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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to the Court of Appeals
Certiorari from Hampton County
Honorable Roger M. Young, Circuit Court Judge

DANIEL LEE FLUDD,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2024-000375

REPLY BRIEF OF PETITIONER

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ARGUMENT IN REPLY

The PCR court erred by finding that because the jury found petitioner guilty of voluntary manslaughter rather than murder, petitioner was not prejudiced by defense counsel's failure to object to the improper jury instruction that malice could be inferred from the use of a deadly weapon when the trial court failed to instruct the jury that malice was not an element of voluntary manslaughter.

In petitioner's case, the PCR court erred by refusing to find trial counsel ineffective for failing to object to the improper inferred malice charge. App. 639. First, trial counsel's performance was deficient because *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009) existed at the time of petitioner's trial and held that when evidence presented during trial reduces, mitigates, excuses, or justifies a homicide caused by a deadly weapon, juries shall not be charged that malice can be inferred from the use of a deadly weapon. The state attempts to frame this issue as whether trial counsel was ineffective for failing to request the trial court to charge that voluntary manslaughter does not include malice to suggest that the issue is unpreserved. BOR. at 6 & n.1; 11-14.¹ However, this misapprehends the argument before this Court. Specifically, the failure to instruct the jury that voluntary manslaughter does not include malice goes to the prejudice that petitioner suffered due to the improper charge, not the deficiency prong.

As the PCR court determined, the inferred malice charge was not proper because evidence of mitigation to voluntary manslaughter and self-defense was presented, and thus, trial

¹ The lack of instruction to the jury that voluntary manslaughter does not require malice demonstrates how petitioner was prejudiced by the improper inferred malice instruction, particularly where, as here, the PCR court concluded that a conviction for voluntary manslaughter eliminated any prejudice that petitioner could suffer. App. 639. Because trial counsel failed to object to the improper inferred malice charge, and thus, allowed the court to improperly instruct petitioner's jury that malice could be inferred from the use of a deadly weapon, there was a greater potential for jury confusion on the issue of malice and its application to the charged offenses.

counsel was deficient for failing to object. App. 639. The PCR court concluded however that petitioner could not show prejudice because the jury convicted petitioner of voluntary manslaughter, which does not include malice aforethought, and found that the state did not prove malice aforethought beyond a reasonable doubt since the jury acquitted petitioner of murder. App. 639. Accordingly, the PCR court erred in so finding that petitioner was not prejudiced by the improper inferred malice charge because there is a reasonable probability that the result of the proceeding would have been different had the improper charge not been given. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

The failure to object to the improper inferred malice instruction prejudiced petitioner because it allowed petitioner's jury to infer malice from the use of a deadly weapon where such an inference was improper and the jury was unaware that voluntary manslaughter did not require a finding of malice to return a guilty verdict. While it is true that the jury acquitted petitioner of murder, the improper inferred malice charge could have still contributed to the verdict because the jury was not instructed that voluntary manslaughter did not require malice. For instance, after the jury was instructed on the elements necessary for a guilty verdict to be reached as to murder, the jury was instructed that voluntary manslaughter was a lesser-included offense of murder. App. 532, l. 22 – 534, l. 20. Importantly, voluntary manslaughter is not a lesser-included by virtue of the elements test but rather because it “has traditionally been considered a lesser included offense of the greater offense charged.” *State v. Burdette*, 427 S.C. 490, 497, 832 S.E.2d 575, 579 (2019) (citing *State v. Northcutt*, 372 S.C. 207, 216, 641 S.E.2d 873, 877-78 (2007)). In these instances where the lesser-included offense is not “wholly contained” within the greater offense, “there is a greater potential for jury confusion when the lesser offense has traditionally been considered a lesser offense of the greater offense.” *Id.* Moreover, “[b]ecause

there is greater potential for jury confusion, there is a great need for clarity when the trial court explains the greater and lesser offenses to the jury.” *Id.* The potential for jury confusion is where the prejudice stemming from the improper inferred malice charge falls.

Given the instructions that the jury did receive, it is entirely possible that the jury relied on the inferred malice charge to convict petitioner of the lesser-included offense of voluntary manslaughter. The mere fact that the jury acquitted petitioner of murder does not conclusively establish that the jury neither considered malice when determining a verdict for voluntary manslaughter nor that the jury did not improperly rely upon the inference of malice it was instructed it could make from the use of a deadly weapon when considering voluntary manslaughter. It was not clear to the jury from the trial court’s instruction that a finding of malice only applied to murder, especially where the jury was instructed that voluntary manslaughter was a lesser-included offense of murder, which did require the state to prove malice aforethought beyond a reasonable doubt. App. 532, l. 22 – 536, l. 2; *See State v. Stukes*, 416 S.C. 493, 498, 787 S.E.2d 480, 482 (2016) (“When reviewing a jury charge for error, an appellate court considers the charge as a whole . . .”). Nor can it be said that the improper inferred malice charge did not impact the jury’s consideration of whether the state disproved self-defense beyond a reasonable doubt. Therefore, trial counsel’s deficient performance by failing to object to the improper inferred malice instruction significantly undermines confidence in the outcome of the trial. *See Rutland v. State*, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016) (“A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.”).

Finally, while the jury in *Burdette* received instruction on murder, voluntary manslaughter, and involuntary manslaughter, the simple fact that petitioner’s jury was not


charged on involuntary manslaughter does not render *Burdette*² inapplicable. BOR at 7-11. Again, petitioner's jury was instructed that murder required the state to prove malice aforethought beyond a reasonable doubt and that voluntary manslaughter was a lesser-included offense of murder. The state suggests that because the jury was instructed only to consider voluntary manslaughter if the state failed to prove murder, the jury had to conclude that the state did not prove murder, which included malice, before considering voluntary manslaughter. BOR. at 10-11. Even still, this does not remove the taint of the improper inferred malice instruction where the jury is only instructed that voluntary manslaughter is a lesser-included offense of murder and the trial court does not provide greater clarity as to the distinction between the greater and lesser offense. Moreover, as in *Burdette*, viewing the trial court's charge on the law as a whole, the jury was left with the impression that it could use the inference of malice deriving from the use of a deadly weapon as a basis for convicting petitioner of voluntary manslaughter, particularly where the jury was left with the impression that malice was an element of voluntary manslaughter. *Burdette*, 427 S.C. at 501, 832 S.E.2d at 581. This is true even without an instruction on involuntary manslaughter.

In sum, trial counsel was deficient for failing to object to the inferred malice instruction given during petitioner's trial. The PCR court erred by finding that petitioner could not demonstrate that he was prejudiced by trial counsel's deficient performance because there is a reasonable probability that, without the improper inferred malice charge, the result of the proceeding would have been different.

² Importantly, the *Burdette* court explains that the inferred malice charge is improper because it allows the trial court to directly comment on facts in evidence, elevate those facts, and emphasize it the jury. *Burdette*, 427 S.C. at 502, 832 S.E.2d at 582. This concern is just as problematic where, as in petitioner's case, the trial court comments on the facts concerning how a jury may infer malice from the use of a deadly weapon but does not explain that malice is not an element of voluntary manslaughter.

CONCLUSION

Based on the foregoing argument, the PCR court's denial of relief should be reversed, and petitioner's case remanded to the Hampton County Court of General Sessions for a new trial.



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This 30th day of April, 2026.

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