STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
JAN 14 2015
SC Court of Appeals

Appeal from Horry County
Honorable Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

Respondent,

v.

BRADLEY GERALD MULLINS,

Appellant

Appellate Case No. 2013-002662

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

CAROLINE M. SCRANTOM
Assistant Attorney General

P.O. Box 11549
Columbia, South Carolina, 29211
(803) 734-6305

JIMMY A. RICHARDSON, II
Solicitor, Fifteenth Judicial Circuit
P.O. Box 1276
Conway, SC 29528

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

APPELLANT'S STATEMENT OF THE ISSUE ON APPEAL iv

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL iv

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

ARGUMENT 4

I. Under these facts, the trial judge properly charged the jury on implied malice because the murder occurred during Appellant's commission of a felony........ 4

A) It was necessary to instruct the jury on implied malice pursuant to *Norris* because that is the prescribed jury instruction for a felony-murder scenario. .6

B) The implied malice charge is proper because it relates to the requirement that malice exist at the time of and only slightly before the murderous act, not at the start of the burglary........ 7

C) Instructing the jury on implied malice defined the term malice in a manner fitting for the case at bar. 10

D) Any error in charging implied malice was harmless beyond a reasonable doubt because the instruction did not contribute to the verdict based upon the conclusive nature of the State's case........ 13

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992) 13

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967).................... 13

In Re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970) 8

Lowry v. State, 376 S.C. 499, 657 S.E.2d 760 (2008) 7, 10, 13

Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009) 6

State v. Adkins, 353 S.C. 312, 577 S.E.2d 460 (Ct. App. 2003).................... 6

State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000) 6, 10

State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).................... 9, 10, 13, 16

State v. Carlson, 363 S.C. 586, 611 S.E.2d 283 (Ct. App. 2005).................... 8

State v. Doig, 2 Rich. 179, 31 S.C.L. 179 (Ct. App. 1845).................... 12

State v. Fuller, 229 S.C. 439, 93 S.E.2d 463 (1956).................... 9

State v. Garris, 394 S.C. 336, 714 S.E.2d 888 (Ct. App. 2011) 5

State v. Harris, 382 S.C.107, 674 S.E.2d 532 (Ct. App. 2009) 6

State v. Harvey, 220 S.C. 506, 68 S.E.2d 409 (1951).................... 9

State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000) 6

State v. Judge, 208 S.C. 497, 38 S.E.2d 715 (1946) 6

State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998) 8

State v. Knoten, 347 S.C. 296, 555 S.E.2d 391 (2001) 10

State v. McDaniel, 68 S.C. 304, 47 S.E. 384 (1904).................... 12

State v. Middleton, 407 S.C. 312, 755 S.E.2d 432 (2014) 13

State v. Miller, 397 S.C. 630, 725 S.E.2d 724 (Ct. App. 2012).................... 5

State v. Norris, 285 S.C. 86 328 S.E.2d 339 (1985) 4, 6, 7, 9, 10, 12

State v. Patterson, 367 S.C. 219, 625 S.E.2d 239 (Ct. App. 2006) 6

State v. Peterson, 287 S.C. 244, 335 S.E.2d 800 (1985) 12

State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001) 6, 7

State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994) 6

State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982).................... 6

State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).................... 9

State v. Turner, 373 S.C. 121, 644 S.E.2d 693 (2007). 5
State v. Yates, 280 S.C. 29, 310 S.E.2d 805 (1982) 6
United States v. Lane, 474 U.S. 438, 106 S.Ct. 725 (1986) 8

Constitutional Provisions

S.C. Const. art. V, § 21 6

Statutes

S.C. Code Ann. § 16-3-10 ..... 8, 12
S.C. Code Ann. § 16-11-311 ..... 7, 8

Other Authorities

Suggested Jury Instructions-Criminal, Felony Murder Inference 154-55 4

APPELLANT'S STATEMENT OF THE ISSUE ON APPEAL

Whether the court erred by instructing the jury than an implication of malice may arise where one intentionally kills another person during the commission of a felony and that first degree burglary was a felony, since the charge was confusing where the state agreed appellant and his accomplices did not think the decedent was home at the time of the burglary, an accomplice testified that the decedent unexpectedly appeared and began shooting at them, and that appellant then shot the victim, since the implication of malice instruction was unnecessary, confusing and prejudicial given the facts of this case?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in instructing the jury on implied malice pursuant to *State v. Norris* where the murder occurred during the commission of a burglary in the victim's home at night.

STATEMENT OF THE CASE

Appellant Bradley Mullins was indicted by the Horry County Grand Jury for the charges of murder and burglary in the first degree. (Indictment Numbers 2013-GS-26-04042 and -04043). Attorney William I. Diggs represented Mullins at a jury trial which began December 2, 2013, before the Honorable Larry B. Hyman, Jr. in Horry County. (Tr. 1). J. Scott Hucks and George DeBusk of the Fifteenth Circuit Solicitors Office prosecuted the case which lasted four days. (Tr. 1). Mullins was convicted on each charge by a jury, and Judge Hyman sentenced Mullins to two concurrent terms of life imprisonment. (Tr. 557, lines 4-14). This appeal follows. (Notice of Appeal).

STATEMENT OF FACTS

Appellant and others gathered on Thursday, September 11, 2008, at a relative's home for a cookout. (Tr. 334, line 2 – 335, line 6). Conversation developed into the formulation of a trip to rob the victim's home of his vast gun collection. (Tr. 336, line 10 – 337, line 15). Near dark, Appellant and with three others traveled approximately thirty minutes to the victim's residence in a Blazer sport utility vehicle. (Tr. 293, lines 2-10). Appellant gave driving directions to the destination. (Tr. 292, lines 13-24). According to co-defendant Anthony Earl Ray, they arrived at dark, because robbery was "not something you do in the daytime." (Tr. 340, lines 6-25). Upon arrival, Ray banged on the front door to see if the victim was home. (339, lines 1-6; Tr. 340, lines 11-15). Appellant broke out a windowpane on the back door, entered the house, and started packing up the victim's gun collection. (Tr. 339, line 23 – 343, line 22). After about twenty minutes, the only unexplored room in the victim's home was locked, and Appellant kicked in the bottom panel of that door to gain access. (Tr. 343, line 23 – 344, line 15). The victim, who had been in his locked bedroom asleep, alone and unclothed, then exited his bedroom pointing a revolver at Appellant and Ray. (Tr. 344, line 17, 346, line 5). The victim fired his own gun into the home and, after initially running away from the victim, Ray aimed a rifle at the victim and shot the victim in his side. (Tr. 346, lines 9-25; Tr. 369, lines 1-8; Tr. 373, lines 4-14). Appellant then stood over the fallen victim and shot him in the head with a pistol. (Tr. 346, lines 13-22; Tr. 371, lines 9-14; Tr. 376, lines 3-11).

Both co-defendant Ray and Appellant exited the victim's home with "a sack of pistols" and a blanket full of shotguns and rifles stolen from the victim's home. (Tr. 343,

lines 1-22; Tr. 349, lines 10-16). Later, other family members listened to the Appellant's telling the account of his robbing the victim, who was not supposed to be home at the time of the robbery, and killing him in the process. (Tr. 194, lines 8-19; Tr. 220, line 10 – 221, line 24; Tr. 251, line 12 – 253, line 1).

On the following Sunday, September 14, 2008, a pair of the victim's friends visited the victim's home because they had not heard from him since six days prior. (Tr. 99, lines 6-24). Because it had recently rained, they could tell from the lack of tire tracks that the victim's car had not been moved for a few days. (Tr. 100, lines 3-11). Approaching the victim's back door, they noticed that the home had been broken into. (Tr. 100, lines 12-18). Then, they entered the home to, as one friend described, "the smell that you would recognize as the smell of death." (Tr. 103, line 18 – 104, line 6). They immediately went outside and called 911. (Tr. 104, lines 7-24). Law enforcement determined a forced entry into the victim's home "commonly found in a burglary" had occurred based upon indications that the glass on the back door "was broken from outside to inside . . . closest to the door locks . . . ." (Tr. 140, line 10 – 141, line 6). No intact firearms were recovered from the home. (Tr. 141, line 9 – 143, line 10). Investigation recovered two additional projectiles, which a crime scene reconstructionist identified as having been fired from the vicinity of the victim's bedroom door, upwards into the living room and towards the kitchen/dining area of the home. (Tr. 154, line 20 – 157, line 14). After autopsy, the forensic pathologist concluded that the victim died as a result of a gunshot to the left side of the head, just above the ear. (Tr. 274, line 21- 275, line 25).

ARGUMENT

I. Under these facts, the trial judge properly charged the jury on implied malice because the murder occurred during Appellant's commission of a felony.

Appellant stood trial and was convicted for the charges of murder and burglary in the first degree. At the charge conference, the State requested and the court agreed to charge the "standard *Norris* charge" on implied malice based upon the felony-murder scenario presented by the State's case against Appellant. (Tr. 441, line 11- 443, line 2). That charge read:

> The law says if one intentionally kills another during the commission of a felony, the implication 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, the jury, along with all other evidence in the case, and you may give such weight as you determine it should receive.

State v. Norris, 285 S.C. 86, 92, 328 S.E.2d 339, 343 (1985).[1] Appellant objected to the charge on several bases: that the court's proposed jury instructions elsewhere sufficiently covered the elements of murder, because the charge was confusing, and because the *Norris* charge "speaks to a different degree of malice" due to evidence indicating Appellant did not know the victim was present in the home at the time of the burglary.

---

[1] The standard jury charge in the current bench book reads slightly differently, but Respondent postures that any differences in diction do not alter the overall effect of the charge. The bench book charge reads:

> If one intentionally ills 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, **[the jury,]** along with all other evidence in the case, and you may give **it the weight that you decide** it should receive.

Suggested Jury Instructions-Criminal, Felony Murder Inference, 154-55 (*available at* http://www.sccourts.org/juryCharges/GS%20InstructionsJune2013.pdf) (differences from *Norris* charge demarcated in bold type).

(Tr. 443, line 4 – 444 line 11). The trial court overruled this objection. (Tr. 446, lines 2-5).[2]

In its jury instruction, the trial judge did include the following *Norris* charge after giving an instruction on the elements of murder, including the definition of malice:

> If one intentionally kills another during the commission of a felony, an implication of malice may arise. If facts are proved beyond a reasonable doubt sufficient to raise an inference of malice, this inference would simply be an evidentiary fact to be taken into consideration by the jury, along with all other evidence in the case.

(Tr. 516, lines 1-7; Court's Exhibit 2, pages 18-19). The trial judge further charged "that the offense of first degree burglary is a felony," and immediately instructed the jury on the elements of first degree burglary. (Tr. 516, lines 8-9; Court's Exhibit 2, pages 18-19). To aid the jury, the trial judge provided the jury with a copy of to the charge in the deliberation room.[3] (Tr. 505, lines 13-24; Court's Exhibit 2).

Standard of Review

"Appellate courts review only errors of law and will not reverse a trial court's decision concerning jury instructions unless the trial court abused its discretion." *State v. Miller,* 397 S.C. 630, 634-35, 725 S.E.2d 724, 727 (Ct. App. 2012). "An abuse of discretion occurs when the [trial] court's decision is unsupported by the evidence or controlled by an error of law." *State v. Garris,* 394 S.C. 336, 344, 714 S.E.2d 888, 893 (Ct. App. 2011).

---

[2] Appellant preserved his objection at the conclusion of the jury charge, and again during post-trial motions. (Tr. 523, lines 6-11; Tr. 539, line 21 – 540, line 11).

[3] "A trial court may, in its discretion, submit its instructions on the law to the jury in writing." *State v. Turner,* 373 S.C. 121, 129, 644 S.E.2d 693, 697 (2007). The copy provided to the jury included the headings as written in the bench book, but the trial judge did not include those headings in this oral instruction.

This Court "must consider the [trial] court's jury charge as a whole in light of the evidence and issues presented at trial." *State v. Adkins,* 353 S.C. 312, 577 S.E.2d 460, 463 (Ct. App. 2003). "If as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error." *State v. Aleksey,* 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000) (citing *State v. Smith,* 315 S.C. 547, 446 S.E.2d 411 (1994)).

A) It was necessary to instruct the jury on implied malice pursuant to *Norris* because that is the prescribed jury instruction for a felony-murder scenario.

"The law to be charged to the jury must be determined by the evidence presented at trial." *State v. Harris,* 382 S.C.107, 113, 674 S.E.2d 532, 535 (Ct. App. 2009) (citing *State v. Patterson,* 367 S.C. 219, 231-32, 625 S.E.2d 239, 245-46 (Ct. App. 2006)). In crafting a jury instruction, "judges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. art. V, § 21; *State v. Hughey,* 339 S.C. 439, 529 S.E.2d 721 (2000), *overruled on other grounds by Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009). In doing so, "the trial judge must charge the correct and current law of the state." *State v. Shuler,* 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001). "**If there is any evidence to support a charge, the trial judge should grant the request**." *Id.* (emphasis added).

It is long-held that South Carolina does not distinguish felony-murder from murder. *Norris,* 285 S.C. at, 93, 328 S.E.2d at 342-43 ("we take this opportunity to remind Bench and Bar that South Carolina follows the common law rule of murder and makes no distinction between murder and felony-murder")); *State v. Yates,* 280 S.C. 29, 310 S.E.2d 805 (1982); *State v. Thompson,* 278 S.C. 1, 292 S.E.2d 581 (1982); *State v. Judge,* 208 S.C. 497, 38 S.E.2d 715 (1946). Instead, our State calls for an implied malice

instruction in cases where a defendant executes a murder during the commission of an enumerated felony. *State v. Norris, supra; Lowry v. State,* 376 S.C. 499, 506 n.4, 657 S.E.2d 760, 764 n.4 (2008) (finding felony murder instruction in the initial jury charge similar to the *Norris* charge, which is the "proper charge on implied malice") (quoting *State v. Norris, supra*). Burglary in the first degree is a felony. S.C. Code Ann. § 16-11-311.

Appellant argues that the trial judge unnecessarily charged the jury pursuant to *Norris.* To the contrary, the implied malice instruction was not only proper, but required as the correct and current law of the State. *Shuler, supra.* Appellant forcibly entered the victim's home at night and with the intent to burglarize the home of the victim's vast gun collection. (Tr. 339, line 23 – 343, line 22). In the moments that ensued, Appellant delivered a fatal gunshot wound to the victim's head at a time when a co-defendant's prior gunshot left him incapacitated. (Tr. 346, lines 9-25; Tr. 371, lines 9-14; Tr. 376, lines 3-11). Sometime thereafter, Appellant exited the victim's home with a sack full of pistols. A blanket full of rifles was also collected from the home. (Tr. 343, lines 1-22; Tr. 349, lines 10-16). As a result, the present murder clearly occurred during the commission of the enumerated felony of first-degree burglary. As a result, the implied malice charge is required, and the trial judge properly instructed the jury in its use of the textbook *Norris* charge.

B) The implied malice charge is proper because it relates to the requirement that malice exist at the time of and only slightly before the murderous act, not at the start of the burglary.

Appellant postures that the trial judge improperly charged implied malice because

during trial, evidence surfaced from which the jury could conclude that Appellant did not think the victim was home when he commenced the burglary.[4] However, Appellant's argument transposes the element of malice as a component of first-degree burglary, not murder. The State must prove each element of a crime beyond a reasonable doubt. *In Re Winship*, 397 U.S. 358, 361, 90 S.Ct. 1068, 1071 (1970). The jury must deliberate separately on each indictment. *United States v. Lane,* 474 U.S. 438, 450, 106 S.Ct. 725, 732 (1986).

Any mistaken belief regarding the victim's absence from the home at the time Appellant forcibly entered does not go towards the requisite mental state for the charge of murder, but of burglary.[5] Burglary in the first degree does not include the element of malice; burglary requires the intent to commit a crime inside the dwelling at the time of entry. S.C. Code. Ann. § 16-11-311. As to the murder charge, the jury was to decide whether malice, as an element of murder, existed at Appellant's pulling of the trigger. S.C. Code Ann. § 16-3-10 ("Murder is the killing of a person with malice aforethought, either express or implied."). Malice must exist at the time of the act producing the resulting death, and it need not exist for any appreciable length of time before that act's

---

[4] Delilah Mullins, Appellant's aunt once-removed, testified to overhearing Appellant relate that the victim was not supposed to be home at the time of the burglary. (Tr. 194, lines 13-16). Co-defendant Ray testified that he would not have forcibly entered the house if the victim had been home, which is why the co-defendants beat on the door before entering. (Tr. 340, lines 11-17). During closing argument, the State included in its summation that Appellant entered the victim's home thinking that the victim was absent. (Tr. 502, lines 17-19).

[5] Appellant neither argued nor requested a jury charge on the defense of mistake of fact at the time of trial. *See State v. Carlson,* 363 S.C. 586, 597, 611 S.E.2d 283, 288 (Ct. App. 2005) ("Arguments not raised to or ruled upon by the trial court are not preserved for appellate review."). Mistake of fact constitutes a viable defense where the mistake negates the mental element of the crime charged. *State v. Kelsey,* 331 S.C. 50, 77-78, 502 S.E.2d 63, 77 (1998).

commission. *State v. Harvey,* 220 S.C. 506, 514-15, 68 S.E.2d 409, 412-13 (1951), *overruled on other grounds by State v. Torrence,* 305 S.C. 45, 406 S.E.2d 315 (1991); *State v. Fuller,* 229 S.C. 439, 445, 93 S.E.2d 463, 467 (1956), *overruled on propriety of implied malice portion of jury instruction by State v. Belcher, infra.* In the present case, Appellant broke into the victim's home at night to steal firearms, ultimately firing a single fatal gunshot into the head of the victim. (Tr. 346, lines 13-15). Prior to that act, the victim had fallen to the floor as a result of co-defendant Ray's gunshot, which debilitated the victim by penetrating the lungs and lodging in the vertebral column. (Tr. 276, lines 4-23; Tr. 349, line 10). Appellant traversed to the downed victim, stood over his fallen body, and shot him in the head. (Tr. 346, lines 13-22). Under *Norris* and its antecedents, malice may be implied, *inter alia*, when one commits murder while carrying out a felony such as first degree burglary, but the murder occurring in the throes of a burglary is merely one fact for the jury's consideration on that element. *Norris'* implied malice instruction expressly reflects the same. Thus, the charge was appropriate because Appellant's state of mind regarding the burglary is not the hinge upon which a determination of the existence of malice pivots.

Even more, any belief by Appellant that the victim was not home at the time Appellant commenced either criminal offense does not amount to evidence that would reduce, mitigate, excuse or justify the homicide. *See State v. Belcher,* 385 S.C. 597, 685 S.E.2d 802 (2009) (where evidence is presented that would reduce, mitigate, excuse or justify a homicide caused by the use of a deadly weapon, juries shall not be charged that

malice may be inferred from the use of a deadly weapon). Even under *Belcher's* holding,[6] any evidence that Appellant did not believe the victim was home *at the time of break-in* cannot determinatively apply to the requirement of malice at the time Appellant fired a gunshot at the victim's head.

C) <u>Instructing the jury on implied malice defined the term malice in a manner fitting for the case at bar.</u>

"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." *State v. Aleksey, supra.* A violation of due process may be found where "it is reasonably likely that the jury understood the charge to create a mandatory presumption requiring it to infer an element of the offense if the State proved certain predicate facts, thereby relieving the State's burden of proof on an element of the offense." *Lowry,* 376 S.C. at 506, 657 S.E.2d at 763 (2008).

"The law to be charged must be determined from the evidence presented at trial." *State v. Knoten,* 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). However, Appellant postures that the implied malice charge was confusing to the jury because it included "language about a burglary in the first degree being a felony and an implication of malice . . . ." (Initial Br. of Appellant p. 10). To the contrary, the *Norris* charge's delivery could not act to confuse the jury. The implied malice portion is syntactic:

> The defendant is charged with murder. The State must prove beyond a reasonable doubt that the defendant killed another person with malice aforethought.

---

[6] Respondent further notes that *Belcher* affirmed the *Norris* charge as appropriate in a felony-murder scenario. 385 S.C. 597 at n.9, 685 S.E.2d 802 at n.9.

> Malice is hatred, ill-will or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with the intent to inflict an injury or under circumstances that the law will infer an evil intent.
>
> Malice aforethought does not require that malice exist for any particular time before the act is committed, but malice must exist in the mind of the defendant just before and at the time of the act or at the time the act is committed. Therefore, there must be a combination of previous evil intent and the act.
>
> Malice aforethought may be expressed or inferred. These terms "express" and "inferred" do not mean different kinds of malice, but merely the manner in which malice may be shown to exist; that is either by direct evidence or by inference from the facts and circumstances which are proved. Expressed malice is shown when a person speaks words which express hatred or ill-will for another, or when the person prepared beforehand to do the act which was later accomplished. For example, lying in wait for a person or any other act of preparation going to show that the deed was within the defendant's mind would be expressed malice.
>
> Malice may be inferred from the conduct showing a total disregard for human life.
>
> If one intentionally kills another during the commission of a felony, an implication of malice may arise. If facts are proved beyond a reasonable doubt sufficient to raise an inference of malice, this inference is an evidentiary fact to be taken into consideration by the jury along with other evidence in the case. I further charge you that the offense of first degree burglary is a felony.
>
> The defendant is charged with first degree burglary. The State must first prove beyond a reasonable doubt that the defendant entered a dwelling without consent . . .

(Tr. 514, line 24 – 516, line 12; Court's Exhibit 2, pages 17-20). The portion of the charge at issue transitions between the elements of murder and first degree burglary.

The implied malice portion also supplements a necessary definition of the term as it relates to the case at bar, but without delivering a specific comment on the facts. Any jury instruction on murder necessarily must *define* malice for the jury's use in

deliberation, an assertion which bears historic and precedential support: "[i]n law, malice is a term of art, importing wickedness and excluding a just cause or excuse." [7] *State v. Doig,* 2 Rich. 179, 31 S.C.L. 179, 182 (Ct. App. 1845). Instructing any jury on S.C. Code § 16-3-10 compels an explanation of the term malice in order for the jury to apply the evidence to that element. "The court here was instructing the jury with reference to murder, and malice as an essential ingredient." *State v. McDaniel*, 68 S.C. 304, 47 S.E. 384, 387 (1904).

Moreover, the textbook-driven charge does not include any constitutionally infirm phrases raising a burden shifting or conclusive presumption, but instead creates only a permissive inference. The instruction "made clear that malice would not be presumed from the commission of a felony, only that it *could* be inferred by the jury." *Norris,* 285 S.C. at 92, 328 S.E.2d at 342 (emphasis in original). The malice instruction as a whole "make[s] it clear to the jury that it is free to accept or reject these permissive inferences depending on its view of the evidence." *State v. Peterson,* 287 S.C. 244, 247, 335 S.E.2d 800, 802 (1985). In sum, the malice charge instructs the jury to consider any inference of malice alongside the total weight of the evidence in reaching its verdict. Also, the jury received a copy of the entire instruction in the deliberation room, further aiding any confusion in its understanding of the charge as a whole. Ultimately, the jury charge defined malice under the law and to the extent needed for the jury to apply it to the situation at bar.

[7] "This is substantially the famous definition of malice[, which,] in common acceptation, means ill will against a person, but in its legal sense it means a wrongful act done intentionally, without just cause or excuse." *State v. McDaniel, infra.*

D) Any error in charging implied malice was harmless beyond a reasonable doubt because the instruction did not contribute to the verdict based upon the conclusive nature of the State's case.

"Errors, including erroneous jury instructions, are subject to harmless error analysis." *Belcher,* 385 S.C. at 611, 685 S.E.2d at 809. The Court should uphold a conviction if it determines, beyond a reasonable doubt, the error complained of did not contribute to the verdict obtained. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828 (1967).

"Whether or not the [implied malice charge] was harmless is a fact-intensive inquiry" as to whether the charge contributed to the guilty verdict rendered. *State v. Middleton,* 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014). Where there is no indication that the jury based its verdict on an improper malice portion of the charge, any error in that instruction is harmless. *See Arnold v. State,* 309 S.C. 157, 163-65, 420 S.E.2d 834, 837-38 (1992). A court makes this determination by first identifying what evidence the jury actually considered in reaching its verdict, and then by weighing the probative force of that evidence against the probative force of the improper presumption alone. *Lowry*, 376 S.C. at 508, 657 S.E.2d at 765.

The State delivered a case succinctly probative of guilt, as evidenced by the jury's verdict. Substantial witness testimony proved probative that these crimes were not committed by mere misfortune or accident. The totality of witness testimony constructed a consistent narrative which began at a family cookout. Four men, including Appellant and co-defendant Ray, left and drove to the victim's home that night. (Tr. 293, lines 2-10; Tr. 336, line 10 – 337, line 15). Accomplice Anthony Earl Ray delivered an eyewitness account of the crimes from start to finish. (Tr. 332-388). He testified as to the method

break-in, the looting of the guns, the mode of transporting the guns out of the home, Appellant's breaking into the victim's bedroom, the victim's emergence, and the resulting gunfire. Ray testified that the victim came out of his bedroom and shot into the home. Ray began to run away, turned, and shot at the victim, who fell down when struck by Ray's first bullet. Ray's eyewitness testimony further described Appellant's fatal action in standing over the downed victim and shooting him in the head. (Tr. 346, lines 13-22; Tr. 371, lines 9-14; Tr. 376, lines 3-11). Of note, Ray was already serving time for a conviction of first degree burglary at the time of his trial testimony. (Tr. 332, lines 10-15).

Scientific evidence corroborated co-defendant Ray's testimony. The forensic pathologist who conducted the autopsy testified as to the wound in the victim's side. That bullet would have caused its recipient to fall upon impact, just as co-defendant Ray described. The only other gunshot wound was sustained by the victim in the left side of his head. (Tr. 274, line 21- 275, line 25). Also consistent with Ray's account of the victim's firing into the home, a crime scene reconstructionist testified that the two bullets recovered from the interior of the home appeared to have been fired from a position near the victim's bedroom door. (Tr. 154, line 20 – 157, line 14).

The State's narrative grew stronger as corroborating lay witnesses testified to listening to Appellant's rendition of the burglary, including his description of delivering a gunshot wound to the victim's head. (Tr. 194, lines 8-19; Tr. 220, line 10 – 221, line 24; Tr. 251, line 12 – 253, line 1). Each of those witnesses are Appellant's familial relations (if not now, they were related at the time of the murder), yet each testified as to their knowledge and understanding of Appellant's role in delivering the fatal blow. The family

members who rode to and from the victim's home in the car with Appellant that night testified as to Appellant's dumping a sack into a creek. (Tr. 297, lines 2-10; Tr. 311, line 21 – 312, line 6; Tr. 323, lines 1-18) Co-defendant Ray testified that Appellant dumped the sack of stolen pistols, including the murder weapon, into a swamp. (Tr. 351, lines 11-19). The family also testified as to guns appearing in an elder's shed after the night of the burglary. (Tr. 246, line 7 – 247, line 9; Tr. 298, line 23 – 299, line 5; Tr. 353, lines 20-22). An entirely consistent narrative grants the State's witnesses' testimony important credibility and probative force.

Moreover, in its summation of the evidence, the State did not frame to the jury that malice could be implied from the fact that the murder occurred during a burglary. Instead, the prosecution squarely presented the proposition that each charge was conclusively proven beyond a reasonable doubt on its own merits. The State did not present to the jury that the burglary could be utilized to prove an element of the other charge of murder. Malice was presented to the jury at closing as follows:

> What is murder? Murder is a killing . . . with malice aforethought. Malice is a lot of things. Malice is the key to murder. Just taking someone's life is not always murder. It requires malice, an element of malice. Malice could be expressed or implied.
>
> Now, what is malice? Malice, under the law, means that you have the wrongful intent to injure a person when you kill him, that you meant to strike the fatal blow. 'Aforethought; means that when you struck the fatal blow, you meant to do it. Malice is a wrongful intent, and 'aforethought' means you meant to do it. It means you had a wrongful intent and you meant to commit the wrongful intent. You meant to do the action you did that took the life of another person.
>
> Murder is one of the shortest statues we have in South Carolina because it is really that simple. Did you kill someone and mean to do the action you did when you killed them?

(Tr. p. 449, line 12 – p. 450, line 6). "Malice is a lot of things," but the State did not pose malice to the jury as being inferred from the act of burglary. Given the clarity and weight of the direct evidence, the State did not need to draw that additional conclusion in its closing argument. The only time the jury heard the proposition of implied malice was during the jury instruction itself.

The probative value of direct evidence of Appellant's guilt and the manner in which the prosecution parsed Appellant's guilt on each charge weighs strongly against the probative force of the inference of malice. Further, Appellant presented neither a defense at trial suggesting he acted without malice,[8] nor evidentiary support confronting the malice issue that would act to amplify any prejudice resulting from the instruction. *Belcher*, 385 S.C. at 612, 685 S.E.2d at 810. Since the evidence presented did not suggest and Appellant never offered any alternative theory to imply that he or another acted without malice, and the jury concluded Appellant *did* act, one must logically conclude that the jury found the State's witnesses and physical evidence more compelling than Appellant's defense at trial.

Because the jury accepted the prosecution's theory as to Appellant's criminal acts, there exists no reason to believe the jury rejected or was confused by the prosecution's theory regarding malice. The jury's questions submitted throughout deliberation

---

[8] Additionally, the victim's friends' testimony regarding the victim's target practice hobby works against the probative value of a self-defense claim, had one been presented. (Tr. 80, line 21 – 81, line 5). When considering the victim's target practice hobby alongside his vast gun collection, the evidence tends to show that the victim was familiar with firearms and likely could have wounded Appellant and Ray had he chosen. Instead, he fired upwards into the walls and surrounding structure.

highlights apparent lack of confusion regarding the implied malice charge. The jury did ask for clarification and the judge did re-instruct on hand of one is the hand of all. (Tr. 526, lines 18 – 530, line 17). The jury also asked for a replaying of the testimony of the three people present in the car to and from the victim's home. (Tr. 524, line 20 - 526, line 13). Regardless of the trial judge's administration of an *Allen* charge, given that the jury did not ask about implied malice but did ask about another portion of the jury instruction, it is evident that any underlying confusion as to the elements of the crimes charged did not center on the definition of malice. Therefore, the State's evidence outweighed the probative force of the challenged malice instruction itself.

Beyond a reasonable doubt, the error complained of did not contribute to the verdict in this case. Even if an error occurred, the lack of alternative theories rendered the probative force of the inference of malice so weak that the evidence relied on substantially outweighed the presumption. Therefore, even if the trial court erroneously charged implied malice, this Court should find that the error was harmless beyond a reasonable doubt.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should affirm the appellant's convictions.

Respectfully submitted,

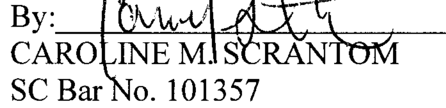
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

CAROLINE M. SCRANTOM
Assistant Attorney General

JIMMY A. RICHARDSON, II
Solicitor, Fifteenth Judicial Circuit

By: 
CAROLINE M. SCRANTOM
SC Bar No. 101357

Office of Attorney General
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT

January 14, 2015
Columbia, South Carolina

RECEIVED
JAN 14 2015
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

Respondent,

v.

BRADLEY GERALD MULLINS,

Appellant

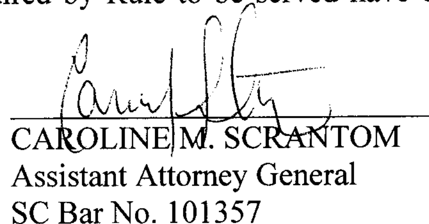
Appellate Case No. 2013-002662

PROOF OF SERVICE

I, Caroline M. Scrantom, counsel for the Respondent, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appeal by depositing two (2) copies of the same in the United States mail, addressed to his attorney of record at:

Robert M. Dudek
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served. This 14th Day of January, 2015.



CAROLINE M. SCRANTOM
Assistant Attorney General
SC Bar No. 101357

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
JAN 14 2015
SC Court of Appeals

January 14, 2015

Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: The State v. Bradley Gerald Mullins
Appellate Case No. 2013-002662

Dear Ms. Kitchings,

Enclosed please find the original and one (1) copy of the ***Initial Brief of Respondent and Designation of Matter***, dated January 14, 2015, along with proof of service, in the above-referenced case.

By copy of this letter, I am serving opposing counsel with same. Thank you for your consideration in this matter.

Sincerely,

Caroline M. Scrantom
Assistant Attorney General

CMS/mv
Enclosure

cc: Robert M. Dudek, Esq., Chief Appellate Defender
The Honorable Jimmy A. Richardson, Solicitor, 15th Circuit
Trisha Allen, Victim Services

REMBERT C. DENNIS BUILDING • POST OFFICE BOX 11549 • COLUMBIA, SC 29211-1549 • TELEPHONE 803-734-3970 • FACSIMILE 803-253-6283