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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Edward W. Miller, Circuit Court Judge

THE STATE,

RECEIVED
Dec 16 2020
SC Court of Appeals

RESPONDENT,

V.

NYQUAN TYKIE BROWN,

APPELLANT.

APPELLATE CASE NO. 2019-001548

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err by charging the jury that "malice can be inferred if one kills another during the commission of a felony" since this instruction eliminated the state's burden to prove malice, a crucial element of the offense of murder, beyond a reasonable doubt, and was an impermissible comment on the facts?

STATEMENT OF THE CASE

A Greenville County Grand Jury indicted Appellant on October 31, 2017 for murder, armed robbery, and possession of a weapon during the commission of a violent crime. R. 358. His case was called to trial on September 3, 2019 before the Honorable Edward W. Miller, and a jury. R. 1. Assistant Solicitor Mark Moyer represented the state, and Thomas Quinn represented Appellant. R. 1.

On September 5, 2019, the jury found Appellant guilty as indicted. R. 353, ll. 3-17. He was sentenced to forty-five years for murder, thirty years for armed robbery, and five years for the weapons offense. The judge ordered all sentenced be served concurrently. R. 357, ll. 12-17.

This appeal follows.

STATEMENT OF FACTS

In December 2016, Karla Coleman and Whitney Parham, who were sisters, lived together in Apartment 31-B in Shemwood Crossing in Greenville. Coleman's two year old daughter and Parham's two young sons also lived in the apartment. R. 64, l. 13 – 65, l. 13; R. 82, ll. 11-23. Fred Anderson, a family friend, frequently slept on the couch in the living room downstairs. R. 65, ll. 14-20; R. 82, l. 24 – 83, l. 16. Anderson was known to sell marijuana. R. 72, ll. 9-14; R. 83, ll. 17-22.

Shortly after ten o'clock on the night of December 8, 2016, two masked men entered Coleman and Parham's apartment through the unlocked front door. R. 67, l. 20 – 68, l. 12. Anderson and Parham were sitting on a chair together with Coleman's daughter watching a movie. R. 66, ll. 2-14. Coleman and her boyfriend were upstairs along with Parham's sons. R. 66, ll. 15-21; R. 84, l. 16 – 85, l. 1. The masked men began demanding "weed and money" and ordered Anderson and Parham to get up. R. 71, ll. 3-25. The shorter of the two was armed with a pistol. R. 70, ll. 24-25. The men "went for the chair." Anderson stored his marijuana in a mason jar under a cushion in the chair. R. 72, ll. 1-19. Anderson ultimately gave the men the mason jar and thirty dollars in cash from his pocket. R. 73, ll. 5-16; R. 88, ll. 1-8.

Coleman's daughter was screaming. The men allowed Parham to bring the child upstairs. R. 73, l. 23 – 74, l. 6. After Parham gave the child to her mother and hid her sons in a closet, she went back downstairs so the masked men would not come looking for her. R. 74, ll. 7-19. Parham stood at the bottom of the stairs. R. 74, ll. 20-22. While she could see the front door, her view of the living room was blocked. R. 74, ll. 23-25. The man with the gun was standing at the bottom of the stairs in front of Parham. R. 75, ll. 16-20. "He just stood there watching with the gun pointed" toward Anderson. R. 76, ll. 2-8. She heard the other man repeatedly ask,

"Where's the wallet?" R. 75, ll. 1-5. Anderson said he did not carry a wallet. R. 75, ll. 6-8. Parham heard "commotion" and then "tussling." R. 75, ll. 8-15. Anderson exclaimed, "I'm not going to fight you because your homeboy is going to shoot me." R. 86, ll. 3-5. The armed man's "hands started to shake." R. 76, ll. 9-11. Parham started backing up because she "knew something bad was about to happen." R. 76, ll. 12-17. As she was backing up, she heard multiple gunshots. R. 76, l. 21 – 77, l. 7. She ran upstairs and hid in the closet with her children. R. 77, ll. 8-14. She never looked back to see what happened. R. 77, ll. 12-14.

After the masked men fled, Coleman called 911. R. 77, ll. 15-20. Parham went back downstairs. She found Anderson laying at the bottom of the stairs near the front door. He was unresponsive. R. 78, l. 16 – 79, l. 7; R. 30, l. 11 – 31, l. 5. Anderson suffered three gunshot wounds, two to the chest and one to the left upper arm. R. 96, l. 23 – 97, l. 3. He succumbed to his injuries before EMS arrived and was pronounced dead at the scene. R. 61, l. 23 – 62, l. 14.

Shortly after the robbery, law enforcement viewed the surveillance footage from the apartment complex. It showed the two masked men flee the scene on foot. As they were running, the suspects were flagged down by an individual from Apartment 329-C. R. 140, ll. 5-20; R. 32, ll. 2-12. The suspects entered this apartment and remained inside for nearly two minutes before leaving again on foot. R. 140, ll. 20-25. Given this evidence, officers conducted a "knock and talk" at Apartment 329-C. R. 32, ll. 8-17; R. 141, ll. 7-14; R. 208, ll. 1-15.

When officers knocked on the door, they could see individuals running toward the back of the apartment. R. 38, ll. 2-14. Two women eventually answered the door. R. 32, l. 18 – 33, l. 5; R. 38, ll. 15-17. They admitted there were two men inside. After the officers called to the men, they ultimately came out as well. R. 33, ll. 1-6; R. 38, ll. 18-21. The men were identified as Jonathan Suber-Perry and Jovante Dodd, who were brothers. R. 209, ll. 13-16.

Both Suber-Purry and Dodd, who were placed in investigative detention, denied that any individuals entered their apartment prior to the officers knocking on the door. R. 210, l. 25 – 211, l. 9. Dodd's girlfriend, the lessee, consented to a search of the apartment. However, law enforcement found nothing of evidentiary value inside. R. 209, ll. 5-23.

Two or three days later, an investigator was watching the surveillance footage from the apartment complex around the timeframe of the shooting. R. 215, ll. 8-17. About thirty minutes before the shooting, he observed a car park in front of Building 329. The passenger from this car met with a man, later identified as Suber-Purry, standing at the open door of Apartment 329-C. The two entered the apartment. R. 215, ll. 22. A couple of minutes later, the two left the apartment and walked down the street "just a little bit." Suber-Purry then pointed toward Coleman's apartment where Anderson was staying. R. 215, l. 22 – 216, l. 9. The passenger then returned to the car, which drove off, and Suber-Purry went back into Apartment 329-C. R. 216, ll. 10-13.

Suber-Purry was arrested on December 13, 2016. He gave multiple inconsistent statements to the police. However, he ultimately identified Appellant as the individual to whom he met with before the shooting. R. 221, l. 9 – 222, l. 18; R. 229, l. 2 – 231, l. 7.

Suber-Purry, who was eighteen in December 2016, was charged with murder, armed robbery, and obstruction of justice related to this case. The day before Appellant's trial, he pled guilty to obstruction of justice. However, his sentencing was deferred until after he testified against Appellant. R. 158, l. 3 – 159, l. 5. Suber-Purry admitted he hoped his pending murder and armed robbery charges would be dismissed as a result of his cooperation. R. 177, ll. 8-10. In addition to his charges related to this case, Suber-Purry also had two pending burglary charges for which he was out on bond for when this incident occurred. R. 158, ll. 16-21; R. 175, ll. 3-6.

Suber-Purry's brother, Jovante Dodd, lived in Apartment 329-C in Shemwood Crossing. R. 159, ll. 6-18. On December 8, 2016, Suber-Purry was at the apartment with his brother, his brother's girlfriend, Natalie Norris, and another woman. R. 159, l. 17 – 160, l. 8. Suber-Purry knew Fred Anderson. Anderson was his cousin. He knew Anderson stayed at Apartment 31-B and he knew he sold marijuana. Suber-Purry also knew Coleman. He had gone to high school with her. R. 161, l. 15 -162, l. 9.

Suber-Purry testified that his brother had an "altercation" with Anderson. They had argued "about something." R. 164, ll. 5-9. Suber-Purry later clarified that the disagreement concerned Anderson "selling a little weed and getting a little money." R. 165, ll. 2-5. Dodd "wanted to knock Fred [Anderson] off his high horse." Suber-Purry claimed Appellant "was the person" who was "sent up there to rob Fred [Anderson]." R. 164, ll. 5-12. About thirty minutes before the shooting, Suber-Purry admitted he pointed out Coleman's apartment, where Anderson was staying, to Appellant. R. 162, l. 16 – 163, l. 5; R. 165, l. 17-19.

After the shooting, Suber-Purry and Dodd were waiting at the back door of their apartment, 329-C. They saw Appellant and the other masked man running. Suber-Purry stopped them. All four men entered the apartment. Dodd asked them what happened. Before they could respond, Suber-Purry claimed he went upstairs. R. 167, ll. 9-25. When he came back downstairs, he saw Appellant and the other man leaving. R. 170, ll. 4-9. Suber-Purry claimed he never saw a gun, either before or after the shooting. R. 170, ll. 1-25.

The state argued Appellant was the shooter based on his height. Parham identified the shooter as the shorter of the two men. She claimed the shooter was shorter than her. She was five feet and five inches tall. R. 68, l. 11 – 71, l. 2. Appellant was approximately. The other suspect was never identified.

STANDARD OF REVIEW

"Jury instructions should be designed to enlighten the jury and aid it in arriving at a correct verdict." State v. Stukes, 416 S.C. 493, 498, 787 S.E.2d 480, 482 (2016) (citing State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987)). "Regardless of whether the charge is a correct statement of the law, instructions which confuse or mislead the jury are erroneous." Id. (citing Leonard, 292 S.C. at 137, 355 S.E.2d at 273). "When reviewing a jury charge for error, an appellate court considers the charge as a whole; the charge must be prejudicial to the appellant to warrant a new trial." Id. (citing State v. Curry, 406 S.C. 364, 373, 752 S.E.2d 263, 267 (2013)).

ARGUMENT

The trial judge erred by charging the jury that "malice can be inferred if one kills another during the commission of a felony" since this instruction eliminated the state's burden to prove malice, a crucial element of the offense of murder, beyond a reasonable doubt, and was an impermissible comment on the facts.

How the Issue was Presented Below

The state requested the trial judge charge the jury that "malice can be inferred if one kills another during the commission of a felony." R. 290, ll. 6-7. Defense counsel objected to the proposed instruction arguing the charge reduced the state's burden of proof. He contended the instruction relieved the state from having to prove malice, an element of murder, beyond a reasonable doubt because the jury could merely infer malice if the killing occurred during the commission of a felony. R. 290, ll. 8-20. Defense counsel also argued the instruction was an impermissible comment on the facts. R. 290, ll. 21-22. He asserted the proposed instruction informed the jury that the offense before them is a felony and improperly suggested that a felony had been committed. R. 290, l. 23 – 291, l. 2. In so arguing, defense counsel emphasized that our Supreme Court "is starting to make clear [its] difficulty with inferences" such as the one proposed. R. 290, ll. 12-13.

Referencing the felony murder rule, the assistant solicitor argued "the law is pretty well settled that if a homicide happens during the course of a . . . felony, then it is murder. Your Honor is going to instruct the jury that armed robbery and murder are violent crimes." R. 291, ll. 13-19.

The judge acknowledged that defense counsel "could be correct with respect to the direction in which the Supreme Court's headed" but maintained the Court had not "gotten there

yet" and this case could give it the "opportunity to get there." R. 291, ll. 22-24. He ultimately overruled Appellant's objection to the state's proposed charge finding 'it's the current state of the law." R. 291, l. 25 – 292, l. 2.

State's Closing Argument

During his closing argument to the jury, the assistant solicitor argued:

> Now, what is murder? Murder is the killing of a person [with] malice aforethought, either expressed or implied. Armed robbery is taking goods or property from the person of another through force or violence while armed with either a real gun or a fake gun. I would spend some time going over that. I don't see the need to in this case because **I don't think there's any question that Fred Anderson was murdered. And it happened during an armed robbery.** ***That means the element of malice has already been subsumed [sic] due to the fact that it [the killing] happened during a felony.***
>
> In other words, ***if you kill somebody while committing the type of felony where death is a possible or foreseeable outcome, it's homicide. 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. His phone was gone, that was probably gone as well. **He was robbed and then he was shot.**

R. 316, l. 21 – 317, l. 14 (emphasis added).

Jury Charge

When instructing the jury on murder, the trial judge explained the state must prove malice. R. 347, ll. 22-25. The judge defined malice as "hatred, ill will, or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under circumstances that the law will infer an evil intent." R. 347, l. 25 – 348, l. 5. He further instructed the jury that:

> [M]alice aforethought may be expressed or inferred. These terms expressed and inferred do not mean different kinds of malice but merely the manner in which malice may be shown to exist. That is either by direct evidence or by inference from the facts and circumstances which are proved. Expressed 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. Malice may also be inferred from conduct showing a total

> disregard for human life. **Malice can be inferred if one killed another during the commission of a felony.** Now, [if] the 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 considered by you, along with all the other evidence in the case. And you give it the weight that you decide it should receive.

R. 348, l. 12 – 349, l. 5 (emphasis added).

Discussion

The trial judge erred by charging the jury that "malice can be inferred if one kills 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. See S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact but shall declare the law."); State v. Stukes, 416 S.C. 493, 499, 787 S.E.2d 480, 483 (2016).

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."); Jackson v. Virginia, 443 U.S. 307, 314 (1979) ("A meaningful opportunity to defend, if not the right to trial itself, presumes as well that a total want of evidence to support a charge will conclude the case in favor of the accused.").

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, Op. No. 27958 (S.C. Sup. Ct. filed June 17, 2020) (Shearouse Adv. Sh. No. 24 at 8-15), 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 9. 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. 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. at 9-10. 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 12.

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 12-13. 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 13.

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 10, 14. 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 10.

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 was killed during the commission of a felony. See Commonwealth v. Brown, 81 N.E.3d 1173, 1195 (Mass. 2017) (overruling prior precedent and holding that a conviction for felony murder requires a finding of actual malice, not merely constructive malice, *i.e.*, where a killing occurs in the commission of a felony, the intent to commit the felony is sufficient alone to establish malice).

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. After defining murder, the assistant solicitor argued there was no "question that Fred Anderson was murdered" since 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).

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.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,

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

ATTORNEY FOR APPELLANT

This 16th day of December, 2020.

RECEIVED
Dec 16 2020
SC Court of Appeals

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 April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

December 16, 2020.

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

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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 Final Brief of Appellant and Designation of Matter in the above referenced case have been served upon Caroline Scrantom, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 16th day of December, 2020.

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

ATTORNEY FOR APPELLANT