

STATE OF SOUTH CAROLINA
In the Supreme Court

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Appeal from Greenville County
The Court of General Sessions
Honorable Edward W. Miller, Circuit Court Judge

S.C. SUPREME COURT

Opinion No. 5953 (S.C. Ct. App. Filed November 30, 2022).

Appellate Case No. 2023-000166

THE STATE,.....RESPONDENT,

v.

NYQUAN TYKIE BROWN,.....PETITIONER.

BRIEF OF RESPONDENT

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PETITIONER’S STATEMENT OF ISSUE PRESENTED

Did the Court of Appeals err by holding the implied malice instruction given in this case – that malice can be inferred if one kills another during the commission of a felony – was not an impermissible comment on the facts and did not eliminate the state’s burden to prove malice, a crucial element of the offense of murder, beyond a reasonable doubt, and further that any error in giving the instruction was harmless because the only dispute was identity, not malice?

RESPONDENT’S COUNTERSTATEMENT OF ISSUE PRESENTED

Whether the Court of Appeals properly resolved that instructing the jury on a permissive inference regarding malice could not support reversible error when the evidence at trial demonstrated “that an unarmed victim was shot multiple time after he expressly disclaimed any intent to defend himself” making the “core dispute” the identity of the shooter, not malice.

STATEMENT OF THE CASE

Petitioner Nyquan Tykie Brown was indicted by a Greenville County Grand Jury for the murder of Fred Anderson, armed robbery, and possession of a weapon during the commission of a violent crime (count two of the murder indictment) in October 2017. R. 358-361. (2017-GS-23-001727, 2017-GS-23-001725). He proceeded to trial by jury before the Honorable Edward W. Miller from September 3 to September 5, 2019, after which he was found guilty as indicted. R. 353. Judge Miller sentenced Petitioner to forty-five years for murder, thirty concurrent years for armed robbery, and five concurrent years for the weapons indictment. R. 357.

Petitioner timely appealed. After briefing, the South Carolina Court of Appeals held oral arguments on September 15, 2022, then affirmed Petitioner's convictions and sentences on November 30, 2022 in a published opinion. App. pp. 3-9; *State v. Brown*, 438 S.C. 146, 881 S.E.2d 771 (Ct. App. 2022). The court denied Petitioner's subsequent petition for rehearing on January 4, 2023. App. pp. 10-20, pp. 22-23. Petitioner then filed a petition for writ of certiorari to the Court of Appeals on February 21, 2023, and it was granted on October 27, 2023.

Petitioner filed his Brief of Petitioner on November 27, 2023. This Brief of Respondent follows.

STATEMENT OF FACTS

The jury convicted Petitioner of the murder of Fred Anderson, an individual who was known to deal in marijuana. The Court of Appeals set out:

The basic facts were not disputed. Anderson was sitting in the apartment with one of the women who lived there. Two masked men entered through an unlocked door. They demanded Anderson give them his marijuana and money. Anderson gave the men a mason jar containing marijuana and the small amount of money in his pocket. The men demanded Anderson give them his wallet. Anderson said he did not carry a wallet.

The intruders allowed the woman sitting with Anderson to go upstairs. She did so, but after that, she walked part of the way back down the stairs and remained in the stairwell. She heard commotion and tussling and heard Anderson say he would not fight the men because one of them had a gun. There were multiple gunshots after that. The investigation eventually revealed that someone shot Anderson four times and that two of the shots were likely fatal. There was also testimony of a delay between the third and fourth gunshots.

No one gave a detailed description of the robbers. The woman who had been sitting with Anderson saw only one person with a gun before she went upstairs. She said this person was Black and unusually short. Surveillance footage revealed the men running into a nearby apartment after the shooting. Footage from before the crime showed someone coming out of that same apartment and pointing the men towards Anderson's apartment. An investigator identified that person as Jonathan Suber-Purry. After giving several inconsistent and false statements, Suber-Purry identified Brown as one of the men shown on the footage for the police. Phone records supported this identification.

State v. Brown, 438 S.C. 146, 149-150, 881 S.E.2d 771, 772-773 (Ct. App. 2022).

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). "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." *State v. Stukes*, 416 S.C. 493, 498, 787 S.E.2d 480, 482 (2016) (*citing State v. Curry*, 406 S.C. 364, 373, 752 S.E.2d 263, 267 (2013)).

DISCUSSION

Judge Miller did not err in instructing on a permissive inference of malice from the killing of another during the commission of a felony as the instruction did not elevate one fact over another nor did it suggest identity. There could be no reversible error.

Judge Miller instructed the jury as follows:

Malice can be inferred if one kills 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.

Brown, at 150, 881 S.E.2d at 773.

Petitioner argues that this instruction affected the entire outcome of his trial. He argues that even though the jury was repeatedly instructed that the State must prove every element of murder beyond a reasonable doubt, somehow the singularly-challenged fourteen-word sentence, “malice can be inferred if one kills another during the commission of a felony,” made every juror decide the State did not have to prove malice at all, and instead communicated to the jury that it was instead Petitioner’s job to disprove malice. That is not what occurred. The instruction merely defined malice for the jury, which was conceded by the defense at trial. This Court should affirm.

Here, Petitioner improperly equates the State’s need to prove malice as an element with the need to prove a defendant intended to kill the specific person who died, Brief of Petitioner at p. 21, and that is not the law. As has been said, murder is a general intent crime in the State of South Carolina.¹ “Murder is the killing *of any person* with malice aforethought, either express or

¹ *State v. Foust*, 325 S.C. 12, 15-16, 479 S.E.2d 50, 51-52 (1996) (“[T]his court has recognized that a specific intent is not required to commit murder”); *State v. Johnson*, 291 S.C. 127, 128, 352 S.E.2d 480, 481 (1987) (wrongful intent to injure another may give rise to a finding of malice to support the verdict of murder); *State v. Mouzon*, 231 S.C. 655, 662, 99 S.E.2d 672, 675-676 (1957) (malice as an element of murder does not necessarily require ill-will toward the

implied.” S.C. Code Ann. § 16-3-10 (emphasis added). Therefore, the State does not have to prove the person *intended* to kill a specific person or really any person to prove the person is guilty of murder beyond a reasonable doubt. To state it more succinctly, a specific intent to kill is not required under our murder statute.²

Petitioner argues the equation at his trial was this: the jury finds he committed a felony = he committed murder. Petitioner advocates the equation should be this: Person expressly intended to kill a specific person via only the act that killed that person + the person died = murder. However, that is not what the statute or our case law says or supports. The proper equation (accurately advanced at trial) is: A person committed an act + that person had an evil heart that was bent on doing wrong while doing the act + someone died during that act³ + that act was the proximate cause of the death = murder. Therefore, if, as in this case, a person commits an armed robbery intentionally + that person did it with an evil heart + someone died + that armed robbery proximately caused the death = murder under our statute. The evil heart part cannot be skipped and was not skipped here. The jury was not told it was mandatory to so find.

individual injured, but signifies a general malignant recklessness of the lives and safety of others); *State v. Alexander*, 30 S.C. 74, 8 S.E. 440 (1889).

² One need to consider only a few examples to ascertain the error in requiring such specificity, for example: what of an individual’s act of loading 50 women in an 18-wheeler truck with the intent of trafficking them, but some accidentally asphyxiate, and others die from dehydration and the elements; or an individual who tortures another with only the intent of acquiring information, but the person dies; or a woman who poisons her husband with the intent of only making him sick so she could care for him and revive their relationship, but he dies. Murder may take many forms.

³ “Aforethought” means malice exists in the mind of the person before the killing. S.C. Code § 16-3-10 *does not* say the person’s evil heart must arise out of or be a desire to specifically kill a person. The malice element is satisfied if the evil heart was to only commit an unlawful act that causes some type of injury to another. If someone died as a natural and foreseeable result of that unlawful act, the malice element is therefore met under our murder statute.

In *State v. Johnson*, 291 S.C. 127, 128, 352 S.E.2d 480, 481 (1987), as well as many other cases, malice is defined as “the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong.” That definition *does not* say “intent that the injury result in death” or “the injury must be death” or “the wrong must be murder;” “injure” or “wrong” are not defined. Injury or wrong therefore include burglary, robbery, torture, rape, a kidnapping, arson, etc. Since it is not defined, though, the injury *could be* ever so slight. Therefore, the word “felony” puts a limiting instruction on the word “injure” that only works in Petitioner’s favor.

Petitioner would be more correct if murder were a specific intent crime. But because specific intent to kill is not a required element to prove murder, malice may therefore be (but is not required to be) found in the intent to injure another by way of an inherently dangerous felony⁴ that coincidentally ends in a death. The jury must still find the State proved malice (which again does not mean intent) regardless beyond a reasonable doubt. The State can do that through circumstantial evidence, which “is proof of a chain of facts and circumstances indicating the existence of a main fact.” R. 343.

If an inherently dangerous felony is committed in connection with the killing of any person, that felonious act is part of the *res gestae* of the killing and directly speaks to the defendant’s state of mind. Malice can and must be found in the actor’s heart before the killing for it to be murder. The definitions of malice do not put a time limit cut off as to how far inquiring minds may go back in time to find malice, and rightly so. It just so also coincidentally happens that the facts of the underlying inherently dangerous felony will always⁵ come in in a murder trial. Therefore, the

⁴ Respondent is not aware of an officially specific list of felonies that constitute “inherently dangerous felonies” in this jurisdiction other than perhaps the list of felonies listed as aggravating circumstances that may be considered during the sentencing phase of a death penalty trial in S.C. Code § 16-3-20(C)(1).

⁵ Although Respondent is sure there is some rare or remote exception.

challenged instruction gives the jury a framework by which to think about the felony and, more importantly, limits what they can do with the felony.⁶ But in no way does evidence of the *res gestae* of a murder equal “the jury must check the malice box because the underlying felony was talked about when malice was discussed.” It just means they can.

As was charged in this case, “to the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other and when taken together point conclusively to the guilt of the accused beyond a reasonable doubt.” R. 343. Many different factual scenarios could result in a jury finding an inherently dangerous felony occurred, but because of some just cause or excuse, could also result in them finding the malice element was not checked. That is why they are instructed to consider all of the facts and circumstances that surround the crime and to ensure they are consistent with each other before finding whether the elements are met for murder. The charge “malice can be inferred if the killing of another occurred during the commission of a felony” is encouraging jurors to ensure the facts of a death and of the existence of malice are consistent with the intent to commit a felony that was not murder. But like a Rule 403 and Rule 404(b), SCRE analysis, finding malice when both a felony and then a separate death occurred is a two-step process.

What is the purpose of jury instructions? To declare the law. S.C. Const. art. V § 21 (1985). The law is declared so juries may clearly decide guilt or innocence based upon it. In this state (as well as many others),⁷ individuals are held accountable for the natural and foreseeable (or

⁶ Or, of course, felonies. No one wants a jury to find intentional possession of less than 28 grams of marijuana, *e.g.*, + someone died because of the possession = murder, although that could be done under the current definitions of malice and the current murder statute. Respondent argues that is why the word “felony” is there.

⁷ See *Accomplice Liability*, <https://nationalgangcenter.ojp.gov/legislation/accompliceliability#6-0>, last accessed December 27, 2023.

probable) consequences of the actions of individuals they set out to commit a crime with.⁸ “Under the hand of one is the hand of all theory [of accomplice liability], one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose.” *State v. Harry*, 420 S.C. 290, 299, 803 S.E.2d 272, 276 (2017) (emphasis added) (citations omitted). It follows that the perpetrator himself, too, is liable for the natural, probable, and foreseeable consequences of his own actions. If he commits an inherently dangerous felony, he is responsible for all of the consequences. Here, an instruction acknowledging that the jury *could* infer (not must infer) malice through the circumstance of a dangerous felony (and thus be held accountable for the consequences of his actions under the murder statute) lines up with our definitions of malice, which have not changed in this state for decades. Malice is, as has been mentioned, and among other definitions:

[A] wicked condition of the heart. It is a wicked purpose. It is a performed purpose to do a wrongful act, without sufficient legal provocation; and in this case it would be an indication to do a wrongful act which resulted in the death of this man, without sufficient legal provocation, or just excuse, or legal excuse

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.

In other words, a malicious killing is where the act is done without legal justification, excuse, or extenuation, and malice has been frequently, substantially so defined as consisting of the intentional doing of a wrongful act toward another without legal justification or excuse.

State v. Judge, 208 S.C. 497, 38 S.E.2d 715 (1946) (emphasis added); *See also* 40 C.J.S., Homicide, § 14.

⁸ *See, e.g., State v. Dickman*, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2020); *State v. Crowe*, 258 S.C. 258, 265, 188 S.E.2d 379, 382 (1972); John F. Decker, *The Mental State Required for Accomplice Liability in American Criminal Law*, Vol. 60, Issue 2, Art. 1, pp. 348-349 <https://scholarcommons.sc.edu/cgi/viewcontent.cgi?article=3872&context=sclr>, last accessed December 27, 2023.

Therefore, if an individual sets out to commit an intentional, felonious act against another and had no legal justification for doing so (*e.g.* proven self-defense or defense of others), and the act (or, felony) was committed with the mens rea of malignant recklessness for the lives and safety of others, it follows that they are responsible for the natural and foreseeable consequence of that wrongful act, including a death. *See Gore v. Leeke*, 261 S.C. 308, 317, 199 S.E.2d 755, 758 (1973) (citing with favor other jurisdictions accepting “the effect that both the nature of the felony itself and the circumstances of its commission are to be considered in determining whether a felony is foreseeably dangerous so as to properly invoke the application of the felony-murder rule.”)

Here, entering a home armed with a weapon with the proven, premeditated intent to harm another through robbing the occupants at gunpoint⁹ had a natural and foreseeable consequence of death, intentional or not, and Petitioner was rightly held accountable under our murder statute. Therefore, the trial judge merely acknowledged that potential pathway to malice. He did not comment on the facts; he did not elevate a fact; he did not presume any fact; rather, he explained the law regarding malice. Therefore, nothing out of the ordinary occurred here.

A natural objection to the above is, “we do not have statutory felony murder in this state.”

Yes, that is true. Statutory felony murder is:

[A] rule that allows a defendant to be charged with first-degree murder for a killing that occurs during a dangerous felony, even if the defendant is not the killer . . . [and] can be convicted of murder even if the defendant did not act with intent or a reckless indifference; the prosecution must show only that the defendant participated in a felony where fatalities occurred.¹⁰

⁹ Respondent acknowledges that malice may no longer be inferred through the use of a deadly weapon. Carrying a weapon is a constitutional right, whereas committing a felony is not. Here, the malice comes from the unlawful break in and the intent to forcibly rob, but it still stands to reason that the killing would probably not have occurred but for the weapon.

¹⁰ <https://www.justia.com/criminal/offenses/homicide/felony-murder/> (emphasis added).

However, unlike other states who separate murder out into first-degree, second degree, felony murder, and others, we only have one general intent murder statute in the State of South Carolina,¹¹ and then voluntary manslaughter (requiring a very specific sudden and uncontrollable heat of passion) and involuntary manslaughter, which only carries 0-5 years. S.C. Code Ann. § 16-3-10; §§16-3-50 to 16-3-60. Therefore, if an individual commits a premeditated killing with a specific intent to kill (commonly known as first-degree murder), they can be convicted under the same statute in this state as an individual who only intended to break into someone's home but ended up intentionally shooting the occupants, whether unintentionally or not (commonly second degree and/or felony murder). The sentencing range is extremely broad in our state, unlike the other states who separate out murder into categories, to account for this.

48 states (including ours) and the District of Columbia utilize the felony murder doctrine in one way or another, through either statutory felony murder (which we do not have) or through common law and/or public policy (which we do have). Only Hawaii and Kentucky do not have murders-committed-during-inherently-dangerous-felony laws.¹² Many states include the necessary proof of a mens rea of recklessness or criminal negligence (or, as argued here, malice), and/or an action committed via circumstances that could reasonably have been known to create a strong likelihood of death, and/or via circumstances manifesting extreme indifference to human life.

To risk being repetitive, malice in this state is “conduct showing a total disregard for human life,” or “a general malignant recklessness of the lives and safety of others.” *State v. Judge*, 208

¹¹ See Footnote 1.

¹² Nazgol Ghandnoosh, Ph.D., The Sentencing Project, *Felony Murder: An On-Ramp For Extreme Sentencing*, FN 6 <https://www.sentencingproject.org/reports/felony-murder-an-on-ramp-for-extreme-sentencing/#footnote-ref-4> .

S.C. at 505-506, 38 S.E.2d at 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 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. at 663, 99 S.E.2d at 676 (1957) (emphasis added). The statute allows malice to be either expressed or implied. S.C. Code Ann. § 16-3-10. Therefore, it follows that, if the State proves an individual intentionally committed an inherently dangerous act against another, with a wicked heart via the mens rea of recklessness or criminal negligence, they have proven malice for the purposes of murder, even if they did not specifically intend to kill the person(s) who died.

This Court recognized that in *State v. Norris*¹³ when it defined the charge for murders committed during the commission of a felony. *State v. Norris*, 285 S.C. 86, 328 S.E.2d 339 (1985) (overruled on other grounds by *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009) (overruled on other grounds by *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019)):

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 . . . You can imply that malice existed if a person is in the commission of a felony at the time of the fatal blow

But, for it to be murder it has to be committed with malice aforethought and that’s where you look at all the facts and circumstances. If it was during the commission of a felony you can consider that as facts and circumstances from which malice can be inferred. You don’t have to infer it, but you can.

Norris, 285 S.C. at 91, 328 S.E.2d at 342 (emphasis added).

¹³ See also *Gore, supra*; *State v. Cannon*, 49 S.C. 550, 27 S.E. 526 (1897); *State v. Johnson*, 156 S.C. 63, 152 S.E. 825 (1930); *State v. Williams*, 189 S.C. 19, 199 S.E. 906 (1938); *State v. Woods*, 189 S.C. 281, 1 S.E.2d 190 (1939); *State v. Ciesielski*, 213 S.C. 513, 50 S.E.2d 194 (1948), etc.

And, as it was then, so it is now: “The charge could not reasonably have been understood by the jury as shifting the burden of proof to [Petitioner] to disprove malice or the implication of malice.” *Id.* at 92, 328 S.E.2d at 342.

Lastly, returning briefly to the mens rea of involuntary manslaughter, at first glance the mens rea is seemingly similar to that listed in the above definitions of malice. *See* S.C. Code Ann. § 16-3-60 (“With regard to the crime of involuntary manslaughter, criminal negligence is defined as the reckless disregard of the safety of others.”) However, the difference between involuntary manslaughter and malice being found for the purposes of a murder charge or conviction *is* the circumstance the individual was involved in when the killing occurred. (See below for more discussion on circumstances.) If a person was involved in the circumstance of an inherently dangerous felony when the death occurred, malice may be inferred because they had an evil heart bent on seriously injuring another when they were committing the inherently dangerous felony. If the person was, however, involved in mere criminal negligence while not committing an inherently dangerous felony and a death occurred, that person may be charged with the far less serious involuntary manslaughter. There is no other way to reconcile the definitions of malice that include phrases such as “malignant recklessness” or “extreme disregard for the value of human life” with the murder and then involuntary manslaughter statutes than to conclude the felony murder doctrine stands and should continue to stand.

The Trial and the Charge Conference

Turning to the specific facts here, the defense did not contest, and all but directly conceded malice during trial (as the Court of Appeals noted) and only disputed the identity of the perpetrator. (*See, e.g.*, R. 321 during closing: “[Forensic testing] costs too much to figure out who killed one of our citizens.”) At the very least, malice was not contested. However, during the charge

conference, the State requested a “malice can be inferred if one kills another during the commission of a felony” charge be included in the jury instructions and the defense objected because it “indicates that malice can be inferred. I believe the Supreme Court is starting to make clear their difficulty with inferences. And in this case, what, essentially, [this] Court would be saying to the jury, if you allow an inference instruction¹⁴. . . you’re reducing the burden on the State.” R. 290.

The defense argued the sentence relieved the State of having to prove the element of malice beyond a reasonable doubt. R. 290. They further claimed the trial court’s remark of “a felony” told the jury that he thought Petitioner in fact had committed a felony, or that they should find Petitioner had committed a felony. R. 290-291. The State responded and said, “the law is pretty well settled that if a homicide happens during the course of a . . . felony, then it is murder.” R. 291. The trial court overruled the objection and included the charge, holding “it’s the current state of the law.” R. 291-292.

The Given Jury Instructions Taken Together Show no Error. A selection of the charge includes:

“[I]n every case tried in this court before a jury, the jury is the sole and exclusive judge of the facts. [A] trial judge cannot comment on or make any statement about the facts in the case . . . It is up to you all to be the judges of the facts.” R. 339. [T]he burden [is] on the State to prove the Defendant guilty . . . the Defendant in a criminal trial will always be presumed to be innocent . . . unless guilt has been proven by evidence, satisfying you, the jury, of guilt beyond a reasonable doubt.” R. 342. “If the circumstances merely portray the Defendant’s behavior as suspicious, the proof has failed. The State has the burden of proving the defendant guilty beyond a reasonable

¹⁴ This highlights the confusion or otherwise that occurred in the defense bar after *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019). This Court did not eliminate inferred malice or inferred malice jury instructions altogether, just prohibited one under a very specific circumstance. *Burdette* involved a very different instruction than the one so challenged here.

doubt and the burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or any combination of the two” “And once again, I instruct you that the burden of proof on the State extends to every element of the crimes charged” R. 343-344.

“A person who joins with another to accomplish the illegal purpose is criminal responsible for everything done by the other person which occurs as a natural consequence of the acts done in carrying out the common plan and purpose.” R. 345. “**The State must prove beyond a reasonable doubt that the Defendant killed another person with malice aforethought.**” R. 347. “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 injury or under circumstances that the law will infer an evil intent. Malice aforethought does not require that malice exists for any particular length of 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.” R. 347-348.

“And malice 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.” R. 348.

“Malice may also be inferred from conduct showing a total disregard for human life. *Malice can be inferred if one kills another during the commission of a felony.* Now, the [if] the facts are proved beyond a reasonable doubt to raise an inference of malice to your satisfaction, this inference

would simply be 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. 348-349.

Taken together, the jury instructions show no error. The trial court did not say “jury, you must check the malice box because this killing occurred during the commission of a felony, and because of which, the State is therefore no longer required to prove malice.” The State’s burden of proving malice might have been *easier* because of Petitioner’s felonious actions of bursting in and holding three people at gunpoint and robbing Fred Anderson of marijuana before killing him, but that does not mean their burden was legally *lower*. The jury may infer malice, meaning find it,¹⁵ which implies analyzing and working the facts. The jury may not *assume*¹⁶ malice automatically, which is what Petitioner argues happened here.

There Was no Error of Law

“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. at 404, 663 S.E.2d at 33 (*quoting Clark v. Cantrell*, 339 S.C. at 389, 529 S.E.2d at 539). Appellate courts do not reverse unless the trial court abused its discretion in choosing which jury instructions to include or exclude. Here, the trial court charged the correct and current law of South Carolina. “A trial court is required to change the current and correct law.” *State v. Cottrell*, 421 S.C. 622, 643, 809 S.E.2d 423, 435 (2017). Courts know they may be overturned if they *do 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

¹⁵ Infer, verb. Arriving at a conclusion by reasoning from evidence. To draw inferences. To derive as a conclusion from facts or premises. Merriam-Webster Dictionary.

¹⁶ Assume, verb. To take something for granted or as true. To upon oneself. To take up or in, to receive.

give a character evidence instruction in a murder trial.) Therefore, the Court of Appeals did not err in finding the trial court exercised proper discretion.

The Instruction Was Supported by the Evidence

“An abuse of discretion occurs when the trial court’s ruling is . . . not supported by the evidence.” *Cole v. Raut*, 378 S.C. at 404, 663 S.E.2d at 33 (2008) (quoting *Clark v. Cantrell*, 339 S.C. at 389, 529 S.E.2d at 539). “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). “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).

The Court of Appeals Properly Held the Instruction was Not a Comment on the Facts

“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). Judge Miller did not indicate his opinion to the jury about whether Petitioner committed a felony in any way. In fact, he told the jury that any instruction he gave could not be taken as him commenting on the facts. The Court of Appeals therefore correctly held the instruction was not an impermissible comment on the facts. *Brown*, 438 S.C. at 152, 881 S.E.2d at 774.

The Court of Appeals Properly Held the Instruction was Not Burden Shifting

The Court of Appeals properly held that the challenged instruction was a constitutionally permissible inference. *Brown*, 438 S.C. at 155, 881 S.E.2d at 755. “A jury instruction violates due process if it is reasonably likely that the jury understood the charge to create a mandatory

presumption requiring it to infer an element of the offense if the State proved certain predicate facts, thereby relieving the State’s burden of proof on an element of the offense.” *Francis v. Franklin*, 471 U.S. 307, 315 (1985). The State can never be relieved of proving beyond a reasonable doubt every essential element of the crime, and they were not here. *Sandstrom v. Montana*, 442 U.S. 510 (1979).

As an aside, although this Court did not address this issue on direct appeal in *Lowry v. State*, this Court did consider a so called “felony murder” instruction on PCR appeal, but only found it unconstitutionally shifted the burden of proof because it did not contain permissible language like “can” or “may.” *Lowry v. State*, 376 S.C. 499, 506-507, 376 S.E.2d 760, 764 (2008). The improper *Lowry* charge said the jury must find the Petitioner guilty of murder if the jury found that a killing occurred in the course of an armed robbery. *Id.* This Court did, however, hint to a “proper instruction on felony murder in the trial court’s initial charge.” *Id.* This Court should affirm that sentiment.

If this Court is so inclined, Respondents respectfully offer the suggestion of officially defining the word “infer” for the jury in the malice jury instructions to ensure juries are not automatically assuming malice from the circumstance of an inherently dangerous felony.

CONCLUSION

For the reasons stated above, this Court should affirm the Court of Appeals.

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