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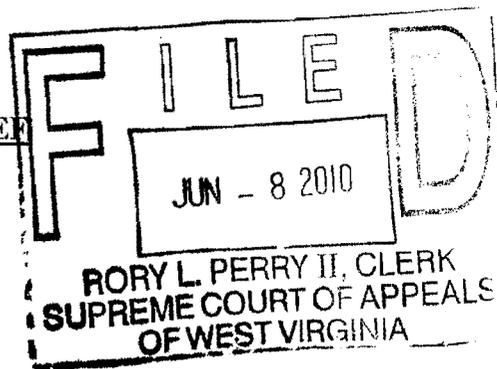
SUPREME COURT OF APPEALS OF WEST VIRGINIA

Howard Kenneth Murray
Appellant

vs.

State of West Virginia
Appellee

APPELLANT'S BRIEF
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APPELLANT'S BRIEF

Appellant, HOWARD KENNETH MURRAY through undersigned counsel, alleges error by the trial court in both its instruction to the court and relevant to the sufficiency of the evidence. In support thereof the Appellant alleges as follows:

Appellant was convicted of first degree "felony" murder as a result of application of the concerted action theory which implicated him in an attempted burglary. This issue arose as a result of the following facts: On February 26, 2008, Four young people were congregated at the trailer rented and occupied by the victim, Mr. Brett Butler and his wife Devon Butler, and located in Sharp's trailer court in Elizabeth, Wirt County, West Virginia. Visiting on that date were Jamie Wine and Ashlea Angely. At least Wine was drinking heavily. A bong packed with marijuana was later found at the scene and identified as belonging to the victim. (Transcript Volume III p. 18). At some point in the evening Wine made a phone call to a friend named Cory Robinson (Transcript Volume II p. 149). Wine arranged to meet with Robinson in Mineral Wells about 10 miles away for the purposes of purchasing marijuana. Devon Butler drove Jamie Wine to Mineral Wells for that purpose. They did meet Corey Robinson near a car wash close to a "7-11" convenience store in Mineral Wells. During this meeting, Wine assaulted Robinson by

punching him in the face and otherwise, and took the marijuana by force without paying for it (Transcript Volume II p. 228). Devon Butler assisted by driving away after the strong arm robbery (Transcript Volume II p. 229). Oscar Gibson was Robinson's marijuana supplier (Transcript Volume II p. 153). Robinson telephoned his marijuana supplier, Oscar Gibson who was located in Parkersburg, West Virginia. He drove to the housing complex where Gibson was located (Transcript Volume II p. 229). He met with Gibson, who, being informed of the assault on Robinson and the theft of the marijuana, proceeded to contact the Appellant. The Appellant, Robinson, and Gibson proceeded to Elizabeth in a car owned and driven by Robinson. There was no evidence adduced as to any specific plan on behalf of the three, who were all ultimately indicted relevant to the incident. (Transcript Volume II p. 205, 278)

When the three arrived in Elizabeth they proceeded to Sharps Trailer Court because Robinson recognized Devon Butler from the marijuana robbery and knew where she lived. He was an acquaintance of the Butlers and had been to their trailer on other occasions. There is significant evidentiary discrepancy as to what happened at the Butler trailer upon their arrival (Transcript Volume II p. 236, 292). All three Defendants below testified that they entered with consent. Angely testified that the three entered without consent and by force. Upon entry the only adults present were Brett Butler and Ashlea Angely. When questioned about the marijuana Wine robbed from Robinson, Brett Butler responded that he had no knowledge. The Appellant admit that thereafter he battered Mr. Butler by kicking and punching him. The three then left the trailer.

It is from this point that the facts which gave rise to the felony murder charge arose. The appellant Robinson and Gibson left the trailer park driven by Robinson. As they were driving out the gate, Devon Butler and Jamie Wine were approaching the trailer park in the Butler Pick up truck (Transcript Volume II p. 232). Apparently seeing Robinson's vehicle they drove past the park entrance and proceeded into and around the town of Elizabeth. Robinson followed and a slow speed pursuit ensued in and around Elizabeth and proceeded back to the trailer park. Devon Butler was driving the Butler truck. She parked outside the Butler trailer. The appellant exited the vehicle and approached the Butler truck. He confronted Devon Butler at the driver's side door and remained there. Meanwhile Jamie Wine exited the Butler truck and ran inside the trailer. (Transcript Volume II p. 240, 241) He immediately emerged back out of the trailer brandishing at Gibson a pair of nunchuka and a medieval mace, which is a wooden stick with a metal spiked ball on the end of a chain attached to the stick (Transcript Volume II p. 244). In turn Gibson brandished a handgun at Wine (Transcript Volume II p. 244). Wine ran back inside the trailer and Gibson began kicking on the front door of the trailer. Gibson did not discuss or plan this with the Appellant prior to taking this action (Transcript Volume II p. 276)

At some point the deceased Brett Butler exited the trailer through a rear door, circled the trailer and approached the Appellant from behind with a weapon described as a spear. Mr. Butler approached the appellant from the rear, and slit the front of the Appellant's neck with a spear. The Appellant's neck bled profusely. (Transcript Volume II p. 245) The Appellant wrestled the spear away from Mr. Butler. Upon loss of his weapon, Mr. Butler retreated. The Appellant proceeded to follow Mr. Butler and

jabbed in the gluteus area with the same spear. Mr. Butler jumped over an embankment. The appellant, Robinson and Gibson all left the scene in Robinson's car. Mr. Butler suffered a wound to the femoral artery in his groin. He bled out and ultimately died from hemorrhagic shock to vital organs.

The trial court erred by instructing the jury as to the concerted action theory and erred by not giving Defendant's instruction number #5 which provided that specific intent must be proved in order to convict the Defendant of felony murder by attempted burglary. The court erred by giving the concerted action theory instruction in the context of this prosecution for felony murder based upon an alleged "attempted burglary." State v Burd, 1991, 419 S.E. 2nd 676, 187 W. Va. 415 provides that to constitute the crime of attempt, proof of specific intent to commit underlying crime and an overt act which falls short of commission of crime must be established. Appellant asked the court to instruct the jury of this principle in his proposed instruction #5 (Appellate transcript p. 393) which the court denied. Given that the crime charged "attempt" is a specific intent crime, it was error for the court to instruct the jury relative to the concerted action theory that Appellant need not have a specific, personalized intent to commit an attempted burglary in order for him to be convicted of felony first degree murder by attempted burglary (Transcript Volume 3, page 121). Rather the court instructed the jury that "The State must demonstrate that the Defendant shared the criminal intent of the principal in the first degree. In this regard, the accused is not required to have intended the particular crime committed by the perpetrator, but only to have knowingly intended to assist, encourage or facilitate the design of the criminal actor." The evidence is void as to

jabbed in the gluteus area with the same spear. Mr. Butler jumped over an embankment. The appellant, Robinson and Gibson all left the scene in Robinson's car. Mr. Butler suffered a wound to the femoral artery in his groin. He bled out and ultimately died from hemorrhagic shock to vital organs.

The trial court erred by instructing the jury as to the concerted action theory and erred by not giving Defendant's instruction number #5 which provided that specific intent must be proved in order to convict the Defendant of felony murder by attempted burglary. The court erred by giving the concerted action theory instruction in the context of this prosecution for felony murder based upon an alleged "attempted burglary." State v Burd, 1991, 419 S.E. 2nd 676, 187 W. Va. 415 provides that to constitute the crime of attempt, proof of specific intent to commit underlying crime and an overt act which falls short of commission of crime must be established. Appellant asked the court to instruct the jury of this principle in his proposed instruction #5 (Appellate transcript p. 393) which the court denied. Given that the crime charged "attempt" is a specific intent crime, it was error for the court to instruct the jury relative to the concerted action theory that Appellant need not have a specific, personalized intent to commit an attempted burglary in order for him to be convicted of felony first degree murder by attempted burglary (Transcript Volume 3, page 121). Rather the court instructed the jury that "The State must demonstrate that the Defendant shared the criminal intent of the principal in the first degree. In this regard, the accused is not required to have intended the particular crime committed by the perpetrator, but only to have knowingly intended to assist, encourage or facilitate the design of the criminal actor." The evidence is void as to

any proof that Appellant intended to commit the second attempted burglary performed by Gibson. The courts instruction is at odds with Burd, erroneous and prejudicial.

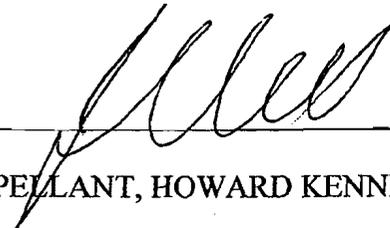
At least one other state limits accomplice liability in cases involving specific intent crimes. In *Sharma v State of Nevada*, 118 Nev. 648, 56 P.3d 868, the Nevada Supreme Court held that

“To be held accountable for the specific intent crime of another under an aiding or abetting theory of principal liability, aider or abettor must have knowingly aided the other person with the intent that the other person commit the charged crime; it is insufficient that a specific intent crime not intended by aider and abettor was natural and probable consequence of target crime of aider and abettor”

This case was later distinguished on other grounds in *State v Bolden*, 121 Nevada 908, 124 P. 3rd. 191 but maintained this principle relative to specific intent crimes.

Nor did the evidence justify the verdict. To understand why the verdict is unjust as applied to the facts of this case and the charge of felony murder one must examine the purpose of the “felony murder rule”. The Felony murder rule provides, in essence, that proof of first degree murder, which otherwise requires proof of premeditation and malice may be made by showing that the Defendant on trial committed certain specific felonies which are inherently dangerous. The pre-mediation and malice is in essence inferred from the commission or attempt to commit certain specified felonies which are inherently dangerous. In essence, the law permits the “scienter” elements of pre-mediation and malice to be inferred by the commission or attempt to

commit certain felonies. One is presumed malicious, and presumed to have committed a pre-meditated malicious homicide if a death ensues during the commission or attempt to commit a arson, robbery kidnapping, sexual assault, burglary, breaking and entering, escape from lawful custody, or a felony offense of manufacturing or delivering a controlled substance as defined in article four, chapter sixty-a of this code. The underlying offense charged in this case is attempted burglary. Consequently, it would be unjust to affirm a conviction for a death, even one which was committed in the course of an attempted robbery (a factual point the Appellant does not concede) , when the accused did not commit the attempted robbery and the attempted robbery was not planned between the accused and the person who committed it. The alleged attempted robbery, looked at in alight most favorable to the Appellee, was the spontaneous act of another, in response to a set of circumstances which were unforeseen. Wherein lies the Appellants malice or pre-mediation, inferred or otherwise? To affirm a charge of first degree murder as a result of an underlying allegation of attempted burglary, when the Appellant did not commit the attempted burglary, the attempted burglary was unplanned, was perhaps unforeseeable, and when the Defendant was provoked by first having his own neck sliced with a razor sharp spear, would be unjust. Any prior legal standard supporting this conviction is overbroad, such that it ensnares within its scope acts for which the felony murder rule was not intended to include. First degree murder is the worst of all crimes against the person. The acts of Appellant should not be included therein.

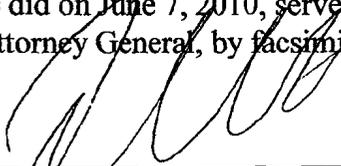


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he did on June 7, 2010, serve a copy of this document on Darrel McGraw, West Virginia Attorney General, by facsimile delivery directed to (304) 558-0140.



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