MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI,

Respondent,

v.

COTY JACK BORST,

Appellant.

DOCKET NUMBER WD83910

Date: February 1, 2022

Appeal from:
Platte County Circuit Court
The Honorable James W. Van Amburg, Judge

Appellate Judges:
Before Special Division: Alok Ahuja, P.J., and Mark D. Pfeiffer and Thomas N. Chapman, JJ.

Attorneys:
Kathryn M. Merwald, Kansas City for appellant
Kristen S. Johnson, Jefferson City for respondent

MISSOURI APPELLATE COURT OPINION SUMMARY

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WESTERN DISTRICT

STATE OF MISSOURI, Respondent,
v.
COTY JACK BORST, Appellant.

WD83910 Platte County

Before Special Division Judges: Alok Ahuja, P.J., and Mark D. Pfeiffer and Thomas N. Chapman, JJ.

Coty Borst was indicted for murder in the second degree, in violation of § 565.021.1, RSMo, and an associated counsel of armed criminal action. The murder charge was based on the allegation that Borst "knowingly caused the death of Jacob Stowers by shooting him."

At Borst's trial, he contended that he shot Stowers in self defense. Borst also contended that he intended to shoot Stowers in the leg, to wound him. In his opening statement, Borst's counsel argued that Borst had not fired "a kill-shot."

After Borst's testimony on direct examination, the circuit court conducted its jury instruction conference. Over Borst's objection, the State was permitted to submit second-degree murder to the jury on the theory that "it was [Borst's] purpose to cause serious physical injury to Jacob Stowers," rather than that Borst had knowingly caused Stowers' death by shooting him (as charged in the indictment).

Referring to the state-of-mind element in its closing argument, the State argued to the jury that "[a] shot to the leg is serious physical injury. He confessed to this element on the stand. He made your job easy. He told you exactly what he was doing."

The jury convicted Borst of murder in the second degree and armed criminal action. Borst was sentenced to 30 years' imprisonment for murder, and 15 years for armed criminal action, with the sentences to run consecutively.

Borst appeals.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

Special Division holds:

Borst preserved his variance argument during trial. While Borst may not have specifically invoked the variance doctrine by name, he advised the trial court during the instruction conference that the State had originally proposed to submit the case on the basis that Borst knowingly caused Stowers' death, but that the State was now "asking for a different instruction," under which the jury would only be required to find "that the Defendant purposely caused serious physical injury to Jacob Stowers." Borst asked the court to instruct the jury consistently with the way in which the offense had been charged in the indictment.

A variance occurred in this case, because Borst was charged with one form or method of committing second-degree murder, but the jury convicted him of committing a different form or method. The alternative states of mind which can support a conviction for conventional second-degree murder are fundamentally different forms of, or methods of committing, the underlying offense. If one form or method is charged, a different form or method cannot be submitted to the jury.

The variance between the indictment and the verdict director was "material," because Borst was charged with committing one method of second-degree murder, but convicted of another. Section 565.021.3, RSMo, which provides that second-degree murder may be submitted to the jury under "any and all of the subdivisions" of the second-degree murder statute, did not provide Borst with adequate notice that he could be convicted based on a different mental state than the one alleged in the indictment.

The variance between the manner in which second-degree murder was charged, and the manner in which it was submitted to the jury, was also prejudicial. Borst's "not a kill-shot" defense hinged on the specific manner in which the State had charged the *mens rea* element of second-degree murder. Borst's testimony that he intended only to shoot Stowers in the leg would have defeated the indictment's allegation that he had "knowingly caused the death of Jacob Stowers." This defense was completely inadequate, however, to defend against the new allegation that Borst had acted with a purpose to cause serious physical injury.

Opinion by: Alok Ahuja, Presiding Judge February 1, 2022

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