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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPELS

Appellate Case No. 2021-000619

THE STATE,

RESPONDENT,

Vs.

JOSEPH DECORIYUS BURTON,

APPELLANT.

Appeal from Beaufort Court

Robert J. Bonds, Circuit Court Judge

Opinion No. 2024-UP-034

PETITION FOR REHEARING

Pursuant to Rule 221(a) SCACR, Appellant Joseph D. Burton, respectfully petitions this court for rehearing in the above-captioned matter after an unpublished opinion, dated January 31, 2024 affirmed his conviction for Murder, and possession of a weapon during the commission of a violent crime. In support of his petition, Appellant respectfully alleges that this court overlooked or misapprehended the following arguments:

ISSUE: I

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

Relevant facts:

Early in the morning of August 4, 2018, appellant and his friends stopped at a gas station after having been out drinking. Tr. 290, l.20-291, 1.18; 292, ll. 2-17. The gas station had multiple surveillance cameras which captured the following incident. Inside the gas station an altercation broke out between appellant's group and another group of individuals that included Christopher fells. Shortly after, the altercation continued outside, and the surveillance video shows appellant turn and fire a gun. State's exhibit 15, surveillance video. Ultimately, fells was hit by the bullets and died several months later. Tr.481, ll. 15-16.

At trial, the state alleged that a man who was part of Fells' group had harassed appellant's girlfriend earlier in the evening and then again inside the gas station. The state claimed that the girlfriend incited appellant's anger and that is why he ultimately shot Fells. Tr.203-05.

Appellant testified at trial that he, a group of close friends, and some family had been out celebrating on the morning of the incident. Tr. 527-28. He contended that he did not know Fells and they had no disagreement that night, in fact they a friendly exchange inside the gas station. Tr.531, l.13-532, l 7; 543, ll. 3-16. Appellant testified that he had bad vision and until he was incarcerated did not wear glasses. Tr. 541, ll. 4-14.

Appellant did not deny having been at the gas station or being the person who fired the gun that ultimately killed Fells. 542, l. 20-543, l.2. Appellant testified that while he was he was in the gas station one of the individuals with the other group, Christian Paez, appeared to have a weapon. Tr.532, l. 13-536, l.21. Appellant said that when he exited the gas station, he walked hurriedly to his car in order to get out of the situation quickly. Tr. 537, l.14- 539, l.5. Once out of the store he heard footsteps and yelling behind him and he head a "gun click", and as a result he fired the gun to protect himself and the people in his group. Tr. 540, ll. 12-24; 542- 43.

During the charge conference, defense counsel made an objection to the court's instruction on murder. Counsel argued that the last sentence, "[m]alice may be shown from conduct showing a total disregard for human life," amounted to a comment on the facts and the jury "could necessarily place undue emphasis" on it. Tr. 504, l.6; 20-505, ll. 11-17. The court overruled defense counsel's objection and decided to keep the language in the charge. Tr. 508, ll. 8-10. During the state's cross-examination of appellant, the following exchange occurred:

Q: And on this night, you didn't have glasses?

A: No.

Q: But you still felt the need to protect yourself and protect your family and your friend and your friends?

A: Yes, ma'am.

Q: And you would do that at all cost?

A: Yes, ma'am.

Q: Even though you can't see what you're doing?

A: Yes.

Q: Wouldn't you agree that blindly shooting into a crowd is a total disregard for human life?

A: Yes, I'd agree with that.

Tr. 563, ll. 11-22. Then during closing the prosecutor highlighted this portion of appellant's testimony stating, "he also agreed that it was disregard to fire blindly into a crowd of people." Tr. 622, ll. 4-6. After closing arguments, the court gave the jury instructions and included that language in the charge for murder. Tr. 640, ll. 8-9

Accordingly, this court erred in not finding as a matter of that the trial court did not erred in given the instruction that "malice may be shown from conduct showing a total disregard for human life," undoubtedly contributed to the verdict in this case where appellant present evidence that he acted in defense of others.

State v. Miller, 397 S.C. 630, in Miller, the court stated that jury instruction permitting implication of malice from use of a deadly weapon was not to be used in a murder prosecution in which evidence is presented that would reduce, mitigate, excuse, or justify the killing. Same as in this case, appellant was acting in defense of others. "When considering whether an error with respect to a jury instruction was harmless, we must 'determine beyond a reasonable doubt that the error complained of did not contribute to the verdict." State v. Middleton, 407 S.C. 312, 317, 755 S.E. 2d 432, 435 (2014) (quoting State v. Kerr, 330 S.C. 130, 144-45, 498, 832 S.E. 2d 575, 580 (2019). "We must review the facts the jury heard and weigh those facts against the erroneous jury charge to determine what effect, if any, it had on the verdict." Kerr, 330 S.C. at 145, 498 S.E.2d at 218. "[O]ur inquiry is not what the verdict would have been had the jury been given the charge, but whether the erroneous charge contributed to verdict rendered." Id. "[W]hether or not the error was harmless is a fact-intensive inquiry." Middleton, 407 S.C. at 317, 755 S.E. 2d at 435.

This court misapprehended that the trial court's erroneous charge was an improper expression of its view of the weight of certain evidence. See State v. Cheeks, 401 S.C. 322, 328, 737 S.E.2d

480, 484 (2013) Nothing '[s]imply because certain facts may be considered by [the jury] as evidence of guilty in a given case where the circumstances warrant, it does not follow that jury should be charged that these facts are probative of guilt.

Accordingly, this Court erred in not finding that the Trial Court erred by instructing the jury that malice may be shown from conduct showing a total disregard for human life because the instruction amounted to a comment on the facts where the state elicited testimony from appellant that his behavior showed total disregard for human life, the state highlighted that testimony during closing, and evidence was presented that appellant acted in defense of others.

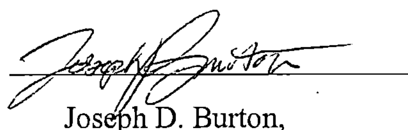
Malice is an element of murder, and the state had the had the burden of proving it beyond a reasonable doubt. Here, there was no doubt appellant was at the gas station and was the individual who shot Fells.

This case did not turn on who committed the act but on the circumstances in which the incident occurred. Appellant's testimony revealed what the surveillance video could not, the context in which the incident occurred. There was no evidence of malice in this case, other than the state's unsupported claim that appellant shot Fells because a man in Fells' group had stood too close to his girlfriend in the gas station. Appellant testified that he had did not know Fells or have any ill will towards him. It is apparent in the surveillance video that appellant had no malice towards Fells where you see the two of them speaking in a friendly manner while inside the gas station. The erroneous charge contributed to the verdict and appellant's convictions should be reversed.

CONCLUSION

Appellant respectfully requests this Court rehear this matter for the significant points overlooked and /or misapprehended in rendering its unpublished opinion filed January 31, 2024.

By reason of the foregoing argument, appellant requests this Court reverse his conviction and remand his case for a new trial.



This 16th day of February, 2024

Joseph D. Burton,

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STATE OF SOUTH CAROLINA

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Honorable Robert J. Bonds, Circuit Court Judge

THE STATE,

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V.

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APPEALLANT.

APPELLATE CASE NO. 2021-000619

CERIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a ture copy of the Petition for rehearing in the above –referenced case has been served upon Melody J. Brown, Esquire, at the address below:

Melody J. Brown, Esquire

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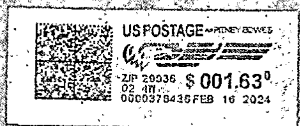

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