STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

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

THE STATE,

RESPONDENT,

V.

WILLIAM C. (BILLY) SELLERS,

PETITIONER.

APPELLATE CASE NO. 2021-000910

APPENDIX

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INDEX

INDEX i

COURT OF APPEALS OPINION NO. 2021-UP-254,
AFFIRMING CONVICTION (FILED JULY 7, 2021) 1

PETITION FOR REHEARING (FILED JULY 22, 2021) 5

ORDER DENYING PETITION FOR REHEARING (FILED JULY 26, 2021) 12

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

William C. (Billy) Sellers, Appellant.

Appellate Case No. 2018-001667

Appeal From Edgefield County
Eugene C. Griffith, Jr., Circuit Court Judge

Unpublished Opinion No. 2021-UP-254
Heard April 15, 2021 – Filed July 7, 2021

AFFIRMED

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, and Assistant Attorney General Caroline M. Scrantom, all of Columbia, for Respondent.

PER CURIAM: A jury convicted William C. Sellers of murder. He now appeals, arguing the trial court erred in (1) instructing the jury that malice "is the intentional

doing of a wrongful act without just cause or excuse" because it unconstitutionally shifted the State's burden of proof to him to show his acts were justified or excusable; (2) instructing the jury on accomplice liability because the evidence did not support this instruction; and (3) admitting witness Phillip Griffin's sentencing sheets into evidence because they were not probative of whether Griffin received consideration from the State for his testimony. We affirm.

1. As to whether the trial court abused its discretion in charging the jury that malice is "is the intentional doing of a wrongful act without just cause or excuse," we are constrained to hold this charge remains good law that circuit judges may include as part of a malice instruction. *See State v. Franks*, 376 S.C. 621, 624, 658 S.E.2d 104, 106 (Ct. App. 2008) ("An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." (quoting *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000))); *State v. Cottrell*, 421 S.C. 622, 643, 809 S.E.2d 423, 435 (2017) ("A trial court is required to charge the current and correct law in South Carolina."); *State v. Wilds*, 355 S.C. 269, 276, 584 S.E.2d 138, 141–42 (Ct. App. 2003) ("Malice is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong. It is the doing of a wrongful act intentionally and without just cause or excuse." (citations omitted)). Our supreme court has held this instruction is not an unconstitutional burden shifting charge. *State v. Bell*, 305 S.C. 11, 19, 406 S.E.2d 165, 170 (1991) ("Appellant complains the trial judge improperly defined malice as 'the doing of a wrongful act intentionally and without just cause or excuse.' He claims the instruction created an unconstitutional burden-shifting presumption. We disagree. The trial judge's definition of malice is correct, *State v. Judge*, 208 S.C. 497, 38 S.E.2d 715 (1946), and the charge given is devoid of any presumption."). The trial court's malice instruction stated in part:

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

(Emphasis added). We understand Sellers' argument that a reasonable jury could apply the phrase equating malice with "intentional doing of a wrongful act without just cause or excuse" in problematic ways. We are not sure what the challenged phrase adds to a malice charge and can see the wisdom in not charging it. We are

also not sure how a wrongful act can be said to be done with malice if all that is proven is that the act was done with intent (all crimes require some level of intent except strict liability ones, *see, e.g.*, *State v. Ferguson*, 302 S.C. 269, 271–72, 395 S.E.2d 182, 183 (1990)). Nor are we sure how an intentional act that is justified or excusable by law could be a crime. But even amidst the trend by our supreme court (aptly noted by Sellers) to revisit dubious and outworn jury instructions, *see Pantovich v. State*, 427 S.C. 555, 832 S.E.2d 596 (2019), we are quite sure we must comply with the precedent of *Bell*.

2. The trial court did not abuse its discretion in instructing the jury on accomplice liability. *See Franks*, 376 S.C. at 624, 658 S.E.2d at 106 ("An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." (quoting *Clark*, 339 S.C. at 389, 529 S.E.2d at 539)). There was evidence Sellers worked with an unidentified coconspirator named Gee or another unknown person to rob and murder the victim by beating him to death. This evidence included testimony from three of Sellers' fellow inmates that Sellers said (1) he and Gee went to rob the victim for pills and money, and they pistol-whipped the victim until he told them where his pills were; (2) he and his friends tied the victim up, beat him, and stole a slot machine, some pills, and some money; and (3) "they" beat an old white man with a .38 and stole some pills. Thus, the evidence was equivocal as to whether Sellers or one of his unknown coconspirators dealt the fatal blow that resulted in the victim's death. *See State v. Washington*, 431 S.C. 394, 407, 848 S.E.2d 779, 786 (2020) ("For an accomplice liability instruction to be warranted, the evidence must be 'equivocal on some integral fact and the jury [must have] been presented with evidence upon which it could rely to find the existence or nonexistence of that fact.'" (alterations in original) (quoting *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011))). Accordingly, we find the trial court properly instructed the jury on accomplice liability, and we affirm as to this issue.

3. The State called Griffin, one of Sellers' fellow inmates, to testify against him. During cross-examination, Sellers questioned Griffin extensively about the potential sentence he faced for the charges he had pending when he was in jail with Sellers, his plea, and the sentence he ultimately received. Sellers' cross-examination raised the issue of Griffin's motive to testify and whether he was testifying against Sellers in exchange for leniency by the State. On redirect, the State introduced Griffin's sentencing sheets, which indicated he pled straight up, without any sentencing negotiations or recommendation from the State. The trial court admitted the sheets over Sellers' relevance objection. Sellers claims this was error. We disagree. We hold the State was entitled to introduce evidence of Griffin's plea negotiations. *See State v. Shuler*, 344 S.C. 604, 629, 545 S.E.2d 805, 817 (2001) ("Most courts

generally recognize the prosecution can introduce evidence of a plea agreement during direct examination of a State witness."). Griffin's sentencing sheets were probative of Griffin's alleged motive in testifying for the State. *State v. McEachern*, 399 S.C. 125, 137, 731 S.E.2d 604, 610 (Ct. App. 2012) ("When a party introduces evidence about a particular matter, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even if the latter evidence would have been incompetent or irrelevant had it been offered initially."); Rule 608(c), SCRE (providing evidence showing "Bias, prejudice or any motive to misrepresent may be shown to impeach the witness . . . ."). The trial court did not err in admitting the sentencing sheets where the only objection was on relevance grounds.

AFFIRMED.

WILLIAMS, THOMAS, and HILL, JJ., concur.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

WILLIAM C. (BILLY) SELLERS,

APPELLANT

APPELLATE CASE NO. 2018-001667

Appeal from Edgefield County

Honorable Eugene C. Griffith, Circuit Court Judge

Opinion No. 2021-UP-254

PETITION FOR REHEARING

Appellant seeks rehearing pursuant to Rule 221 (a), SCACR because this Court may have overlooked the fact that given the thirty year passage of time since State v. Bell, 305 S.C. 11, 406 S.E.2d 165 (1991) and material changes in the law that it should not be "[c]onstrained to hold this [malice instruction] remains good law that circuit judges may include as part of a malice instruction." State v. William C. (Billy) Sellers, 2021-UP-254 (filed July 7, 2021). This Court noted that the jury instruction that malice "[i]s the intentional doing of a wrongful act without just cause or excuse . . ." had been held by the Supreme Court to not be an unconstitutional burden shifting instruction in State v. Bell, 305 S.C. 11, 19, 406 S.E.2d 165, 170 (1991).

However, Bell is an outdated thirty-year-old death penalty opinion, decided long before, as this Court correctly determined, the "[t]rend by our Supreme Court (aptly noted by Sellers) to revisit dubious and outworn jury instructions, see Pantovich v. State, 427 S.C. 555, 832 S.E.2d 596 (2019) . . ." State v. William C. (Billy) Sellers, 2021-UP-254 (filed July 7, 2021).

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

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

If this Court is unwilling to so hold after granting rehearing, this jury instruction was also extremely confusing, and, consequently, very prejudicial. It is reversible error to give jury instructions which are calculated to confuse or mislead the jury. This is so because the purpose of jury instructions is to enlighten the jury as to what the law is, in order that the jury may arrive

at a just, fair, and proper verdict. See State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987); State v. Hewitt, 205 S.C. 207, 31 S.E.2d 257, 259 (1944).

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

2. **Accomplice liability instruction**

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

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

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

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

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

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

3. **A sentencing sheet is not probative of whether a promise was made to a snitch**

Finally, this Court should also grant rehearing because the state introducing inmate Griffin's form sentencing sheet to allegedly prove he "pled straight up, *without any sentencing negotiations or recommendation from the State*" was misleading on its face to the lay people on the jury. See State v. William C. (Billy) Sellers, 2021-UP-254 (filed July 7, 2021) (emphasis added). It is common knowledge among judges and criminal defense attorneys on both sides that inmates -- jailhouse snitches -- have great incentive to mislead by claiming the defendant on trial implicated himself or herself in the crime to obtain sentencing consideration or other favors for themselves.

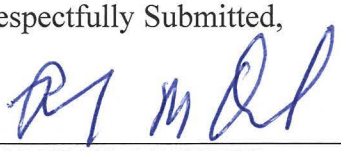
State v. McEachern, 399 S.C. 125, 137, 731 S.E.2d 604, 610 (Ct. App. 2012), does hold that "[w]hen a party introduces evidence about a particular matter, the other party is entitled to introduce evidence *in explanation or rebuttal thereof*, even if the latter evidence would have been incompetent or irrelevant had it been offered initially." A sentencing sheet, as here, simply does not rebut or explain evidence that the snitch got a lesser sentence or some other consideration. This consideration can range from a lesser sentence to movement to another facility to having dental work done to canteen privileges. See State v. Quattlebaum, 338 S.C. 441, 451, 527 S.E.2d 105, 110 (2000); State v. Jones, 343 S.C. 562, 570-71, 541 S.E.2d 813, 816-18 (2001).

Additionally, the sentencing sheet was *not relevant* to rebut the claim or evidence that Griffin was receiving consideration for his "cooperation" because such deals are often made off the record and behind the scenes. The sentencing sheet therefore was simply not *relevant* in rebuttal or explanation. This Court insinuated that it might have held otherwise if a Rule 403,

SCRE objection had been interposed – but relevance was a proper objection as explained above.

Rehearing therefore should be granted on this issue as well.

Respectfully Submitted,



ROBERT M. DUDEK
Chief Appellate Defender

This 22nd day of July, 2021.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Edgefield County

Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

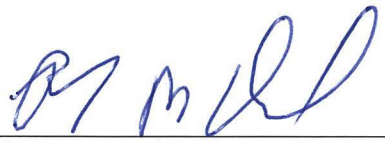
WILLIAM C. (BILLY) SELLERS,

APPELLANT

APPELLATE CASE NO. 2018-001667

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon Caroline Scrantom, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 22nd day of July, 2021.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

The South Carolina Court of Appeals

The State, Respondent,

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Appellate Case No. 2018-001667

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.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

cc:
Robert Michael Dudek, Esquire
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Caroline M. Scrantom, Esquire
Donald J. Zelenka, Esquire
The Honorable Eugene C. Griffith, Jr.

FILED
Jul 26 2021