RECEIVED
Oct 17 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Honorable Robert J. Bonds, Circuit Court Judge

Appellate Case No. 2021-000619

THE STATE, ...RESPONDENT,

v.

JOSEPH DECORIYUS BURTON, ...APPELLANT.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

JULIANNA E. BATTENFIELD
Assistant Attorney General
S.C. Bar No. 103135

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-6305

DUFFIE STONE
Solicitor, Fourteenth Judicial Circuit

P.O. Box 1880
Bluffton, South Carolina 29910
(843) 779-8477

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Code Sections

Other

APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred by instructing the jury that malice may be shown from conduct showing a total disregard for human life because the instruction amounted to a comment on the facts where the state elicited testimony from appellant that his behavior showed total disregard for human life, the state highlighted that testimony during closing, and evidence was presented that appellant acted in defense of others?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

As the legal definition of malice includes "a general malignant recklessness of the lives and safety of others," whether the trial court erred in defining malice for the jury?

STATEMENT OF THE CASE

Appellant was indicted at the January 2019 and February 2019 terms of the grand jury for Beaufort County for possession of a weapon during the commission of a violent crime and murder, respectively. (2019-GS-07-01273; 2019-GS-07-00262). R. 518-519. Appellant proceeded to trial by jury before the Honorable Robert J. Bonds on June 1, 2021 and was found guilty as charged on June 3, 2021. R. 510. The case was prosecuted by Assistant Solicitor Mary Jones, Esq. and Scott Lee, Esq., represented Appellant. R. 1. Judge Bonds sentenced Appellant to forty years' imprisonment for murder and two years concurrent for the weapons charge with credit for time he had already served. R. 518-519. Appellant timely filed a notice of intent to appeal his convictions and sentences and subsequently submitted a brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

Appellant Joseph Burton, wearing a white shirt and black pants, calmly and coolly retrieved his 40-caliber Smith & Wesson from the passenger seat of his car on August 4, 2018, walked over to the victim (Christopher Shaun Fells), and shot him five times. The shooting was captured on multiple surveillance cameras. The Appellant admitted to shooting the victim on the stand. He admitted he was calm when he did it. He also admitted he intentionally went to get his weapon in order to join the fight that was already in progress. R. 101-104, 115, R. 333, R. 357-358, R. 398-415; State's Exhibit 16 (11-minute gas station surveillance video compilation).

Twelve Times

Before the trial, the judge instructed the potential jury panel that the State had the sole burden of presenting evidence that convinced them the defendant committed murder beyond a reasonable doubt. During the trial, the defense opened by telling the jury the State had the burden of proving each element of murder beyond a reasonable doubt. The defense closed by reiterating the same. The State also told the jury twice during its closing that they, the State, had the burden of proving each element beyond a reasonable doubt. The judge then instructed the jury *no less than seven times* that the State had the burden of proving every element of murder during his jury instructions. R. 4, R. 75-76, R. 430, R. 444, R.475, R. 482-485, R. 487-488.

The judge gave the jury the elements of murder during his charge on the law: **"The State must prove beyond a reasonable doubt that the defendant killed another person with malice aforethought."** He then defined malice for the jury, after telling them they must determine criminal intent from the circumstances in the case and telling them they were not to "infer that [he had] an opinion on the facts in this case . . . the law simply does not permit me to have an opinion about the facts. As jurors it is your duty alone to determine the effect, value, and the weight of the evidence presented . . ." R. 477-478, R. 483-485. His malice charge was:

> Malice is hatred, ill will, or hostility toward another person. It is the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury. It is an evil intent. Malice is the wrongful intent to injure another person. It indicates a wicked or depraved spirit intent on doing wrong.
>
> Malice is a legal term implying wickedness and excluding a just cause or excuse. The term malice indicates a formed purpose and design to do a wrongful act under the circumstances that exclude any legal right to do it.
>
> Malice aforethought does not require that malice exists for any particular time before the act is committed, but malice must exist in the mind of the defendant just before and at the time the act is committed. Therefore, there must be a combination of the previous evil intent and the act. Malice aforethought may be expressed or implied.
>
> These terms "express" or "implied" do not mean different kinds of malice, but merely the manner in which the malice may be shown to exist either by direct evidence or by circumstantial evidence from the facts and circumstances which are proved.
>
> Express malice is shown when a person speaks words which express hatred or ill will for another, or when the person prepared beforehand to do the act which was later accomplished. For example, lying in wait for a person, **or any other acts of preparation** going to show that the deed was within the defendant's mind would be express malice. Malice may be shown from conduct showing a total disregard for human life.[1]

R. 488-490 (emphasis added).

Factual Background – The Defendant's Group

We know the who. We know the when and the what. The where: The fancy Kangaroo Gas Station on Hilton Head Island at 6 Palmetto Bay. The why is generally unimportant and largely unknown. Appellant had just won an amateur boxing match, so he and his common-law wife Chrissie Martinez, her sister Crystal Hobbs, Chrissie's sons Abraham and Michael Martinez, and their friend Derrick Frazier went to the upscale Triangle BarMuda to celebrate around 11:30 PM on the night of August 3, 2018. They drove in Appellant and Chrissie's gray

[1] The defense consistently objected to the sentence, "malice may be shown from conduct showing a disregard for human life" throughout and after the trial. R. 364, 369-371, R. 423-425, R. 495, R. 511. The court overruled the objection each time. R. 364-365, R. 373, R. 425, R. 495, R. 511-512.

Nissan Altima. After leaving at close around 2:00 AM, Chrissie told her husband she wanted snacks and needed to use the restroom, so they drove across the street to the Kangaroo Gas Station. Their friends Shaquille Green and Trey joined them a few minutes later and they entered the gas station at 2:06 AM. State's Exhibit 16 (surveillance video); State's Exhibit 62 (Nissan registration DMV record); R. 130-131, R. 165-188, R. 379-382.

They were all captured on camera inside the gas station, first in the upper right-hand corner by the bathroom and beer coolers, browsing in various aisles, then at the cash register. They were not in a hurry to leave. Chrissie wore a red and white checkered shirt, Appellant a white shirt with black pants and white sneakers, and Crystal wore a maroon tank top, jeans, and a ponytail. A big man in a red jersey with the number 30 on it – wearing a tricolored hat – was captured on video standing near them but was not with their group. Derrick Frazier had dreadlocks and wore all white. Abraham, a thin man, was in black pants and a # 21 red jersey, and Michael, also thin, had a purple shirt on. Shaquille had on a red shirt and a mustache and Trey had on khaki pants and a black shirt. State's Exhibit 16 (video); R. 130-134, R. 184-192.

The Victim's Group

The victim, Shaun Fells, entered the gas station ten minutes later at 2:15:20 AM. He wore a grey shirt that was twice rimmed on the sleeves, gray pants, and a black ballcap. He and Appellant initially had a cordial interaction. Austin Radel, wearing a loose red tank top, a grey Mickey Mouse hat skewed off to the side, and slouchy sweatpants, sauntered in at 2:15:40, and he and the victim purposed to acquire beer from the coolers. The third member of the victim's group, Kyle Burden,[2] came in wearing a khaki-colored ballcap, no shirt except for a blue tee around his shoulders, and shorts at 2:16:23. R. 186, R. 264-266; State's Exhibit 16 (video).

[2] The transcript cites both "Burden" and "Burton" as Kyle's last name.

Trouble Brewing?[3]

At 2:16:31, Austin attempted to distract the cashier so the victim could walk out with a case of beer, and in doing so got too close to Chrissie at the register. She turned around and confronted him, so he put his hands up in an apology and backed up. The Appellant, Shaquille, and Abraham were outside at the time hearing Shaquille tell a lively story. Kyle, the only one who knew Appellant from the victim's group, greeted him with a hug. Then Chrissie, unsatisfied, came out at 2:17:09 AM to tell Appellant and the group that Austin was messing with her. The fourth man in the victim's group, Christian Paez, backed his silver SUV up to the pump, turned around, and parked in front of it. Shaquille and Appellant then went back into the gas station.

Austin Radel (in the Mickey Mouse hat) said something to Shaquille, which caused Shaquille and Appellant to approach him aggressively. Shirtless Kyle, who knew both groups, stepped in the middle. At 2:18 AM, the Appellant's group inside the station included Derrick Frazier in all white, Chrissie, Crystal, and Shaquille in a red shirt and a mustache. The victim's group included Austin Radel, Kyle Burden, and Christian Paez, who was 6'5 and 400 to 450 pounds. The victim was not in the gas station at this point. State's Exhibit 16.

The groups talked and moved around each other until Austin shoved Derrick and Shaquille at 2:18:16. Christian Paez, wearing a massively oversized shirt, shoved Shaquille back at 2:18:18. The victim then came back into the gas station to see what his friends had gotten into. Christian Paez turned around and walked to the back of the gas station at 2:18:29 and the Appellant pointed at him and told his group to go outside. The victim walked out with the second case of beer at 2:18:32. Most of the Appellant's group was outside by 2:18:44.

[3] The remainder of the facts are pulled directly from State's Exhibit 16, the 11-minute surveillance video compilation. Respondent moves this Court to watch it.

The Shooting

Austin and Christian Paez remained inside the gas station as things seemingly calmed down. Austin paid for something at the register as Christian talked to him at 2:18:54. Outside, the victim (in all grey) headed for the SUV to put a case of beer through a window. No one else from his group was outside. Appellant calmly walked toward his vehicle in the right upper corner of the screen at 2:18:44 AM, followed by Derrick in all white, Crystal, and the unknown man in the 30 jersey. The victim, standing facing the station with his back to the SUV, said something to Derrick, which made Derrick, Shaquille, and the victim start to fight again in front of the SUV, then around the front of it to where the gas pump was at 2:18:54. The Appellant walked over toward them, having retrieved his handgun from his vehicle, and shot the victim five times at 2:18:58. The flash of the muzzle was captured on camera. No one else had a weapon. He ran back to his car at 2:19:02 along with everyone he drove there with and sped off. The victim died at a hospital in Tallahassee, Florida on January 26, 2019. R. 267, R. 354.

STANDARD OF REVIEW

An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court committed an abuse of discretion. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence." *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008) (quoting *Clark*, 339 S.C. at 389, 529 S.E.2d at 539). An erroneous jury instruction is not grounds for reversal unless the appellant can show prejudice from the erroneous instruction. *Ellison v. Simmons*, 238 S.C. 364, 372, 120 S.E.2d 209, 213 (1961) (citing *Cole*, 378 S.C. at 405, 663 S.E.2d at 33). "When reviewing a trial judge's instructions for error, this court must consider the instructions in their entirety." *State v. Kerr*, 330 S.C. 132, 144, 498 S.E.2d 212, 218 (Ct. App. 1998); *State v. Andrews*, 324 S.C. 516, 479 S.E.2d 808 (Ct. App. 1996).

ARGUMENT

I. Appellant complains that the trial judge defined malice for the jury. This is not error. Appellant admitted to being the shooter, did not claim accident, and there is no evidence of sudden heat of passion. Therefore, he shot either with malice or in self-defense. As there was no evidence of self-defense, the judge properly defined the element of malice for the jury.

Appellant argues the jury instruction "malice may be shown from conduct showing a total disregard for human life" was an improper comment on the facts. Appellant's other contentions regarding the State's comments are not raised as allegations of error, so they are irrelevant as to whether the trial court abused its discretion.[4] Appellant's argument is without merit. There is no error here. Malice is an element of murder, a general intent crime,[5] and the judge merely stated the legal definition of malice to the jury, a portion of which is: "a general malignant recklessness of the lives and safety of others." *State v. Judge*, 208 S.C. 497, 505-506, 38 S.E.2d 715, 719-720 (1946). "Conduct showing a total disregard for human life" is only stating the aforementioned definition in simpler terms.

A. No Abuse of Discretion Occurred. The Judge Declared the Law the Facts Supported.

"Judges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. Art. V, § 21 (1985). "A trial court is required to charge the current and correct law in South Carolina." *State v. Cottrell*, 421 S.C. 622, 643, 809 S.E.2d 423, 435 (2017). Cases will be *reversed* if the court does *not* charge the current and correct law. *See, e.g.*, *Pantovich v. State*, 427 S.C. 555, 832 S.E.2d 596 (2019) (finding the trial court erred by failing to give a character evidence instruction in a murder trial) (emphasis added). "An appellate court will not reverse the

[4] The defense did not contemporaneously object to the solicitor's question or closing argument comment. R. 415-416, R. 472. The defense only brought the State's comments up in reference to the jury instruction. R. 423-424, R. 511-512.

[5] *State v. Foust*, 325 S.C. 12, 15-16, 479 S.E.2d 50, 51-52 (1996); *State v. Mouzon*, 231 S.C. 655, 662, 99 S.E.2d 672, 675-676 (1957).

trial court's decision regarding jury instructions unless the trial court abused its discretion." *State v. Franks*, 376 S.C. 621, 624, 658 S.E.2d 104, 106 (Ct. App. 2008). An abuse of discretion occurs when the trial court's decision is unsupported by the evidence or is controlled by an error of law. *State v. Garris*, 394 S.C. 336, 344, 714 S.E.2d 888, 893 (Ct. App. 2011).

There was no abuse of discretion here. First, the malice charge was supported by the evidence.[6] Not only was the Appellant captured on video shooting the victim, but he admitted to shooting the victim on the stand. No party disputes Appellant was the shooter, and self-defense was not readily apparent.[7] *See* IBOA p. 7. No stand your ground hearing[8] was conducted, and the defense does not challenge the denial of their directed verdict motion. In fact, the trial court did not *even charge the jury on self-defense*, with no defense objection then or now.[9] The objected-to definition, however, "conduct showing a total disregard for human life," *was* supported by the evidence because the video shows Appellant shooting the victim while two of Appellant's friends were directly next to him. State's Exhibit 16 at 2:18:58.

Second, the trial court's decision was not controlled by an error of law. No party moved to charge the jury with lesser-included offenses, likely because there was no evidence supporting

---

[6] "The trial court is required to charge the law as determined from the evidence presented at trial." *State v. Gates,* 269 S.C. 557, 561, 238 S.E.2d 680, 681 (1977). If any evidence supports a charge, it should be given. *State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999).

[7]There is no evidence the victim attacked or even moved toward Appellant, the victim was not armed with a weapon, no verbal threats were exchanged, and there is no evidence in the record Appellant was lawfully acting in defense of others under South Carolina law when he fired. There *is* evidence Appellant voluntarily joined a conflict that was already in progress.

[8] Under the Protection of Persons and Property Act, S.C. Code §§ 16-11-410 to 450; *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011).

[9] It is curious the defense did not formally claim self-defense or accident when admitting to the shooting. Appellant claims he bore no ill-will toward the victim as he did not even know him. IBOA p. 7. Why, then, did he shoot him if it was not accident and it was not self-defense?

voluntary or involuntary manslaughter. Therefore, legally, the jury's only options were: **(1)** find the Appellant not guilty because of informal self-defense; or **(2)** find him guilty of murder. *State v. Milam*, 88 S.C. 127, 70 S.E. 447, 449 (1911) ("In this case there was no evidence which would have warranted a finding that defendant shot in sudden heat and passion upon sufficient legal provocation; **therefore, he shot either with malice or in self-defense**.") Thus, the court was well within its purview to read the legal definition of malice to the jury to help them understand what it meant. "The purpose of a jury instruction is to enlighten the jury and to aid it in arriving at a correct verdict." *State v. Blurton*, 352 S.C. 203, 207-208, 573 S.E.2d 802, 804 (2002).

B. Murder is a General Intent Crime. The State Only Had to Prove A Purpose and an Act.

South Carolina appellate courts have always, especially recently, worked diligently to eliminate confusion in jury instructions. *See, e.g., State v. King*, 422 S.C. 47, 57, 810 S.E.2d 18, 23 (2017); *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575, 582 (2019). This is just. Trial judges must work to only state the law in their charges, taking care to not improperly emphasize a fact in evidence to the unjust gain of one side or the other. *Burdette*, 427 S.C. at 503, 832 S.E.2d at 582. "A trial judge must refrain from any comment which tends to indicate his opinion as to the weight or sufficiency of the evidence, the credibility of witnesses, the guilt of an accused, or any fact in controversy." *Sosobee v. Leeke*, 293 S.C. 531, 535, 362 S.E.2d 22 (1987). "It is always for the jury to determine the facts, and the inferences that are to be drawn from those facts." *State v. Cheeks*, 401 S.C. 322, 328, 737 S.E.2d 480, 484 (2013). Therefore, it was Judge Bonds' job to only state the law that would aid the jury in arriving in a verdict. He did so. He also took care to tell the jury, after defining malice, that they were not to infer anything he said to be a comment on the facts. He started by telling them what the elements of murder were.

"Murder" is the killing of any person with malice aforethought, either express or implied. S.C. Code § 16-3-10 (1962). It is a general intent crime. The Legislature's definition does *not* say "the killing of the *specific person* who died." The State must only prove the person formed the purpose to act, and then in fact acted. *State v. Fennell*, 340 S.C. 266 n.2, 531 S.E.2d 512, 517 n.2 (2000) ("The term malice indicates a formed purpose and design to do a wrongful act . . ."); *State v. Judge*, 208 S.C. 497, 505, 38 S.E.2d 715, 719 (1946) (malice "is a performed purpose to do a wrongful act, without sufficient legal provocation.") The person who acted is accountable for every foreseeable consequence that follows.[10]

The State does not have to prove why the person acted (motive), or even directly prove the person acted with evil intent. *State v. Perry*, 434 S.C. 92, 862 S.E.2d 451 (Ct. App. 2021). The State may, instead, prove implied malice through circumstantial evidence alone. *See, e.g, State v. Thompson*, 76 S.C. 116, 56 S.E. 789 (1907); *Keys v. State*, 104 Nev. 736, 738, 766 P.2d 270, 271 (1988) (holding implied malice does not relate to a deliberate, intentional killing but rather a mens rea inferred in law from the "circumstances of the killing.") It should be noted that implied malice and inferred malice are the same thing. *Amicus Brief of the S.C. Ass'n of Crim. Defense Lawyers in State v. Taylor*, 2022 WL 487257 at 4 n.2 (2022).

C. The Malice Charge was Adequate – It Covered All of the Law Required by the Facts.

"A charge is correct if it adequately explains the law and contains the correct definition when read as a whole." *Perry*, 434 S.C. at 99, 862 S.E.2d at 454; *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011). A charge must adequately *cover* the law. *State v. Johnson*, 315 S.C. 485, 487, 445 S.E.2d 637, 638 n.1 (1994) (emphasis added)."In reviewing jury charges for

[10] *See State v. Slater*, 373 S.C. 66, 71, 644 S.E.2d 50, 53 (2007) (finding Slater's carrying of a cocked weapon, in open view, into an already violent attack in which he had no prior involvement the proximate cause of the homicide.)

error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003). A jury charge that is substantially correct and covers the law does not require reversal. "The Court of Appeals will not find error based upon isolated excerpts which, standing alone, might be misleading." *Adkins*, 353 S.C. at 318, 577 S.E.2d at 464; *Keaton ex rel. Foster v. Greenville Hosp. Sys*., 334 S.C. 488, 514 S.E.2d 570 (1999) (Isolated portions, possibly misleading, do not constitute reversible error). The substance of the law is what must be charged, not any particular verbiage. *State v. Burkart*, 350 S.C. 252, 565 S.E.2d 298 (2002). The judge here had a duty to cover all of the law that related to the facts. Therefore, deleting the objected-to sentence would have been error.

D. A Reasonable Juror Would Not Think The Charge Was Improper. It Was the Legal Definition of Malice from Beginning to End.

The test to "determine the propriety of the trial judge's charge is what a reasonable juror would have understood the charge to mean." *State v. Bell*, 305 S.C. 11, 16, 406 S.E.2d 165, 168 (1991). Here, this Court must decide whether a reasonable juror would view the objected-to sentence as anything more than a guide to help them determine whether the shooting was done with malice or in self-defense. The jury knew they had to determine whether Appellant had malice in his mind when he chose to act. Looking at the jury charge as a whole, a reasonable juror would not think the judge was telling them he thought malice existed (and they should too). Instead, a reasonable juror would think the judge was simply giving them its definition.

The jury charge presented malice in multiple ways in order to increase the jurors' understanding of the word's meaning. The charge (R. 488-490) first addressed what it looked like to form a malicious intent and concluded with how malice could continue to exist through an already-decided-upon act. The second sentence alone, "[malice] is the intentional doing of a

wrongful act," was likely enough for a reasonable juror to conclude the Appellant was guilty of murder. He admitted to intentionally doing the act on the stand. The only question that remained was, therefore, whether the act was wrongful. "[Malice] indicates a formed purpose and design to do a wrongful act" a few sentences later likely served to underscore the Appellant's guilt. "[M]alice must exist in the mind of the defendant just before and at the time the act is committed"[11] was the probable nail in the coffin. Appellant intentionally chose to calmly go and get his weapon, walk over, and fire five rounds into the victim. Malice existed in his mind just before and at the time the act was committed. Five total paragraphs of similar, permitted language did the trick. The jury was convinced by the time the judge got to his last sentence.

To address the last sentence, however: "Malice *may*" is, if anything but words setting up a definition, a constitutionally permitted inference. *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983); *Francis v. Franklin*, 471 U.S. 307, 314, 317 (1985) (holding that only jury charges raising mandatory presumptions constituted reversible error.)[12] "Jury instructions that explain the

---

[11] From *State v. Milam*: "While there may be and probably is some distinction between 'malice' and 'malice aforethought,' the latter conveying more the idea of premeditation and design, and being, therefore, more intense in respect to the wickedness of heart involved than in the word 'malice' alone, still the word 'aforethought' is usually understood to refer to the time when the evil intent is conceived. The authorities agree that it need not exist for any appreciable period of time before the commission of the act, - indeed, it may be conceived at the very moment the fatal blow is given. It is sufficient in law if the combination of the evil intent and act produce the fatal result." *State v. Milam*, 88 S.C. at 127, 70 S.E. at 449.

[12] A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts. A permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion. Mandatory presumptions must be measured against the standards of . . . as elucidated in [*Sandstrom v. Montana*, 442 U.S. 510 (1979)]. Such presumptions violate the Due Process Clause if they relieve the State of the burden of persuasion on an element of an offense. A permissive inference does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proved. Such inferences do not necessarily implicate the concerns of *Sandstrom*.

inevitable process of drawing reasonable inferences from the record evidence are entirely consistent with the constitution and, indeed, are highly effective tools in equipping the jury for carrying out its assigned responsibilities." *Rock v. Zimmerman*, 959 F.2d 1237, 1245 (3rd Cir. 1992) (cleaned up.) This Court should affirm the trial court.

It is hard to see the sentence as a permissive inference, however, because it really just was a continued definition of malice under South Carolina law.

> In its popular sense, the term "malice" conveys the meaning of hatred, ill-will, or hostility toward another. In its legal sense, however, as it is employed in the description of murder, it does not of necessity import ill-will toward the individual injured, but signifies rather a general **malignant recklessness of the lives and safety of others**, or a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief.

State v. Judge, 208 S.C. 497, 505-506, 38 S.E.2d 715, 719-720 (1946).

"Malice does not necessarily mean an actual intent to take human life. It may be inferential or implied, instead of positive, as when an act which imports danger to another is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life." *State v. Mouzon*, 231 S.C. 655, 663, 99 S.E.2d 672, 676 (1957). "Implied malice is when **circumstances demonstrate a 'wanton or reckless disregard for human life'** or 'a reasonably prudent man would have known that according to common experience there was a plain and strong likelihood that death would follow the contemplated act." *State v. Thompson*, 76 S.C. 116, 56 S.E. 789, 791 (1907). A "total disregard for human life" is not a comment on the facts.

E. Examples of Improper Comments on the Facts in South Carolina

What constitutes an improper comment on the facts by a judge, then?

- "She never said he was walking, Mr. Wilson. You're just examining idly now. You're asking her didn't she say so-and-so, and it's exactly what she in fact said. Move along . . . ." "It isn't something she made up between then and now, as you suggested."

Francis, 417 U.S. at 314-315.

Sosobee v. Leeke, 293 S.C. 531, 532-534 (1987) (said by the trial judge to the defense attorney during the direct and cross-examination of the victim.)

> "Some of the testimony has tended to establish the fact that immoral people have been seen in there, that women of the lowest type – I am just giving you this for your information. Some of the testimony in the case has tended to show that women of low character frequent that place, have been seen there . . . . You know what you are indicted for, Mrs. Pruitt, is what is known as maintaining a nuisance . . . the law is that a nuisance is anything that works hurt or inconvenience or annoyance to the public generally.
>
> And some of the testimony in this case has been that that noise goes on there until three or four o'clock in the morning, and that there's cursing going on in there, and drinking, and that it's been a place where immoral people resort for entertainment . . . . one or more of the witnesses have testified they have seen anywhere from two to four couples dancing in there."

State v. Pruitt, 187 S.C. 58, 196 S.E. 371 (1938).

- *State v. Riley*, 98 S.C. 386, 82 S.E. 621 (1914), when the trial court told the judge he thought the testimony "drifted" toward an accidental killing.

- *Thomasson v. Southern Ry*, 72 S.C. 1, 51 S.E. 443 (1905), when the trial court improperly charged the jury that, "there is in the case evidence tending to prove that the defendant was guilty of a willful, intentional, or wanton act."

In all of these examples, it is clear the trial court went too far and emphasized the testimony given by witnesses to the benefit of one side over another. The courts made themselves participants in the determinations of the facts, invading the province of the jury. Their remarks therefore prejudiced the defendants' cases before the jury and amounted to intimations of their opinions on the facts. (*See Pruitt*, 187 S.C. at 372). The same is not true here. This case is more like *State v. Bell*, 305 S.C. 11, 406 S.E.2d 165 (1991) where our Supreme Court found that a reasonable juror would not have intended the trial court's opening remark to the jury that "there *may* be certain conflicting or contradicting testimony in the case" to be anything other than a guide to determine credibility of the witnesses when necessary (rather than a comment on the defendant's failure to testify) (emphasis added).

F. If There was Error, it was Harmless. Appellant Has Not Shown Prejudice.

There is no error here. If this Court finds error, however, it was harmless. The jury was instructed no less than twelve times that it was the State's duty to prove every element of murder beyond a reasonable doubt. Further, the single objected-to sentence addresses facts that only underscore the malice that existed in Appellant's mind when he pulled the trigger. He formed the requisite intent to act while walking to his vehicle to retrieve his weapon. He admitted he intentionally went to get his gun on the stand. R. 408. He went to get it so he could insert himself into a conflict that had already begun. He was irritated and decided he wanted to shoot someone. Therefore, malice existed in his mind before he shot "blindly" into the crowd (shooting blindly being a defense argument). Therefore, even if the sentence "malice may be shown from conduct showing a total disregard for human life" was error, it was harmless because malice already existed as defined under our law. A reasonable jury could and did find so.

"We must review the facts the jury heard and weigh those facts against the erroneous jury charge to determine what effect, if any, it had on the verdict." *State v. Kerr*, 330 S.C. at 145, 498 S.E.2d at 218. Any reversible error, however, comes from whether the Appellant can show prejudice from an erroneous instruction, not whether the charge had the potential to confuse the jury. *Ellison v. Simmons*, 238 S.C. 364, 372, 120 S.E.2d 209, 213 (1961); *Cole v. Raut*, 378 S.C. 398, 405, 663 S.E.2d 30, 33 (2008). The Appellant has not shown how the single objected-to sentence contributed to the verdict. He has not shown how a reasonable juror could view this as the judge commenting on the facts, somehow favoring the State. The trial court did not err in defining malice for the jury and Respondents ask this Court to affirm.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgments, convictions, and sentences of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

JULIANNA E. BATTENFIELD
Assistant Attorney General
S.C. Bar No. 103135

DUFFIE STONE
Solicitor, Fourteenth Judicial Circuit

BY: *s/Julianna E. Battenfield*
Julianna E. Battenfield
S.C. Bar No. 103135

Attorney for Respondent
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-6305

OFFICE OF THE ATTORNEY GENERAL

Columbia, South Carolina
October 17, 2022

RECEIVED
Oct 17 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Honorable Robert J. Bonds, Circuit Court Judge

Appellate Case No. 2021-000619

THE STATE, ...RESPONDENT,

v.

JOSEPH DECORIYUS BURTON, ...APPELLANT.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This17th day of October 2022.

s/Julianna E. Battenfield
JULIANNA E. BATTENFIELD
Assistant Attorney General

Office of Attorney General
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT