STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Edgefield County
Honorable Eugene C. Griffith, Circuit Court Judge

Opinion No. 2021-UP-254 (S.C. Ct. App. Filed July 7, 2021)
Lower Court Case No. 2015-GS-19-00044

THE STATE,

RESPONDENT,

V.

WILLIAM C. (BILLY) SELLERS,

PETITIONER.

APPELLATE CASE NO. 2021-000910

BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

ISSUES PRESENTED

1.

Whether the Court of Appeals erred by not finding reversible error where it acknowledged the trial court's instruction that malice "is the intentional doing of a wrongful act without just cause or excuse" was needlessly confusing particularly where the charge also could reasonably have been interpreted as shifting the burden to petitioner to prove a justification or excuse for his wrongful acts thereby rendering the instruction violative of petitioner's Due Process constitutional rights?

2.

Whether the Court of Appeals erred by finding no abuse of discretion in the trial court instructing the jury on accomplice liability, "the hand of one is the hand of all," since it was improper to instruct accomplice liability on the theory that the jury may believe some of the evidence and disbelieve other evidence, and it improperly invited speculation as to another person being the shooter and petitioner being guilty as a participant where the evidence did not justify this instruction under the precedent of State v. Washington, 431 S.C. 394, 848 S.E.2d 779 (2020)?

STATEMENT OF THE CASE

Petitioner was indicted by the Edgefield County Grand Jury for the offense of murder. R. 757. His case was called to trial on August 27, 2018, before the Honorable Eugene C. Griffith, and a jury. Bennett Castro and Elizabeth Fullwood represented petitioner. Suzanne Mayes and Robert McNair were the assistant solicitors. R. 1.

On August 31, 2018, the jury found petitioner guilty. R. 749, ll. 2-3. Judge Griffith sentenced petitioner to life imprisonment based upon his prior conviction in Florida for entering a dwelling while armed. R. 750, l. 16 – 751, l. 11.

The Court of Appeals affirmed petitioner's conviction in an unpublished opinion. State v. William C. (Billy) Sellers, Op. No. 21-UP-254 (S.C. Ct. App. filed July 7, 2021) (Williams, Thomas, and Hill, JJ., concur). App. 1-4. Petitioner sought rehearing. App. 5-11. The Court of Appeals denied the petition for rehearing on July 26, 2021. App. 12.

Petitioner then sought certiorari from this Court. The writ was granted on issues one and two by order of this Court dated June 28, 2022. The brief of petitioner on those two issues follows.

STANDARD OF REVIEW

"In criminal cases an appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id.

ARGUMENT

1.

The Court of Appeals erred by not finding reversible error where it acknowledged the trial court's instruction that malice "is the intentional doing of a wrongful act without just cause or excuse" was needlessly confusing particularly where the charge also could reasonably have been interpreted as shifting the burden to petitioner to prove a justification or excuse for his wrongful acts thereby rendering the instruction violative of petitioner's Due Process constitutional rights.

Relevant facts

The indictment in this case alleged that "William C. (Billy) Sellers, did in Edgefield County on or about October 9, 2014, feloniously, willfully, and with malice aforethought, kill Johnny Hydrick, the victim, by means of beating and that the said victim died in Edgefield County as a proximate result thereof . . ." R. 758. There were no co-defendants in this allegation, and no conspiracy was alleged. The state's case was circumstantial.

The state's theory of the case was that petitioner had been buying oxycontin from the decedent. The decedent was found dead inside his home tied with his hands bound in duct tape. He had suffered blunt force trauma and a fractured nose. He died of a closed head injury. R. 381, l. 7 – 386, l. 25.

The pathologist, Dr. Janice Ross, opined that the decedent may have been beaten with "a rod or something with a straight edge." R. 387, l. 25 – 388, l. 6. Dr. Ross also said that some of the decedent's injuries could have come from a fist. The decedent had "oxycodone and oxymorphone in his system." R. 391, l. 17 – 392, l. 16.

Richard Hydrick, the decedent's brother, found the decedent's body on October 11, 2014, and he called 911. R. 34, l. 20 – 35, l. 5. Richard had talked to his decedent brother the night

before and "everything was fine." The decedent was on "disability" after being in a car accident and he was taking prescription pain medications. He was dating Jessica Reeder. Strangely, Reeder was living with Travis Murray at the time. R. 35, l. 1 – 40, l. 23.

Richard testified that Reeder had gotten into an argument with the decedent in August or September of that year. Richard believed that Reeder hit the decedent on the side with a baseball bat during that argument. R. 41, l. 5 – 42, l. 24.

Defense counsel later argued to the jury that Reeder and her jealous live-in boyfriend Travis Murray actually killed the decedent, and petitioner was blamed for it. "If Billy didn't have the motive, then who did? Two people. Travis Murray and Jessica Reeder. The same two people that had the motive to kill Johnny Hydrick." R. 689, l. 16 – 693, l. 21.

Richard said he talked with Investigator Ireland on October 16, 2014, about items he believed were stolen from his decedent brother's house during the burglary-murder. There was no sign of forced entry, however. Thus, subterfuge to gain entry may have been involved by someone he knew. The stolen items included guns. A slot machine in his home was also "busted up in pieces." R. 42, l. 22 – 47, l. 23.

On October 11, 2014, Officer Joseph Wood responded to the scene at the decedent's home in Edgefield County. Wood observed no obvious signs of forced entry. R. 52, ll. 9-11. Blood was found in several locations "all throughout the house . . ." R. 52, l. 22 – 53, l. 9. As stated, the decedent's hands were bound with duct tape. There was also a blanket covering him. R. 55, ll. 2-15.

The decedent wore an electronic monitor (GPS device) apparently because he was on probation with the Department of Probation, Parole, and Pardon Services. R. 63, ll. 2-25. The

monitor ceased working at 1:43 a.m. on October 10, 2014. The theory was that the monitor quit working when the decedent died at 1:43 a.m. on October 10, 2014. R. 72, l. 17 – 74, l. 13.

Investigator Curtis Morris testified petitioner's DNA was *not* found inside the home of the decedent. Neither petitioner's DNA nor his fingerprints were found on the duct tape. R. 149, l. 21 – 154, l. 3. Petitioner's DNA was also *not* found on a .38 caliber Titan Tiger gun. R. 161, l. 5 – 162, l. 5.

The blanket covering the body of the decedent was not sent to SLED for testing. The baseball bat allegedly used by Jessica Reeder to hit the decedent on a prior occasion was also not collected by law enforcement at the time of his death. R. 157, l. 7 – 158, l. 22. When the decedent's brother, Richard Hydrick, later brought that baseball bat to the police, no blood was found on that bat. R. 158, l. 3 – 159, l. 5.

The state presented various jailhouse snitches who claimed they received information about the murder from petitioner. Dennis Amerson admitted he had been addicted to methamphetamines. R. 174, l. 3 – 175, l. 8. Amerson said he met petitioner for the first time in the Edgefield County jail. R. 175, l. 24 – 176, l. 7.

Amerson offered that petitioner showed him photographs of his children "and stuff and was like telling me where that he was gonna (sic) get called up and that he was worried that they were gonna find stuff in his van to convict him of the charges because he had told me that he was being convicted of murder." R. 176, l. 20 – 177, l. 1. Amerson claimed petitioner also said "he hopes his wife don't find out that he had done it . . . that she wouldn't have nothing to do with him." R. 177, ll. 8-17.

Amerson maintained that petitioner told him that the decedent "was tied up and I think beat. I think that's what it was." Amerson also said petitioner confided that "a slot machine . . .

pills, and some change or something like that . . ." were stolen. Petitioner also allegedly told Amerson "they had got rid of them [the stolen items]." R. 178, ll. 13-24.

In addition, Amerson claimed that petitioner told him that a drug dealer had been arrested in Aiken "or somewhere like that and he had told on him to try to get hisself (sic) out of trouble." R. 179, l. 22 – 180, l. 6. Amerson contended that petitioner confessed to him that he committed the murder and stole pills, money, and a slot machine. Amerson denied that petitioner merely told him what he was accused of doing. R. 186, ll. 18-25.

Phillip Griffin was arrested on November 21, 2014. He also was addicted to methamphetamines. R. 197, l. 23 – 202, l. 13.

Griffin testified that he became cellmates with petitioner, and they began talking "about each other's charges." Griffin said petitioner told him "at first it wasn't him and then that kind of changed towards the end. . . . His story would change a little bit and he kind of started putting himself involved in the case." R. 202, l. 17 – 203, l. 11.

Griffin testified petitioner asked him questions about DNA evidence. Griffin said petitioner mentioned a time "when the guy Johnny fell down the steps and kind of broke his nose, broke his nose and he went to help him up and he said if there was any blood like on the passenger side, that's what that would be from because he tried to help him in the van. He was going to take him to the hospital and the guy Johnny was like no. No. I'll be fine." Griffin thought petitioner was talking about an incident from September 2014 involving the decedent and the van. R. 204, l. 6 – 205, l. 16.

Griffin maintained that petitioner's story "changed a lot." Griffin claimed petitioner told him he "went there" to commit a robbery and that they were going to "pull a lick." They knew the decedent "just got his prescriptions filled and he was gonna go get his pills. If he had any money,

he wanted it, too." The rumor was that a man named "Gee" – who was never located and may not even exist -- was allegedly involved with petitioner in the robbery. R. 205, l. 13 – 207, l. 4.

Griffin alleged petitioner told him, "They went to his house and they taped him up and was asking him where the pills were and they were pistol whipping him until he told them where the pills were." R. 207, ll. 5-14. Griffin maintained that petitioner was surprised he was charged with murder "because he said when he left, the guy was still alive." R. 209, ll. 4-24.

Finally, Griffin said that petitioner -- in addition to talking about a person named "Gee" -- also mentioned a person named "Jersey." R. 212, ll. 19-23.

Griffin admitted he had a sentencing exposure of *fifty years imprisonment* at the time, but he denied he received any sentencing exposure assistance for testifying against petitioner. R. 228, ll. 9-20. He admitted some charges were dropped, and he got a lenient sentence with probation on other charges, but he nonetheless denied the sentencing judge knew of his agreement to testify in this case. R. 226, l. 4 – 228, l. 20.

After Griffin claimed he received no sentencing consideration for testifying against petitioner, the state sought to introduce two of Griffin's guilty plea sentencing sheets which had "no negotiation" checked on the form. Defense counsel objected on the grounds of relevance, and that objection was overruled. The sentencing sheets were then admitted. R. 231, l. 16 – 233, l. 25; R. 752.

Hakim Talib testified that he sold marijuana to "the whole neighborhood" and that petitioner began buying marijuana from him also. He was "Jersey." R. 291, l. 24 – 292, l. 5. Hakim said that petitioner at one point approached him about buying "a shotgun, pills, and a .38." R. 296, ll. 11-15. Hakim maintained that he told petitioner he did not want to buy a shotgun, "I

ain't interested in no shotgun. I can't flip no shotgun like that. I don't want no big giant gun. I don't need no big gun." R. 297, ll. 15-20.

Hakim said he talked to Investigator Ireland about what he knew about this case and he told him about "Gee." Hakim said he thought Gee was a "real person" but he did not know his real name. R. 318, l. 21 – 320, l. 21.

Wesley Brown had been convicted of trafficking in crack. R. 439, l. 1 – 440, l. 13. Brown met petitioner when he was his cellmate in the detention center. R. 440, ll. 11-19.

Brown testified that in "general conversation" petitioner mentioned Shawn Nicholson, who was known as "Bald Head." Brown told petitioner he was very close to Shawn and petitioner allegedly told Brown "that Shawn was his alibi and that, you know, he just went to talking about, you know, all kind of small stuff about saying that a guy named Jersey was the reason he was locked up. Said Jersey got caught with some stuff, some drugs or something, got busted in Aiken and told on him." R. 442, l. 1 – 443, l. 19.

Brown contended that petitioner wanted Brown to talk to the investigator "and basically tell the investigator that Jersey was the one who killed this guy." R. 443, l. 20 – 444, l. 2. Brown also contended petitioner wanted him "to say that I met Jersey and sold him some drugs and he tried to sell me some guns and Jersey was supposed to tell me that, you know, guns came from the guy that got killed and all of this stuff. He wanted me to tell the investigator that Jersey gave me all the information about the murder." R. 444, ll. 3-9.

Brown testified petitioner "gave me a piece of paper that he had done wrote down what he wanted me to say." R. 445, ll. 1-16. Brown claimed that petitioner told him that "they did it with a .38" but he did not know the other person -- "who that could be" -- petitioner may have alleged was also involved. R. 446, ll. 1-25.

However, Brown maintained petitioner wanted him to "pin it on Jersey." R. 447, ll. 3-4. Brown testified that petitioner told him they used a .38 "not to shoot him but to beat him with it. They beat him with a .38." R. 447, ll. 15-18. Brown said the letter he wrote said:

> "Sometime in the middle of October I went to serve some reefer to a guy named Jersey, a/k/a Hakim Talib. After I served him, he began to ask me if I was interested in buying a shotgun, a .38 revolver or some pain pills. He said he had beat some dude's ass who owe him some money. Beat him unconscious with a .38 he was trying to sell so he took the guy's shotgun and pills as payment. Told me that had it been him he'd have given everything that he had to avoid a beating like that. Jersey said he had his cousin handle it like pros, that there was no way it would come back on them. I said I didn't need anything like that. A couple of weeks later I was visiting a friend who told me Jersey got busted with a pound of reefer and some gun. I went to his house off Alfred Street and he told me that he was gonna get probation he thought because he told the police about the guy he beat who ended up dying and set up a white boy he used to sell reefer to. Jersey said he found out from the white boy dude named Billy that he was questioned by the Edgefield police about the death of his pill guy so Jersey had his cousin who was serving the white guy at the time start putting certain information in the white boy's phone but didn't say what. It said that the white boy was a duck and trusted anyone. He said he was a meth head and was an easy fall guy. Jersey then asked if I could get him right with some reefer and I said I'll see what I could do. I'll see what was up."

R. 448, l. 19 – 449, l. 18.

Brown claimed he wrote the letter because petitioner told him he could get out of jail if he provided good information to law enforcement. R. 474, ll. 4-14. Brenda Heath, the questioned documents examiner, testified petitioner was the author of State's Exhibit 84, the letter. R. 485, ll. 7-10.

Investigator Phillip Ireland testified he spoke to petitioner on October 25, 2014. R. 502, l. 2 – 504, l. 3. Ireland said petitioner asked him, "Have you found anyone else besides me who did this, or do you feel like it's just me?" R. 505, ll. 15-24.

Ireland related that during his investigation he learned that Travis Murray and Jessica Reeder had a strained relationship and that Travis was very jealous of her. R. 526, l. 12 – 533, l. 5. Ireland testified that the decedent provided Jessica Reeder with pills and money. Ireland also learned that Jessica Reeder had hit the decedent with a baseball bat on a prior occasion. R. 531, l. 5 – 533, l. 5. Petitioner admitted to Ireland that he had purchased pills from the decedent.

Ireland testified that Travis Murray and Jessica Reeder were both arrested for the first-degree burglary of the decedent's home and for the murder of the decedent. R. 544, ll. 17-23. Ireland finally opined he believed that "Gee" was a real person although law enforcement was never able to locate him. R. 539, l. 18 – 540, l. 4.

Shawn Nicholson testified that petitioner was his neighbor for a year or a year and a half. They both got high smoking marijuana "and things of that sort." R. 577, l. 12 – 578, l. 6.

Nicholson testified that he, Travis Murray, and petitioner went to an abandoned house to "scrap for metal" to sell to the recycling plant. R. 579, l. 4 – 582, l. 9. Nicholson heard petitioner and Travis talking about a man "Travis girlfriend was dealing with" at the time. R. 584, ll. 1-22. Nicholson said he never learned the name of the man they were talking about but he thought it was someone having sex "with his [Travis's] girlfriend" and they were talking about "doing a lick." Nicholson thought "they was just talking trash," and that they were not serious about robbing this man. R. 586, l. 1 – 587, l. 9.

Nicholson testified that on the night of October 9, 2014, petitioner came to his house and said he had been in an argument with his girlfriend or wife. R. 587, l. 10 – 594, l. 6. While petitioner stayed at Nicholson's house that night, Nicholson maintained that petitioner was gone from about midnight to 3 a.m. that morning. R. 591, l. 9 – 596, l. 11.

Joseph Lowe testified he had sold meth to petitioner in the past. R. 629, l. 2 – 630, l. 14. Lowe claimed petitioner "wanted to know if I wanted to do a lick with him." This apparently involved the robbery of a disabled man who "gets drunk and gets pilled up and passes out and he'll be an easy target and I told him I didn't want no part of it." R. 631, ll. 2-6. Lowe said he "cut ties with him [petitioner]" at that point. R. 631, ll. 10-15.

Lowe also testified that petitioner called him on the phone late at night and asked him "if I wanted to trade him some, he said I think a shotgun and a rifle and some pills that he had gotten, uhm, and I didn't want them . . ." R. 631, l. 25 – 632, l. 6. Lowe maintained petitioner told him "for a beating like that he would have give everything he had to not get a beating like that but he didn't have but a dollar in his wallet." Lowe said he thought petitioner told him "a shotgun and a rifle and some pills were stolen." R. 632, ll. 22-25.

Lowe thought that petitioner wanted to trade the stolen items for "crystal meth." R. 633, ll. 4-8. Lowe said he contacted Tommy Brock, a longtime family friend, with the Aiken police department to tell him about what petitioner had said about the incident. R. 635, l. 11 – 647, l. 23. Lowe admitted he had only known petitioner for about two weeks when he claimed petitioner asked him about "doing this lick." R. 647, ll. 5-20. Lowe also maintained that he only continued talking to petitioner so that Investigator Ireland could find petitioner and arrest him. R. 651, ll. 4-22.

The charge conference – malice and accomplice liability

Defense counsel Fullwood objected to the judge charging the jury that malice is the "intentional doing of a wrongful act without just cause or excuse and [or] with an intent to inflict an injury under circumstances that the law will infer an evil intent [or malice]." Counsel argued that the phrase "*without just cause or excuse*," could be construed as burden shifting. Defense

counsel Fullwood also observed, "I know it's in the charge books but I always object to it because I think it's wrong." R. 725, l. 20 – 726, l. 21.

The judge then stated, "That's how charges get amended and changed." However, after the solicitor said she had no comment or objection to the "standard charge," the judge overruled counsel's objection to the "without just cause or excuse" malice instruction. "I'm gonna stick with the standard charge. Do you know how oddly I have my granddad's old charge book and he retired in '67 and this charge is in there still. . . ." R. 725, l. 20 – 726, l. 21.

Defense counsel Fullwood then stated that while she was not waiving her objection to the "without just cause or excuse" jury instruction she asked the judge to modify it with the preface that it could "lead to an inference of malice depending on your view of the evidence" if the judge would charge that instead. The judge said he "would think about it." R. 726, l. 22 – 727, l. 13.

Defense counsel Fullwood also objected to charging the hand of one is the hand of all, or, the accomplice liability instruction. She noted that there was no evidence "[t]hat there was anyone else involved. There's no testimony that this was the act of more than one person." Counsel argued that "references" or "suggestions" and "innuendo" did not constitute evidence which was needed for an accomplice liability instruction. R. 662, ll. 13-22.

The state argued while there were not any indicted co-defendants, that petitioner's statements could be interpreted to mean he did not act alone. Defense counsel then cited Wilds v. State, 407 S.C. 432, 756 S.E.2d 387 (2014), in support of her argument that accomplice liability should not be charged in this case. Counsel noted the very real problem that the Supreme Court recognized in Wilds was that "the jury might believe this part and this part, not this part, but if we can patch it together, they might think that, and that's what Wilds says you can't do to be entitled to a charge on accomplice liability." R. 662, l. 4 – 665, l. 23.

The judge said he understood the defense objection to the hand of one, hand of all charge but stated he was going to charge it over petitioner's objection. R. 662, l. 13 – 666, l. 5; R. 727, l. 14 – 728, l. 11.

The jury charge

The judge charged the jury, "In order to sustain a conviction for murder the state must prove beyond a reasonable doubt that he, a person, the defendant killed another person with malice aforethought. Now, I tell you that malice is defined as hatred, ill will, hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse or with an intent to inflict danger or under the circumstances which the law infers an evil intent or malice. . . ." R. 740, l. 21 – 741, l. 7. (emphasis added).

The judge also instructed that "hand of one is the hand of all," specifically, inter alia, the judge instructed, "Two people can be guilty of killing another person when only one of the two had a gun and there's only one bullet, only one of the two fired the shot that caused the death but if the two or more people are acting together assisting each other in committing the offense, the act of one is the act of all or as it is sometimes said the hand of one is the hand of all." R. 742, l. 4 – 743, l. 11.

Court of Appeals opinion

In its unpublished opinion in State v. William C. (Billy) Sellers, Op. No. 21-UP-254 (S.C. Ct. App. filed July 7, 2021) (Williams, Thomas, and Hill, JJ., concur) the Court held:

> As to whether the trial court abused its discretion in charging the jury that malice is "is the intentional doing of a wrongful act without just cause or excuse," we are constrained to hold this charge remains good law that circuit judges may include as part of a malice instruction. *See State v. Franks*, 376 S.C. 621, 624, 658 S.E.2d 104, 106 (Ct. App. 2008) ("An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." (quoting *Clark v. Cantrell*, 339 S.C. 369, 389,

529 S.E.2d 528, 539 (2000))); *State v. Cottrell*, 421 S.C. 622, 643, 809 S.E.2d 423, 435 (2017) ("A trial court is required to charge the current and correct law in South Carolina."); *State v. Wilds*, 355 S.C. 269, 276, 584 S.E.2d 138, 141–42 (Ct. App. 2003) ("Malice is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong. It is the doing of a wrongful act intentionally and without just cause or excuse." (citations omitted)). Our supreme court has held this instruction is not an unconstitutional burden shifting charge. *State v. Bell*, 305 S.C. 11, 19, 406 S.E.2d 165, 170 (1991) ("Appellant complains the trial judge improperly defined malice as 'the doing of a wrongful act intentionally and without just cause or excuse.' He claims the instruction created an unconstitutional burden-shifting presumption. We disagree. The trial judge's definition of malice is correct, *State v. Judge*, 208 S.C. 497, 38 S.E.2d 715 (1946), and the charge given is devoid of any presumption."). The trial court's malice instruction stated in part:

> In order to sustain a conviction for murder the State must prove beyond a reasonable doubt that . . . the defendant killed another person with malice aforethought. Now, I tell you that malice is defined as hatred, ill will hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse or with an intent to inflict danger or under the circumstances which the law infers an evil intent or malice.

(Emphasis added). We understand Sellers' argument that a reasonable jury could apply the phrase equating malice with "intentional doing of a wrongful act without just cause or excuse" in problematic ways. We are not sure what the challenged phrase adds to a malice charge and can see the wisdom in not charging it. We are also not sure how a wrongful act can be said to be done with malice if all that is proven is that the act was done with intent (all crimes require some level of intent except strict liability ones, see, e.g., *State v. Ferguson*, 302 S.C. 269, 271–72, 395 S.E.2d 182, 183 (1990)). Nor are we sure how an intentional act that is justified or excusable by law could be a crime. But even amidst the trend by our supreme court (aptly noted by Sellers) to revisit dubious and outworn jury instructions, *see Pantovich v. State*, 427 S.C. 555, 832 S.E.2d 596 (2019), we are quite sure we must comply with the precedent of *Bell*.

2. The trial court did not abuse its discretion in instructing the jury on accomplice liability. *See Franks*, 376 S.C. at 624, 658 S.E.2d at 106 ("An appellate court will not reverse the trial court's decision

> regarding jury instructions unless the trial court abused its discretion." (quoting *Clark*, 339 S.C. at 389, 529 S.E.2d at 539)). There was evidence Sellers worked with an unidentified coconspirator named Gee or another unknown person to rob and murder the victim by beating him to death. This evidence included testimony from three of Sellers' fellow inmates that Sellers said (1) he and Gee went to rob the victim for pills and money, and they pistol-whipped the victim until he told them where his pills were; (2) he and his friends tied the victim up, beat him, and stole a slot machine, some pills, and some money; and (3) "they" beat an old white man with a .38 and stole some pills. Thus, the evidence was equivocal as to whether Sellers or one of his unknown coconspirators dealt the fatal blow that resulted in the victim's death. *See State v. Washington*, 431 S.C. 394, 407, 848 S.E.2d 779, 786 (2020) ("For an accomplice liability instruction to be warranted, the evidence must be 'equivocal on some integral fact and the jury [must have] been presented with evidence upon which it could rely to find the existence or nonexistence of that fact.'" (alterations in original) (quoting *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011))). Accordingly, we find the trial court properly instructed the jury on accomplice liability, and we affirm as to this issue.

Rehearing

Petitioner argued, *inter alia*, in his rehearing petition that the Court of Appeals should reconsider its opinion and grant rehearing because the:

> Court may have overlooked the fact that given the thirty year passage of time since State v. Bell, 305 S.C. 11, 406 S.E.2d 165 (1991) and material changes in the law that it should not be "[c]onstrained to hold this [malice instruction] remains good law that circuit judges may include as part of a malice instruction." State v. William C. (Billy) Sellers, 2021-UP-254 (filed July 7, 2021). This Court noted that the jury instruction that malice "[i]s the intentional doing of a wrongful act without just cause or excuse . . ." had been held by the Supreme Court to not be an unconstitutional burden shifting instruction in State v. Bell, 305 S.C. 11, 19, 406 S.E.2d 165, 170 (1991). However, Bell is an outdated thirty-year-old death penalty opinion, decided long before, as this Court correctly determined, the "[t]rend by our Supreme Court (aptly noted by Sellers) to revisit dubious and outworn jury instructions, see Pantovich v. State, 427 S.C. 555, 832 S.E.2d 596 (2019) . . ." State v. William C. (Billy) Sellers, 2021-UP-254 (filed July 7, 2021).

This Court also wrote, "We understand Sellers' argument that a reasonable jury could apply the phrase equating malice with 'intentional doing of a wrongful act without just cause or excuse' in problematic ways. We are not sure what the challenged phrase adds to a malice charge and can see the wisdom in not charging it. We are also not sure how a wrongful act can be said to be done with malice if all that is proven is that the act was done with intent (all crimes require some level of intent except strict liability ones, see, e.g., (State v. Ferguson, 302 S.C. 269, 271-72, 395 S.E.2d 182, 183 (1990)). Nor are we sure how an intentional act that is justified or excusable by law could be a crime." State v. William C. (Billy) Sellers, 2021-UP-254 (filed July 7, 2021).

Yet, despite this excellent analysis of the multiple problems with this jury instruction, this Court reasoned it was bound by the precedent of Bell. However, this Court should reverse because it recognizes the current jurisprudence of the Supreme Court disfavoring such confusing, unnecessary jury instructions that did not exist thirty years ago when Bell was issued. This instruction that malice "is the intentional doing of a wrongful act without just cause or excuse" should be adjudicated to be burden shifting, and therefore unconstitutional.

If this Court is unwilling to so hold after granting rehearing, this jury instruction was also extremely confusing, and, consequently, very prejudicial. It is reversible error to give jury instructions which are calculated to confuse or mislead the jury. This is so because the purpose of jury instructions is to enlighten the jury as to what the law is, in order that the jury may arrive at a just, fair, and proper verdict. See State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987); State v. Hewitt, 205 S.C. 207, 31 S.E.2d 257, 259 (1944).

Given the modern jurisprudence of the Supreme Court as to jury instructions, as this Court aptly recognized in its opinion in this case, rehearing should be granted as to this confusing, burden shifting, and prejudicial malice charge issue. See Pantovich v. State, 427 S.C. 555, 832 S.E.2d 596 (2019); State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019); State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009); State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987); State v. Hewitt, 205 S.C. 207, 31 S.E.2d 257, 259 (1944).

2. **Accomplice liability instruction**

This Court should also reconsider its holding that the trial judge did not abuse his discretion by instructing the jury on accomplice liability. The vague testimony of jailhouse snitches about "[a]n *unidentified* coconspirator named Gee or *another unknown person*" allegedly robbing and murdering the victim by beating him to death should be insufficient as a matter of law to justify the jury instruction on accomplice liability.

Appellant submits accomplice liability must be based on the defendant acting with another real, identifiable person to commit the crime, and the evidence must be "equivocal" as to whether the defendant or his accomplice dealt the fatal blow that resulted in the victim's death. See State v. Washington, 431 S.C. 394, 407, 848 S.E.2d 779, 786 (2020). In Washington, the Supreme Court noted: "For an accomplice liability instruction to be warranted, the evidence must be equivocal on some integral fact and the jury [must have] been presented with evidence upon which it could rely to find the existence or nonexistence of that fact. Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011)."

The Court in Washington also wrote: "In this case, there was evidence Petitioner was the shooter. There was also evidence petitioner was not the shooter. The question becomes whether there was equivocal evidence the shooter, if not Petitioner, was an accomplice of Petitioner. Based on the evidence presented in this case, Kinloch is the only possible person who could fall into the category of Petitioner's accomplice. Therefore, if the record contains no evidence Kinloch was the shooter, then the accomplice liability instruction should not have been given." Id. 431 S.C. at 407, 848 S.E.2d at 786.

The Court in Washington determined there was not any probative evidence that Kinloch was the shooter, and therefore Washington could not be his accomplice. The trial court therefore erred in charging accomplice liability. There was no doubt that Kinloch was a real person.

To allow the state to obtain an accomplice liability instruction, the "hand of one, is the hand of all" charge here, based upon the claims and supposition of jailhouse snitches places a criminal defendant's due process right to a fair trial in great jeopardy. The accomplice liability instruction here allowed the jury to guess that some unknown person (allegedly real) other than

> Appellant Billy Sellers may have committed the murder while still holding Billy Sellers criminally liable for that murder.
>
> To be able to obtain an instruction on accomplice liability, an evidentiary predicate should be required to show that the shooter is in reality a real person and not just "a theoretical person" or "an unknown person." See State v. Washington, 431 S.C. 394, 407, 848 S.E.2d 779, 786 (2020). No such evidentiary predicate was established in this case. Rehearing should be granted on this issue also.

App. 5-11. Rehearing was denied. App. 12.

Discussion

Defense counsel here objected to the judge charging the jury that malice was the "intentional doing of a wrongful act without just cause or excuse." Defense counsel correctly noted that this instruction could reasonably be interpreted by the jury to be burden shifting. Meaning, that petitioner intentionally doing a wrongful act without just cause or excuse constituted malice and shifted the burden to petitioner to prove just cause or excuse. R. 725, l. 20 – 727, l. 13.

This instruction should not have been given. Earlier, in State v. Burdette, 427 S.C. 490, 493, 832 S.E.2d 575, 577 (2019), this Court held that "Regardless of the evidence presented at trial, a trial court shall not instruct a jury that it may infer the existence of malice when the deed was done with a deadly weapon." This opinion overruled State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), which allowed the inference of malice instruction from the use of a deadly weapon unless there was evidence which would reduce, mitigate, excuse or justify the killing or assault and battery with intent to kill.

This Court's decision in Burdette was consistent with this Court's modern pattern of disapproving of jury instructions on how the jury should interpret certain evidence. For example, the Court in Burdette cited State v. Grant, 275 S.C. 404, 407-08, 272 S.E.2d 169, 171 (1980), where it held it was improper for the trial court to charge the jury that the defendant's flight may

be considered evidence of guilt. State v. Burdette, 427 S.C. 490, 502, 832 S.E.2d 575, 582 (2019). This Court also cited State v. Hughey, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000), where it held that the trial judge correctly refused the defendant's request to charge specific examples of voluntary manslaughter that might be considered evidence of legal provocation. See State v. Burdette, 427 S.C. 490, 502, 832 S.E.2d 575, 582 (2019).[1]

Further, in State v. Cheeks, 401 S.C. 322, 328-29, 737 S.E.2d 480, 484 (2013), this Court held that the trial court must not charge the jury that actual knowledge of the presence of drugs is strong evidence of a defendant's intent to control their disposition or use. See State v. Burdette, 427 S.C. 490, 502, 832 S.E.2d 575, 82 (2019).

More recently, in State v. Cartwright, 425 S.C. 81, 819 S.E.2d 756 (2018), this Court held that in the future, even in the rare event when evidence is permitted of the defendant's attempted suicide, it will still be improper for the trial court to instruct the jury by way of a limiting instruction or otherwise about that suicide evidence. The Court noted that under the South Carolina constitution, "Judges shall not charge juries in respect to matters of fact, but shall declare the law." State v. Cartwright, 425 S.C. 81, 93, 819 S.E.2d 756, 762 (2018), *citing* S.C. Const. Art. V, § 21.

In this case, the objectionable jury charge was much worse because it was that malice went beyond it raising an "inference of malice" as defense counsel noted. The instruction was that malice *was* "the intentional doing of a wrongful act without just cause or excuse."

As with the other cases cited above this instruction was unnecessary and problematic since it was about how the jury should interpret evidence. The solicitor was free to argue there was no excuse or justification for petitioner being involved in drug transactions with the decedent, or him allegedly entering the decedent's home with the intent to harm him, or by him allegedly beating

[1] Overruled on other grounds in Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009).

the decedent, and that the jury could find any of these actions constituted malice. However, it was quite different and improper for the Court to *charge it, and* it was burden shifting.

Defense counsel correctly argued that the instruction that the intentional doing of a wrongful act without just cause or excuse was burden shifting. As defense counsel argued, the state must prove a defendant's guilt beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). Any jury instruction that has the effect of relieving the state of its burden of proof beyond a reasonable doubt as to every essential element of the crime is impermissible. See, Sandstrom v. Montana, 442 U.S. 510 (1979).

In High v. State, 300 S.C. 88, 386 S.E.2d 463 (1989), this Court held that defense counsel was ineffective for failing to object to a burden shifting instruction. In High, the judge charged involuntary manslaughter as "the unintentional cause of the death of another through mere criminal negligence." The judge defined intent as "to act knowingly." The judge then charged the jury that the law presumes the intent from the doing of an unlawful act. *Citing* Yates v. Aiken, 484 U.S. 211 (1988) and Sandstrom v. Montana, 442 U.S. 510 (1979), this Court held the instruction was "clearly erroneous." See, High v. State, 300 S.C. 88, 89, 386 S.E.2d 463, 464 (1989).

Here, the judge defined malice as "the intentional doing of a wrongful act without just cause or excuse." Defense counsel correctly objected that a reasonable juror could interpret this instruction as shifting the burden to petitioner to show "just cause or excuse" for his intentional doing of a wrongful act.

In this case, those wrongful acts could include the selling or buying of drugs. They also could include burglary. In addition, they could include an alleged plan to do "a lick," or the beating of the decedent.

This Court has disapproved instructions on malice where, as here, they tend to have inferences of malice that can be derived from evidence that exists in the case such as the use of a deadly weapon. Burdette and Belcher, supra. The instruction in this case *defined* malice as "the intentional doing of a wrongful act without just cause or excuse." Again, that was even stronger than an inference of malice instruction, it was burden shifting to petitioner, and it should be condemned or disapproved by this Court. There was, as seen above, a variety of evidence of unlawful or wrongful acts that this jury instruction impermissibly called upon petitioner to show "just cause or excuse" for in this case.

The Court of Appeals, bound by the precedent of this Court, noted, "Our supreme court has held this instruction is not an unconstitutional burden shifting charge. *Citing* State v. Bell, 305 S.C. 11, 19, 406 S.E.2d 165, 170 (1991). In Bell this Court wrote that the defendant claimed this "doing of a wrongful act intentionally and without just cause or excuse" created an unconstitutional burden shifting presumption." This Court relied on State v. Judge, 208 S.C. 497, 38 S.E.2d 715 (1946) to hold the instruction of malice was correct, and to find it was devoid of a presumption. State v. Bell, 305 S.C. 11, 19, 406 S.E.2d 165, 170 (1991).

State v. Judge was a 1946 case decided long before Sandstrom v. Montana, 442 U.S. 510 (1979), which was the beginning of the modern day malice "presumption," or "inferring malice" days of our jurisprudence. Further, State v. Judge cited the 1908 case of State v. Gallman, 79 S.C. 229, 60 S.E. 682 (1908) in support of its holding. Further, State v. Judge largely considered the interplay of manslaughter and self-defense as it related to "malice" or "malice aforethought" -- none of which was involved in this case.

While the Court of Appeals was "constrained" to affirm based on the precedent of this Court, State v. Bell is an outdated case especially considering the modern precedent of this Court

condemning "inference of malice" instructions, State v. Belcher and State v. Burdette, and other cases cited above disfavoring charges on how the jury should interpret the evidence before it.

Petitioner should be granted a new trial.

2.

The Court of Appeals erred by finding no abuse of discretion in the trial court instructing the jury on accomplice liability, "the hand of one is the hand of all," since it was improper to instruct accomplice liability on the theory that the jury may believe some of the evidence and disbelieve other evidence, and it improperly invited speculation as to another person being the shooter and petitioner being guilty as a participant where the evidence did not justify this instruction under the precedent of State v. Washington, 431 S.C. 394, 848 S.E.2d 779 (2020).

The solicitor here, as seen above, argued that even though there were no co-defendants or co-conspirators in this case that an instruction on accomplice liability was proper. The solicitor said some of petitioner's statements implied another person or others may have been involved. R. 662, l. 13 – 666, l. 5; R. 727, l. 14 – 728, l. 11.

Defense counsel countered that pursuant to this Court's opinion in Wilds v. State, 407 S.C. 432, 756 S.E.2d 387 (Ct. App. 2014) that it was improper to give an instruction on accomplice liability on the theory that the jury may believe some of the testimony and disbelieve other parts of the testimony. Further, the innuendo and rumors about someone else being involved were just that – innuendo and rumors. R. 662, l. 13 – 666, l. 5; R. 727, l. 14 – 728, l. 11.

Petitioner alone was indicted for murdering the decedent. There was no indictment or allegation of conspiracy. A man named "Gee" was mentioned but at the end of the trial the fact of whether such a man – "Gee" -- even existed was still being discussed. While defense counsel blamed the murder on Travis Murray and Jessica Reeder in this closing argument the motive to kill the decedent was their motive, independent of petitioner.

The instruction on accomplice liability based on speculation that someone else or others may have been involved was improper. In Wilds v. State, there was no evidence anyone other

than the defendant was the shooter. While the evidence in this case was not as dramatically clear cut, there was still no evidence presented by the state that anyone other than petitioner was the killer -- if petitioner was the killer. The state's case was circumstantial, and there was no circumstantial evidence that someone else was the killer. The jury should have been forced to decide if the state proved beyond a reasonable doubt that petitioner killed the decedent. Allowing a guilty of murder verdict based on a theory -- accomplice liability -- where the evidence did not support that theory was error. Wilds v. State. 407 S.C. 432, 438, 756 S.E.2d 387, 390 (Ct. App. 2014).

Accomplice liability must be based on the defendant acting with another real, identifiable person to commit the crime, and the evidence must be "equivocal" as to whether the defendant or his accomplice dealt the fatal blow that resulted in the victim's death. See State v. Washington, 431 S.C. 394, 407, 848 S.E.2d 779, 786 (2020). In Washington, this Court held: "For an accomplice liability instruction to be warranted, the evidence must be equivocal on some integral fact and the jury [must have] been presented with evidence upon which it could rely to find the existence or nonexistence of that fact." State v. Washington, 431 S.C. 394, 406, 848 S.E.2d 779, 785 (2020) *citing* Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011)." See, also, State v. Campbell, 435 S.C. 528, 868 S.E.2d 414 (Ct. App. 2021).[2]

Finally, defense counsel correctly argued that the accomplice liability instruction was improper on the basis that the jury may find an alternate theory of liability because the jury "may believe some of the evidence and disbelieve other evidence." Wilds v. State, 407 S.C. 432, 438, 756 S.E.2d 387, 390 (Ct. App. 2014) *citing* Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 438 (2011). In many murder cases innuendo and rumors are indeed alive. This does not justify a

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2 Pending on certiorari by the state at the time of the filing of this brief of petitioner.

jury instruction and a verdict based on "accomplice liability." Most respectfully, "the hand of one is the hand of all" is a very dangerous jury instruction given its broad interpretation -- such as the only "one bullet," "one gun," but multiple persons being guilty jury instruction in this case. R. 742, ll. 11-18.

Petitioner was indicted for murder. The jury's task was to decide whether petitioner killed the decedent with malice aforethought in violation of S.C. Code § 16-3-10. Allowing the jury to convict petitioner on an improper alternative theory of liability by inviting speculation based on the jury believing some evidence but not believing other evidence presented by the state impermissibly invited speculation. Wilds v. State, 407 S.C. 432, 756 S.E.2d 387 (Ct. App. 2014).

Petitioner should be granted a new trial.

CONCLUSION

By reason of the foregoing arguments, petitioner's conviction should be reversed and this case remanded to the Edgefield County Court of General Sessions for a new trial.

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This 28th day of July, 2022.