

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Lexington County
Honorable Robin B. Stilwell, Circuit Court Judge
Appellate Case No. 2014-000125

THE STATE,

Respondent,

vs.

KERWIN S. PARKER,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON CERTIORARI

The Court of Appeals correctly determined that any issue with trial judge's jury charge on inferring malice from the use of a deadly weapon was not preserved for appellate review because defense counsel did not contemporaneously object to the jury charge during trial and, instead, specifically indicated that he had no objection to the charge as given. However, even if the issue was somehow preserved, any error resulting from the trial judge instructing the jury that it could infer malice from the use of a deadly weapon was entirely harmless in light of the jury's verdict, which demonstrated that the jury did not believe the use of a deadly weapon alone mandated a finding of malice or precluded a finding that the defendants' actions were excused, justified, or mitigated by the circumstances.

STATEMENT OF THE CASE

Procedural History

On November 20, 2006, Petitioner Kerwin S. Parker was arrested following an investigation into an incident where several people were injured and one person was fatally shot. In April of 2007, the Lexington County grand jury indicted Parker for one count of murder, one count of assault and battery with intent to kill, and one count of possession of a weapon during the commission of a violent crime. On September 14, 2009, a jury trial was commenced in the Lexington County court of general sessions with the Honorable Robin B. Stilwell, circuit court judge, presiding. At the conclusion of trial, the jury acquitted Parker of murder and convicted Parker of the other indicted offenses. Following the verdict, the trial judge deferred the sentencing proceedings. Thereafter, on October 21, 2009, a sentencing hearing was conducted in the Lexington County court of general sessions with Judge Stilwell again presiding. At the conclusion of the hearing, the trial judge sentenced Parker to concurrent terms of imprisonment of twenty years for assault and battery with intent to kill and five years for possession of a weapon during the commission of a violent crime.¹ Parker then timely filed a notice of appeal.

Subsequently, following oral argument, the Court of Appeals unanimously affirmed Parker's convictions in an unpublished opinion. State v. Parker, Op. No. 2013-UP-403 (S.C. Ct. App. filed Oct. 30, 2013). Thereafter, Parker petitioned the Court of

¹ Parker's brother, Curtis T. Johnson, was indicted for one count of murder, two counts of assault and battery with intent to kill, and one count of possession of a firearm during the commission of a violent crime for his role in the incident, and he was jointly tried with Parker. At the conclusion of trial, Johnson was convicted of one count of the lesser-included offense of voluntary manslaughter, two counts of the lesser-included offense of assault and battery of a high and aggravated nature, and one count of possession of a weapon during the commission of a violent crime. During the subsequent sentencing hearing, the trial judge sentenced Johnson to concurrent terms of imprisonment of thirty years for voluntary manslaughter and ten years for each of the assault and battery of a high and aggravated nature convictions along with a consecutive term of imprisonment of five years for possession of a weapon during the commission of a violent crime.

Appeals for rehearing, and the petition was denied. Parker then filed a petition for a writ of certiorari in the Supreme Court.

Factual History

At approximately 1:30 a.m. in the early morning hours of November 20, 2006, Jose Hernandez, a resident of the Church Hill Apartments in Lexington County, South Carolina, heard a loud noise coming from an area across from his apartment followed by several gunshots. (R. pp. 199-200; p. 226; pp. 230-231). Hernandez went outside to see what was going on and, when he did so, observed a vehicle stuck between a tree and the apartment building across from him. (R. p. 231). He then saw two individuals, one with long hair and one with short hair, standing on a patio behind the apartment near where the vehicle was located. (R. pp. 231-234). Hernandez continued to watch as the long-haired man walked back to the vehicle and the short-haired man remained on the patio while pointing a gun in a downward direction. (R. pp. 231-234). Hernandez then heard someone ask not to be shot before he saw the short-haired man fire two gunshots. (R. p. 232; pp. 235-236). Following the gunshots, a woman came out of the apartment and asked the men what they had done, and the men then walked down the street together. (R. pp. 233-234). Thereafter, Hernandez watched as the short-haired man left the area and the long-haired man returned to the apartment. (R. pp. 233-234). The long-haired man then kicked a man lying on the ground several times, returned to the crashed vehicle, attempted to leave in it, and then walked away. (R. p. 234).

Shortly thereafter, law enforcement officers were notified of the shooting and responded to the scene. (R. pp. 259-260; p. 276; pp. 294-295; p. 314). After they arrived, Deputy Teddy Xanthakus and Deputy Danny Lewis of the Lexington County Sheriff's Office observed a vehicle resting in the bushes next to the apartment building

and saw a long-haired man, Curtis T. Johnson, walking in the road "in a daze." (R. pp. 259-263; pp. 276-277; p. 329). The officers then arrested Johnson and found a set of brass knuckles in his pocket. (R. pp. 262-263; pp. 277-278). Thereafter, Deputy Xanthakus moved to secure the apartment, found a severely-injured man on the apartment patio, observed a blood trail leading away from the apartment, and discovered the body of a deceased person sprawled out on the floor of the kitchen inside of the apartment. (R. pp. 263; pp. 265-268). Emergency medical personnel then arrived on the scene and began treating the injured victims, and the apartment was secured. (R. p. 272). Officers subsequently recovered numerous pieces of evidence from the scene, including a shotgun, a metal pipe, eight shell casings, a box of shotgun shells, numerous bullet fragments, and multiple fired bullets. (R. p. 267; pp. 358-360; pp. 363-364; p. 368; p. 374; p. 384; pp. 395-396; p. 400; p. 402; pp. 404-405).

As the investigation into the shooting progressed, officers learned Johnson's older brother, Petitioner Kerwin S. Parker, was involved in the incident, and they went to his residence to apprehend him. (R. p. 31; pp. 295-296; p. 540). Upon arriving, officers found a man standing in the yard of the residence, and he advised them that Parker was inside. (R. pp. 301-302; p. 306). The officers then entered the residence, located Parker and his mother, and detained Parker.² (R. p. 302; p. 307). Following his arrest, Parker's mother provided the officers with Parker's shoes and informed them Parker's gun was in a vehicle located in the yard of the residence. (R. pp. 302-303; pp. 309-310). Officers then discovered a forty-caliber handgun in the glove box of the vehicle, and it was later confirmed to belong to Parker. (R. p. 317; p. 321; pp. 483-484).

² At the time of his arrest, Parker had short hair, was not wearing any shoes, and did not appear to have any injuries. (R. p. 298; p. 302; p. 304; 307; p. 428; pp. 627-628). Likewise, at the time of his arrest, Johnson had no visible injuries. (R. p. 615). Furthermore, Johnson was wearing a black sweatshirt and Parker was wearing a gray sweatshirt when they were arrested. (R. p. 221; p. 330).

After Johnson and Parker were arrested, officers collected the sweatshirts they were wearing at the time and performed gunshot residue tests on their hands and clothing.³ (R. pp. 329-330; pp. 334-335; p. 355; p. 366). Upon analysis, gunshot residue was discovered on both of Johnson's hands and on the right and left sleeves of both sweatshirts that were submitted for testing. (R. pp. 455-456; pp. 459-460). Blood was also located on Parker's shoes and Johnson's socks and shoes. (R. pp. 488-492). Jasper Humbert, a forensic D.N.A. analyst with S.L.E.D., determined the blood on Parker's shoes belonged to one of the victims, Isaac Wilson ("Isaac"), and the blood on Johnson's socks and shoes belonged to Isaac and another of the victims, A.J. Wilson ("A.J."). (R. pp. 495-496; pp. 498-500). Furthermore, Parker's gun and the fired cartridges, bullets, and bullet fragments recovered during the investigation into the shooting were analyzed by S.L.E.D. Agent David Black, an expert in firearms examinations. (R. pp. 468-470). Based on his analysis, Black concluded all seven of the recovered bullet cartridges were fired from Parker's gun and three of the four recovered bullets were fired from the weapon.⁴ (R. p. 470).

Meanwhile, the victims were taken to the hospital and treated for their injuries. (R. p. 501; pp. 505-506). The man who left the blood trail at the scene, Walter Gadson, suffered a femur fracture during the incident. (R. pp. 502-503). Likewise, the man found on the patio, A.J., suffered numerous injuries, including injuries to his vertebrae, face, mouth, extremities, shoulder, flank, wrist, and thumb. (R. p. 162; p. 504; pp. 509-510). A.J.'s injuries were so severe that a person who saw him after the shooting stated "it

³ The gunshot residue test was not conducted on Parker until approximately 6:30 a.m., which was roughly five hours after the shooting. (R. p. 366; pp. 457-458).

⁴ Black was unable to determine what gun fired the final bullet because it was too damaged for proper analysis. (R. p. 470).

looked like some of the part of, some of his mouth was gone.” (R. p. 140). Furthermore, the lower portion of A.J.’s body was paralyzed as a result of the shooting. (R. p. 163; pp. 509-510).

Subsequently, Dr. Janice Ross, an expert in forensic pathology, performed an autopsy on Isaac, who was the person killed in the shooting. (R. pp. 512-513). During the autopsy, Dr. Ross located two gunshot wounds to Isaac’s chest and gunshot powder burns on Isaac’s clothing. (R. pp. 513-514). One bullet entered the right side of Isaac’s chest, travelled through his lungs and heart, and left an exit wound that suggested Isaac was lying on concrete at the time he was shot. (R. pp. 515-516). The other bullet entered the left side of Isaac’s chest and travelled through his left lung and stomach. (R. pp. 516-517). Based on her findings, Dr. Ross concluded Isaac bled to death as a result of the shooting. (R. p. 517). She further concluded Isaac was shot from a close distance and the gun was only four to twelve inches away from his body when the shots were fired. (R. pp. 514-515; p. 518).

Thereafter, Parker was indicted for murder, assault and battery with intent to kill (“ABWIK”), and possession of a weapon during the commission of a violent crime, and he proceeded to trial with Johnson, who was charged with the same offenses along with an additional count of ABWIK. (R. p. 2; pp. 868-871; pp. 873-874). During the trial, which began on September 14, 2009, multiple accounts of the shooting were presented to the jury. (R. p. 1; pp. 100-118; pp. 151-162; pp. 230-236; pp. 570-579; pp. 799-813).

Gadson recounted he and Isaac got into a physical altercation with Johnson earlier in the evening prior to the shooting and Johnson threatened them as he was leaving the area. (R. pp. 96-98). He testified they then returned home before observing Parker’s vehicle near their apartment. (R. pp. 99-100). In response, Gadson stated he, Isaac, and

A.J. exited the apartment after Isaac retrieved a shotgun. (R. pp. 103-104). Once outside, Gadson stated Johnson got out of the vehicle and blew its horn and then Parker came around from the side of the apartment. (R. pp. 104-105). He testified he then spoke with Parker, Parker pulled his pants leg up and reached for something, A.J. yelled that Parker had a gun, A.J. and Isaac ran towards the patio, and Isaac tossed him the shotgun. (R. pp. 105-111). After that, Gadson indicated Johnson drove the vehicle towards him, he unsuccessfully tried to fire the shotgun to stop the vehicle, and he was struck and injured. (R. pp. 111-104). Thereafter, he stated he saw Johnson exit the vehicle armed with a pistol and then heard multiple gunshots as he crawled away from the scene. (R. pp. 114-117).

Similarly, A.J. testified he was at his apartment late on the night of November 19, 2006, when Isaac and Gadson arrived and stated they had been in a fight with Johnson. (R. pp. 148-149; pp. 170-171). Later that night, A.J. stated Johnson arrived at the apartment complex so they all went outside with Isaac armed with a shotgun. (R. pp. 151-152). Once outside, A.J. stated a man approached them and asked why they did something to his brother. (R. pp. 153-155). After that, A.J. testified the man reached for something and he responded by yelling that the man had a gun before running towards the apartment patio. (R. pp. 156-157). Thereafter, A.J. stated he heard gunshots, went inside the apartment, and then went back outside when he did not see Isaac. (R. p. 157). When he went outside, A.J. indicated he saw a long-haired man on top of Isaac and he tried to get the man off of him. (R. pp. 158-159). When he did so, he testified the man who confronted them earlier pulled out a gun and shot him in the mouth, side, hand, and back. (R. pp. 159-163). A.J. further testified he selected the photograph of the shooter

from a photographic line-up, and he identified Parker in-court as the shooter and indicated he was certain of the identification.^{5 6} (R. pp. 161-167).

Subsequently, Johnson testified in his own defense and offered a substantially different account of the incident from the testimony of A.J. and Gadson. (R. p. 540). Prior to the shooting, Johnson stated he was attacked by Gadson and Isaac while stopped at a red light and was kicked in the head by Gadson while he was still seated in the vehicle. (R. pp. 557-558). Johnson claimed he was then pulled from the vehicle during the altercation but was eventually able to escape.⁷ (R. pp. 559-561). Thereafter, Johnson testified he returned home and told Parker about the incident, and Parker responded by saying he was going to go speak with the attackers. (R. pp. 564-565). Johnson indicated they then drove to Isaac's apartment, parked in the rear, and intended to resolve the dispute by talking to Isaac and Gadson. (R. pp. 568-572). Johnson testified Parker then exited the vehicle and walked out of view before Isaac, Gadson, and A.J. approached his vehicle while carrying three different shotguns. (R. pp. 574-577). He claimed he then heard Isaac say he was going to shoot him, he honked the horn, and they stopped walking towards him. (R. pp. 577-578). When he honked the horn, Johnson testified Parker ran back to the vehicle, stopped when he saw the shotguns, and asked the men to put the guns down. (R. pp. 578-579; pp. 799-800). Johnson claimed Parker then tried to convince Isaac to let them leave, but Gadson charged at Parker with a shotgun. (R. pp. 800-802).

⁵ Detective Steve Collins of the Lexington County Sheriff's Office showed A.J. a photographic line-up while A.J. was still hospitalized from his injuries. (R. p. 198; pp. 200-203). A.J. selected Parker from the line-up and indicated he was certain of his identification. (R. pp. 202-203; pp. 209-211).

⁶ Consistent with A.J.'s testimony, Amy Fleming, who lived with Isaac and A.J. at the time of the shooting, stated she saw Parker armed with a gun on the apartment patio after A.J. was shot, and she testified she heard Parker state he should kill all of them. (R. p. 32; pp. 39-40).

⁷ As a result of the attack, Johnson stated he suffered "a little nick" under his lip, dirt in his eye, and emotional pain. (R. pp. 562-563).

Johnson stated he then drove towards Gadson and struck a wall. (R. pp. 802-805; p. 807). After hitting the wall, Johnson indicated he looked over at the patio and saw Isaac pointing a gun at Parker while he was being held by A.J. (R. p. 808). Johnson claimed he then grabbed a gun from his vehicle's glove box and fired a warning shot out of the window before running over and shooting A.J. five times and Isaac two times.⁸ (R. pp. 810-811). After the shooting, Johnson testified Parker left to go get help while he went into the apartment and then walked in the roadway. (R. pp. 811-813).

At the conclusion of the evidentiary phase of trial, the trial judge conducted a charge conference and stated he intended to instruct the jury on voluntary manslaughter and self-defense. (R. p. 637). Thereafter, counsel for both Parker and Johnson requested a jury instruction on the lesser-included offense of assault and battery of a high and aggravated nature ("ABHAN"), and the trial judge agreed to give the charge. (R. pp. 640-642). Subsequently, the trial judge instructed the jury on the applicable law, including on murder, voluntary manslaughter, ABWIK, ABHAN, self-defense, and defense of others, and explained malice in the context of murder and ABWIK as follows:

[M]alice may be indicated from conduct showing a disregard for human life. An implication of malice may also arise when the deed is done with a deadly weapon. That implication is merely an evidentiary fact which may be taken into consideration along with any other evidence in this case. The deadly weapon is an article, instrument, or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case.

(R. pp. 714-729). After finishing his instructions to the jury, the trial judge asked the parties if there were any objections to the jury charge as given, and no objections were

⁸ Notably, Johnson also claimed that he shot Parker during the incident. (R. p. 604).

raised.⁹ (R. pp. 731-732). Specifically, defense counsel for Parker responded: “None, Your Honor.” (R. p. 732).

At the conclusion of trial, the jury acquitted Parker of murder, convicted Parker of ABWIK and possession of a weapon during the commission of a violent crime, and convicted Johnson of possession of a weapon during the commission of a violent crime, the lesser-included offense of voluntary manslaughter, and two counts of the lesser-included offense of ABHAN. (R. pp. 740-741). The trial judge then deferred the sentencing proceedings to a later date. (R. pp. 742-743).

Thereafter, on October 21, 2009, a sentencing hearing was conducted. (R. p. 744; p. 747). At the outset of the hearing, counsel for Parker moved for a new trial, arguing that the trial judge’s jury charge on inferring malice from the use of a deadly weapon was no longer an appropriate charge in light of the Supreme Court’s decision in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), which he noted was decided subsequent to Parker’s trial. (R. pp. 748-749). Defense counsel asserted Parker was entitled to the benefit of the decision in Belcher because his case was not considered final until he was sentenced. (R. p. 749). In response, the solicitor asserted the Supreme Court explicitly instructed in the Belcher opinion that the decision only applied to cases where the issue was preserved. (R. p. 750). The solicitor noted the issue was not preserved in Parker’s case because Parker raised no objection to the inference of malice charge during trial. (R. p. 750). In rebuttal, defense counsel contended that any objection he potentially could have raised to the charge would likely have been found to be specious in light of the law

⁹ After the jury subsequently began its deliberations, the jury submitted a request for explanations as to “the differences between murder and voluntary manslaughter” and “at what point does malice determine murder or voluntary manslaughter.” (R. p. 734). In response to the questions, the trial judge re-instructed the jury on murder, malice, and voluntary manslaughter. (R. p. 737-738). Notably, just as with the initial jury charge, no objections were raised to the trial judge’s supplemental instructions to the jury on inferring malice from the use of a deadly weapon. (R. pp. 738-739).

in effect at the time of Parker's trial, and he further asserted principles of judicial economy warranted the grant of a new trial because he maintained that relief would be granted through an ineffective assistance of counsel claim if not granted immediately. (R. pp. 750-751). After considering the issue, the trial judge denied Parker's new trial motion, ruling he was not given an opportunity to grant a curative instruction or revise the jury charge due to the fact that Parker did not object to the charge during trial and further finding Parker suffered no prejudice as a result of the charge in light of the jury's verdict and the evidence presented during trial. (R. pp. 751-752). The trial judge then sentenced Parker to concurrent terms of imprisonment of twenty years for ABWIK and five years for possession of a weapon during the commission of a violent crime, and Parker subsequently appealed his convictions. (R. pp. 775-776).

On appeal, the Court of Appeals affirmed Parker's convictions. (App'x pp. 1-2). In reaching that decision, the Court of Appeals found that Parker's appellate challenge to the propriety of the inference of malice jury instruction was not preserved for appellate review. (App'x p. 2).

ARGUMENT

The Court of Appeals correctly determined that any issue with trial judge's jury charge on inferring malice from the use of a deadly weapon was not preserved for appellate review because defense counsel did not contemporaneously object to the jury charge during trial and, instead, specifically indicated that he had no objection to the charge as given. However, even if the issue was somehow preserved, any error resulting from the trial judge instructing the jury that it could infer malice from the use of a deadly weapon was entirely harmless in light of the jury's verdict, which demonstrated that the jury did not believe the use of a deadly weapon alone mandated a finding of malice or precluded a finding that the defendants' actions were excused, justified, or mitigated by the circumstances.

Parker contends that the Court of Appeals erred in finding his appellate challenge to the trial judge's jury charge on inferring malice from the use of a deadly weapon was not preserved for appellate review. In support of that contention, Parker maintains that the issue was properly preserved for appellate review because his case was not yet final at the time of this Court's decision in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), and because the issue was preserved through an objection raised for the first time in a post-verdict and post-trial sentencing hearing. To the contrary, the Court of Appeals correctly determined that any issue with the trial judge's jury charge was not preserved for appellate review because no timely objections to the jury charge were raised during trial. Instead, after the trial judge concluded his jury instructions, defense counsel specifically indicated that he had no objection to the charge. As a result, any issue with the propriety of the charge was waived, and defense counsel's post-verdict and post-trial challenge to the jury charge, which was raised for the first time during the sentencing proceedings, was not sufficient to preserve the issue pursuant to the requirements of South Carolina's issue preservation rules. However, even if the issue had somehow been preserved for appellate review despite the lack of a contemporaneous objection to the jury charge during trial, any error resulting from the trial judge instructing the jury that it

could infer malice from the use of a deadly weapon was entirely harmless and had no impact on Parker's case because the jury's verdict demonstrated that it did not mistakenly believe the use of a deadly weapon alone required a finding of malice or precluded a finding that the defendants' actions were excused, justified, or mitigated by the circumstances. For those reasons, the Court of Appeals properly affirmed Parker's convictions. Parker's petition for a writ of certiorari should be denied.

A. Issue Preservation

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005). "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000).

Regarding the requirement that a timely objection be raised, a defendant must make a contemporaneous objection to a perceived error during trial in order to preserve the issue for further review. State v. Blalock, 357 S.C. 74, 79, 591 S.E.2d 632, 635 (Ct. App. 2003); see State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) ("A contemporaneous objection is required to properly preserve an error for appellate review."). Thus, when a perceived error arises, the defendant must object at the first opportunity to do so or the issue is waived. State v. Sullivan, 310 S.C. 311, 314, 426 S.E.2d 766, 768 (1993); see State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169

(1991) (“A defendant must object at his first opportunity to preserve an issue for appellate review.”); see also State v. King, 349 S.C. 142, 157, n.1, 561 S.E.2d 640, 647 (Ct. App. 2002) (“[N]o objection was made contemporaneously with this testimony so as to preserve the issue for review. King’s belated objection to subsequent testimony came too late.”). “It is axiomatic that an issue cannot be raised for the first time in a post-trial motion.” Bank of New York v. Sumter County, 387 S.C. 147, 159, 691 S.E.2d 473, 479 (2010).

In addition to the general requirements of our issue preservation rules, the South Carolina Rules of Criminal Procedure also provide specific guidance in regards to raising and preserving an objection to a jury charge. See Rule 20, SCRCrimP (outlining the requirements for requesting jury instructions and objecting to a jury charge). Pursuant to our criminal procedure rules, a defendant must object to the jury charge as given or request an additional charge when afforded the opportunity to do so in order to properly preserve an objection to a charge. State v. Stone, 285 S.C. 386, 387, 330 S.E.2d 286, 287 (1985); see Rule 20(a), SCRCrimP (“All requests for legal instructions to the jury shall be submitted at the close of the evidence, or at such earlier time as the trial judge shall reasonably direct.”); Rule 20(b), SCRCrimP (“Notwithstanding any request for legal instructions, the parties shall be given the opportunity to object to the giving or failure to give an instruction before the jury retires, but out of the hearing of the jury. Any objection shall state distinctly the matter objected to and the grounds for objection.”). “The rule in this State is firmly established that failure to object to a charge, or failure to request an additional charge when the opportunity is afforded, constitutes a waiver of any right to complain on appeal of an alleged error in the charge.” State v. Williams, 266 S.C. 325, 335, 223 S.E.2d 38, 43 (1976); see Rule 20(b), SCRCrimP (“Failure to object

in accordance with this rule shall constitute a waiver of objection.”). “[T]he right to have the law declared may be waived by the parties and, ordinarily, silence in the face of an omission from, or error in the charge amounts to waiver.” Williams, 266 S.C. at 335, 223 S.E.2d at 43.

In the case sub judice, the Court of Appeals correctly determined that any issue with the propriety of the inference of malice jury instruction was not preserved for appellate review. Significantly, after the trial judge instructed the jury on the applicable law and explained that malice could potentially be inferred from the use of a deadly weapon, the trial judge inquired of counsel whether there were any objections to the jury charge as given, and Parker’s defense counsel specifically responded: “None, Your Honor.” Because defense counsel did not object to the inference of malice jury charge after it was given and, instead, indicated he had no objection to the charge, any issue that Parker may have had with the giving of that instruction was waived. See State v. Smith, 279 S.C. 440, 442, 308 S.E.2d 794, 794-795 (1983) (“Error is claimed by reason of the trial judge’s charge to the jury concerning the implication of malice from the use of a deadly weapon. No objection to the jury instruction was raised at trial. The question therefore is not available for our review.”); State v. Rios, 388 S.C. 335, 342, 696 S.E.2d 608, 612 (Ct. App. 2010) (“Even after the trial court specifically asked if there were any objections to the charges given, Rios responded, ‘None.’ By failing to contemporaneously object to the jury charges, Rios has waived his right to allege error on appeal.”); see also State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007) (finding any issue with the admission of a challenged piece of evidence was waived where Dicapua’s counsel specifically stated he had no objection when the evidence was introduced during trial); see, e.g., State v. Burton, 326 S.C. 605, 613, 486

S.E.2d 762, 766 (Ct. App. 1997) (“This testimony was admitted without objection. Because Burton failed to object, he is barred from raising this issue on appeal.”).

Thereafter, defense counsel first raised an objection to the inference of malice jury charge during a sentencing hearing conducted over a month after the jury returned its verdict and Parker’s trial had ended. Cf. Bowers v. Charleston & W. Carolina Ry. Co., 210 S.C. 367, 371, 42 S.E.2d 705, 706 (1947) (not reviewing an issue on appeal where the issue was not raised at the time the allegedly objectionable argument was made but, instead, was raised for the first time in a motion for new trial made after the jury issued its verdict). However, because defense counsel’s post-verdict and post-trial objection to the charge was not raised contemporaneously with the alleged error, the objection was untimely and, significantly, did not present the trial judge with any opportunity to effectively respond to the objection or correct the alleged deficiencies with his jury instructions since the trial had already concluded. See State v. Pauling, 322 S.C. 95, 100, 470 S.E.2d 106, 109 (1996) (“Having denied the trial judge an opportunity to cure any alleged error by failing to contemporaneously object to the charge, Appellant is procedurally barred from raising these issues for the first time on appeal.”); see also Williams, 266 S.C. at 335, 223 S.E.2d at 43 (“The rule in this State is firmly established that failure to object to a charge, or failure to request an additional charge when the opportunity is afforded, constitutes a waiver of any right to complain on appeal of an alleged error in the charge.”); State v. Black, 319 S.C. 515, 521, 462 S.E.2d 311, 315 (Ct. App. 1995) (“It is a fundamental principle that a contemporaneous objection is required at trial to properly preserve an error for appellate review.”). As a result, Parker failed to properly preserve any issue with the jury charge for appellate review, and the Court of Appeals correctly declined to address the issue on appeal. See State v. James, 362 S.C.

557, 562, 608 S.E.2d 455, 457 (Ct. App. 2004) (holding an untimely argument did not preserve an issue for appellate review); see also Abba Equip., Inc. v. Thomason, 335 S.C. 447, 486, 517 S.E.2d 235, 240 (Ct. App. 1999) (“An appellate court may not address an issue that is not preserved.”).

In arguing to the contrary, Parker contends that this Court’s decision in Belcher was applicable to his case because his case was not yet final at the time Belcher was decided since he had not yet been sentenced and because he allegedly preserved the issue through his new trial motion raised after the jury returned its verdict and the trial was concluded. Critically though, Parker’s post-verdict and post-trial motion for a new trial, which was indisputably raised for the first time during the sentencing proceedings, was not sufficient to preserve the issue pursuant to South Carolina’s issue preservation requirements. See Bank of New York, 387 S.C. at 159, 691 S.E.2d at 479 (“[A]n issue cannot be raised for the first time in a post-trial motion.”); see also State v. Penland, 275 S.C. 537, 538, 273 S.E.2d 765, 766 (1981) (“One may not preserve a vice until he learns what the result will be and then, take advantage of the error on appeal.”); State v. Burnett, 226 S.C. 421, 424, 85 S.E.2d 744, 746 (1954) (“A defendant may not reserve vices in his trial, of which he has notice as here, taking his chances of a favorable verdict, and in case of disappointment, use the error to obtain another trial.”); State v. Ballew, 83 S.C. 82, 87, 63 S.E. 688, 690 (1909) (“The general principle that a party can not take his chances of a successful issue, reserving vices in the trial, of which he has notice, for use in case of disappointment, is universally recognized and obviously just.”). As a result, the new rule announced in Belcher regarding the propriety of jury charges on inferring malice was not applicable to Parker’s case since that rule only applies to cases “which are pending on direct review or not yet final **where the issue is preserved.**” Belcher, 385 S.C. at 612,

685 S.E.2d at 810 (emphasis added). Accordingly, the Court of Appeals correctly declined to address Parker's challenge to the inference of malice jury charge on appeal and affirmed his convictions. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("An issue that was not preserved for review should not be addressed by the Court of Appeals[.]"). Parker's petition for a writ of certiorari should be denied.¹⁰

B. Harmlessness of Any Error Regarding the Inference of Malice Jury Charge

After an error is discovered, the appellate court must then determine whether the error was harmless. See State v. Northcutt, 372 S.C. 207, 217, 641 S.E.2d 873, 878 (2007) ("Determining the trial judge committed error is the first step of our analysis. Next we must determine whether the error was harmless."). Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). The harmlessness of an error generally depends on the materiality of the error in relation to the case as a whole. State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003); see State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010) ("No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case."). An error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17,

¹⁰ During the post-verdict sentencing hearing, defense counsel argued that Parker should be granted a new trial in light of the Belcher decision despite the fact that he did not object to the jury charge during trial because he believed Parker would be entitled to a new trial through an ineffective assistance of counsel claim if he was not granted a new trial at that time. (R. pp. 750-751). Significantly though, this Court specifically stated in its Belcher opinion that the change in law announced in that case was not applicable to convictions challenged on post-conviction relief. See Belcher, 385 S.C. at 613, 685 S.E.2d at 810 ("Our ruling, however, will not apply to convictions challenged on post-conviction relief."). Furthermore, this Court has previously explained that counsel is not considered to be ineffective for failing to anticipate potential changes in the law. See State v. Harden, 260 S.C. 405, 408, 602 S.E.2d 48, 49 (2004) ("An attorney is not required to anticipate potential changes in the law which are not in existence at the time of the conviction."). Therefore, defense counsel's failure to foresee the change in the law regarding the inference of malice charge brought about by Belcher did not constitute ineffective assistance of counsel and would not entitle Parker to any post-conviction relief.

25, 664 S.E.2d 480, 484 (2008); see State v. Hariott, 210 S.C. 290, 298, 42 S.E.2d 285, 288 (1947) (“It is a rule of practically universal application in appellate procedure that an accused cannot avail himself of error as a ground for reversal where the error has not been prejudicial to him.”). When a review of the entire record establishes an error is harmless beyond a reasonable doubt, an appellate court should not reverse a conviction. State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003).

In the case at bar, even if the issue had somehow been preserved despite the lack of a timely trial objection, the trial judge’s instruction to the jury that it could infer malice from the use of a deadly weapon was entirely harmless and had no impact on the ultimate outcome of Parker’s case based on the verdict returned by the jury. Specifically, despite the fact that the jury was instructed it could infer malice from the use of a deadly weapon, its verdict demonstrated that it was not misled to believe it could not find the existence of justification, excuse, or mitigation in a situation where a deadly weapon was used, which was the precise type of jury misunderstanding that this Court’s new rule in Belcher sought to avoid. See Belcher, 385 S.C. at 610, 685 S.E.2d at 808-809 (“[I]nferred malice from the use of a deadly weapon is indeed only a ‘half-truth.’ The absence of justification, excuse or mitigation cannot be inferred from the use of a deadly weapon standing alone. Other facts and evidence (or the absence of other facts and evidence) are required for the fulfillment of these component parts.”). Critically, even though the evidence presented showed Isaac’s death and A.J.’s injuries resulted from the use of a deadly weapon, the jury demonstrated that it found Parker’s co-defendant’s actions did not involve malice and were mitigated under the circumstances by convicting Johnson of the lesser-included offenses of voluntary manslaughter and ABHAN. Cf. Nation v. State, 252 Ga. App. 620, 623-624, 556 S.E.2d 196, 200-201 (Ga. Ct. App. 2001) (finding any

error that resulted from the giving of an erroneous jury charge was harmless and did not contribute to the verdict where the jury's verdict demonstrated it was not impacted by the erroneous charge). Thus, the inference of malice jury instruction did not confuse the jury in Parker's case or mislead them to believe the use of a deadly weapon alone mandated a finding of malice. See State v. Chambers, 194 S.C. 197, 203, 9 S.E.2d 549, 552 (1940) (finding any error resulting from the trial judge's jury instructions on malice was harmless where the jury convicted the defendants of lesser-included offenses of the offense of ABWIK and, thus, did not find the defendants acted with malice). As a result, any error that could have resulted from the giving of that instruction was entirely harmless and did not impact the verdict in Parker's case, and the Court of Appeals properly affirmed Parker's convictions. See Fletcher, 379 S.C. at 25, 664 S.E.2d at 484 ("Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained."). Parker's petition for a writ of certiorari should be denied.

CONCLUSION


For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

BY:



Mark R. Farthing

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

January 24, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Lexington County
Honorable Robin B. Stilwell, Circuit Court Judge
Appellate Case No. 2014-000125

THE STATE,

Respondent,

vs.

KERWIN S. PARKER,

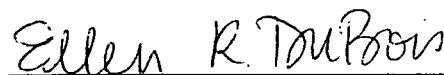
Petitioner.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 24th day of January, 2014.



ELLEN R. DuBOIS
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727



ALAN WILSON
ATTORNEY GENERAL

January 24, 2014

Wanda H. Carter, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

RE: State v. Kerwin S. Parker – Appellate Case No. 2014-000125

Dear Ms. Carter:

I am enclosing two (2) copies of the Return to Petition for Writ of Certiorari, along with proof of service, in the above-referenced case.

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar Number 76901

MRF/
Enclosures

cc: Honorable Daniel E. Shearouse (original and six copies enclosed)
~~Honorable Jenny A. Kitchings (one copy enclosed)~~
Victim Services

RECEIVED
JAN 24 2014
SC Court of Appeals