STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

NYQUAN TYKIE BROWN,

APPELLANT.

APPELLATE CASE NO. 2019-001548

Appeal from Greenville County

Honorable Edward W. Miller, Circuit Court Judge

Opinion No. 5953

PETITION FOR REHEARING

On November 30, 2022, this Court affirmed Appellant's convictions for murder, armed robbery, and possession of a weapon during the commission of a violent crime. State v. Brown, Op. No. 5953 (S.C. Ct. App. filed Nov. 30, 2022) (Howard Adv. Sh. No. 42 at 16). Pursuant to Rule 221(a), SCACR, Appellant respectfully requests this Court rehear the matter based upon the significant points overlooked and/or misapprehended by this Court in reaching its decision.

On appeal, Appellant argued the trial judge erred by charging the jury that "malice can be inferred if one killed another during the commission of a felony" since this instruction eliminated

the state's burden of proving malice, a critical element of the offense of murder, beyond a reasonable doubt and was an impermissible comment on the facts.

In its published opinion, this Court acknowledged that "a line of cases suggests [the charge] may be improper because it arguably emphasizes a particular fact in evidence—the commission of a felony." However, the Court refused to "reach that question" and instead held that if the charge was error, the error was harmless. The Court determined that the "core dispute in this case was identity." It contended that nobody disputed that the "killing was unprovoked and deliberate," that an armed robbery occurred, or that the decedent's "killing lacked malice." While recognizing the state always bears the burden of proving all elements of a crime beyond a reasonable doubt, the Court stated it was "not persuaded that an instruction about drawing an inference of malice had any bearing on a case where the undisputed evidence is that an unarmed victim was shot multiple times after he expressly disclaimed any intent to defend himself."

Despite acknowledging that the Court "need not go further to resolve this case" given its holding that any error was harmless, the Court proceeded to analyze whether the challenged instruction was an impermissible comment on the facts or burden shifting. The Court concluded the charge was not a comment on the facts because the instruction did "not imply the circuit court believed Brown [Appellant] committed an armed robbery." Additionally, the charge did "not suggest the court was attempting to influence the jury to find malice in this particular way, nor did it encourage the jury to give evidence of the robbery any special weight." In so holding, the Court emphasized that it was unable to "reach a clear conclusion about how felony murder applies in South Carolina and what (if anything) a circuit court should charge with respect to that doctrine."

As to burden shifting, this Court maintained that "inference charges are not burden-shifting if they are permissive and not mandatory." In support of this holding, the Court cited to Lowry v. State, 376 S.C. 499, 657 S.E.2d 760 (2008); State v. Norris, 285 S.C. 86, 328 S.E.2d 339 (1985), *overruled by* State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009); and State v. Wilds, 355 S.C. 269, 584 S.E.2d 138 (Ct. App. 2003), all of which preceded our Supreme Court's decisions in State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019) (holding courts could no longer instruct juries that they may infer malice from the use of a deadly weapon); State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480 (2013) (invalidating the instruction that knowledge of the presence of drugs is strong evidence of intent to control the disposition or use of drugs); State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016) (invalidating the instruction that the accuser's testimony in a criminal sexual conduct case need not be corroborated); State v. Stewart, 433 S.C. 382, 858 S.E.2d 808 (2021) (involving an instruction about knowledge or possession of drugs when drugs are found on property under the defendant's control); and Pantovich v. State, 427 S.C. 555, 832 S.E.2d 596 (2019) (involving an instruction on good character alone).

For the reasons that follow, Appellant respectfully requests this Court grant rehearing, reverse his convictions and sentence, and remand for a new trial. The Fifth, Sixth, and Fourteenth Amendments of the United States Constitution require the state prove each element of a crime beyond a reasonable doubt. See State v. Brown, 360 S.C. 581, 595, 602 S.E.2d 392, 400 (2004) ("[T]he United States Supreme Court recently has re-emphasized the constitutional protections of surpassing importance contained in the Fourteenth Amendment's due process clause and the Sixth Amendment right to a jury trial, which indisputably entitle a defendant to a jury determination that he is guilty of every element of the crime which he is charged, beyond a reasonable doubt." (internal quotation marks omitted)); In re Winship, 397 U.S. 358 (1970)

("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). When a jury charge creates a mandatory presumption and impermissibly shifts the burden of proof to the defendant, the Due Process Clause of the Fourteenth Amendment is violated. Sandstrom v. Montana, 442 U.S. 510, 524 (1979); Mullaney v. Wilbur, 421 U.S. 684, 703-704 (1975).

In 1985, our Supreme Court promulgated a jury charge on implied malice and the felony murder rule. State v. Norris, 285 S.C. 86, 92, 328 S.E.2d 339, 342-343 (1985). The underlying felony in Norris was criminal sexual conduct. Id. at 89, 328 S.E.2d at 341. The trial court in Norris gave the following felony murder charge:

> The law also allows the jury to infer malice if you conclude that the homicide was a proximate, direct result of the commission of a felony. And for that regard, criminal sexual conduct in the first degree would be a felony under our law. You can imply that malice existed if a person is in the commission of a felony at the time of the fatal blow.

Id. at 91, 328 S.E.2d at 342 (emphasis removed).

While the Court found no error in the trial court's instruction, it suggested its own "proper charge on implied malice." Id. at 92, 328 S.E.2d at 343. The instruction stated:

> The law says if one intentionally kills another during the commission of a felony, the implication of malice may arise. If facts are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

Id. (citing State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983) (suggested charge on implied malice from use of a deadly weapon)). The Court's citation to Elmore for its implied malice instruction indicates that it created the charge from the inference of malice from the use of a deadly weapon. Id.

In State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009), having carefully scrutinized the historical antecedents of the charge, our Supreme Court held trial courts could no longer give the inferred malice from the use of a deadly weapon instruction in cases in which evidence was presented that would reduce, mitigate, excuse, or justify a homicide or an assault and battery with intent to kill. The Court recently extended the holding in Belcher in State v. Burdette, 427 S.C. 490, 503, 832 S.E.2d 575, 582 (2019), to prohibit trial courts from ever instructing juries that malice may be inferred from the use of a deadly weapon "regardless of the evidence presented at trial."

Burdette was indicted and tried for murder and possession of a weapon during the commission of a violent crime after he shot and killed Evan Tyner. Id. at 493, 832 S.E.2d at 577. Burdette maintained the shooting was an accident. Id. The trial court ultimately charged the jury on murder, voluntary manslaughter, involuntary manslaughter, and accident. Id. at 493-494, 832 S.E.2d at 577. Citing Belcher, Burdette objected to the court's proposed instruction that inferred malice could arise when a deadly weapon is used arguing the instruction was improper because there was evidence presented that could reduce, excuse, justify, or mitigate the homicide. Id. The jury found Burdette not guilty of murder but guilty of voluntary manslaughter and the weapons offense. Id. at 494, 832 S.E.2d at 578.

Our Supreme Court held the trial court erred in charging the jury that malice could be inferred from the use of a deadly weapon in light of Belcher since there was evidence presented at trial that tended to reduce, mitigate, or justify Burdette's killing of the decedent. Id. at 495, 832 S.E.2d at 578. The Court further held this error was not harmless given the jury instructions as a whole because even though Burdette was acquitted of murder and found guilty of voluntary

manslaughter, the trial court did not specifically inform the jury that malice was not an element of voluntary manslaughter. Id. at 501, 832 S.E.2d at 581.

The Supreme Court emphasized that it had previously "held in other settings that it is improper to give examples of conduct the jury may consider when determining whether the State has proven an element of a crime or when determining whether certain other facts have been proven or disproven." Id. at 502, 832 S.E.2d at 582 (citing State v. Grant, 275 S.C. 404, 407-408, 272 S.E.2d 169, 171 (1980) (holding it was improper for the trial judge to charge the jury that the defendant's flight may be considered as evidence of guilt); State v. Hughey, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000) (holding, in a voluntary manslaughter case, the trial court correctly refused the defendant's request to charge the jury specific examples of conduct that might be considered as evidence of legal provocation, as the giving of such examples would be an impermissible charge on the facts), *overruled on other grounds by* Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009); State v. Cheeks, 401 S.C. 322, 328-329, 737 S.E.2d 480, 484 (2013) (holding, in a drug trafficking case, that the trial court must not charge the jury that actual knowledge of the presence of a drug is strong evidence of a defendant's intent to control its disposition or use)).

The Court asserted, "In Cheeks, we noted, 'Simply because certain facts may be considered by the jury as evidence of guilt in a given case where the circumstances warrant, it does not follow that [the jury] should be charged that these facts are probative of guilt. It is always for the jury to determine the facts, and the inferences that are to be drawn from these facts.'" Id. at 502, 832 S.E.2d at 582 (quoting Cheeks, 401 S.C. at 328, 737 S.E.2d at 484). The Court further explained, "When the trial court tells the jury it may use evidence of the use of a deadly weapon to establish the existence of malice, a critical element of the charge of murder,

the trial court has directly commented upon facts in evidence, elevated those facts, and emphasized them to the jury. . . . A jury instruction that malice may be inferred from the use of a deadly weapon is an improper court-sponsored emphasis of a fact in evidence—that the deed was done with a deadly weapon—and it should no longer be permitted." Id. at 502-503, 832 S.E.2d at 582.

Despite holding the trial court should never instruct the jury that it may infer malice when the deed was done with a deadly weapon, the Court made clear that the state and the defendant are free to argue the existence or nonexistence of malice based on the evidence in the record, including evidence that the act was done with a deadly weapon and "any other facts that would naturally and logically allow a jury to conclude the defendant acted with malice aforethought." Id. at 503, 832 S.E.2d at 582.

Subsequently, in State v. Smith, 430 S.C. 226, 845 S.E.2d 495 (2020), our Supreme Court held the trial court erred by instructing the jury on implied malice. Smith shot a young woman in Five Points in downtown Columbia. It was undisputed that Smith did not intend to harm her. Id. at 228, 845 S.E.2d at 496. Rather, Smith maintained he was acting in self-defense by shooting at a group of men who had threatened him. Id. Smith missed his intended target and hit the young woman by accident. Id. Smith was charged with the attempted murder of the young woman and a host of other gun related charges, including possession of a firearm by a person convicted of a felony. Id. At trial, Smith conceded guilt to the felon in possession offense, but denied the attempted murder charge arguing he acted in self-defense. Id. at 229, 845 S.E.2d at 496. In so doing, Smith implicitly acknowledged he had an express intent to kill the men at whom he was shooting, but asserted his actions were justified. Id.

Despite conceding Smith presented evidence that he acted in self-defense, the state requested the trial court charge the jury on implied malice. Id. Pursuant to Belcher, the law at the time of trial precluded an implied malice charge (based on the use of a deadly weapon) when a viable self-defense claim existed. Id. "Perhaps recognizing this, the State sought to create a new category of implied malice for 'felony attempted murder,' with the predicate felony being the felon in possession charge." Id. Our Supreme Court held, in requesting this charge, the state essentially circumvented then existing law expressly precluding an implied malice charge. Id. The trial court ultimately charged the jury:

> "Now, the law also allows you to infer malice if you conclude that the attempted murder was a proximate direct result of the commission of a felony. And for that regard, two of the gun charges, possession of a firearm by a person convicted of a crime of violence and possession of a weapon by a person convicted of a violent felony, would be felonies under our law. You can imply that malice existed if a person in the commission of a felony at the time of the attempted fatal blow - - if one attempts to kill another during the commission of a felony, the inference of malice may arise.

Id. at 232, 845 S.E.2d at 498.

The Supreme Court concluded the trial court erred by instructing the jury on implied malice given the holding in Belcher and the fact that felony attempted murder is not a recognized crime. Id. at 232-233, 845 S.E.2d at 498. Further, the Court held the error could not be harmless because the implied malice instruction "essentially eliminated [the state's] burden to prove all of the elements of attempted murder beyond a reasonable doubt, specifically that Smith acted with malice aforethought." Id. at 233, 845 S.E.2d at 498.

Moreover, the Court held trial courts may no longer give an implied malice charge when there has been evidence presented that the defendant acted in self-defense. Id. at 234, 845 S.E.2d at 499. The Court noted that this holding is slightly different than the holding in Burdette where

the Court found an implied malice charge based on the use of a deadly weapon could never be given. Id. at 230 n.3, 845 S.E.2d at 496 n.3.

In this case, the trial judge violated Appellant's right to due process of law pursuant to the Fifth, Sixth, and Fourteenth Amendments, by shifting the burden of proof to Appellant and eliminating the state's burden to prove each element of the crime beyond a reasonable doubt. The implied malice instruction given in this case, like the instructions in Burdette and Smith, alleviated the state from having to prove malice. Instead, all the state was required to prove was that Anderson, the decedent, was killed during the commission of a felony. See Smith, 430 S.C. at 233, 845 S.E.2d at 498 (holding the error in charging implied malice could not be harmless because the implied malice instruction "essentially eliminated [the state's] burden to prove all of the elements of attempted murder beyond a reasonable doubt, specifically that Smith acted with malice aforethought."). Id. at 233, 845 S.E.2d at 498.

Moreover, by instructing the jury that it could use evidence of the commission of a felony to establish the existence of malice, the judge directly commented upon facts in evidence, elevated those facts, and emphasized them to the jury. A jury instruction that malice may be inferred if one kills another during the commission of a felony is an improper emphasis of a fact in evidence—that the act was done during the commission of a felony—and it should no longer be permitted. See Burdette, 427 S.C. at 502-503, 832 S.E.2d at 582.

Our Supreme Court's holding in Burdette demonstrates a preference for removing any charges dealing with facts and inferred malice and leaving it to the state and the defendant in closing argument to draw these inferences for jurors. See Burdette, 427 S.C. at 503, 832 S.E.2d at 582. The state, during its closing argument in this case, did just that. See R. 316, l. 21 – 317, l. 14.

Additionally, unlike this Court held, the error in charging the jury on implied malice could not be harmless. "An erroneous instruction alone is insufficient to warrant this Court's reversal." Burdette, 427 S.C. at 496, 832 S.E.2d at 578. "Errors, including erroneous jury instructions, are subject to harmless error analysis." Id. (quoting Belcher, 385 S.C. at 611, 685 S.E.2d at 809) (internal quotation marks omitted). "When considering whether an error with respect to a jury instruction was harmless, [this Court] must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict." Id. (quoting State v. Middleton, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014)); See State v. Kerr, 330 S.C. 132, 144-45, 498 S.E.2d 212, 218 (Ct. App. 1998). "In making a harmless error analysis, [the] inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered." Id. (quoting Middleton, 407 S.C. at 317, 755 S.E.2d at 435).

The assistant solicitor's argument in closing is sufficient evidence that the erroneous charge on implied malice contributed to verdict. After defining murder, the assistant solicitor argued there was no "question that Fred Anderson was murdered" because the element of malice was presumed given that the killing happened during the commission of a felony. R. 316, l. 21 – 317, l. 6. He asserted, "In other words, ***if you kill somebody while committing the type of felony where death is a possible or foreseeable outcome, it's . . . a murder.*** **We have all of that here.** Fred was robbed of money, he was robbed of a little marijuana, probably his phone . . . **He was robbed and then he was shot.**" R. 317, ll. 7-14 (emphasis added). Given the solicitor's argument, there is a reasonable probability the jury understood the instruction to mean that the element of malice was met simply because the killing occurred during the commission of an armed robbery, a felony.

Moreover, while the evidence suggested that the armed robbery was planned, there was no evidence that the killing was likewise planned. Despite what this Court concluded, there was evidence that the decedent and one of the perpetrators were engaged in a struggle when the shots were fired and that the shooter's hands were shaking immediately before the shooting took place, suggesting the shooter was nervous and only fired because he did not know what else to do, not because he was acting with malice. See R. 75, ll. 8-15; R. 76, ll. 9-11.

Respectfully, given the erroneous jury instruction, which was an impermissible comment on the facts and eliminated the state's burden of proving every element of the offense of murder beyond a reasonable doubt, this Court should reverse Appellant's convictions and sentence and remand for a new trial.

Based on the foregoing, Appellant respectfully requests this Court rehear his case pursuant to Rule 221(a), SCACR, due to the significant legal and factual points overlooked and/or misapprehended by this Court in affirming Appellant's convictions for murder, armed robbery, and possession of a weapon during the commission of a violent crime.

Respectfully Submitted,

s/ Lara M. Caudy
LARA M. CAUDY
Appellate Defender

This 15th day of December, 2022.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

NYQUAN TYKIE BROWN,

APPELLANT.

APPELLATE CASE NO. 2019-001548

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above referenced case has been served upon Julianna E. Battenfield, Esquire, at the primary email address listed in the Attorney Information System (AIS); and Nyquan Tykie Brown, #381299, at Evans Correctional Institution, 610 Highway 9 West, Bennettsville, SC 29512, this 15th day of December, 2022.

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

From: Leverett, Scott
To: Julianna Battenfield
Cc: SC - RANKIN BRANDY; Caudy, Lara
Subject: Nyquan Tykie Brown - Petition for Rehearing - Appellate Case No. 2019-001548
Date: Thursday, December 15, 2022 3:56:00 PM
Attachments: Nyquan Tykie Brown - Petition for Rehearing - Appellate Case No. 2019-001548.pdf

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Dear Ms. Battenfield,

Attached please find a copy of the petition for rehearing that is being filed today, December 15, 2022, with the Court of Appeals.

-Scott Leverett
Admin. Asst. for Lara Caudy
Appellate Defense