RECEIVED
Aug 30 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Beaufort County
The Honorable Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

Respondent,

vs.

DEVANTE LAMONT WHITE,

Appellant.

Appellate Case No. 2022-001793

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General
State Bar No. 14244

R. BRANDON LARRABEE
Assistant Attorney General
State Bar No. 104865
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

Hon. Isaac McDuffie Stone
Solicitor, Fourteenth Judicial Circuit
P.O. Box 1880
Bluffton, South Carolina 29910
(843) 779-8477
ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

STATEMENT OF THE CASE

Respondent accepts Appellant's statement of the case for the purposes of this appeal.

STATEMENT OF FACTS

On November 16, 2020, Appellant Devante White, Malik White,[1] and Jamal Coakley got into a black Nissan in Savannah, Georgia, and drove to Summerville, S.C. Tr. p. 441, l. 4–p. 442, l. 20. There, they picked up a then-17-year-old woman named Sarah Barr. Tr. p. 442, ll. 20–22. Barr knew Appellant as a pimp. Tr. p. 392, ll. 5–7. According to Barr, at some point, Appellant and Barr's relationship was sexual. Tr. p. 396, ll. 1–9. At the time, Barr was involved in prostitution. Tr. p. 394, ll. 4–25. She did an "out call" with Tim Milliken in September 2020. Tr. p. 394, l. 14–p. 395, l. 25. On the day when the men picked up Barr, Appellant told her that "[w]e was going to rob a rich white man." Tr. p. 397, l. 2.

The group drove to Westbury Park, where Milliken lived. Tr. p. 398, ll. 6–11. Upon arriving at the gate, Barr began communicating with Milliken. Tr. p. 444, ll. 12–18. However, as Milliken began to approach the car, Appellant seemed to realize that the presence of all four of them in the car might look "sketchy" to Milliken. Tr. p. 398, l. 23–p. 399, l. 13. The car was driven a short distance away. Tr. p. 325, l. 18–p. 326, l. 1; Tr. p. 399, ll. 17 – 22; Tr. p. 444, ll. 19–22. It was at this point, Coakley said, that Appellant told him about the plan to rob Milliken. Tr. 326, ll. 19–25.[2] Coakley was hesitant about robbing Milliken, but said Appellant threatened him

---

[1] The relationship between Appellant and Malik White is somewhat unclear. Malik said that he was familiar with Appellant through his relationship with Appellant's cousin; Malik and Appellant also called each other cousins because they grew up near to each other. See Tr. p. 438, ll. 10–15. To minimize confusion, this brief will refer to Malik White by his first name. Malik White and Jamal Coakley are cousins. Tr. p. 440, ll. 12–14.

[2] Malik said he found out about the plan to rob Milliken "basically when we got there." Tr. p. 455, ll. 22–23.

with a gun and told Coakley to climb into the car's trunk.[3] Tr. p. 326, l. 25–p. 327, l. 9. Coakley complied, and Malik also climbed into the trunk. Tr. p. 327, ll. 12 – 16. Appellant gave both men masks. Tr. p. 327, l. 17–p. 328, l. 1.

With Malik and Coakley concealed, Appellant and Barr then drove to a gate, and Milliken got into the car. Tr. p. 400, ll. 18–20. The car drove to another gate, where Milliken put in a passcode. Tr. p. 400, l. 5–12. The group then went to Milliken's driveway. Tr. p. 401, ll. 13–17.

According to Malik, Barr told Milliken to get her luggage from the trunk. Tr. p. 445, l. 23–p. 446 l. 2. When the trunk opened, Malik White and Coakley emerged, with Coakley brandishing the firearm. Tr. p. 329, ll. 14–16. Appellant grabbed Milliken and told him he was under arrest for prostitution. Tr. p. 329, ll. 18–23.[4]

The four then went to Milliken's back door. Tr. p. 330, ll. 12–13. There, the would-be robbers attempted to get Milliken to open the door and let them into the house; Milliken resisted. Tr. p. 330, ll. 13–14; Tr. p. 449, ll. 2–15. Appellant threatened Milliken's children and pets. Tr. p. 331, l. 23–p. 332, l. 2. Coakley hit Milliken with the gun, testifying later that he was trying to prevent a situation where Milliken would get shot.[5] Tr. p. 362, l. 11–p. 363, l. 5. According to Coakley, Appellant told Coakley to shoot Milliken, but Coakley was unwilling. Tr. p. 330, ll. 16–

---

[3] Malik uses "he" with an antecedent in some of his responses, but the context indicates he is talking about Appellant. Malik recalls Appellant and Coakley having a discussion and Appellant, referring to Coakley, saying: "He's tripping, he won't even get in the trunk." Tr. p. 444, l. 25–p. 445, l. 3. Malik does not recall Appellant threatening Coakley. Tr. p. 465, ll. 15–17. Malik said he saw Coakley, but not Appellant, with the gun until then. Tr. p. 465, l. 15–p. 466, l. 1.

[4] There is some dispute as to whether Appellant tried to use zip ties to subdue Milliken. Tr. p. 332, ll. 12–14; Tr. p. 404, ll. 9–20. Appellant denied knowing about zip ties. Tr. p. 548, l. 25–p. 549, l. 3.

[5] Coakley also testified that Appellant hit Milliken during the confrontation. Tr. p. 331, ll. 15–17, Tr. p. 362, ll. 8–10.

25. So Appellant took the gun[6] and in the ensuing moments fired two shots—one accidental and one that sliced through Milliken's femoral artery and femoral vein. Tr. p. 331, ll. 8–15; Tr. p. 339, ll. 10–15; Tr. p. 385, ll. 11–20; Tr. p. 485, ll. 13–19. Barr heard the second shot and thought Appellant had shot the washing machine because "it sounded like water flooding." Tr. p. 405, l. 18–p. 406, l. 7. The would-be robbers fled. Tr. p. 339, ll. 19–22. Massive blood loss likely caused Milliken to die within minutes. Tr. p. 487, l. 25–p. 488, l. 8.

Milliken's home video system caught the shooting on tape. State's Exh. 38.[7] Milliken can be seen coming into his laundry room and attempting to fight off entry by others. *Id.* There is a flash. *Id.* A Black male[8] grabs Milliken by his clothing as he begins to bleed. *Id.* Milliken is eventually freed. *Id.* The Black male points the gun at Milliken again. *Id.* Milliken appears to open a container and then collapse as his dog watches. *Id.*

After the shooting, law enforcement began pursuing the group by tracking the car. Tr. p. 231, l. 4–Tr. p. 232, l. 10; Tr. p. 239, l. 10–p. 242, l. 18. During their attempts to elude law enforcement, Appellant told Malik that he did not intend to shoot Milliken. Tr. p. 464, l. 19–p. 465, l. 1. Coakley said he and Appellant argued about the incident. Tr. p. 340, ll. 10–18. Coakley also recalled Appellant throwing a bag into the sewer in Georgia. Tr. p. 343, ll. 7–12.[9] Authorities would eventually catch up to the group in Gwinnett County, Georgia. Tr. p. 242, l. 6–p. 243, l. 5;

---

[6] Coakley later testified that Appellant asked for the gun, Malik took it, and then Malik gave Appellant the gun. Tr. p. 383, ll. 13–16. Malik's testimony appears to support that series of events. Tr. p. 448, ll. 1–6.

[7] The version of the exhibit viewed by counsel includes two flash drives and multiple views of Milliken's home at the time of the shooting. The description here is based on the video of the laundry room from 11:07: 17 p.m. until 11:10:55 p.m., according to the timestamps.

[8] Appellant's testimony about related photographs appears to concede that he is the Black male in question. Tr. p. 567, ll. 1–20.

[9] Coakley admitted at trial that he concealed this information from authorities for around a year. Tr. p. 343, ll. 13–22.

Tr. p. 274, l. 21–p. 275, l. 2. The three men attempted to run away as police arrived. Tr. p. 344, ll. 1–17; Tr. p. 408, ll. 6–13; Tr. p. 453, ll. 7–15; Tr. p. 558, ll. 14–19. All three were caught. Tr. p. 344, ll. 13–17; Tr. p. 453, ll. 16–17; Tr. p. 558, ll. 20–22. Barr was arrested later in South Carolina. Tr. p. 408, ll. 18–22.

Appellant's trial was held December 12 – 16, 2022, in Beaufort. The Honorable Brooks Goldsmith presided. Malik White, Coakley, and Barr all testified for the State.

Appellant testified in his own defense. Tr. p. 532, l. 15–p. 573, l. 15. Appellant denied having been sexually involved with Barr. Tr. p. 536, ll. 5–7. Appellant testified that he thought on the day of the incident that the group was going to drive somewhere, and that it was Coakley's idea. Tr. p. 539, ll. 8–25. According to Appellant, he believed the group was trying get a picture that Milliken possessed. Tr. p. 562, l. 1–p. 563 l. 3. Appellant testified that Coakley gave orders on driving and initiated the discussion of robbing Milliken; Appellant testified that *he* was the one who hesitated and only agreed because Coakley had the gun. Tr. p. 544, l. 11–p. 545, l. 18. Appellant further testified variously that Coakley told him what to say while grabbing Milliken, that Appellant was "thinking off the top of [his] head" when using the lines, and that Coakley gave him instructions that were not "word-for-word." Tr. p. 548, ll. 6–8; Tr. p. 572, ll. 6–25; Tr. p. 573, ll. 6–11. Appellant also said he did not intend to hurt or kill Milliken. Tr. p. 548, ll. 17–24. Appellant claimed he tried to keep Coakley from hitting Milliken. Tr. p. 550, l. 23–p. 551, l. 6. Appellant testified that he did not intentionally fire the gun, but also said Coakley ordered him to fire at least one shot. Tr. p. 552, l. 5–p. 553, l. 3. Appellant also said he was not certain in the immediate aftermath that he had shot Milliken. Tr. p. 553, ll. 9–12. Appellant claimed not to have seen blood, even though blood is visible in the video even before the door is closed. Tr. p. 553; Exh. 38.

During closing arguments, the solicitor explained the felony murder rule and the inference of malice to the jury. Tr. p. 624, ll. 6–14. Over defense's objections, the trial judge's charge included these instructions:

> If I tell you that one intentionally kills another during the commission of a felony, the inference 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 simply be an evidentiary fact, to be taken into consideration by you, along with all the other evidence in this case, you may give it the weight that you believe it should receive.
>
> I tell you that in this state, the crime of kidnapping is considered a felony. And as I stated, the Defendant is charged with the crime of kidnapping, and the State must prove beyond a reasonable doubt that the Defendant knowingly and unlawfully seized, confined, decoyed, kidnapped, abducted, or carried away another person without authority of law. . . .

Tr. p. 646, ll. 1–18.

Early on the second day of deliberations, the jury reached verdicts of guilty on charges of murder, kidnapping, and possession of a weapon during a violent crime. Tr. p. 661, ll. 10–16. The court sentenced Appellant to 40 years for the murder, 30 years for the kidnapping, and five years for possession of a weapon during a violent crime, all to be served concurrently. Tr. p. 672, ll. 9–25. This appeal follows.

STANDARD OF REVIEW

South Carolina's appellate courts review jury instructions in context, checking for errors that are of constitutional dimensions. *See State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000) ("[J]ury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error. The standard for review of an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution." (citation

omitted)). Any errors can still be found to be harmless if they did not "contribute[] to the verdict rendered." *State v. Burdette*, 427 S.C. 490, 496, 832 S.E.2d, 578 (2019) (quoting *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014)). "A jury charge which is substantially correct and covers the law does not require reversal." *State v. Adkins*, 353 S.C. 312, 319, 577 S.E.2d 460, 464 (Ct. App. 2003).

ARGUMENT

I. Under our supreme court's recent precedent, the trial court should not have charged the felony murder inference. However, in this case, the charge was without a doubt harmless.

Appellant urges this court to reverse his conviction for murder because the trial court charged the jury that it could infer malice from the fact that the victim was killed during the commission of a felony.

The State concedes that the inferred malice instruction should not have been given under our supreme court's decision in *State v. Brown*. Op. No. 28218 (S.C. Sup. Ct. filed July 17, 2024) (Howard Adv. Sh. No. 27 at 32, 34) ("We hold the trial court erred in giving the inferred malice instruction, for, in doing so, the trial court improperly elevated and commented to the jury upon a particular fact—the commission of a felony."). However, viewing the entirety of the charge in this case, the error was harmless. *See id.* at 35 (subjecting decision to harmless error standard).

First, there was overwhelming evidence—including video evidence—before the jury that Appellant shot Milliken. There is also overwhelming evidence to prove that Appellant acted with malice in shooting Milliken. *See Burdette*, 427 S.C. at 496, 832 S.E.2d at 578–79 ("In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but *whether the erroneous charge contributed to the verdict rendered.*" (emphasis added) (quoting *Middleton*, 407 S.C. at 317, 755 S.E.2d at 435)).

Here, despite Appellant's self-serving attempts to limit his culpability, Appellant admitted to his involvement in the crime, and evidence was presented that Appellant planned the robbery of Milliken; displayed growing anger as he used the gun to batter his victim; threatened the victim's children and animals; and "meant" to shoot Milliken, according to one of his fellow robbers. There is clear video evidence that he did not intervene in an effort to help Milliken as blood began gushing from his leg, but instead was still fighting with the victim even after firing the shot. He points the gun at the victim a second time.

There is no reasonable likelihood that the jury applied the felony murder inference in a way that violated the Constitution. Nothing about the charge indicated that the jury should automatically find that Appellant was guilty of murder based on its finding that the Appellant was guilty of kidnapping. *See also State v. Daniels*, 401 S.C. 251, 260, 737 S.E.2d 473, 477 (2012) (Toal, C.J., concurring in result for a majority of the court) ("[T]he trial court included several improper statements as part of his jury instruction. However, the trial court prefaced those remarks with full and adequate instructions on reasonable doubt."). Indeed, the court warned the jurors against allowing their considerations of one allegation to taint their considerations of another. *See* Tr. p. 648, ll. 22–25 ("There are three indictments, and each indictment carries a separate and distinctive offense. And you must decide each indictment separately on the evidence, and the law that applies uninfluenced by your decision, as to any other indictment . . . ."). *But see State v. Perry*, 440 S.C. 396, 408, 892 S.E.2d 273, 279 (2023), *reh'g denied* (Oct. 4, 2023) (noting importance in *Burdette* of differences between state's version of events, which said the shooting was intentional, and defendant's argument that it was an accident).

Second, the solicitor in this case brought up the felony murder instruction before the court gave its charge on the law. During its closing argument, the State said:

> And in South Carolina, this is very important, felony murder rule of law, when you' re in the commission of a felony, when you' re committing felony like kidnapping someone, you don't get to say, "Oh, I'm sorry, I didn't mean to do it," that's not the way it works. And remember the gun going off twice, he had to cock that handle back, intentional actions. Malice can be inferred when the commission of the crime.

Tr. p. 624, ll. 6–14. As a result, even if the trial court had not instructed the jury on the felony murder inference, the jury still would have heard the inference and about its relevance to this case. Several of our supreme court's decisions overruling charges on the facts have nonetheless allowed the parties to continue to argue the same points in their closings. *See, e.g., Burdette*, 427 S.C. at 503, 832 S.E.2d at 582 ("[I]f evidence is introduced that the deed was done with a deadly weapon, the State is free to argue to the jury that it should infer the existence of malice based on that fact and any other facts that would naturally and logically allow a jury to conclude the defendant acted with malice aforethought."). Given that the State had already mentioned the felony murder inference, its repetition by the trial court could not meaningfully contribute to the jury's verdict.

II. The trial court did not err by correctly stating that under South Carolina law, kidnapping is a felony.

Appellant contends that the trial court compounded its error by correctly informing the jury that kidnapping is a felony under South Carolina law. However, if juries are still allowed to infer the presence of malice from the commission of a felony—and under our state's precedents, they are—then the legal question of which crimes are felonies are relevant to the consideration. There was no error in the charge.

The inability of a trial court to instruct juries to consider certain inferences does not limit the juries' ability to draw those inferences. Nor does it prevent those inferences from being mentioned in the courtroom. Indeed, our supreme court's recent line of decisions on factual inferences has often maintained that parties are still free to argue these inferences. *See, e.g.,*

Burdette, 427 S.C. at 503, 832 S.E.2d at 582 ("[I]f evidence is introduced that the deed was done with a deadly weapon, the State is free to argue to the jury that it should infer the existence of malice based on that fact 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 583 ("It is axiomatic that some matters appropriate for jury argument are not proper for charging." (quoting *State v. Belcher*, 385 S.C. 597, 612 n.9, 685 S.E.2d 802, 810 n.9 (2009), overruled on other grounds by *Burdette*)); *State v. Stewart*, 433 S.C. 382, 391, 858 S.E.2d 808, 813 (2021) ("The inference [about knowledge or possession of drugs] is a valid one for the jury to draw, and the trial attorneys may argue to the jury whether the inference should be drawn. The *jury instruction* explaining the inference, however, is improper." (citation, footnote omitted)); *State v. Cartwright*, 425 S.C. 81, 93, 819 S.E.2d 756, 762 (2018) ("The absence of a jury instruction shall in no manner foreclose the ability of the State and the defendant to make permissible jury arguments respecting the jury's consideration of the suicide-attempt evidence." (footnote omitted)).

The trial court's instruction in this case that kidnapping is a felony in South Carolina was legally correct. *See* S.C. Code Ann. § 16-3-910 ("A person who unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away any other person by any means whatsoever without authority of law, except when a minor is seized or taken by his parent, is guilty of a felony and, upon conviction, must be imprisoned for a period not to exceed thirty years.").[10] Judges are not just allowed to charge juries on questions of law; they must do so. *See* S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but *shall declare the law*." (emphasis added)); *see also Eaddy v. Jackson Beauty Supply Co.*, 244 S.C. 256, 258–59, 136 S.E.2d 297, 298

[10] This section of the code was amended in 2024, after Appellant's conviction. However, the changes are not substantive.

(1964) ("But conjoined with the duty to refrain from trespassing upon the domain of the facts is the mandatory and nondelegable duty imposed upon the judge of declaring the law." (quoting *Powers v. Rawles*, 119 S.C. 134, 112 S.E. 78, 83 (1922)) (civil case)).

Jurors do not keep in their heads a running list of South Carolina felonies, and they are not supposed to use any law outside of that given by the judge to render their verdict. To not give an instruction on the felony murder inference is one thing; to require the jury to rummage through the state code to find out whether a crime is a felony—for the purpose of applying an inference that is still valid under South Carolina law—is another. The court's instruction here did not constitute error; it was aimed at warding it off.

CONCLUSION

For all the foregoing reasons, Respondent asks this court to find that any error was harmless and affirm the Appellant's convictions.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General
State Bar No. 14244

R. BRANDON LARRABEE
Assistant Attorney General
State Bar No. 104865

Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

By: *s/ R. Brandon Larrabee*
R. BRANDON LARRABEE

Attorneys for Respondent

August 30, 2024.