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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of
Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
Roger M. Young, Sr., Circuit Court
Judge

Case No. 2023GS1003220-3222

State of South Carolina,

Respondent,

v.

Michael Whitlock,

Appellant.

APPELLANT'S INITIAL REPLY BRIEF

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INTRODUCTION

Appellant files this reply brief as to Issues I, II, and III and submits that the State's response ultimately depends on three unsound premises: first, that the evidence permitted only a choice between complete self-defense and murder; second, that the *Miranda* issue is either unpreserved or harmless because other evidence existed; and third, that the solicitor's rebuttal closing is effectively insulated from review despite the circuit court's merits ruling denying a new trial.

ARGUMENT I.

THE CIRCUIT COURT ERRED IN REFUSING THE INVOLUNTARY-MANSLAUGHTER INSTRUCTION BECAUSE THE STATE'S RESPONSE RESTS ON A FALSE BINARY THAT COLLAPSES MALICE, JUSTIFICATION, AND RECKLESSNESS INTO A SINGLE ALL-OR-NOTHING CHOICE.

The State's central answer to Issue I is that firing fourteen shots into a crowd was either justified self-defense or unlawful murder, with no room for involuntary manslaughter. (Respondent's Br. 8-21.) That framing is too rigid. Under *State v. Pittman*, 373 S.C. 527, 571, 647 S.E.2d 144, 167 (2007), involuntary manslaughter includes an unintentional killing without malice while engaged in a lawful act with reckless disregard for the safety of others. The question, then, was not whether the jury had to accept full self-defense or reject it entirely, but whether the evidence permitted the jury to find that Mr. Whitlock fired in reaction to perceived danger yet did so in a reckless, non-malicious manner. That evidence was present. Mr. Whitlock testified that he saw a person coming toward him with a firearm, that he was afraid he would be

shot, that he fired into the air, that he was not aiming at the man in red, and that he did not want to hurt or shoot anybody. (Tr. 684-686.) At the charge conference, defense counsel argued the evidence would allow the jury to find that Mr. Whitlock “was reckless in how he was firing that gun or how he was aiming that gun into a group of people down the street.” (Tr. 732-733.) And the defense theory throughout trial was that any shots Mr. Whitlock fired were reactive, fear-driven, and not part of a preconceived plan. (Tr. 646-651, 768-773, 780-784.)

The State’s response says that because Mr. Whitlock claimed fear, any lawful-use theory necessarily became complete self-defense, and once the jury rejected self-defense the only remaining option was murder. (Respondent’s Br. 15-21.) But that simply assumes away the middle ground. A jury could partially credit his testimony that he perceived danger and still conclude that the manner in which he responded was reckless rather than justified. That is not a contradiction; it is the very distinction between complete exoneration and a lesser, non-malicious homicide.

The State also leans heavily on Mr. Whitlock’s testimony that he did not view himself as acting recklessly. (Respondent’s Br. 15.) But the jury was not bound by his characterization of his own mental state. Mental state is inferred from conduct and surrounding circumstances, and the jury could have accepted his testimony that he acted in fear while rejecting his own label for that conduct.

The State’s harmless-error argument fails for the same reason. Under *State v. Burdette*, 427 S.C. 490, 498, 832 S.E.2d 575, 580 (2019), and *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014), the inquiry is whether the omitted charge contributed to the verdict actually rendered. Here, the omission mattered because it removed the only intermediate, non-malicious option consistent with a jury that might partially credit both sides’ evidence. Saying

the jury was instructed on murder and self-defense does not answer the prejudice; it confirms it. Without the involuntary-manslaughter instruction, the jury was forced into an all-or-nothing choice the evidence did not require.

ARGUMENT II.

THE STATE OVERSTATES BOTH PRESERVATION AND HARMLESSNESS AS TO THE CUSTODIAL STATEMENT, AND ITS ATTEMPT TO RECAST MR. WHITLOCK’S REQUEST FOR COUNSEL DOES NOT ANSWER THE MIRANDA VIOLATION.

The State first argues the Miranda issue is largely unpreserved. (Respondent’s Br. 17-23.) The record shows otherwise. Before trial, the parties litigated the admissibility of the statement in limine. Defense counsel argued that the pre-Miranda portion was custodial, that any waiver was not knowing and voluntary under the totality of the circumstances, and that Mr. Whitlock invoked counsel by asking about a lawyer. (Tr. 75-79.) The State answered those same points and specifically argued the question was ambiguous. (Tr. 79-87.) The trial court took the matter under advisement, later allowed the State to play essentially the entire interview, and defense counsel objected when the statement was published and admitted. (Tr. 362, 442-444.) That was sufficient to place the Miranda/right-to-counsel issue before the court.

On the merits, the State tries to minimize the request for counsel by insisting the exact wording was, “Do we have a lawyer already here? Because I do not know what’s going on,” rather than “Where is the lawyer?” (Respondent’s Br. 17-18; Tr. 67; Ex. 108 at 3:37:20.) But under either phrasing, the substance is the same: Mr. Whitlock communicated that he wanted a lawyer because he did not know what was happening. Under *State v. Kennedy*, 333 S.C. 426,

430-32, 511 S.E.2d 244, 246-47 (1999), as argued below, and *Davis v. United States*, 512 U.S. 452, 458-62, 114 S. Ct. 2350, 2355-57 (1994), the question is how a reasonable officer would understand the statement in context. In the setting of a lengthy early-morning custodial interview in which Miranda warnings began at 5:23 and questioning continued for hours thereafter, the officers were not free to ignore the request and simply press on. (Ex. 108; Respondent's Br. 17-18.)

The State's response also attempts to separate the pre-Miranda and post-Miranda portions and to characterize the challenged later admissions as cumulative. (Respondent's Br. 30-32, 47-49.) But this appeal does not depend on suppression of everything that was said from the first minute of the interview. At a minimum, the post-request, post-warning portion should have been excluded. The jury nevertheless heard the entire multi-hour interrogation, including admissions about shooting, the number of rounds fired, and Mr. Whitlock's asserted reasons for firing.

That leads to harmlessness. The State argues any error was harmless because other evidence induced Mr. Whitlock to testify and because his testimony was largely consistent with the recording. (Respondent's Br. 30-32.) But the harmlessness inquiry is not satisfied merely because other incriminating evidence existed. *Under Harrison v. United States*, 392 U.S. 219, 223 (1968), and *State v. Newell*, 303 S.C. 471, 478, 401 S.E.2d 420, 424 (Ct. App. 1991), the question is whether the challenged statement contributed to the verdict or induced the defendant's decision to testify.

Here, the State itself acknowledges that after Detective Rodriguez entered the interview, Mr. Whitlock admitted he may have fired fourteen or fifteen rounds and equivocated about Bolton shooting next to him. (Ex. 108 at 7:20, 7:24, 7:34; Respondent's Br. 48-49.) Those are not trivial details. They strengthened the State's narrative using Mr. Whitlock's own words. And

because the State played the recording for the jury, the prejudice cannot be dismissed as abstract or cumulative. The interrogation gave the prosecution a ready-made account of the shooting in Mr. Whitlock's own voice. On this record, the Court cannot say beyond a reasonable doubt that admission of the challenged portion of the statement made no difference.

ARGUMENT III.

THE STATE'S PRESERVATION ARGUMENT AS TO THE SOLICITOR'S REBUTTAL CLOSING IS OVERBROAD, AND IN ANY EVENT THE REMARKS WENT BEYOND ANY PERMISSIBLE INVITED RESPONSE BY ATTACKING DEFENSE COUNSEL'S ROLE AND INTEGRITY.

The State is correct that no contemporaneous objection was made during rebuttal closing, and Appellant does not ignore that difficulty. (Respondent's Br. 33-39.) But the State goes too far in treating the issue as though the circuit court never addressed it. Mr. Whitlock raised this claim as Ground 3 in his written motion for a new trial, and the successor judge squarely ruled on it by summarizing the challenged remarks, finding they were invited responses, and rejecting prejudice on the merits. *State v. Whitlock*, Order Denying Defendant's Motion for New Trial at 1-2. This Court may therefore review whether the denial of new-trial relief was an abuse of discretion, even if the absence of a contemporaneous objection affects the scope of review.

On the merits, the State understates both the content of the remarks and their prejudice. The problem was not merely a stray six-word phrase. The solicitor contrasted the State's asserted duty to "present the truth" with a description of defense counsel's role as to "manipulate, shroud, or confuse" jurors, and also characterized portions of the defense argument as "things that cannot be said to a jury." (Tr. 760-767, 799; *State v. Whitlock*, Order Denying Defendant's Motion for

New Trial at 1-2.) That argument did not merely answer an evidentiary point; it invited the jury to distrust the defense because of who was making it. *United States v. Young*, 470 U.S. 1, 11-13, 105 S. Ct. 1038, 1044-45 (1985), does not authorize that move. *Young* allows a reviewing court to consider whether a prosecutor's response merely "right[ed] the scale." But criticism of the State's evidence, omissions, or witness inconsistencies does not open the door to telling jurors that defense counsel's role is deception. Defense counsel argued that the State's proof was incomplete, inconsistent, emotional, and insufficient to establish malice beyond a reasonable doubt. (Tr. 768-769, 770-783, 793-798.) Those were proper merits arguments about the evidence and the burden of proof.

The State says the remarks were invited because defense counsel had criticized the State and its witnesses. (Respondent's Br. 35-42.) Even if some rebuttal was warranted, the solicitor crossed the line by turning a disagreement about the evidence into an attack on defense counsel's legitimacy. There is a material difference between answering an argument and telling the jury that the defense exists to confuse it.

Nor should the remarks be dismissed as harmless simply because the rebuttal was brief relative to the entire closing. When the State expressly aligns itself with "truth" and opposes that supposed truth-seeking function to defense counsel's alleged mission of manipulation, the argument strikes at the heart of the adversary system. In a case where the jury had to decide malice, self-defense, and the significance of Mr. Whitlock's recorded statement, an argument asking jurors to view the defense as bad-faith misdirection carried obvious prejudice. The circuit court therefore abused its discretion in denying a new trial on this ground.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Appellant's Initial Brief, Appellant respectfully requests that this Court reverse his convictions and remand this matter for a new trial.

RESPECTFULLY SUBMITTED:

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