree. The trial judge instructed the jury as to the lesser included offense as follows:

Now, if you find that the State has failed to prove all of the elements of Attempted Murder beyond a reasonable doubt, you may consider whether the State has proved the lesser included offense of Assault and Battery in the First Degree beyond a reasonable doubt. A person commits the offense of Assault and Battery in the First Degree if the person unlawfully offers or attempts to injure another person with the present ability to do so and the act is accomplished by a means likely to produce

death or great bodily injury. Great bodily injury means bodily injury which causes a substantial risk or death or which causes serious permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ.

(App. p. 375, line 21 – p. 376, lines 1-8).

The jury instruction on implied malice was error. The remainder of the instruction was ambiguous and confusing to the jury. There is a reasonable likelihood that once the jury was erroneously instructed that malice could be inferred from the use of a deadly weapon, the jury no longer considered the lesser included offense. The instruction on assault and battery first degree did not mention malice while the attempted murder instruction emphasized malice. The attempted murder instruction failed to emphasize a requirement for both express malice and a specific intent to kill. There is a reasonable likelihood that the jury ended deliberations after finding implied malice without addressing a specific intent to kill.

“The standard for review of an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution.” State v. Aleksey, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000). “In reviewing jury charges for error, this [c]ourt must consider the [trial] court's jury charge as a whole in light of the evidence and issues presented at trial.” State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009). “If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error.” Id. “A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.” Id. “To warrant reversal, a [trial] court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant.” Id.

In State v. Taylor, 434 S.C. 365, 370, 862 S.E.2d 924, 927 (Ct. App. 2021), the South Carolina Court of Appeals wrote:

When our supreme court spoke of implied malice in King, it was speaking of malice implied by operation of law, not of the jury's ability to infer malice based on its view of certain facts. King cited Keys v. State, 104 Nev. 736, 766 P.2d 270 (1988), for its holding that specific intent to kill is an essential element of attempted murder. King, 422 S.C. at 56–57, 810 S.E.2d at 23. Keys distinguished attempted murder from murder by defining “express malice” as a specific intent to kill and said “express malice” was “malice in fact.” 766 P.2d at 272. “Implied malice,” on the other hand, consisted of a “general malignant recklessness” rather than the specific intent to kill. Id. at 273. As Keys and King explain, malignant recklessness is a sufficient criminal intent for murder but not for attempted murder because the attempted murder statute explicitly requires “intent to kill.” Recklessness is not enough.

The implied malice instruction in the present case involved the “malice implied by operation of law” discussed in King. The jury was not instructed that malignant recklessness was not sufficient for attempted murder. Under the facts of this case involving attempted murder for the shooting into an occupied trailer, the inferred malice instruction was prejudicial.

If the jury instruction had been challenged at trial, the refusal to correct the erroneous instruction would have constituted reversible error. Trial counsel was deficient in failing to object to the implied malice instruction. Petitioner was prejudiced by the deficient performance. The erroneous instruction diluted the State’s burden of proof by not requiring the State to prove express malice and a specific intent to kill. The erroneous instruction coupled with the ambiguous and confusing remainder of the instruction prevented the jury from considering the lesser included offense.

CONCLUSION

Based on the above argument this Court should reverse the conviction for attempted murder and remand the case for a new trial.


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This 7th day of April, 2022.