RECEIVED
Aug 26 2020
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas
The Honorable R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2019–001575

KERWIN S. PARKER,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

SUPPLEMENTAL APPENDIX

KATHRINE H. HUDGINS
Appellate Defender

S.C Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 1158
Columbia, South Carolina 2911
(803) 734-1330

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

LILLIAN L. MEADOWS
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

INDEX

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KERWIN PARKER,

APPELLANT

Appellate Case No. 2009-147266

FINAL BRIEF OF APPELLANT

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

4

STATEMENT OF ISSUE ON APPEAL

The trial judge erred in instructing the jury that the use of a deadly weapon implied malice in connection with the assault and battery with intent to kill charge given at trial because this instruction was confusing and prejudicial in light of the submission of evidence that clearly reduced, mitigated, excused or justified appellant's actions in the case

STATEMENT OF THE CASE

Appellant Kerwin Parker was convicted per jury trial of assault and battery with intent to kill and possession of a firearm during the commission of a violent crime per a jury trial held during the September 2009 term of the Lexington County General Sessions Court before Judge Robin B. Stilwell. Appellant received an aggregate twenty-year prison term at his sentencing hearing held during the October 2009 term of the Lexington County General Sessions Court. Appellant was represented by Jack Duncan at his trial and sentencing proceedings.

Appellant appealed. This brief follows.

ARGUMENT

The trial judge erred in instructing the jury that the use of a deadly weapon implied malice in connection with the assault and battery with intent to kill charge given at trial because this instruction was confusing and prejudicial in light of the submission of evidence that clearly reduced, mitigated, excused or justified appellant's actions in the case.

Appellant and codefendant Curtis Johnson were tried together for charges emanating from a shoot-out that occurred on November 20, 2006. Based on the evidence presented at trial, it appeared as though appellant and his brother Curtis Johnson went to Isaac Wilson's apartment on that night to discuss and/or settle a few matters: one of which was Isaac Wilson's and Walter Gadson's alleged attack on Curtis Johnson, and another was Curtis Johnson's ex-girlfriend's involvement with Isaac Wilson. Sentencing Transcript p. 23, lines 5-10. A melee between these men ensued after appellant and Curtis Johnson arrived at Isaac Wilson's residence. The men who participated in the incident were Isaac Wilson, Walter Gadson, AJ Wilson, appellant, and Johnson. After the gunfire ceased, Isaac Wilson was fatally shot, Walter Gadson was injured by a vehicle, and AJ Wilson was shot, but not killed.

At trial, Walter Gadson testified that while he, Isaac Wilson, and Johnson were all stopped at a traffic light at Monticello Road on November 20, 2006, a verbal and physical altercation erupted where he (Gadson) and Isaac Wilson, both of whom were roommates, confronted Curtis Johnson because Johnson had been threatening Isaac Wilson since he (Isaac Wilson) had become involved with his (Johnson's) ex-girlfriend Rebecca Fleming. Gadson stated that he and Isaac Wilson struck Johnson and Johnson yelled "y'all gonna get y'all's." Then, later on that evening when Gadson and Isaac Wilson arrived at their apartment, Johnson and his brother Kerwin Parker (appellant) appeared in an SUV at their place. Gadson stated that he and Isaac Wilson went to the

patio to investigate. Following the shoot-out that occurred thereafter, Isaac Wilson was shot dead, and AJ Wilson, who was also present at the scene, was shot, but lived, and Gadson sustained injuries after having been struck by the SUV. Gadson stated that Isaac Wilson was in possession of a shotgun, but that he (Gadson) took the gun from Isaac Wilson. Gadson explained that around the same time that he was struck by the vehicle, he saw Johnson (who drove the SUV) exit the vehicle and noted that Johnson was armed with a pistol. Immediately thereafter, Gadson stated that he heard gunshots being fired. R. 86, l. 4-p. 117, l. 22.

AJ Wilson testified that he had been living with Isaac Wilson (who was his cousin) and was present on the scene when the events in question occurred. AJ Wilson added that he walked outside onto the patio with Isaac Wilson and Gadson when Johnson and appellant arrived. AJ Wilson stated that he did not see appellant with a gun, but nonetheless yelled that appellant had a gun and then ran back inside the apartment. AJ Wilson added that when he heard gunshots being fired, he came back outside the apartment, and that it was at that point when appellant pointed a gun at him and shot him. AJ Wilson stated that he also saw Johnson standing over Isaac Wilson in the kitchen. R. 146, l. 1-p. 163, l. 24.

Amy Flemming, who lived with Gadson and Isaac Wilson, testified that she heard gunshots on the night in question and stated that she heard Isaac Wilson declare that he had been shot after Johnson and appellant made their way to the apartment. Also, Flemming added that she heard Johnson accuse Isaac Wilson of sleeping with his (Johnson's) girlfriend Rebecca Flemming. Amy Flemming stated that she saw both appellant and Isaac Wilson with guns. R. 30, l. 9-p. 40, l. 4.

Rebecca Flemming testified that in November, 2006, she and Johnson were no longer together and that she had started spending time with Isaac Wilson. Rebecca was present at Isaac Wilson's apartment when the shootings in question took place. Rebecca stated that AJ Wilson,

Gadson, and Issac Wilson, who was armed with a shotgun, all went outside the apartment when Johnson and appellant arrived there. Rebecca Flemming added that she saw someone come up to the patio and shoot, and that she saw someone flying in the air after the SUV drove up, and that she saw Isaac get shot and fall down in the kitchen while Johnson was in the kitchen. R. 53, l. 16-p. 67, l. 5.

Appellant did not testify in his defense at trial, but co-defendant Curtis Johnson testified at trial. Johnson explained that he was assaulted by Gadson and Isaac Wilson on Moticello Road on the night in question and that shortly thereafter, he and appellant went to Isaac Wilson's residence to try and talk peacefully. However, when he and appellant arrived, they saw three armed men appear outside the apartment, and they heard Isaac Wilson threatening to shoot them. Johnson stated that appellant exited the vehicle first, and that he exited after he drove the SUV up to the point where he saw guns pointed at appellant. R. 539, l. 2-p. 579, l. 23. See Reconstruction Hearing R. 801, lines 1-25. Johnson stated that minutes later, he saw AJ Wilson holding appellant down while Isaac Wilson was pointing a gun at appellant. Johnson stated that he fired his gun and that he then shot AJ Wilson five times and then shot Isaac Wilson two times. Reconstruction Hearing R. 801, l. 1-p. 819, l. 17.

At the close of the case, both counsels for appellant and co-defendant Johnson requested charges on self defense and aggravated assault and battery. R. 632, l. 21-p. 643, l. 7. The trial judge granted counsels' requests to charge the jury on the law of self defense, mutual combat, the defense of others, and aggravated assault and battery. Appellant was found not guilty of murder, but convicted of the assault and battery with intent to kill AJ Wilson. The trial judge's assault and battery with intent to kill charge follows:

> In order to prove assault and battery with intent to kill, the State must prove, beyond a reasonable doubt, that the defendant committed an unlawful act of a violent nature to the person of another with malice aforethought. The difference between assault and battery with intent to kill and assault and battery of a high and aggravated nature is the presence or absence of malice. Malice, as I have previously defined to you, is ill will or hostility towards another person and the intentional doing of a wrongful act without just cause or excuse with the intent to inflict an injury or under circumstances that the law will infer an evil intent.

R. 719, l. 21-p. 721, l. 15.

> Malice is hatred, ill will, or hostility towards another person. [Malice] is the intentional doing of a wrongful act without just cause or excuse and with the intent to inflict an injury or under certain circumstances that the law will implicate an evil intent. Malice aforethought may be expressed or inferred. Express malice is shown when a person speaks words which express hate or ill will. Malice may be indicated from conduct showing a disregard for human life. An implication of malice may also arise when the deed is done with a deadly weapon. That implication is merely an evidentiary fact which may be taken into consideration along with any other evidence in this case.

R. 715, l. 2 – p. 716, l. 5.

At sentencing, appellant's counsel moved for a new trial due to error based on the trial judge's jury instruction that charged them that they "may infer malice from the use of a deadly weapon in a prosecution for murder and/or assault and battery with intent to kill" per the new rule in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). Sentencing Hearing Transcript p. 747, l. 19-p. 749, l. 20. The motion was denied. Sentencing Hearing Transcript p.751, l. 5 – p.752, l. 4.

A.) **NEW RULE**

On October 12, 2009, the Belcher Court handed down a clear break from an historical instruction that the use of a deadly weapon implied malice and held that a jury charge that instructs the jury that malice maybe inferred from the use of a deadly weapon is no longer good law where evidence is presented that would reduce, mitigate, excuse or justify the homicide. The Belcher Court held further that because the crime of assault and battery requires malice, this new rule

would apply to that offense as well. The Court looked to the word "intent" as part of its analysis as follows:

> The use of the term "intentional" is instructive. Say, for example, a homicide occurs by the use of a deadly weapon under circumstances warranting a self-defense instruction. The killing would be intentional, yet under our currently sanctioned charge, the jury would be permitted to find malice merely because "if one intentionally kills another with a deadly weapon, the implication of malice may arise." *Elmore*, 279 S.C. at 421, 308 S.E.2d at 784. That highlights the "half-truth" nature of the charge.
>
> One appellate court has described this jury charge as "half-truth." Glenn v. State, 68 Md. App. 379, 511 A.2d 1110, 1126 (1986). In discussing its meaning behind this observation, *Glenn* notes that malice includes the absence of justification, excuse and mitigation. *Glenn*, 511 A.2d at 1122. When malice is viewed in light of these component parts, it becomes clear that inferring malice from the use of a deadly weapon is indeed only a "half-truth." The absence of justification, excuse or mitigation cannot be inferred from the use of a deadly weapon standing alone. Other facts and evidence (or the absence of other facts and evidence) are required for the fulfillment of these component parts.

See also State v. Miller, 725 S.E.2d 724 (2012), where the court held that since the jury was charged with voluntarily manslaughter, then there was evidence to reduce or mitigate murder (gun present), which in turn rendered the malice inference instruction improper.

Under Belcher, the test is whether there is evidence presented that would reduce, justify or mitigate the killing. In the case at bar, there were many pieces of evidence presented that would have reduced, justified or mitigated the actions assigned to appellant. Clearly, guns were in the hands of Isaac Wilson, AJ Wilson, Gadson and Johnson. There was no definite conclusion drawn as to whether appellant was in possession of a gun on the night in question. For example, Gadson testified that appellant was in possession of a rod/stick, but could not admit that he saw a gun in his (appellant's) possession. R. 106, l. 7-20; R. 110, lines 2-9. AJ Wilson testified that he "imagined" that appellant had a gun, but that he did not see a gun. R. 156, lines 5-9; Then, AJ

testified that appellant shot him. R. 160, lines 5-13. However, since AJ testified that appellant shot him, it is possible that appellant reacted in self defense based on AJ Wilson's aggression as witnessed by Johnson. Johnson stated that AJ Wilson and Isaac Wilson held appellant at gun point. Reconstruction Hearing R. 808, l. 6 – p. 809, l. 11. Moreover, there was evidence in the record indicating that AJ Wilson's identification of the shooter was incorrect because Johnson testified that he shot AJ Wilson in defense of his brother, i.e. appellant. R. 809, l. 6 – p. 811, l.3. Note that Johnson's counsel admitted to the jury during the opening arguments that Johnson shot AJ Wilson. R. 22, lines 17-24. There was also evidence in the case that appellant may have reacted in defense of Johnson because when he exited the truck first, he saw all three men pointing guns at them. Resentencing Transcript 798, l. 25 – p. 799, l. 16. Furthermore, there was evidence presented suggesting that mutual combat was in progress on that night in question. Thus, under any scenario, evidence was presented that would have reduced, mitigated, excused or justified the assault and battery to kill charge, but the jury instruction regarding how to process the use of a deadly weapon prejudiced appellant if the jury inferred malice due to the use of a deadly weapon as this negated evidence of justification, excuse, or mitigation on the offense of assault and battery with intent to kill charged against appellant. And finally, it is completely conceivable that the jury might have interpreted the scenario to find that appellant was not guilty or only guilty of aggravated assault, but the inference of malice from the use of a deadly weapon charge (in the event they found that appellant possessed a weapon) would have operated to confuse the jury and possibly precluded an acquittal of a jury verdict on aggravated assault.

B.) **HARMLESS ERROR ANALYSIS OF NEW RULE**

Error is harmless if could not have affected the result of the trial. State v. Mitchell, 378 SC 305, 662 S.E.2d 493 (2008). The Belcher Court held that since evidence of self-defense was

presented to the jury in the case, then the inferred malice instruction connected to the deadly weapon charge could not be considered harmless. See Miller, supra, where the court reversed due to the erroneous malice inferred instruction and found that the error was not harmless because there was evidence of involuntary manslaughter, which was charged, that could have reduced or mitigated the murder, and because there was no overwhelming evidence of malice in the case. Here, the inferred malice instruction connected to the deadly weapon charge was not harmless error because the same prejudiced appellant to the extent that it conflicted with self defense and the defense of others evidence that would have reduced, mitigated, excused or justified the assault and battery with intent to kill charge. This was a convoluted set of events that did not present clear cut or overwhelming evidence of malice apart from the use of a deadly weapon. We cannot conclude that the malice inferred instruction did not affect the jury verdict in appellant's case.

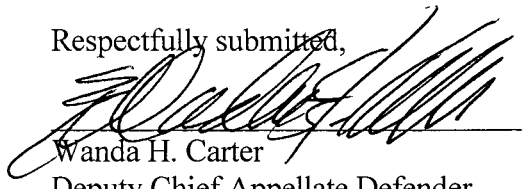
C.) **RETROACTIVE APPLICATION OF NEW RULE**

When counsel moved for a new trial prior to the pronouncement of sentencing due to error per the new rule announced in Belcher, counsel added that the request was timely entered "as this case is not final." Sentencing Transcript p. 749, lines 18-20. Appellant was convicted on September 18, 2009, and sentenced on October 21, 2009. Belcher was decided on October 12, 2009. The Belcher Court held that "because our decision represents a clear break from our modern precedent, [the] ruling is effective... for all cases which are pending on direct review or not yet final where the issue is preserved." See Miller, which was decided on February 16, 2012, where the court held that Belcher applied as it (Miller case) was pending on direct review when Belcher was decided on October 12, 2009.

CONCLUSION

Due to the circuit court judge's error in denying appellant's Belcher claim, this case should be reversed and remanded to the trial court for a new trial.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender
Attorney for Appellant

This 26th day of February, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

February 26th, 2013

Wanda H. Carter
Deputy Chief Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KERWIN PARKER,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 26th day of February, 2013.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 26th day of February, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: November 16, 2022.

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Honorable Robin B. Stilwell, Circuit Court Judge
Appellate Case No. 2009-147266

THE STATE,

Respondent,

vs.

KERWIN S. PARKER,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other Authorities:

STATEMENT OF ISSUE ON APPEAL

Any issue with the trial judge's jury instructions was not preserved for appellate review because defense counsel did not contemporaneously object to the jury charge during trial and, instead, indicated he had no objection to the charge as given. Additionally, the trial judge properly instructed the jury on the current and correct law in effect at the time of Appellant's trial, and a subsequent change in the law after the jury issued its verdict was not applicable to Appellant's case because no objections to the jury charge were raised during trial. Furthermore, any error resulting from the trial judge instructing the jury it could infer malice from the use of deadly weapon was entirely harmless in light of the jury's verdict, which reflected the jury did not believe the use of a deadly weapon alone mandated a finding of malice.

STATEMENT OF THE CASE

On November 20, 2006, Appellant Kerwin S. Parker was arrested following an investigation into an incident where several people were injured and one person was fatally shot. In April of 2007, the Lexington County grand jury indicted Appellant for one count of murder, one count of assault and battery with intent to kill, and one count of possession of a weapon during the commission of a violent crime. On September 14, 2009, a jury trial was commenced in the Lexington County court of general sessions with the Honorable Robin B. Stilwell, circuit court judge, presiding. At the conclusion of trial, the jury acquitted Appellant of murder and convicted Appellant of the other indicted offenses. Following the verdict, the trial judge deferred the sentencing proceedings. Thereafter, on October 21, 2009, a sentencing hearing was conducted in the Lexington County court of general sessions with Judge Stilwell again presiding. At the conclusion of the hearing, the trial judge sentenced Appellant to concurrent terms of imprisonment of twenty years for assault and battery with intent to kill and five years for possession of a weapon during the commission of a violent crime.[1] Appellant then timely filed a notice of appeal.

[1] Appellant's brother, Curtis T. Johnson, was indicted for one count of murder, two counts of assault and battery with intent to kill, and one count of possession of a firearm during the commission of a violent crime for his role in the incident, and he was jointly tried with Appellant. At the conclusion of trial, Johnson was convicted of one count of the lesser-included offense of voluntary manslaughter, two counts of the lesser-included offense of assault and battery of a high and aggravated nature, and one count of possession of a weapon during the commission of a violent crime. During the subsequent sentencing hearing, the trial judge sentenced Johnson to concurrent terms of imprisonment of thirty years for voluntary manslaughter and ten years for each of the assault and battery of a high and aggravated nature convictions along with a consecutive term of imprisonment of five years for possession of a weapon during the commission of a violent crime.

STATEMENT OF FACTS

At approximately 1:30 a.m. in the early morning hours of November 20, 2006, Jose Hernandez, a resident of the Church Hill Apartments in Lexington County, South Carolina, heard a loud noise coming from an area across from his apartment followed by several gunshots. (R. pp. 199-200; p. 226; pp. 230-231). Hernandez went outside to see what was going on and, when he did so, observed a vehicle stuck between a tree and the apartment building across from him. (R. p. 231). He then saw two individuals, one with long hair and one with short hair, standing on a patio behind the apartment near where the vehicle was located. (R. pp. 231-234). Hernandez continued to watch as the long-haired man walked back to the vehicle and the short-haired man remained on the patio while pointing a gun in a downward direction. (R. pp. 231-234). Hernandez then heard someone ask not to be shot before he saw the short-haired man fire two gunshots. (R. p. 232; pp. 235-236). Following the gunshots, a woman came out of the apartment and asked the men what they had done, and the men then walked down the street together. (R. pp. 233-234). Thereafter, Hernandez watched as the short-haired man left the area and the long-haired man returned to the apartment. (R. pp. 233-234). The long-haired man then kicked a man lying on the ground several times, returned to the crashed vehicle, attempted to leave in it, and then walked away. (R. p. 234).

Shortly thereafter, law enforcement officers were notified of the shooting and responded to the scene. (R. pp. 259-260; p. 276; pp. 294-295; p. 314). After they arrived, Deputy Teddy Xanthakus and Deputy Danny Lewis of the Lexington County Sheriff's Office observed a vehicle resting in the bushes next to the apartment building

and saw a long-haired man, Curtis T. Johnson, walking in the road "in a daze."[2] (R. pp. 259-263; pp. 276-277; p. 329). The officers then arrested Johnson and found a set of brass knuckles in his pocket. (R. pp. 262-263; pp. 277-278). Thereafter, Deputy Xanthakus moved to secure the apartment, found a severely-injured man on the apartment patio, observed a blood trail leading away from the apartment, and discovered the body of a deceased person sprawled out on the floor of the kitchen inside of the apartment. (R. pp. 263; pp. 265-268). Emergency medical personnel then arrived on the scene and began treating the injured victims, and the apartment was secured. (R. p. 272). Officers subsequently recovered numerous pieces of evidence from the scene, including a shotgun, a metal pipe, eight shell casings, a box of shotgun shells, numerous bullet fragments, and multiple fired bullets. (R. p. 267; pp. 358-360; pp. 363-364; p. 368; p. 374; p. 384; pp. 395-396; p. 400; p. 402; pp. 404-405).

As the investigation into the shooting progressed, officers learned Johnson's older brother, Appellant Kerwin S. Parker, was involved in the incident, and they went to his residence to apprehend him. (R. p. 31; pp. 295-296; p. 540). Upon arriving, officers found a man standing in the yard of the residence, and he advised them Appellant was inside. (R. pp. 301-302; p. 306). The officers then entered the residence, located Appellant and his mother, and detained Appellant.[3] (R. p. 302; p. 307). Following his arrest, Appellant's mother provided the officers with Appellant's shoes and informed them Appellant's gun was in a vehicle located in the yard of the residence. (R. pp. 302-

[2] During the investigation into the shooting, Deputy Wilson Matthews of the Lexington County Sheriff's Office examined the crashed vehicle and determined the vehicle drove through the road, hit a curb, continued through shrubbery, and struck the apartment wall with sufficient force to move the wall to the right approximately two feet. (R. pp. 284-291).

[3] At the time of his arrest, Appellant had short hair, was not wearing any shoes, and did not appear to have any injuries. (R. p. 298; p. 302; p. 304; 307; p. 428; pp. 627-628). Likewise, at the time of his arrest, Johnson had no visible injuries. (R. p. 615). Furthermore, Johnson was wearing a black sweatshirt and Appellant was wearing a gray sweatshirt when they were arrested. (R. p. 221; p. 330).

303; pp. 309-310). Officers then discovered a forty-caliber handgun in the glove box of the vehicle, and it was later confirmed to belong to Appellant. (R. p. 317; p. 321; pp. 483-484).

After Johnson and Appellant were arrested, officers collected the sweatshirts they were wearing at the time and performed gunshot residue tests on their hands and clothing.[4] (R. pp. 329-330; pp. 334-335; p. 355; p. 366). Upon analysis, gunshot residue was discovered on both of Johnson's hands and on the right and left sleeves of both sweatshirts that were submitted for testing. (R. pp. 455-456; pp. 459-460). Blood was also located on Appellant's shoes and Johnson's socks and shoes. (R. pp. 488-492). Jasper Humbert, a forensic D.N.A. analyst with S.L.E.D., determined the blood on Appellant's shoes belonged to Isaac and the blood on Johnson's socks and shoes belonged to A.J. and Isaac. (R. pp. 495-496; pp. 498-500). Furthermore, Appellant's gun and the fired cartridges, bullets, and bullet fragments recovered during the investigation into the shooting were analyzed by S.L.E.D. Agent David Black, an expert in firearms examinations. (R. pp. 468-470). Based on his analysis, Black concluded all seven of the recovered bullet cartridges were fired from Appellant's gun and three of the four recovered bullets were fired from the weapon.[5] (R. p. 470).

Meanwhile, the victims were taken to the hospital and treated for their injuries. (R. p. 501; pp. 505-506). The man who left the blood trail at the scene, Walter Gadson, suffered a femur fracture during the incident. (R. pp. 502-503). Likewise, the man found on the patio, A.J. Wilson ("A.J."), suffered numerous injuries, including injuries to his

[4] The gunshot residue test was not conducted on Appellant until approximately 6:30 a.m., which was roughly five hours after the shooting. (R. p. 366; pp. 457-458).

[5] Black was unable to determine what gun fired the final bullet because it was too damaged for proper analysis. (R. p. 470).

vertebrae, face, mouth, extremities, shoulder, flank, wrist, and thumb. (R. p. 162; p. 504; pp. 509-510). A.J.'s injuries were so severe that a person who saw him after the shooting stated "it looked like some of the part of, some of his mouth was gone." (R. p. 140). Furthermore, the lower portion of A.J. was paralyzed as a result of the shooting. (R. p. 163; pp. 509-510).

Subsequently, Dr. Janice Ross, an expert in forensic pathology, performed an autopsy on Isaac Wilson ("Isaac"), who was the person killed in the shooting. (R. pp. 512-513). During the autopsy, Dr. Ross located two gunshot wounds to Isaac's chest and gunshot powder burns on Isaac's clothing. (R. pp. 513-514). One bullet entered the right side of Isaac's chest, travelled through his lungs and heart, and left an exit wound that suggested Isaac was lying on concrete at the time he was shot. (R. pp. 515-516). The other bullet entered the left side of Isaac's chest and travelled through his left lung and stomach. (R. pp. 516-517). Based on her findings, Dr. Ross concluded Isaac bled to death as a result of the shooting. (R. p. 517). She further concluded Isaac was shot from a close distance and the gun was only four to twelve inches away from his body when the shots were fired. (R. pp. 514-515; p. 518).

Thereafter, Appellant was indicted for murder, assault and battery with intent to kill ("ABWIK"), and possession of a weapon during the commission of a violent crime, and he proceeded to trial with Johnson, who was charged with the same offenses along with an additional count of ABWIK. (R. p. 2; pp. 868-871; pp. 873-874). During the trial, which began on September 14, 2009, multiple accounts of the shooting were presented to the jury. (R. p. 1; pp. 100-118; pp. 151-162; pp. 230-236; pp. 570-579; pp. 799-813).

Gadson recounted he and Isaac got into a physical altercation with Johnson earlier in the evening prior to the shooting and Johnson threatened them as he was leaving the area. (R. pp. 96-98). He testified they then returned home before observing Appellant's vehicle near their apartment. (R. pp. 99-100). In response, Gadson stated he, Isaac, and A.J. exited the apartment after Isaac retrieved a shotgun. (R. pp. 103-104). Once outside, Gadson stated Johnson got out of the vehicle and blew its horn and then Appellant came around from the side of the apartment. (R. pp. 104-105). He testified he then spoke with Appellant, Appellant pulled his pants leg up and reached for something, A.J. yelled Appellant had a gun, A.J. and Isaac ran towards the patio, and Isaac tossed him the shotgun. (R. pp. 105-111). After that, Gadson indicated Johnson drove the vehicle towards him, he unsuccessfully tried to fire the shotgun to stop the vehicle, and he was struck and injured. (R. pp. 111-104). Thereafter, he stated he saw Johnson exit the vehicle armed with a pistol and then heard multiple gunshots as he crawled away from the scene. (R. pp. 114-117).

Similarly, A.J. testified he was at his apartment late on the night of November 19, 2006, when Isaac and Gadson arrived and stated they had been in a fight with Johnson. (R. pp. 148-149; pp. 170-171). Later that night, A.J. stated Johnson arrived at the apartment complex so they all went outside with Isaac armed with a shotgun. (R. pp. 151-152). Once outside, A.J. stated a man approached them and asked why they did something to his brother. (R. pp. 153-155). After that, A.J. testified the man reached for something and he responded by yelling that the man had a gun before running towards the apartment patio. (R. pp. 156-157). Thereafter, A.J. stated he heard gunshots, went inside the apartment, and then went back outside when he did not see Isaac. (R. p. 157). When he went outside, A.J. indicated he saw a long-haired man on top of Isaac and he

tried to get the man off of him. (R. pp. 158-159). When he did so, he testified the man who confronted them earlier pulled out a gun and shot him in the mouth, side, hand, and back. (R. pp. 159-163). A.J. further testified he selected the photograph of the shooter from a photographic line-up, and he identified Appellant in-court as the shooter and indicated he was certain of the identification.[67] (R. pp. 161-167).

Subsequently, Johnson testified in his own defense and offered a substantially different account of the incident from the testimony of A.J. and Gadson. (R. p. 540). Prior to the shooting, Johnson stated he was attacked by Gadson and Isaac while stopped at a red light and was kicked in the head by Gadson while he was still seated in the vehicle. (R. pp. 557-558). Johnson claimed he was then pulled from the vehicle during the altercation but was eventually able to escape.[8] (R. pp. 559-561). Thereafter, Johnson testified he returned home and told Appellant about the incident, and Appellant responded by saying he was going to go speak with the attackers. (R. pp. 564-565). Johnson indicated they then drove to Isaac's apartment, parked in the rear, and intended to resolve the dispute by talking to Isaac and Gadson. (R. pp. 568-572). Johnson testified Appellant then exited the vehicle and walked out of view before Isaac, Gadson, and A.J. approached his vehicle while carrying three different shotguns. (R. pp. 574-577). He claimed he then heard Isaac say he was going to shoot him, he honked the horn, and they stopped walking towards him. (R. pp. 577-578). When he honked the horn,

---

[6] Detective Steve Collins of the Lexington County Sheriff's Office showed A.J. a photographic line-up while A.J. was still hospitalized from his injuries. (R. p. 198; pp. 200-203). A.J. selected Appellant from the line-up and indicated he was certain of his identification. (R. pp. 202-203; pp. 209-211).

[7] Consistent with A.J.'s testimony, Amy Fleming, who lived with Isaac and A.J. at the time of the shooting, stated she saw Appellant armed with a gun on the apartment patio after A.J. was shot, and she testified she heard Appellant state he should kill all of them. (R. p. 32; pp. 39-40).

[8] As a result of the attack, Johnson stated he suffered "a little nick" under his lip, dirt in his eye, and emotional pain. (R. pp. 562-563).

Johnson testified Appellant ran back to the vehicle, stopped when he saw the shotguns, and asked the men to put the guns down. (R. pp. 578-579; pp. 799-800). Johnson claimed Appellant then tried to convince Isaac to let them leave, but Gadson charged at Appellant with a shotgun. (R. pp. 800-802). Johnson stated he then drove towards Gadson and struck a wall. (R. pp. 802-805; p. 807). After hitting the wall, Johnson indicated he looked over at the patio and saw Isaac pointing a gun at Appellant while he was being held by A.J. (R. p. 808). Johnson claimed he then grabbed a gun from his vehicle's glove box and fired a warning shot out of the window before running over and shooting A.J. five times and Isaac two times.[9] (R. pp. 810-811). After the shooting, Johnson testified Appellant left to go get help while he went into the apartment and then walked in the roadway. (R. pp. 811-813).

At the conclusion of the evidentiary phase of trial, the trial judge conducted a charge conference and stated he intended to instruct the jury on voluntary manslaughter and self-defense. (R. p. 637). Thereafter, counsel for both Appellant and Johnson requested a jury instruction on the lesser-included offense of assault and battery of a high and aggravated nature ("ABHAN"), and the trial judge agreed to give the charge. (R. pp. 640-642). Subsequently, the trial judge instructed the jury on the applicable law, including on murder, voluntary manslaughter, ABWIK, ABHAN, self-defense, and defense of others, and explained malice in the context of murder and ABWIK as follows:

> [M]alice may be indicated from conduct showing a disregard for human life. An implication of malice may also arise when the deed is done with a deadly weapon. That implication is merely an evidentiary fact which may be taken into consideration along with any other evidence in this case. The deadly weapon is an 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 circumstances of each case.

[9] Notably, Johnson also claimed he shot Appellant during the incident. (R. p. 604).

(R. pp. 714-729). After finishing his instructions to the jury, the trial judge asked the parties if there were any objections to the jury charge as given, and no objections were raised.[10] (R. pp. 731-732). Specifically, counsel for Appellant responded: "None, Your Honor." (R. p. 732).

At the conclusion of trial, the jury acquitted Appellant of murder, convicted Appellant of ABWIK and possession of a weapon during the commission of a violent crime, and convicted Johnson of possession of a weapon during the commission of a violent crime, the lesser-included offense of voluntary manslaughter, and two counts of the lesser-included offense of ABHAN. (R. pp. 740-741). The trial judge then deferred the sentencing proceedings to a later date. (R. pp. 742-743).

Thereafter, on October 21, 2009, a sentencing hearing was conducted. (R. p. 744; p. 747). At the outset of the hearing, counsel for Appellant moved for a new trial, arguing the trial judge's jury charge on inferring malice from the use of a deadly weapon was no longer an appropriate charge in light of the Supreme Court's decision in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), which he noted was decided subsequent to Appellant's trial. (R. pp. 748-749). Defense counsel asserted Appellant was entitled to the benefit of the decision in Belcher because his case was not considered final until he was sentenced. (R. p. 749). In response, the solicitor asserted the Supreme Court explicitly instructed in the Belcher opinion that the decision only applied to cases where the issue was preserved. (R. p. 750). The solicitor noted the issue was not preserved in

[10] After the jury subsequently began its deliberations, the jury submitted a request for explanations as to "the differences between murder and voluntary manslaughter" and "at what point does malice determine murder or voluntary manslaughter." (R. p. 734). In response to the questions, the trial judge re-instructed the jury on murder, malice, and voluntary manslaughter. (R. p. 737-738). Notably, just as with the initial jury charge, no objections were raised to the trial judge's supplemental instructions to the jury on inferring malice from the use of a deadly weapon. (R. pp. 738-739).

Appellant's case because Appellant raised no objection to the inference of malice charge during trial. (R. p. 750). In rebuttal, defense counsel contended any objection he potentially could have raised to the charge would likely have been found to be specious in light of the law in effect at the time of Appellant's trial, and he further asserted principles of judicial economy warranted the grant of a new trial because he maintained that relief would be granted through an ineffective assistance of counsel claim if not granted immediately. (R. pp. 750-751). After considering the issue, the trial judge denied Appellant's new trial motion, ruling he was not given an opportunity to grant a curative instruction or revise the jury charge due to the fact Appellant did not object to the charge during trial and further finding Appellant suffered no prejudice as a result of the charge in light of the jury's verdict and the evidence presented during trial. (R. pp. 751-752). The trial judge then sentenced Appellant to concurrent terms of imprisonment of twenty years for ABWIK and five years for possession of a weapon during the commission of a violent crime. (R. pp. 775-776).

ARGUMENT

Any issue with the trial judge's jury instructions was not preserved for appellate review because defense counsel did not contemporaneously object to the jury charge during trial and, instead, indicated he had no objection to the charge as given. Additionally, the trial judge properly instructed the jury on the current and correct law in effect at the time of Appellant's trial, and a subsequent change in the law after the jury issued its verdict was not applicable to Appellant's case because no objections to the jury charge were raised during trial. Furthermore, any error resulting from the trial judge instructing the jury it could infer malice from the use of deadly weapon was entirely harmless in light of the jury's verdict, which reflected the jury did not believe the use of a deadly weapon alone mandated a finding of malice or precluded a finding that the defendants' actions were excused, justified, or mitigated by the circumstances.

Appellant contends the trial judge erred in instructing the jury it could infer malice from the use of a deadly weapon. Appellant maintains the instruction was erroneous because evidence was presented that could have reduced, excused, mitigated, or justified his actions. Initially, any issue with the trial judge's jury charge was not preserved for appellate review because no objections to the jury charge were raised during trial. Instead, after the trial judge concluded his jury instructions, defense counsel specifically indicated he had no objection to the charge, which waived any issue with the propriety of the charge. Additionally, the trial judge committed no error in instructing the jury on inferring malice from the use of a deadly weapon because that instruction was a current and correct statement of the law at the time of Appellant's trial, and subsequent changes to the law were not applicable to Appellant's case because no contemporaneous objection was raised to the inference of malice jury instruction during trial. Furthermore, even if the issue had been preserved, any error resulting from the trial judge instructing the jury it could infer malice from the use of a deadly weapon was entirely harmless and had no impact on Appellant's case because the jury's verdict demonstrated it did not mistakenly believe the use of a deadly weapon alone required a finding of malice or

precluded a finding that the defendant's actions were excused, justified, or mitigated by the circumstances. Appellant's convictions should be affirmed.

A. Issue Preservation

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005). "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000).

Regarding the requirement that a timely objection be raised, a defendant must make a **contemporaneous** objection to a perceived error **during trial** in order to preserve the issue for further review. State v. Blalock, 357 S.C. 74, 79, 591 S.E.2d 632, 635 (Ct. App. 2003); see State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) ("A contemporaneous objection is required to properly preserve an error for appellate review."). Thus, when a perceived error arises, the defendant must object at the first opportunity to do so or the issue is waived. State v. Sullivan, 310 S.C. 311, 314, 426 S.E.2d 766, 768 (1993); see State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) ("A defendant must object at his first opportunity to preserve an issue for appellate review."); see also State v. King, 349 S.C. 142, 157, n.1, 561 S.E.2d 640, 647 (Ct. App. 2002) ("[N]o objection was made contemporaneously with this testimony so as to preserve the issue for review. King's belated objection to subsequent testimony came

too late."). "It is axiomatic that an issue cannot be raised for the first time in a post-trial motion." Bank of New York v. Sumter County, 387 S.C. 147, 159, 691 S.E.2d 473, 479 (2010).

In addition to the general requirements of our issue preservation rules, the South Carolina Rules of Criminal Procedure also provide specific guidance in regards to raising and preserving an objection to a jury charge. See Rule 20, SCRCrimP (outlining the requirements for requesting jury instructions and objecting to a jury charge). Pursuant to our criminal procedure rules, a defendant must object to the jury charge as given or request an additional charge when afforded the opportunity to do so in order to properly preserve an objection to a charge. State v. Stone, 285 S.C. 386, 387, 330 S.E.2d 286, 287 (1985); see Rule 20(a), SCRCrimP ("All requests for legal instructions to the jury shall be submitted at the close of the evidence, or at such earlier time as the trial judge shall reasonably direct."); Rule 20(b), SCRCrimP ("Notwithstanding any request for legal instructions, the parties shall be given the opportunity to object to the giving or failure to give an instruction before the jury retires, but out of the hearing of the jury. Any objection shall state distinctly the matter objected to and the grounds for objection."). "The rule in this State is firmly established that failure to object to a charge, or failure to request an additional charge when the opportunity is afforded, constitutes a waiver of any right to complain on appeal of an alleged error in the charge." State v. Williams, 266 S.C. 325, 335, 223 S.E.2d 38, 43 (1976); see Rule 20(b), SCRCrimP ("Failure to object in accordance with this rule shall constitute a waiver of objection."). "[T]he right to have the law declared may be waived by the parties and, ordinarily, silence in the face of an omission from, or error in the charge amounts to waiver." Williams, 266 S.C. at 335, 223 S.E.2d at 43.

In the case sub judice, any issue with the propriety of the inference of malice jury instruction was not properly preserved for appellate review. Significantly, after the trial judge instructed the jury on the applicable law and explained that malice could potentially be inferred from the use of a deadly weapon, the trial judge inquired of counsel whether there were any objections to the jury charge as given, and counsel for Appellant responded: "None, Your Honor." Because defense counsel did not object to the inference of malice jury charge after it was given and, instead, indicated he had no objection to the charge, Appellant waived any issue he may have had with the giving of that instruction. See State v. Smith, 279 S.C. 440, 442, 308 S.E.2d 794, 794-795 (1983) ("Error is claimed by reason of the trial judge's charge to the jury concerning the implication of malice from the use of a deadly weapon. No objection to the jury instruction was raised at trial. The question therefore is not available for our review."); see also State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007) (finding any issue with the admission of a challenged piece of evidence was waived where Dicapua's counsel specifically stated he had no objection when the evidence was introduced during trial); see, e.g., State v. Burton, 326 S.C. 605, 613, 486 S.E.2d 762, 766 (Ct. App. 1997) ("This testimony was admitted without objection. Because Burton failed to object, he is barred from raising this issue on appeal.").

Thereafter, defense counsel first raised an objection to the inference of malice jury charge during a sentencing hearing conducted over a month **after** the jury returned its verdict and Appellant's trial had ended. Cf. Bowers v. Charleston & W. Carolina Ry. Co., 210 S.C. 367, 371, 42 S.E.2d 705, 706 (1947) (not reviewing an issue on appeal where the issue was not raised at the time the allegedly objectionable argument was made but, instead, was raised for the first time in a motion for new trial made **after** the jury

issued its verdict). However, because defense counsel's post-verdict and post-trial objection to the charge was not raised contemporaneously with the alleged error, the objection was untimely and, significantly, did not present the trial judge with any opportunity to effectively respond to the objection or correct the alleged deficiencies with his jury instructions since the trial had already concluded. See State v. Black, 319 S.C. 515, 521, 462 S.E.2d 311, 315 (Ct. App. 1995) ("It is a fundamental principle that a contemporaneous objection is required at trial to properly preserve an error for appellate review."); see also Williams, 266 S.C. at 335, 223 S.E.2d at 43 ("The rule in this State is firmly established that failure to object to a charge, or failure to request an additional charge when the opportunity is afforded, constitutes a waiver of any right to complain on appeal of an alleged error in the charge."). As a result, Appellant failed to properly preserve any issue with the jury charge for appellate review. See State v. James, 362 S.C. 557, 562, 608 S.E.2d 455, 457 (Ct. App. 2004) (holding an untimely argument did not preserve an issue for appellate review).

On appeal, Appellant appears to contend his post-trial motion for a new trial was sufficient to preserve the challenge to the inference of malice jury charge because that motion was based on the new rule announced in State v. Belcher and his case was not final due to the fact he had not yet been sentenced at the time the issue was raised. However, as the Supreme Court instructed in the Belcher opinion, the new rule regarding the inference of malice jury charge only applies to cases "which are pending on direct review or not yet final **where the issue is preserved**." State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009) (emphasis added). Because Appellant did not contemporaneously object to the giving of the inference of malice jury instruction, Appellant waived any issue he had with the instruction and failed to preserve it for

appellate review.[11] See State v. Rios, 388 S.C. 335, 342, 696 S.E.2d 608, 612 (Ct. App. 2010) ("Even after the trial court specifically asked if there were any objections to the charges given, Rios responded, 'None.' By failing to contemporaneously object to the jury charges, Rios has waived his right to allege error on appeal."). Accordingly, in light of the fact Appellant's challenge to the jury charge was not preserved, the decision in Belcher did not apply to Appellant's case, and his appellate challenge to the charge should not be considered or addressed on appeal. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("An issue that was not preserved for review should not be addressed by the Court of Appeals[.]"). For the foregoing reasons, Appellant's convictions should be affirmed.[12]

B. Propriety of the Trial Judge's Jury Instructions

In instructing the jury on the applicable law, "[t]he trial court is required to charge the correct law of South Carolina." State v. Rayfield, 357 S.C. 497, 505, 593 S.E.2d 486, 490 (Ct. App. 2004). A jury charge is appropriate if it is substantially correct and adequately covers the law applicable to the case. State v. Foust, 325 S.C. 12, 16, 479

[11] Notably, in State v. Miller, 397 S.C. 630, 636, 725 S.E.2d 724, 728 (Ct. App. 2012), this Court found the decision in Belcher to be applicable to Miller's case despite the fact it was decided after Miller's trial concluded because Miller's appeal was pending on direct review when the Belcher decision was issued. However, Miller's case is highly distinguishable from Appellant's case because, unlike Appellant, Miller specifically objected to the inference of malice jury instruction during his trial, which preserved the issue for appellate review in his case. See Miller, 397 S.C. at 636, 725 S.E.2d at 727 (noting Miller objected to the presentation of an inference of malice charge during trial).

[12] During the sentencing hearing, defense counsel argued Appellant should be granted a new trial in light of the Belcher decision despite the fact he did not object to the jury charge during trial because he believed Appellant would be entitled to a new trial through an ineffective assistance of counsel claim if he was not granted a new trial at that time. (R. pp. 750-751). Significantly though, the Supreme Court specifically stated in its Belcher opinion that the change in law announced in that case was not applicable to convictions challenged on post-conviction relief. See Belcher, 385 S.C. at 613, 685 S.E.2d at 810 ("Our ruling, however, will not apply to convictions challenged on post-conviction relief."). Furthermore, the Supreme Court has previously explained that counsel is not considered to be ineffective for failing to anticipate potential changes in the law. See State v. Harden, 260 S.C. 405, 408, 602 S.E.2d 48, 49 (2004) ("An attorney is not required to anticipate potential changes in the law which are not in existence at the time of the conviction."). Therefore, defense counsel's failure to foresee the change in the law regarding the inference of malice charge brought about by Belcher did not constitute ineffective assistance of counsel and would not entitle Appellant to any post-conviction relief.

S.E.2d 50, 52 (1996). In reviewing a trial judge's jury instructions, the appellate court must view the jury charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009). So long as the jury instructions presented are substantially correct and cover the applicable law, reversal is not warranted. See State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996) ("A jury charge which is substantially correct and covers the law does not require reversal.").

At the time of Appellant's trial, it was entirely proper for trial judges in South Carolina to instruct juries that malice could be inferred from the use of a deadly weapon. See Belcher, 385 S.C. at 600, 685 S.E.2d at 803 ("It has long been the practice for trial courts in South Carolina, **as sanctioned by this Court**, to charge juries in any murder prosecution that the jury may infer malice from the use of a deadly weapon." (emphasis added)); see also Sellers v. State, 362 S.C. 182, 188, 607 S.E.2d 82, 85 (2005) ("[M]alice may be implied if the defendant uses a deadly weapon."). However, subsequent to Appellant's trial but prior to the time Appellant was sentenced for his crimes, the Supreme Court revisited the issue of whether a trial judge should instruct the jury on inferring malice from the use of a deadly weapon through its decision in Belcher. During Belcher's trial, conflicting evidence was presented regarding the circumstances under which Belcher shot and killed the victim. Belcher, 385 S.C. at 601, 685 S.E.2d at 804. One view of the evidence suggested Belcher shot the victim without justification or excuse while another view of the evidence suggested Belcher shot the victim only after the victim confronted him with a gun without provocation. Id. The trial judge instructed the jury on inferring malice from the use of a deadly weapon over Belcher's objection, and Belcher was convicted of murder. Id. On appeal, Belcher contended the trial judge

erred in instructing the jury on inferring malice from the use of a deadly weapon in light of the fact the jury was also instructed on the law of self-defense. Id. The Supreme Court ultimately agreed, instructing:

> [W]here evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon. The permissive inference charge concerning the use of a deadly weapon remains a correct statement of the law where the only issue presented to the jury is whether the defendant has committed murder (or assault and battery with intent to kill).

Id. at 612, 685 S.E.2d at 810. Significantly though, the Supreme Court explained the new rule it announced through its decision would only be applicable to cases "pending on direct review or not yet final **where the issue [was] preserved.**" Id. at 597, 612, 685 S.E.2d at 810 (emphasis added).

In Appellant's case, the trial judge instructed the jury it was permitted to infer malice from the use of a deadly weapon, which was an accurate and proper statement of the law at that time. See State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998) ("Malice may be implied from the defendant's use of a deadly weapon."). Accordingly, the trial judge committed no error in instructing the jury in Appellant's case. See Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004) ("[T]he trial court is required to charge only the current and correct law of South Carolina."). However, pursuant to the decision Belcher, the new rule precluding trial judges from instructing juries on inferring malice from the use of a deadly weapon under certain circumstances would have rendered the trial judge's instruction erroneous and been applicable to Appellant's case **if** the issue had been preserved during trial. Critically though, the issue was not preserved due to the fact Appellant did **not** contemporaneously object to the

inference of malice charge during his trial. For that reason, the trial judge committed no error in instructing the jury without objection that it could infer malice from the use of a deadly weapon, which was a current and correct statement of the applicable law at the time of Appellant's trial. See Ezell, 321 S.C. at 425, 468 S.E.2d at 681 ("A jury charge which is substantially correct and covers the law does not require reversal."). Appellant's convictions should be affirmed.

C. Harmlessness of Any Error

After an error is discovered, the appellate court must then determine whether the error was harmless. See State v. Northcutt, 372 S.C. 207, 217, 641 S.E.2d 873, 878 (2007) ("Determining the trial judge committed error is the first step of our analysis. Next we must determine whether the error was harmless."). Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). The harmlessness of an error generally depends on the materiality of the error in relation to the case as a whole. State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003); see State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010) ("No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case."). An error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008); see State v. Hariott, 210 S.C. 290, 298, 42 S.E.2d 285, 288 (1947) ("It is a rule of practically universal application in appellate procedure that an accused cannot avail himself of error as a ground for reversal where the error has not been prejudicial to him."). When a review of the entire record establishes an error is

harmless beyond a reasonable doubt, an appellate court should not reverse a conviction. State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003).

In the case at bar, even if erroneous, the trial judge's instruction to the jury that it could infer malice from the use of a deadly weapon was entirely harmless and had no impact on the ultimate outcome of Appellant's case based on the verdict returned by the jury. Despite the fact the jury was instructed it could infer malice from the use of a deadly weapon, its verdict reflected it was not misled to believe it could not find the existence of justification, excuse, or mitigation in a situation where a deadly weapon was used, which was the precise type of jury misunderstanding the Supreme Court's new rule in Belcher sought to avoid. See Belcher, 385 S.C. at 610, 685 S.E.2d at 808-809 ("[I]nferring malice form the use of a deadly weapon is indeed only a 'half-truth.' The absence of justification, excuse or mitigation cannot be inferred from the use of a deadly weapon standing alone. Other facts and evidence (or the absence of other facts and evidence) are required for the fulfillment of these component parts."). Critically, even though the evidence presented showed Isaac's death and A.J.'s injuries resulted from the use of a deadly weapon, the jury demonstrated it found Appellant's co-defendant's actions did not involve malice and were mitigated under the circumstances by convicting Johnson of the lesser-included offenses of voluntary manslaughter and ABHAN. Cf. Nation v. State, 252 Ga. App. 620, 623-624, 556 S.E.2d 196, 200-201 (Ga. Ct. App. 2001) (finding any error that resulted from the giving of an erroneous jury charge was harmless and did not contribute to the verdict where the jury's verdict demonstrated it was not impacted by the erroneous charge). Thus, the inference of malice jury instruction did not confuse the jury in Appellant's case or mislead them to believe the use of a deadly weapon alone mandated a finding of malice. See State v. Chambers, 194 S.C.

197, 203, 9 S.E.2d 549, 552 (1940) (finding any error resulting from the trial judge's jury instructions on malice was harmless where the jury convicted the defendants of lesser-included offenses of the offense of ABWIK and, thus, did not find the defendants acted with malice). As a result, any error that could have resulted from the giving of that instruction was entirely harmless and did not impact the verdict in Appellant's case. See Fletcher, 379 S.C. at 25, 664 S.E.2d at 484 ("Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained."). Appellant's convictions should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

BY: 
Mark R. Farthing

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

February 7, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Honorable Robin B. Stilwell, Circuit Court Judge
Appellate Case No. 2009-147266

THE STATE,

Respondent,

vs.

KERWIN S. PARKER,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

BY: 
Mark R. Farthing

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

February 7, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Honorable Robin B. Stilwell, Circuit Court Judge
Appellate Case No. 2009-147266

THE STATE,

Respondent,

vs.

KERWIN S. PARKER,

Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served. This 7th day of February, 2013.

Ellen R. DuBois

ELLEN R. DuBOIS
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Kerwin S. Parker, Appellant.

Appellate Case No. 2009-147266

Appeal From Lexington County
Robin B. Stilwell, Circuit Court Judge

Unpublished Opinion No. 2013-UP-403
Heard October 7, 2013 – Filed October 30, 2013

AFFIRMED

Deputy Chief Appellate Defender Wanda H. Carter, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Mark Reynolds Farthing, both of Columbia, for Respondent.

PER CURIAM: Kerwin Parker was convicted of assault and battery with intent to kill (ABWIK) and the possession of a firearm during the commission of a violent crime. He appeals, arguing the trial court erred in instructing the jury with

regard to the ABWIK charge that an implication of malice may arise from the use of a deadly weapon. Parker contends the jury instruction was confusing and prejudicial in light of evidence that clearly reduced, mitigated, excused, or justified his actions.

We affirm pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Belcher*, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009) (providing the *Belcher* court's "ruling is effective in this case and for all cases which are pending on direct review or not yet final *where the issue is preserved*" (emphasis added)); *State v. Price*, 400 S.C. 110, 113-14, 732 S.E.2d 652, 653 (Ct. App. 2012) (recognizing an appellate court will "resolve the issue on preservation grounds when it clearly is unpreserved" (quoting *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012))); Rule 20(b), SCRCrimP ("Notwithstanding any request for legal instructions, the parties shall be given the opportunity to object to the giving or failure to give an instruction before the jury retires, but out of the hearing of the jury. . . . Failure to object in accordance with this rule shall constitute a waiver of objection."); *State v. Todd*, 264 S.C. 136, 139, 213 S.E.2d 99, 100 (1975) ("In cases too numerous to cite, . . . it has been held that the failure of a defendant to object to the charge as made or to request additional instructions, when the opportunity to do so is afforded, constitutes a waiver of any right to complain of errors in the charge."); *State v. Robinson*, 238 S.C. 140, 150, 119 S.E.2d 671, 676 (1961) (stating South Carolina does not permit a party disappointed by a verdict to employ a motion for a new trial to raise, for the first time, an error committed at trial (*overruled on other grounds by State v. Torrence*, 305 S.C. 45, 69 n.5, 406 S.E.2d 315, 328 n.5 (1991))).

AFFIRMED.

SHORT and WILLIAMS, JJ., and CURETON, A.J., concur.

ORIGINAL

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

KERWIN PARKER,

APPELLANT

APPELLATE CASE NO. 2009-147266

Appeal from Lexington County

Robin B. Stilwell, Circuit Court Judge

RECEIVED
NOV 1 4 2013
SC Court of Appeals

Opinion No. 2013-UP-403

PETITION FOR REHEARING

Pursuant to Rules 221 and 224, SCACR, appellate counsel requests a rehearing in this appeal because when deciding the case, this Court might have overlooked the fact that appellant's trial was a bifurcated proceeding (including a guilt phase and a sentencing phase); and therefore, the Belcher,[1] issue that would apply to cases "pending on direct review or not yet final where the issue [was] preserved," was indeed preserved for review in this appeal as the Belcher issue was raised at sentencing, which was when the case "was not yet final," and "the issue [was] preserved" prior to the finality of sentencing. Appellate counsel would present the following points in support of this position.

---

[1] State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

1.) Appellant was convicted of possession of a firearm during the commission of a violent crime and assault and battery with intent to kill A. J. Wilson during a shoot-out between appellant, co-defendant Johnson, A.J. Wilson, Walter Gadson, and Isaac Wilson (deceased) on the night of November 20, 2006. Co-defendant Johnson was convicted of voluntary manslaughter in relation to Isaac Wilson's death, and aggravated assault against Walter Gadsen and AJ Wilson. The action began when appellant and co-defendant Johnson arrived at Isaac Wilson's residence. During the commotion that followed, appellant acted in self defense and in defense of others when A.J. Wilson, Isaac Wilson, and Walter Gadsen, all of whom held guns, and shouted "let's shoot [appellant and codefendant]." R. 691, l. 5 - p. 692, l. 13. Also, appellant acted in self-defense at one point during the melee when A. J. Wilson fought and held him down while Isaac Wilson pointed a gun at him. R. 732, lines 3-10. In addition, it appeared that all of the men were engaged in mutual combat during the fighting.

2.) The trial judge charged the jury on the law of self defense, defense of others, mutual combat, and murder and voluntary manslaughter. R. 853, l. 13 – p. 854, l. 21; R. 858, l. 21 – p. 865, l. 2. In addition, the trial judge gave the following instructions on "malice" and "the use of a deadly weapon" to the jury:

> In order to prove assault and battery with intent to kill, the State must prove, beyond a reasonable doubt, that the defendant committed an unlawful act of a violent nature to the person of another with malice aforethought. The difference between assault and battery with intent to kill and assault and battery of a high and aggravated nature is the presence or absence of malice. Malice, as I have previously defined to you, is ill will or hostility towards another person and the intentional doing of a wrongful act without just cause or excuse with the intent to inflict an injury or under circumstances that the law will infer an evil intent.

R. 719, l. 21-p. 721, l. 15.

> Malice is hatred, ill will, or hostility towards another person. [Malice] is the intentional doing of a wrongful act without just cause or excuse and with the intent to inflict an injury or under certain circumstances that the law will implicate an evil intent. Malice

> aforethought may be expressed or inferred. Express malice is shown when a person speaks words which express hate or ill will. Malice may be indicated from conduct showing a disregard for human life. An implication of malice may also arise when the deed is done with a deadly weapon. That implication is merely an evidentiary fact which may be taken into consideration along with any other evidence in this case.

R. 715, l. 2 – p. 716, l. 5.

3.) The Belcher issue was raised at appellant's sentencing proceeding and on direct appeal. The Court of Appeals affirmed appellant's appeal on the Belcher issue as follows:

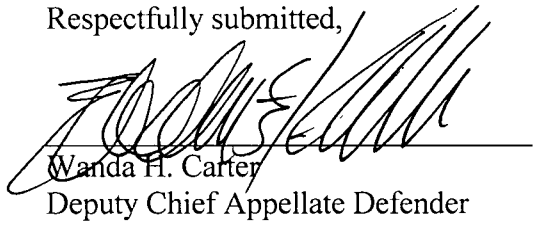
> We affirm pursuant to Rule 220(b), SCACR and the following authorities: State v. Belcher, 385 S.C. 597, 685 S.E. 2d 802 (2009) (providing the Belcher Court's "ruling is effective in all cases which are pending on direct review or not yet final where the issue is preserved."

4.) The imposition of the sentence is the final judgment in a case from which an appeal can be taken. State v. Miller, 289 S.C. 426, 346 S.E.2d 705 (1986). Petitioner's guilt phase concluded on September 18, 2009. Belcher was decided on October 12, 2009. Petitioner was sentenced on October 21, 2009. Undoubtedly, appellant's case was "not yet final" when the Belcher issue was raised at sentencing because this happened before appellant's sentences were pronounced and thus before the case was final; and furthermore, the Belcher issue "[was] preserved" at sentencing before appellant's sentences were pronounced, and again before the case was final. Hence, per appellant's bifurcated proceeding, the Belcher issue was properly raised at sentencing before the case was "not yet final" and "preserved" at sentencing before the sentences were pronounced and the case finality achieved.

WHEREFORE, inasmuch as this Court might have overlooked the fact that appellant's trial was a bifurcated proceeding that included a guilt phase and a sentencing phase, then the Belcher issue, which was raised and preserved at the sentencing phase

before the case was finalized, was clearly and properly preserved for appellate review before this Court. As a result, counsel for appellant respectfully requests a rehearing into the preservation of and merits of the Belcher error in this case on appeal.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

This 14th day of November, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
NOV 1 4 2013
SC Court of Appeals

Appeal from Lexington County

Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KERWIN PARKER,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and upon Mr. Kerwin Parker, #337544 at Broad River Correctional Institution, 460 Broad River Road, Columbia, SC 29210, this 14th day of November, 2013.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 14th day
of November, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

The South Carolina Court of Appeals

The State, Respondent,

v.

Kerwin S. Parker, Appellant.

Appellate Case No. 2009-147266

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul G. Short, Jr. J.

H B Wee J.

Joseph M Curreton A. J.

Columbia, South Carolina

cc: Wanda H. Carter
Mark Reynolds Farthing

FILED
December 23, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Robin B. Stilwell, Circuit Court Judge

Opinion No. 2013-UP-403 (S.C. Ct. App. filed 10/30/2013)

07-GS-32-01540, 0151, 01542

THE STATE,

RESPONDENT,

V.

KERWIN PARKER,

PETITIONER

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

INDEX

[1] State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

[2] A Belcher review would require that the issue be "pending on direct review or not yet final where the issue is preserved."

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on December 27, 2013

QUESTION PRESENTED

The Court of Appeals erred in holding that the rule in Belcher[3] was not properly preserved[4] for appeal because petitioner's trial was bifurcated via a trial phase and sentencing phase, and since the Belcher issue was raised at the sentencing phase, then this meant that the case was "not yet final," when the Belcher issue was "preserved" and it is "now pending" properly before this court for appellate review.

[3] State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

[4] A Belcher review would require that the issue be "pending on direct review or not yet final where the issue is preserved."

STATEMENT

Petitioner Kerwin Parker was convicted per jury trial of assault and battery with intent to kill and possession of a firearm during the commission of a violent crime per a jury trial held during the September 2009 term of the Lexington County General Sessions Court before Judge Robin B. Stilwell. Petitioner received an aggregate twenty-year prison term at his sentencing hearing held during the October 2009 term of the Lexington County General Sessions Court. Petitioner was represented by Jack Duncan at his trial and sentencing proceedings, and Solicitor Donald V. Myers and Assistant Solicitor Colleen E. Dixon appeared on behalf of the state in the case.

Petitioner appealed his trial court convictions and sentences, and on October 30, 2013, pursuant to an oral argument held in the case on October 7, 2013, the Court of Appeals issued an opinion affirming petitioner's convictions and sentences. See State v. Parker, Unpublished Opinion No. 2013-UP-403 (October 30, 2013). App. p. 1-2. The undersigned counsel represented petitioner on appeal and Assistant Attorney Mark R. Farthing represented the state on appeal.

A petition for rehearing was filed in the case on November 14, 2013. App. p. 3-7. The petition for rehearing was denied by Order of the Court of Appeals on December 27 2013. App. p. 8. This petition for writ of certiorari follows.

ARGUMENT

The Court of Appeals erred in holding that the rule in Belcher[5] was not properly preserved[6] for appeal because petitioner's trial was bifurcated via a trial phase and sentencing phase, and since the Belcher issue was raised at the sentencing phase when the case was "not yet final," then this meant that the Belcher issue was "preserved" and it is "now pending" properly before this court for appellate review.

Petitioner was convicted of possession of a firearm during the commission of a violent crime and assault and battery with intent to kill A. J. Wilson during a shoot-out between petitioner, co-defendant Johnson, A.J. Wilson, Walter Gadson, and Isaac Wilson (deceased) on the night of November 20, 2006. Co-defendant Johnson was convicted of voluntary manslaughter in relation to Isaac Wilson's death, and aggravated assault against Walter Gadsen and AJ Wilson. The action began when petitioner and co-defendant Johnson arrived at Isaac Wilson's residence. During the commotion that followed, petitioner acted in self defense and in defense of others when A.J. Wilson, Isaac Wilson, and Walter Gadsen, all of whom held guns, and shouted "let's shoot [appellant and codefendant]." R. 691, l. 5 - p. 692, l. 13. Also, petitioner acted in self-defense at one point during the melee when A. J. Wilson fought and held him down while Isaac Wilson pointed a gun at him. R. 732, lines 3-10. In addition, it appeared that all of the men were engaged in mutual combat during the fighting.

The trial judge charged the jury on the law of self defense, defense of others, mutual combat, murder, and voluntary manslaughter. R. 853, l. 13 – p. 854, l. 21; R. 858, l.

[5] State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

[6] A Belcher review would require that the issue be "pending on direct review or not yet final where the issue is preserved."

21 – p. 865, l. 2. In addition, the trial judge gave the following instructions on "malice" and "the use of a deadly weapon" to the jury:

> In order to prove assault and battery with intent to kill, the State must prove, beyond a reasonable doubt, that the defendant committed an unlawful act of a violent nature to the person of another with malice aforethought. The difference between assault and battery with intent to kill and assault and battery of a high and aggravated nature is the presence or absence of malice. Malice, as I have previously defined to you, is ill will or hostility towards another person and the intentional doing of a wrongful act without just cause or excuse with the intent to inflict an injury or under circumstances that the law will infer an evil intent.

R. 719, l. 21-p. 721, l. 15.

> Malice is hatred, ill will, or hostility towards another person. [Malice] is the intentional doing of a wrongful act without just cause or excuse and with the intent to inflict an injury or under certain circumstances that the law will implicate an evil intent. Malice aforethought may be expressed or inferred. Express malice is shown when a person speaks words which express hate or ill will. Malice may be indicated from conduct showing a disregard for human life. An implication of malice may also arise when the deed is done with a deadly weapon. That implication is merely an evidentiary fact which may be taken into consideration along with any other evidence in this case.

R. 715, l. 2 – p. 716, l. 5.

The Belcher issue was raised at petitioner's sentencing proceeding and on direct appeal. The Court of Appeals affirmed petitioner's convictions and sentences and decided the Belcher issue as follows:

> We affirm pursuant to Rule 220(b), SCACR and the following authorities: State v. Belcher, 385 S.C. 597, 685 S.E. 2d 802 (2009) (providing the Belcher Court's "ruling is effective in all cases which are pending on direct review or not yet final where the issue is preserved."

The imposition of the sentence is the final judgment in a case from which an appeal can be taken. State v. Miller, 289 S.C. 426, 346 S.E.2d 705 (1986). Petitioner's guilt phase concluded on September 18, 2009. Belcher was decided on October 12, 2009. Petitioner was sentenced on October 21, 2009. Undoubtedly, petitioner's case was "not yet final" when the Belcher issue was raised at sentencing because this happened before petitioner's

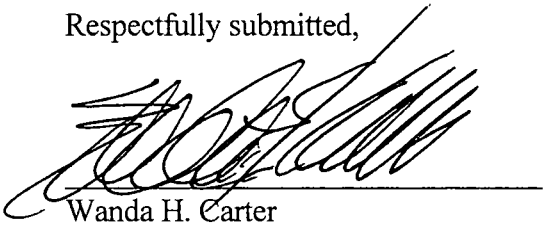
sentences were pronounced and thus before the case was final; and furthermore, the Belcher issue "[was] preserved" at sentencing before petitioner's sentences were pronounced, and again before the case was final. Hence, per petitioner's bifurcated proceeding, the Belcher issue was properly raised at sentencing before the case was "not yet final" and "preserved" at sentencing before the sentences were pronounced and the case finality achieved.

The Court of Appeals erred in holding that the Belcher issue was not preserved for appellate review in petitioner's case.

CONCLUSION

Based on the foregoing argument, petitioner requests that this Court grant the petition for writ of certiorari in the case.

Respectfully submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of January, 2014.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Robin B. Stilwell, Circuit Court Judge

Opinion No. 2013-UP-403 (S.C. Ct. App. filed 10/30/2013)

07-GS-32-01540, 0151, 01542

THE STATE,

RESPONDENT,

V.

KERWIN PARKER,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in his case have been served on Mark R. Farthing, Esquire this 22nd day of January, 2014.

Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 22nd day
of January, 2014.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Lexington County
Honorable Robin B. Stilwell, Circuit Court Judge
Appellate Case No. 2014-000125

THE STATE,

Respondent,

vs.

KERWIN S. PARKER,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other Authorities:

STATEMENT OF ISSUE ON CERTIORARI

The Court of Appeals correctly determined that any issue with trial judge's jury charge on inferring malice from the use of a deadly weapon was not preserved for appellate review because defense counsel did not contemporaneously object to the jury charge during trial and, instead, specifically indicated that he had no objection to the charge as given. However, even if the issue was somehow preserved, any error resulting from the trial judge instructing the jury that it could infer malice from the use of a deadly weapon was entirely harmless in light of the jury's verdict, which demonstrated that the jury did not believe the use of a deadly weapon alone mandated a finding of malice or precluded a finding that the defendants' actions were excused, justified, or mitigated by the circumstances.

STATEMENT OF THE CASE

Procedural History

On November 20, 2006, Petitioner Kerwin S. Parker was arrested following an investigation into an incident where several people were injured and one person was fatally shot. In April of 2007, the Lexington County grand jury indicted Parker for one count of murder, one count of assault and battery with intent to kill, and one count of possession of a weapon during the commission of a violent crime. On September 14, 2009, a jury trial was commenced in the Lexington County court of general sessions with the Honorable Robin B. Stilwell, circuit court judge, presiding. At the conclusion of trial, the jury acquitted Parker of murder and convicted Parker of the other indicted offenses. Following the verdict, the trial judge deferred the sentencing proceedings. Thereafter, on October 21, 2009, a sentencing hearing was conducted in the Lexington County court of general sessions with Judge Stilwell again presiding. At the conclusion of the hearing, the trial judge sentenced Parker to concurrent terms of imprisonment of twenty years for assault and battery with intent to kill and five years for possession of a weapon during the commission of a violent crime.[1] Parker then timely filed a notice of appeal.

Subsequently, following oral argument, the Court of Appeals unanimously affirmed Parker's convictions in an unpublished opinion. State v. Parker, Op. No. 2013-UP-403 (S.C. Ct. App. filed Oct. 30, 2013). Thereafter, Parker petitioned the Court of

[1] Parker's brother, Curtis T. Johnson, was indicted for one count of murder, two counts of assault and battery with intent to kill, and one count of possession of a firearm during the commission of a violent crime for his role in the incident, and he was jointly tried with Parker. At the conclusion of trial, Johnson was convicted of one count of the lesser-included offense of voluntary manslaughter, two counts of the lesser-included offense of assault and battery of a high and aggravated nature, and one count of possession of a weapon during the commission of a violent crime. During the subsequent sentencing hearing, the trial judge sentenced Johnson to concurrent terms of imprisonment of thirty years for voluntary manslaughter and ten years for each of the assault and battery of a high and aggravated nature convictions along with a consecutive term of imprisonment of five years for possession of a weapon during the commission of a violent crime.

Appeals for rehearing, and the petition was denied. Parker then filed a petition for a writ of certiorari in the Supreme Court.

Factual History

At approximately 1:30 a.m. in the early morning hours of November 20, 2006, Jose Hernandez, a resident of the Church Hill Apartments in Lexington County, South Carolina, heard a loud noise coming from an area across from his apartment followed by several gunshots. (R. pp. 199-200; p. 226; pp. 230-231). Hernandez went outside to see what was going on and, when he did so, observed a vehicle stuck between a tree and the apartment building across from him. (R. p. 231). He then saw two individuals, one with long hair and one with short hair, standing on a patio behind the apartment near where the vehicle was located. (R. pp. 231-234). Hernandez continued to watch as the long-haired man walked back to the vehicle and the short-haired man remained on the patio while pointing a gun in a downward direction. (R. pp. 231-234). Hernandez then heard someone ask not to be shot before he saw the short-haired man fire two gunshots. (R. p. 232; pp. 235-236). Following the gunshots, a woman came out of the apartment and asked the men what they had done, and the men then walked down the street together. (R. pp. 233-234). Thereafter, Hernandez watched as the short-haired man left the area and the long-haired man returned to the apartment. (R. pp. 233-234). The long-haired man then kicked a man lying on the ground several times, returned to the crashed vehicle, attempted to leave in it, and then walked away. (R. p. 234).

Shortly thereafter, law enforcement officers were notified of the shooting and responded to the scene. (R. pp. 259-260; p. 276; pp. 294-295; p. 314). After they arrived, Deputy Teddy Xanthakus and Deputy Danny Lewis of the Lexington County Sheriff's Office observed a vehicle resting in the bushes next to the apartment building

and saw a long-haired man, Curtis T. Johnson, walking in the road "in a daze." (R. pp. 259-263; pp. 276-277; p. 329). The officers then arrested Johnson and found a set of brass knuckles in his pocket. (R. pp. 262-263; pp. 277-278). Thereafter, Deputy Xanthakus moved to secure the apartment, found a severely-injured man on the apartment patio, observed a blood trail leading away from the apartment, and discovered the body of a deceased person sprawled out on the floor of the kitchen inside of the apartment. (R. pp. 263; pp. 265-268). Emergency medical personnel then arrived on the scene and began treating the injured victims, and the apartment was secured. (R. p. 272). Officers subsequently recovered numerous pieces of evidence from the scene, including a shotgun, a metal pipe, eight shell casings, a box of shotgun shells, numerous bullet fragments, and multiple fired bullets. (R. p. 267; pp. 358-360; pp. 363-364; p. 368; p. 374; p. 384; pp. 395-396; p. 400; p. 402; pp. 404-405).

As the investigation into the shooting progressed, officers learned Johnson's older brother, Petitioner Kerwin S. Parker, was involved in the incident, and they went to his residence to apprehend him. (R. p. 31; pp. 295-296; p. 540). Upon arriving, officers found a man standing in the yard of the residence, and he advised them that Parker was inside. (R. pp. 301-302; p. 306). The officers then entered the residence, located Parker and his mother, and detained Parker.[2] (R. p. 302; p. 307). Following his arrest, Parker's mother provided the officers with Parker's shoes and informed them Parker's gun was in a vehicle located in the yard of the residence. (R. pp. 302-303; pp. 309-310). Officers then discovered a forty-caliber handgun in the glove box of the vehicle, and it was later confirmed to belong to Parker. (R. p. 317; p. 321; pp. 483-484).

[2] At the time of his arrest, Parker had short hair, was not wearing any shoes, and did not appear to have any injuries. (R. p. 298; p. 302; p. 304; 307; p. 428; pp. 627-628). Likewise, at the time of his arrest, Johnson had no visible injuries. (R. p. 615). Furthermore, Johnson was wearing a black sweatshirt and Parker was wearing a gray sweatshirt when they were arrested. (R. p. 221; p. 330).

After Johnson and Parker were arrested, officers collected the sweatshirts they were wearing at the time and performed gunshot residue tests on their hands and clothing.[3] (R. pp. 329-330; pp. 334-335; p. 355; p. 366). Upon analysis, gunshot residue was discovered on both of Johnson's hands and on the right and left sleeves of both sweatshirts that were submitted for testing. (R. pp. 455-456; pp. 459-460). Blood was also located on Parker's shoes and Johnson's socks and shoes. (R. pp. 488-492). Jasper Humbert, a forensic D.N.A. analyst with S.L.E.D., determined the blood on Parker's shoes belonged to one of the victims, Isaac Wilson ("Isaac"), and the blood on Johnson's socks and shoes belonged to Isaac and another of the victims, A.J. Wilson ("A.J."). (R. pp. 495-496; pp. 498-500). Furthermore, Parker's gun and the fired cartridges, bullets, and bullet fragments recovered during the investigation into the shooting were analyzed by S.L.E.D. Agent David Black, an expert in firearms examinations. (R. pp. 468-470). Based on his analysis, Black concluded all seven of the recovered bullet cartridges were fired from Parker's gun and three of the four recovered bullets were fired from the weapon.[4] (R. p. 470).

Meanwhile, the victims were taken to the hospital and treated for their injuries. (R. p. 501; pp. 505-506). The man who left the blood trail at the scene, Walter Gadson, suffered a femur fracture during the incident. (R. pp. 502-503). Likewise, the man found on the patio, A.J., suffered numerous injuries, including injuries to his vertebrae, face, mouth, extremities, shoulder, flank, wrist, and thumb. (R. p. 162; p. 504; pp. 509-510). A.J.'s injuries were so severe that a person who saw him after the shooting stated "it

[3] The gunshot residue test was not conducted on Parker until approximately 6:30 a.m., which was roughly five hours after the shooting. (R. p. 366; pp. 457-458).

[4] Black was unable to determine what gun fired the final bullet because it was too damaged for proper analysis. (R. p. 470).

looked like some of the part of, some of his mouth was gone." (R. p. 140). Furthermore, the lower portion of A.J.'s body was paralyzed as a result of the shooting. (R. p. 163; pp. 509-510).

Subsequently, Dr. Janice Ross, an expert in forensic pathology, performed an autopsy on Isaac, who was the person killed in the shooting. (R. pp. 512-513). During the autopsy, Dr. Ross located two gunshot wounds to Isaac's chest and gunshot powder burns on Isaac's clothing. (R. pp. 513-514). One bullet entered the right side of Isaac's chest, travelled through his lungs and heart, and left an exit wound that suggested Isaac was lying on concrete at the time he was shot. (R. pp. 515-516). The other bullet entered the left side of Isaac's chest and travelled through his left lung and stomach. (R. pp. 516-517). Based on her findings, Dr. Ross concluded Isaac bled to death as a result of the shooting. (R. p. 517). She further concluded Isaac was shot from a close distance and the gun was only four to twelve inches away from his body when the shots were fired. (R. pp. 514-515; p. 518).

Thereafter, Parker was indicted for murder, assault and battery with intent to kill ("ABWIK"), and possession of a weapon during the commission of a violent crime, and he proceeded to trial with Johnson, who was charged with the same offenses along with an additional count of ABWIK. (R. p. 2; pp. 868-871; pp. 873-874). During the trial, which began on September 14, 2009, multiple accounts of the shooting were presented to the jury. (R. p. 1; pp. 100-118; pp. 151-162; pp. 230-236; pp. 570-579; pp. 799-813).

Gadson recounted he and Isaac got into a physical altercation with Johnson earlier in the evening prior to the shooting and Johnson threatened them as he was leaving the area. (R. pp. 96-98). He testified they then returned home before observing Parker's vehicle near their apartment. (R. pp. 99-100). In response, Gadson stated he, Isaac, and

A.J. exited the apartment after Isaac retrieved a shotgun. (R. pp. 103-104). Once outside, Gadson stated Johnson got out of the vehicle and blew its horn and then Parker came around from the side of the apartment. (R. pp. 104-105). He testified he then spoke with Parker, Parker pulled his pants leg up and reached for something, A.J. yelled that Parker had a gun, A.J. and Isaac ran towards the patio, and Isaac tossed him the shotgun. (R. pp. 105-111). After that, Gadson indicated Johnson drove the vehicle towards him, he unsuccessfully tried to fire the shotgun to stop the vehicle, and he was struck and injured. (R. pp. 111-104). Thereafter, he stated he saw Johnson exit the vehicle armed with a pistol and then heard multiple gunshots as he crawled away from the scene. (R. pp. 114-117).

Similarly, A.J. testified he was at his apartment late on the night of November 19, 2006, when Isaac and Gadson arrived and stated they had been in a fight with Johnson. (R. pp. 148-149; pp. 170-171). Later that night, A.J. stated Johnson arrived at the apartment complex so they all went outside with Isaac armed with a shotgun. (R. pp. 151-152). Once outside, A.J. stated a man approached them and asked why they did something to his brother. (R. pp. 153-155). After that, A.J. testified the man reached for something and he responded by yelling that the man had a gun before running towards the apartment patio. (R. pp. 156-157). Thereafter, A.J. stated he heard gunshots, went inside the apartment, and then went back outside when he did not see Isaac. (R. p. 157). When he went outside, A.J. indicated he saw a long-haired man on top of Isaac and he tried to get the man off of him. (R. pp. 158-159). When he did so, he testified the man who confronted them earlier pulled out a gun and shot him in the mouth, side, hand, and back. (R. pp. 159-163). A.J. further testified he selected the photograph of the shooter

from a photographic line-up, and he identified Parker in-court as the shooter and indicated he was certain of the identification.[5] [6] (R. pp. 161-167).

Subsequently, Johnson testified in his own defense and offered a substantially different account of the incident from the testimony of A.J. and Gadson. (R. p. 540). Prior to the shooting, Johnson stated he was attacked by Gadson and Isaac while stopped at a red light and was kicked in the head by Gadson while he was still seated in the vehicle. (R. pp. 557-558). Johnson claimed he was then pulled from the vehicle during the altercation but was eventually able to escape.[7] (R. pp. 559-561). Thereafter, Johnson testified he returned home and told Parker about the incident, and Parker responded by saying he was going to go speak with the attackers. (R. pp. 564-565). Johnson indicated they then drove to Isaac's apartment, parked in the rear, and intended to resolve the dispute by talking to Isaac and Gadson. (R. pp. 568-572). Johnson testified Parker then exited the vehicle and walked out of view before Isaac, Gadson, and A.J. approached his vehicle while carrying three different shotguns. (R. pp. 574-577). He claimed he then heard Isaac say he was going to shoot him, he honked the horn, and they stopped walking towards him. (R. pp. 577-578). When he honked the horn, Johnson testified Parker ran back to the vehicle, stopped when he saw the shotguns, and asked the men to put the guns down. (R. pp. 578-579; pp. 799-800). Johnson claimed Parker then tried to convince Isaac to let them leave, but Gadson charged at Parker with a shotgun. (R. pp. 800-802).

---

[5] Detective Steve Collins of the Lexington County Sheriff's Office showed A.J. a photographic line-up while A.J. was still hospitalized from his injuries. (R. p. 198; pp. 200-203). A.J. selected Parker from the line-up and indicated he was certain of his identification. (R. pp. 202-203; pp. 209-211).

[6] Consistent with A.J.'s testimony, Amy Fleming, who lived with Isaac and A.J. at the time of the shooting, stated she saw Parker armed with a gun on the apartment patio after A.J. was shot, and she testified she heard Parker state he should kill all of them. (R. p. 32; pp. 39-40).

[7] As a result of the attack, Johnson stated he suffered "a little nick" under his lip, dirt in his eye, and emotional pain. (R. pp. 562-563).

Johnson stated he then drove towards Gadson and struck a wall. (R. pp. 802-805; p. 807). After hitting the wall, Johnson indicated he looked over at the patio and saw Isaac pointing a gun at Parker while he was being held by A.J. (R. p. 808). Johnson claimed he then grabbed a gun from his vehicle's glove box and fired a warning shot out of the window before running over and shooting A.J. five times and Isaac two times.[8] (R. pp. 810-811). After the shooting, Johnson testified Parker left to go get help while he went into the apartment and then walked in the roadway. (R. pp. 811-813).

At the conclusion of the evidentiary phase of trial, the trial judge conducted a charge conference and stated he intended to instruct the jury on voluntary manslaughter and self-defense. (R. p. 637). Thereafter, counsel for both Parker and Johnson requested a jury instruction on the lesser-included offense of assault and battery of a high and aggravated nature ("ABHAN"), and the trial judge agreed to give the charge. (R. pp. 640-642). Subsequently, the trial judge instructed the jury on the applicable law, including on murder, voluntary manslaughter, ABWIK, ABHAN, self-defense, and defense of others, and explained malice in the context of murder and ABWIK as follows:

> [M]alice may be indicated from conduct showing a disregard for human life. An implication of malice may also arise when the deed is done with a deadly weapon. That implication is merely an evidentiary fact which may be taken into consideration along with any other evidence in this case. The deadly weapon is an 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 circumstances of each case.

(R. pp. 714-729). After finishing his instructions to the jury, the trial judge asked the parties if there were any objections to the jury charge as given, and no objections were

[8] Notably, Johnson also claimed that he shot Parker during the incident. (R. p. 604).

raised.[9] (R. pp. 731-732). Specifically, defense counsel for Parker responded: "None, Your Honor." (R. p. 732).

At the conclusion of trial, the jury acquitted Parker of murder, convicted Parker of ABWIK and possession of a weapon during the commission of a violent crime, and convicted Johnson of possession of a weapon during the commission of a violent crime, the lesser-included offense of voluntary manslaughter, and two counts of the lesser-included offense of ABHAN. (R. pp. 740-741). The trial judge then deferred the sentencing proceedings to a later date. (R. pp. 742-743).

Thereafter, on October 21, 2009, a sentencing hearing was conducted. (R. p. 744; p. 747). At the outset of the hearing, counsel for Parker moved for a new trial, arguing that the trial judge's jury charge on inferring malice from the use of a deadly weapon was no longer an appropriate charge in light of the Supreme Court's decision in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), which he noted was decided subsequent to Parker's trial. (R. pp. 748-749). Defense counsel asserted Parker was entitled to the benefit of the decision in Belcher because his case was not considered final until he was sentenced. (R. p. 749). In response, the solicitor asserted the Supreme Court explicitly instructed in the Belcher opinion that the decision only applied to cases where the issue was preserved. (R. p. 750). The solicitor noted the issue was not preserved in Parker's case because Parker raised no objection to the inference of malice charge during trial. (R. p. 750). In rebuttal, defense counsel contended that any objection he potentially could have raised to the charge would likely have been found to be specious in light of the law

[9] After the jury subsequently began its deliberations, the jury submitted a request for explanations as to "the differences between murder and voluntary manslaughter" and "at what point does malice determine murder or voluntary manslaughter." (R. p. 734). In response to the questions, the trial judge re-instructed the jury on murder, malice, and voluntary manslaughter. (R. p. 737-738). Notably, just as with the initial jury charge, no objections were raised to the trial judge's supplemental instructions to the jury on inferring malice from the use of a deadly weapon. (R. pp. 738-739).

in effect at the time of Parker's trial, and he further asserted principles of judicial economy warranted the grant of a new trial because he maintained that relief would be granted through an ineffective assistance of counsel claim if not granted immediately. (R. pp. 750-751). After considering the issue, the trial judge denied Parker's new trial motion, ruling he was not given an opportunity to grant a curative instruction or revise the jury charge due to the fact that Parker did not object to the charge during trial and further finding Parker suffered no prejudice as a result of the charge in light of the jury's verdict and the evidence presented during trial. (R. pp. 751-752). The trial judge then sentenced Parker to concurrent terms of imprisonment of twenty years for ABWIK and five years for possession of a weapon during the commission of a violent crime, and Parker subsequently appealed his convictions. (R. pp. 775-776).

On appeal, the Court of Appeals affirmed Parker's convictions. (App'x pp. 1-2). In reaching that decision, the Court of Appeals found that Parker's appellate challenge to the propriety of the inference of malice jury instruction was not preserved for appellate review. (App'x p. 2).

ARGUMENT

The Court of Appeals correctly determined that any issue with trial judge's jury charge on inferring malice from the use of a deadly weapon was not preserved for appellate review because defense counsel did not contemporaneously object to the jury charge during trial and, instead, specifically indicated that he had no objection to the charge as given. However, even if the issue was somehow preserved, any error resulting from the trial judge instructing the jury that it could infer malice from the use of a deadly weapon was entirely harmless in light of the jury's verdict, which demonstrated that the jury did not believe the use of a deadly weapon alone mandated a finding of malice or precluded a finding that the defendants' actions were excused, justified, or mitigated by the circumstances.

Parker contends that the Court of Appeals erred in finding his appellate challenge to the trial judge's jury charge on inferring malice from the use of a deadly weapon was not preserved for appellate review. In support of that contention, Parker maintains that the issue was properly preserved for appellate review because his case was not yet final at the time of this Court's decision in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), and because the issue was preserved through an objection raised for the first time in a post-verdict and post-trial sentencing hearing. To the contrary, the Court of Appeals correctly determined that any issue with the trial judge's jury charge was not preserved for appellate review because no timely objections to the jury charge were raised during trial. Instead, after the trial judge concluded his jury instructions, defense counsel specifically indicated that he had no objection to the charge. As a result, any issue with the propriety of the charge was waived, and defense counsel's post-verdict and post-trial challenge to the jury charge, which was raised for the first time during the sentencing proceedings, was not sufficient to preserve the issue pursuant to the requirements of South Carolina's issue preservation rules. However, even if the issue had somehow been preserved for appellate review despite the lack of a contemporaneous objection to the jury charge during trial, any error resulting from the trial judge instructing the jury that it

could infer malice from the use of a deadly weapon was entirely harmless and had no impact on Parker's case because the jury's verdict demonstrated that it did not mistakenly believe the use of a deadly weapon alone required a finding of malice or precluded a finding that the defendants' actions were excused, justified, or mitigated by the circumstances. For those reasons, the Court of Appeals properly affirmed Parker's convictions. Parker's petition for a writ of certiorari should be denied.

A. Issue Preservation

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005). "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000).

Regarding the requirement that a timely objection be raised, a defendant must make a **contemporaneous** objection to a perceived error **during trial** in order to preserve the issue for further review. State v. Blalock, 357 S.C. 74, 79, 591 S.E.2d 632, 635 (Ct. App. 2003); see State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) ("A contemporaneous objection is required to properly preserve an error for appellate review."). Thus, when a perceived error arises, the defendant must object at the first opportunity to do so or the issue is waived. State v. Sullivan, 310 S.C. 311, 314, 426 S.E.2d 766, 768 (1993); see State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169

(1991) ("A defendant must object at his first opportunity to preserve an issue for appellate review."); see also State v. King, 349 S.C. 142, 157, n.1, 561 S.E.2d 640, 647 (Ct. App. 2002) ("[N]o objection was made contemporaneously with this testimony so as to preserve the issue for review. King's belated objection to subsequent testimony came too late."). "It is axiomatic that an issue cannot be raised for the first time in a post-trial motion." Bank of New York v. Sumter County, 387 S.C. 147, 159, 691 S.E.2d 473, 479 (2010).

In addition to the general requirements of our issue preservation rules, the South Carolina Rules of Criminal Procedure also provide specific guidance in regards to raising and preserving an objection to a jury charge. See Rule 20, SCRCrimP (outlining the requirements for requesting jury instructions and objecting to a jury charge). Pursuant to our criminal procedure rules, a defendant must object to the jury charge as given or request an additional charge when afforded the opportunity to do so in order to properly preserve an objection to a charge. State v. Stone, 285 S.C. 386, 387, 330 S.E.2d 286, 287 (1985); see Rule 20(a), SCRCrimP ("All requests for legal instructions to the jury shall be submitted at the close of the evidence, or at such earlier time as the trial judge shall reasonably direct."); Rule 20(b), SCRCrimP ("Notwithstanding any request for legal instructions, the parties shall be given the opportunity to object to the giving or failure to give an instruction before the jury retires, but out of the hearing of the jury. Any objection shall state distinctly the matter objected to and the grounds for objection."). "The rule in this State is firmly established that failure to object to a charge, or failure to request an additional charge when the opportunity is afforded, constitutes a waiver of any right to complain on appeal of an alleged error in the charge." State v. Williams, 266 S.C. 325, 335, 223 S.E.2d 38, 43 (1976); see Rule 20(b), SCRCrimP ("Failure to object

in accordance with this rule shall constitute a waiver of objection."). "[T]he right to have the law declared may be waived by the parties and, ordinarily, silence in the face of an omission from, or error in the charge amounts to waiver." Williams, 266 S.C. at 335, 223 S.E.2d at 43.

In the case sub judice, the Court of Appeals correctly determined that any issue with the propriety of the inference of malice jury instruction was not preserved for appellate review. Significantly, after the trial judge instructed the jury on the applicable law and explained that malice could potentially be inferred from the use of a deadly weapon, the trial judge inquired of counsel whether there were any objections to the jury charge as given, and Parker's defense counsel specifically responded: "None, Your Honor." Because defense counsel did not object to the inference of malice jury charge after it was given and, instead, indicated he had no objection to the charge, any issue that Parker may have had with the giving of that instruction was waived. See State v. Smith, 279 S.C. 440, 442, 308 S.E.2d 794, 794-795 (1983) ("Error is claimed by reason of the trial judge's charge to the jury concerning the implication of malice from the use of a deadly weapon. No objection to the jury instruction was raised at trial. The question therefore is not available for our review."); State v. Rios, 388 S.C. 335, 342, 696 S.E.2d 608, 612 (Ct. App. 2010) ("Even after the trial court specifically asked if there were any objections to the charges given, Rios responded, 'None.' By failing to contemporaneously object to the jury charges, Rios has waived his right to allege error on appeal."); see also State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007) (finding any issue with the admission of a challenged piece of evidence was waived where Dicapua's counsel specifically stated he had no objection when the evidence was introduced during trial); see, e.g., State v. Burton, 326 S.C. 605, 613, 486

S.E.2d 762, 766 (Ct. App. 1997) ("This testimony was admitted without objection. Because Burton failed to object, he is barred from raising this issue on appeal.").

Thereafter, defense counsel first raised an objection to the inference of malice jury charge during a sentencing hearing conducted over a month **after** the jury returned its verdict and Parker's trial had ended. Cf. Bowers v. Charleston & W. Carolina Ry. Co., 210 S.C. 367, 371, 42 S.E.2d 705, 706 (1947) (not reviewing an issue on appeal where the issue was not raised at the time the allegedly objectionable argument was made but, instead, was raised for the first time in a motion for new trial made **after** the jury issued its verdict). However, because defense counsel's post-verdict and post-trial objection to the charge was not raised contemporaneously with the alleged error, the objection was untimely and, significantly, did not present the trial judge with any opportunity to effectively respond to the objection or correct the alleged deficiencies with his jury instructions since the trial had already concluded. See State v. Pauling, 322 S.C. 95, 100, 470 S.E.2d 106, 109 (1996) ("Having denied the trial judge an opportunity to cure any alleged error by failing to contemporaneously object to the charge, Appellant is procedurally barred from raising these issues for the first time on appeal."); see also Williams, 266 S.C. at 335, 223 S.E.2d at 43 ("The rule in this State is firmly established that failure to object to a charge, or failure to request an additional charge when the opportunity is afforded, constitutes a waiver of any right to complain on appeal of an alleged error in the charge."); State v. Black, 319 S.C. 515, 521, 462 S.E.2d 311, 315 (Ct. App. 1995) ("It is a fundamental principle that a contemporaneous objection is required at trial to properly preserve an error for appellate review."). As a result, Parker failed to properly preserve any issue with the jury charge for appellate review, and the Court of Appeals correctly declined to address the issue on appeal. See State v. James, 362 S.C.

557, 562, 608 S.E.2d 455, 457 (Ct. App. 2004) (holding an untimely argument did not preserve an issue for appellate review); see also Abba Equip., Inc. v. Thomason, 335 S.C. 447, 486, 517 S.E.2d 235, 240 (Ct. App. 1999) ("An appellate court may not address an issue that is not preserved.").

In arguing to the contrary, Parker contends that this Court's decision in Belcher was applicable to his case because his case was not yet final at the time Belcher was decided since he had not yet been sentenced and because he allegedly preserved the issue through his new trial motion raised **after** the jury returned its verdict and the trial was concluded. Critically though, Parker's post-verdict and post-trial motion for a new trial, which was indisputably raised for the first time during the sentencing proceedings, was **not** sufficient to preserve the issue pursuant to South Carolina's issue preservation requirements. See Bank of New York, 387 S.C. at 159, 691 S.E.2d at 479 ("[A]n issue cannot be raised for the first time in a post-trial motion."); see also State v. Penland, 275 S.C. 537, 538, 273 S.E.2d 765, 766 (1981) ("One may not preserve a vice until he learns what the result will be and then, take advantage of the error on appeal."); State v. Burnett, 226 S.C. 421, 424, 85 S.E.2d 744, 746 (1954) ("A defendant may not reserve vices in his trial, of which he has notice as here, taking his chances of a favorable verdict, and in case of disappointment, use the error to obtain another trial."); State v. Ballew, 83 S.C. 82, 87, 63 S.E. 688, 690 (1909) ("The general principle that a party can not take his chances of a successful issue, reserving vices in the trial, of which he has notice, for use in case of disappointment, is universally recognized and obviously just."). As a result, the new rule announced in Belcher regarding the propriety of jury charges on inferring malice was not applicable to Parker's case since that rule only applies to cases "which are pending on direct review or not yet final **where the issue is preserved**." Belcher, 385 S.C. at 612,

685 S.E.2d at 810 (emphasis added). Accordingly, the Court of Appeals correctly declined to address Parker's challenge to the inference of malice jury charge on appeal and affirmed his convictions. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("An issue that was not preserved for review should not be addressed by the Court of Appeals[.]"). Parker's petition for a writ of certiorari should be denied.[10]

B. Harmlessness of Any Error Regarding the Inference of Malice Jury Charge

After an error is discovered, the appellate court must then determine whether the error was harmless. See State v. Northcutt, 372 S.C. 207, 217, 641 S.E.2d 873, 878 (2007) ("Determining the trial judge committed error is the first step of our analysis. Next we must determine whether the error was harmless."). Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). The harmlessness of an error generally depends on the materiality of the error in relation to the case as a whole. State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003); see State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010) ("No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case."). An error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17,

[10] During the post-verdict sentencing hearing, defense counsel argued that Parker should be granted a new trial in light of the Belcher decision despite the fact that he did not object to the jury charge during trial because he believed Parker would be entitled to a new trial through an ineffective assistance of counsel claim if he was not granted a new trial at that time. (R. pp. 750-751). Significantly though, this Court specifically stated in its Belcher opinion that the change in law announced in that case was not applicable to convictions challenged on post-conviction relief. See Belcher, 385 S.C. at 613, 685 S.E.2d at 810 ("Our ruling, however, will not apply to convictions challenged on post-conviction relief."). Furthermore, this Court has previously explained that counsel is not considered to be ineffective for failing to anticipate potential changes in the law. See State v. Harden, 260 S.C. 405, 408, 602 S.E.2d 48, 49 (2004) ("An attorney is not required to anticipate potential changes in the law which are not in existence at the time of the conviction."). Therefore, defense counsel's failure to foresee the change in the law regarding the inference of malice charge brought about by Belcher did not constitute ineffective assistance of counsel and would not entitle Parker to any post-conviction relief.

25, 664 S.E.2d 480, 484 (2008); see State v. Hariott, 210 S.C. 290, 298, 42 S.E.2d 285, 288 (1947) ("It is a rule of practically universal application in appellate procedure that an accused cannot avail himself of error as a ground for reversal where the error has not been prejudicial to him."). When a review of the entire record establishes an error is harmless beyond a reasonable doubt, an appellate court should not reverse a conviction. State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003).

In the case at bar, even if the issue had somehow been preserved despite the lack of a timely trial objection, the trial judge's instruction to the jury that it could infer malice from the use of a deadly weapon was entirely harmless and had no impact on the ultimate outcome of Parker's case based on the verdict returned by the jury. Specifically, despite the fact that the jury was instructed it could infer malice from the use of a deadly weapon, its verdict demonstrated that it was not misled to believe it could not find the existence of justification, excuse, or mitigation in a situation where a deadly weapon was used, which was the precise type of jury misunderstanding that this Court's new rule in Belcher sought to avoid. See Belcher, 385 S.C. at 610, 685 S.E.2d at 808-809 ("[I]nferring malice form the use of a deadly weapon is indeed only a 'half-truth.' The absence of justification, excuse or mitigation cannot be inferred from the use of a deadly weapon standing alone. Other facts and evidence (or the absence of other facts and evidence) are required for the fulfillment of these component parts."). Critically, even though the evidence presented showed Isaac's death and A.J.'s injuries resulted from the use of a deadly weapon, the jury demonstrated that it found Parker's co-defendant's actions did not involve malice and were mitigated under the circumstances by convicting Johnson of the lesser-included offenses of voluntary manslaughter and ABHAN. Cf. Nation v. State, 252 Ga. App. 620, 623-624, 556 S.E.2d 196, 200-201 (Ga. Ct. App. 2001) (finding any

error that resulted from the giving of an erroneous jury charge was harmless and did not contribute to the verdict where the jury's verdict demonstrated it was not impacted by the erroneous charge). Thus, the inference of malice jury instruction did not confuse the jury in Parker's case or mislead them to believe the use of a deadly weapon alone mandated a finding of malice. See State v. Chambers, 194 S.C. 197, 203, 9 S.E.2d 549, 552 (1940) (finding any error resulting from the trial judge's jury instructions on malice was harmless where the jury convicted the defendants of lesser-included offenses of the offense of ABWIK and, thus, did not find the defendants acted with malice). As a result, any error that could have resulted from the giving of that instruction was entirely harmless and did not impact the verdict in Parker's case, and the Court of Appeals properly affirmed Parker's convictions. See Fletcher, 379 S.C. at 25, 664 S.E.2d at 484 ("Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained."). Parker's petition for a writ of certiorari should be denied.

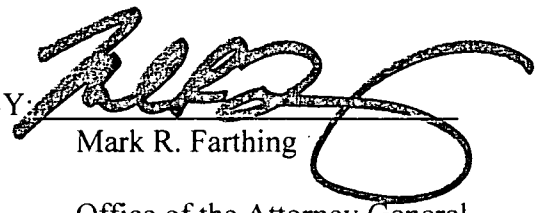
CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

BY: 
Mark R. Farthing

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

January 24, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Lexington County
Honorable Robin B. Stilwell, Circuit Court Judge
Appellate Case No. 2014-000125

THE STATE,

Respondent,

vs.

KERWIN S. PARKER,

Petitioner.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served. This 24th day of January, 2014.

Ellen R. DuBois

ELLEN R. DuBOIS
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

The Supreme Court of South Carolina

The State, Respondent,

v.

Kerwin S. Parker, Petitioner.

Appellate Case No. 2014-000125
Lower Court Case Nos. 2007-GS-32-01540, 2007-GS-32-01541, and 2007-GS-32-01542

ORDER

The petition for a writ of certiorari to review the Court of Appeals' decision in *State v. Parker*, Op. No. 2013-UP-403 (S.C. Ct. App. filed Oct. 30, 2013) is denied.

C.J.
FOR THE COURT

Columbia, South Carolina
July 24, 2014

cc:
The Honorable Jenny Abbott Kitchings
The Honorable Beth Carrigg
Wanda H. Carter, Esquire
Mark Reynolds Farthing, Esquire
Alan McCrory Wilson, Esquire

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

August 02, 2014

The Honorable Beth Carrigg
205 E Main St Ste 146
Lexington SC 29072-3557

REMITTITUR

Re: The State v. Kerwin Parker
Lower Court Case No. 2007GS3201540, 2007GS3201541, 2007GS3201542
Appellate Case No. 2009-147266

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen

DEPUTY CLERK

Enclosure

cc: Wanda H. Carter, Esquire
Mark Reynolds Farthing, Esquire