STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Roger L. Couch, Circuit Court Judge

THE STATE,

PETITIONER,

V.

SHAWN ANTONIO MILLER,

RESPONDENT

APPELLATE CASE NO. 2012-212350

BRIEF OF RESPONDENT

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I. Did Respondent present evidence that, if believed, reduced his murder charge to involuntary manslaughter and obviated an instruction to the jury that it could infer malice from the use of a deadly weapon under *State v. Belcher*[1] where the only eyewitnesses testified that Respondent and the decedent were completely friendly; that Respondent was "messing" with the gun like a toy prior to the shooting; and that the gun accidentally fired when Respondent made a gesture in the decedent's direction with the gun in his hand?

II. Was Respondent's objection that the instruction amounted to "a comment on the facts" sufficient to preserve the *Belcher* issue for review?

[1] 385 S.C. 597, 685 S.E.2d 802 (2009).

STATEMENT OF THE CASE

On November 21, 2008, the Spartanburg County Grand Jury indicted Respondent Shawn Antonio Miller for murder and possession of a firearm during the commission of a violent crime. App. 322-323. On April 15, 2009, Respondent proceeded to trial before The Honorable Roger L. Couch and a jury. Kathleen Hodges represented Respondent, and Ryan McCarty and Lauren Barnwell represented the State. App. 5.

At the conclusion of the trial, Judge Couch charged the jury on murder, involuntary manslaughter, and possession of a firearm during the commission of a violent crime. Judge Couch included an instruction that the jury could infer malice "when the deed is done with a deadly weapon." App. 291, ln. 1—App. 296, ln. 25. The jury found Respondent guilty on both counts. App. 310, ll. 18-25. Judge Couch sentenced Respondent to five years imprisonment for the firearm charge and forty years concurrent for the murder charge. App. 318, ll. 18-25.

On December 2, 2009 and January 21, 2010, Respondent appealed with an *Anders*[2] brief and a pro se brief, respectively. App. 325-346. On April 20, 2011, the Court of Appeals denied the *Anders* petition to be relieved as counsel and instructed the parties to brief whether the trial court improperly charged the jury regarding inferred malice. App. 347-348. On May 20, 2011, Respondent filed a brief arguing under *State v. Belcher* that Judge Couch improperly instructed the jury as to inferable malice because evidence existed that mitigated or reduced the homicide. App. 349-362. On August 19, 2011, the State filed its response brief arguing, *inter alia*, that the *Belcher* rule did not apply because the evidence

[2] *Anders v. California*, 386 U.S. 738 (1967).

presented did not entitle Respondent to a reduced charge of involuntary manslaughter. App. 363-388.

On April 25, 2012, the Court of Appeals issued its Opinion reversing Respondent's convictions and remanding for a new trial. The Opinion concluded that Respondent adequately preserved for review the issue of whether Judge Couch properly charged the jury that it could infer malice from the use of a deadly weapon. The Opinion also concluded that the inferable malice jury charge was improper under *Belcher* because "evidence of mitigation" existed in the record,[3] regardless of whether the evidence could support a reduced charge of involuntary manslaughter. In a concurring opinion, Judge Pieper concluded that the evidence did warrant the involuntary manslaughter charge. Ct. App. Op. No. 4965 filed Apr. 25, 2012.

On May 11, 2012, the State filed a Petition for Rehearing, arguing that the *Belcher* issue was not preserved for review and that no evidence of mitigation was presented under *Belcher* because the evidence could not support a reduced charge of involuntary manslaughter. App. 395-411. On May 25, 2012, the Court of Appeals issued an order denying the Petition for Rehearing. App. 412.

[3] Specifically, the Opinion concluded that evidence of Respondent's lack of motive and intent to commit the homicide constituted mitigating evidence: "Here, the State presented evidence that there were no ill feelings between [Respondent] and [the decedent] and [Respondent] exhibited surprise and panic when the gun discharged."

ARGUMENT

I. EVIDENCE THAT RESPONDENT'S GUN FIRED ACCIDENTALLY, THAT PETITIONER WAS FRIENDS WITH THE DECEDENT AND HAD NO MOTIVE TO THREATEN HIM, AND THAT PETITIONER WAS ONLY GESTURING TOWARDS HIM AND DID NOT DISPLAY THE GUN IN A THREATENING OR INTIMIDATING WAY SUPPORTED A FINDING THAT PETITIONER WAS ACTING LAWFULLY BUT RECKLESSLY; THEREFORE, HE WAS ENTITLED TO A REDUCED CHARGE OF INVOLUNTARY MANSLAUGHTER PRECLUDING THE BELCHER INSTRUCTION.

STATEMENT OF FACTS

The State alleged at trial that on October 26, 2007, Respondent and another man visited a crack house together in Spartanburg County. Sometime later, Respondent indicated he was ready to leave, but the other man indicated he was not ready. The State alleged that in response, Respondent pulled a revolver and shot and killed the man. App. 91, ll. 7-24. Respondent admitted to the shooting, but he contended that it was an accident resulting from his reckless handling of the revolver.[4] App. 94, ln. 6—App. 95, ln. 5.

The State's first eyewitness testified that Respondent "came in with the . . . [the decedent] like they were friends or partners, you know, they had been hanging out somewhere." App. 133, ll. 19-22. For about forty minutes, the two sat in a room with around seven other people in various seats and passed drugs. During this time the atmosphere was lighthearted and convivial. App. 134, ln. 3—App. 138, ln. 13; App. 148, ll. 11-25. The decedent never showed aggression, presented a weapon, or otherwise indicated hostility toward Respondent, and no altercation or argument surfaced between them. App. 136, ll. 4-17; App. 151, ll. 4-6.

[4] Respondent was present in the courtroom for the trial. App. 315, ll. 10-12. According to SCDC records, he is currently twenty-four years old. Therefore, he would have been around eighteen years of age at the time of the shooting.

The State's second eyewitness also stated that Respondent and the decedent appeared to be friends:

> Q: Who was there with you?
>
> A: Well, the lady that just left, Tammy, Perry, me, and [Respondent], and his friend.
>
> Q: Okay. When you say his friend, how would you describe his friend?
>
> A: I'm saying they came in together, you know, and everything was cool.

App. 161, ll. 6-17.

> Q: . . . [W]hen they came in, could you describe what you saw them do and how they were acting?
>
> A: I mean pretty much that's why I came up with the term friend because I mean it's, . . . it's not no big issue that we know that it didn't happen [sic]. But what I would say is that I know the kid ain't tried to do what he did.

App. 159, ll. 1-6.

The witness further testified that Respondent was "messing with the gun," likening him to "somebody that got a brand new toy that they want to play with . . . . They want to see what it [sic], you know, this and that." App. 163, lines 21-24. "I told him about three or four times," the witness explained, "I said, 'Look, bro, you need to put that up before something happens.'" App. 163, lines 16-20. He then described how the decedent was shot:

> A: [E]verything was all right, you know. I mean Shawn was happy. . . . [I]t was like a, a social gathering, everybody sitting around kicking it . . . .
>
> . . .

> A: He stood up, . . . he said man, I'm fixing to go, but I'll be back through or something, and he just told the [decedent], you know, man, because he had the thing in his hand, he said man, you need to bring your little punk self on[5] or something and the gun fired . . . .[6]

App. 164, ln. 22—App. 165, ln. 22. He said Respondent was stunned. App. 169, ll. 18-20.

The State's first witness had similarly described Respondent as getting up and walking to the door preparing to leave. He was "probably laughing and grinning like he always does," when a single shot "went off." App. 155, ll. 17-23; App. 139, ln. 17—App. 140, ln. 23. Respondent started screaming that "he didn't mean to do it, he didn't mean to do it" and said, "Y'all know I didn't mean to shoot him!" App. 141, ll. 1-3; App. 153, ll. 5-12. In response, the witness told Respondent that he knew it was an accident. App. 155, ll. 1-2.

The State questioned the second witness specifically about how Respondent was handling the gun:

> Q: He had the gun in his hand, right?
>
> A: Yeah, cause he had his hand in his pocket, . . . and when he come up with it it's just like a gesture, . . . and it scared him just as more it scared everybody else in the house . . . .
>
> Q: He pointed the gun at him?
>
> A: Not really. It was just like a wave . . . . Like if I wave something this way, but you wasn't in the line of fire, . . . you got a tendency of getting hit . . . . I'm not just putting that in your face and telling you to come on. No, it wasn't like that, . . . it was just like a little wave . . . .

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[5] The witness later explained that Respondent did not use a "mean" tone, and he took it as "just an expression" for "come on, let's go." App. 171, ll. 8-22.

[6] The State's first witness testified that the loaded revolver required no action to fire other than pulling the trigger. App. 135, ll. 23-25.

App. 165, ln. 15—App. 166, ln. 13.

After the close of evidence, Judge Couch instructed the jury on murder, involuntary manslaughter, and possession of a firearm during the commission of a violent crime. Judge Couch included an instruction that the jury could infer malice "when the deed is done with a deadly weapon." App. 291, ln. 1—App. 296, ln. 25. After the jury left for deliberations, Judge Couch asked the State whether it wished to object to any instruction, and the State declined.

During sentencing, Judge Couch commented, "What occurred here, in the court's estimation, is, at the very least, a grossly negligent and reckless act that resulted in the death of an individual." App. 318, 9-11.

DISCUSSION

Evidence that Respondent's gun fired accidentally, that Petitioner was friends with the decedent and had no motive to threaten him, and that Petitioner was only gesturing towards him and did not display the gun in a threatening or intimidating way supported a finding that Petitioner was acting lawfully but recklessly. Therefore, he was entitled to a reduced charge of involuntary manslaughter precluding the *Belcher* instruction. Murder is defined as the unlawful killing of another person with malice aforethought. *State v. Belcher*, 385 S.C. 597, 601, 685 S.E.2d 802, 804 (2009). Involuntary manslaughter is defined as the unintentional killing of another without malice while either (1) engaged in an unlawful activity not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) engaged in a lawful activity with reckless disregard for the safety of others. *State v. Crosby*, 355 S.C. 47, 51-2, 584 S.E.2d 110, 112 (2003). In *Belcher*, this Court held that "the 'use of a deadly weapon'

implied malice instruction has no place in a murder . . . prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing . . . ." *Belcher* at 609, 685 S.E.2d at 809.[7]

In determining whether the evidence supports a reduced charge for involuntary manslaughter, a trial judge must view the evidence presented in the light most favorable to the defendant. *State v. Coleman*, 342 S.C.172, 179-80, 536 S.E.2d 387, 391 (Ct. App. 2000) (citing *State v. Byrd*, 323 S.C. 319, 474 S.E.2d 430 (1996)); *State v. Knoten,* 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "Importantly, our courts have long emphasized that to warrant a court's eliminating the offense of manslaughter, it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." *State v. Brayboy*, 387 S.C. 174, 180, 691 S.E.2d 482, 486 (Ct. App. 2010).

"It is unlawful for a person to present or point at another person a loaded or unloaded firearm," and a person who violates this provision is guilty of a felony. S.C. Code Ann. § 16-23-410. This Court has held one presents a firearm by using it to intimidate or coerce another person. *State v. Cabrera-Pena*, 361 S.C. 372, 381, 605 S.E.2d 522, 526-27 (2004). The South Carolina Court of Appeals has held that one presents a firearm by either offering to view or showing a firearm in a threatening manner. *In the Interest of Spencer R.*, 387 S.C. 517, 521, 692 S.E.2d 569, 572 (Ct. App. 2010).

In this case, the evidence viewed in the light most favorable to Respondent shows he was acting lawfully when the gun accidentally fired and did not unlawfully present the

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[7] In so doing, the Court specifically overruled past homicide cases, such as State v. Reese, 370 S.C. 31, 633 S.E.2d 898 (2006), where two specific factors co-exist: "(1) approval of the jury instruction that malice may be inferred from the use of a deadly weapon; and (2) evidence was presented that, if believed, would have reduced, mitigated, excused or justified the homicide charged . . . ." Belcher, 385 S.C. at 613 n.10, 685 S.E.2d at 811 n.10.

firearm to the decedent in an intimidating, coercive, or threatening way as required by section 16-23-410.[8] First, both of the State's eyewitness gave a description of the firing of the gun as an accident rather than a deliberate action by Respondent. One testified that the gun "went off," and the other testified that it "fired"; neither spoke in terms of Respondent actually aiming the gun and pulling the trigger. Additionally, testimony was given that the gun was a revolver, which required no action to fire other than pulling the trigger. Further, the States' second eyewitness testified that Respondent was acting carelessly with the gun, "messing with" it like "somebody that got a brand new toy." Petitioner's young age and refusal to heed repeated warnings about putting the gun away reinforced this ostensibly careless attitude. Finally, the second eyewitness testified that after the gun fired, Respondent was stunned and immediately screamed that "he didn't mean to do it, he didn't mean to do it." He also said, "Y'all know I didn't mean to shoot him!" Both eyewitnesses readily averred that the shooting was an accident.

Not only did the evidence show the shooting was unintentional, but it supported a finding that Respondent did not present the gun to the decedent in a threatening or intimidating manner. First, the evidence did not support a motive for Petitioner to threaten or intimidate the decedent. The State's first eyewitness testified that the two entered the house together like they were friends or partners and had already been fraternizing for some time that day. The State's second eyewitness also stated that Respondent and the decedent appeared to be friends with no animosity between them. During the entire time in the house,

[8] The State has never alleged Respondent was not lawfully in possession of the gun. *Cf.* S.C. Code Ann. § 16-23-20 ("It is unlawful for anyone to carry about the person any handgun . . . except . . . (8) . . . a person who has the permission of the owner or the person in legal possession or the person in legal control of the home . . . .").

the atmosphere was lighthearted and convivial. The decedent never showed aggression, presented a weapon, or otherwise indicated hostility toward Respondent, and no altercation or argument surfaced between them. The eyewitness testimony also failed to show that Respondent made any clear verbal threat to the decedent.

Second, the evidence presented did not establish that Respondent showed the gun to the decedent in a way that could cause him to feel threatened or intimidated. The only material details of the shooting that the State presented were that Respondent had his hand in his pocket and removed his hand and the gun to make a gesture towards the decedent. Respondent had been handling the gun for up to forty minutes just prior to the shooting. Thus, had anyone in the room, including the decedent, seen the gun in Respondent's hand in the course of his gesture, the sight would not likely have been so startling as to result in a specific feeling of intentional threat or intimidation. Additionally, the second witness testified that Respondent did not specifically point the gun at the decedent, and no evidence showed that the gun was aimed at the decedent for an identifiable duration of time. Rather, the only eyewitness testimony was that Respondent made a waving or sweeping gesture in the decedent's direction, during the course of which the barrel of the gun momentarily crossed the decedent's body. The State did not offer direct evidence that the decedent was looking at Respondent or saw the gun for the apparently brief time Respondent had it in the open. Thus, a jury could not find that Respondent gripped and moved the gun for a sufficient duration in the decedent's plain view for him to be able to recognize the gun and suffer a feeling of threat or intimidation without a substantial inferential leap.

Finally, because Respondent lawfully possessed the gun at the time of the shooting, whether Respondent was engaged in unlawful drug activity prior to the shooting is

immaterial. The State has never argued or presented evidence to prove beyond a reasonable doubt that the drug activity was a proximate cause of the shooting. *See generally State v. Burriss*, 334 S.C. 256, 513 S.E.2d 104 (1999).

Because the evidence viewed in the light most favorable to Respondent supports a finding that Respondent unintentionally fired the gun and that he did not present the firearm to the decedent in an intimidating, coercive, or threatening way, the evidence warranted Judge Couch's charge of involuntary manslaughter. Accordingly, under *Belcher*, his instruction to the jury that it could infer malice from Respondent's possession of the gun constituted legal error.

II. RESPONDENT'S OBJECTION THAT THE INFERRED MALICE INSTRUCTION WAS AN IMPROPER COMMENT ON THE FACTS WAS ON POINT WITH THE RATIONALE FOR PROHIBITING THE INSTRUCTION UNDER *BELCHER.*

STATEMENT OF FACTS

After Judge Couch dismissed the jury for deliberation, Respondent objected to the inferable malice instruction:

> The Court: Anything from the defense?
>
> [Counsel]: Yes, Your Honor. We would renew our objection to the Court's decision not to give the charge of accident. In addition, Your Honor, there is a, a portion of the Court's charge, which I understand is probably in the standard charge, but it deals with malice being able to be inferred from the use of a deadly weapon.
>
> Respectfully, Your Honor, we would argue that that is, can be construed as a comment on the facts of the case, and invade the province of the jury and we would object to that as well.
>
> The Court: Well, I understand your objection. It's noted. Of course, I'll leave the charge as it is.

App. 299, line 18—App. 300, line 5. Later, during deliberation, the jury requested from the court "a copy of details and explanation concerning [the] charge concerning murder and involuntary manslaughter." In response, Judge Couch sent the jury a printed version of the instructions relating to murder, involuntary manslaughter, and possession of a weapon during the commission of a violent crime, including the inferable malice instruction. App. 307, ln. 24—309, ln. 13. Respondent renewed the objection, and Judge Couch overruled the renewed objection. App. 309, ll. 8-18.

DISCUSSION

Respondent's objection during trial that the inferred malice instruction was an improper comment on the facts was on point with the rationale for prohibiting the instruction under *Belcher*. A party must contemporaneously object with specificity sufficient to inform the trial court of the point being urged. *State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011). The Court's good practice is to reach the merits when error preservation is doubtful. *See Atl. Coast Builders & Contractors v. Lewis*, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012).

The purpose of a jury instruction is "to enlighten the jury and to aid it in arriving at a correct verdict. It is error to give instructions which are calculated to confuse or mislead the jury." *State v. Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). In assessing the propriety of an inferable malice instruction in *Belcher*, this Court reviewed the line of cases in this state addressing the extent to which presumptions and then inferences from the use of a deadly weapon were proper in a jury's determination of malice. In framing the issue and undertaking this analysis, the Court specifically used the defendant's trial objection as a point of departure:

> The charge given by the trial court has heretofore been considered textbook. Yet when confronted with Belcher's challenge, the learned and experienced trial court judge expressed "concern about [the charge] rising to a charge on the facts."
>
> Where a jury is asked to consider a lesser included offense of murder or a defense, Belcher asserts the permissive inference charge violates our common law and our constitutional prohibition against charging juries on the facts. We elect to decide this appeal solely under the common law. Relying on Belcher's common law challenge, we conclude that our modern day usage of this jury charge has strayed from this Court's original jurisprudence.

Belcher at 601-602, 685 S.E.2d at 804.

In "return[ing] to the rationale underlying [its earliest cases]," [9] *id.* at 612, 685 S.E.2d at 810, the Court in *Belcher* studied the "core feature" of *State v. Hopkins*: "the contradiction of *inviting* a jury to infer malice from the use of a deadly weapon where evidence was presented that would reduce, mitigate, excuse or justify the homicide," *id.* at 606, 685 S.E.2d at 806 (emphasis added). The Court viewed this contradiction as "confusing and prejudicial" to a jury attempting a determination of malice. *Id.* at 611, 685 S.E.2d at 809.

Additionally, this Court in *Belcher* relied on the reasoning in *State v. Hopkins*, 15 S.C. 153 (1881), that a presumption of malice from the use of a deadly weapon is unwarranted when further evidence has fully developed all of the material circumstances: "'[w]hen all the circumstances of the case are fully proved there is no room for presumption. The question becomes one of fact for the jury, under the general principle that he who affirms must prove, and that every man is presumed innocent until the contrary appears.'" *Id.* at 602-603, 685 S.E.2d at 805 (quoting *Hopkins*, 15 S.C. 153). This Court concluded that by extension, the express instruction to a jury that it may infer malice from the use of a deadly weapon was also gratuitous.[10]

Thus, this Court in *Belcher* first reasoned that the inferable malice instruction is confusing because it invites the jury to reach a factual decision based on a single piece of

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[9] Namely, *State v. Hopkins*, 15 S.C. 153 (1881); *State v. Levelle*, 34 S.C. 120, 13 S.E. 319 (1891); and *State v. Jackson*, 36 S.C. 487, 15 S.E.559 (1892).

[10] "It is axiomatic that some matters appropriate for jury argument are not proper for charging. 'Do jurors need the court's permission to infer something? The answer is, of course not.'" *Belcher* at 612 n.9, 685 S.E.2d at 810 n.9 (quoting Bruce A. Antkowiak, *The Art of Malice*, 60 Rutgers L. Rev. 435, 476 (2008)).

evidence when numerous other important pieces of evidence point to a contrary decision. Put differently, the instruction amounts to a confusing comment on how the jury should weigh the fact that the defendant knowingly used a deadly weapon in the killing against facts showing specifically showing the defendant did not kill with malice aforethought. Accordingly, the instruction is an unhelpful comment on the facts.

This Court secondly reasoned that the inferable malice instruction is gratuitous when the evidence developed presents a complete picture of the facts standing on their own. In such a situation a jury is equipped to weigh the evidence and draw factual inferences on its own, and no need exists for the trial judge to bring certain factual inferences to the forefront under its aegis through an instruction. Accordingly, the instruction is gratuitous and an unhelpful comment on the facts.

Consistent with this reasoning, the *Belcher* opinion expressly stated from the outset that its analysis arose under the defendant's allegation that the inferable malice instruction posed an improper charge on the facts: "Belcher asserts the . . . charge violates our common law and our constitutional prohibition against charging juries on the facts. We elect to decide this appeal solely under the common law . . . [and] conclude that our modern day usage of this jury charge has strayed from this Court's original jurisprudence." In other words, while the defendant correctly asserted that both the South Carolina common law and the South Carolina Constitution prohibit charging on the facts, the Court would only decide the issue under the common law prohibition. This course of action was simply a product of the longstanding jurisprudential policy that the Court will not unnecessarily reach a constitutional question. *See, e.g., City of Greenville v. Bane*, 390 S.C. 303, 307-308, 702

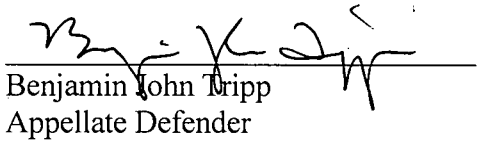
S.E.2d 112, 114 (2010) (citing *Morris v. Anderson County*, 349 S.C. 607, 564 S.E.2d 649 (2002)).

Thus, at the trial below, Respondent preserved the *Belcher* issue for review by objecting with all due specificity. The objection expressed in terms equivalent to those in *Belcher* the underlying argument that the inferable malice instruction posed a confusing, gratuitous, and therefore unhelpful comment to the jury about how it should decide a factual issue in the case.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court affirm the decision of the Court of Appeals.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of March 2014.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Roger L. Couch, Judge

THE STATE,

PETITIONER,

V.

SHAWN ANTONIO MILLER,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Brief of Respondent in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 24th day of March, 2014.

Benjamin John Tripp
Appellate Defender

ATTORNEY FOR RESPONDENT.

SUBSCRIBED AND SWORN TO before me
this 24th day of March, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.