STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Horry County
Steven H. John, Circuit Court Judge

STATE OF SOUTH CAROLINA,

Respondent,

v.

ARMANDO K. CHESTNUT,

Appellant

Appellate Case No. 2013-002123

INITIAL BRIEF OF RESPONDENT AND DESIGNATION OF MATTER

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to grant a new trial where it erroneously gave a Belcher instruction that the jury could infer malice from the use of a deadly weapon where self-defense was a verdict option, and the judge's later instruction that "if there's self-defense, there's no inference that can be associated with the use of a deadly weapon", was hopelessly confusing, and exacerbated rather than cured the prejudice?

RESPONDENT'S COUNTER-STATEMENT OF ISSUE ON APPEAL

I. Whether a new trial is warranted based upon an initial inadvertent instruction on the inference of malice through use of a deadly weapon where the trial judge granted defense counsel's request for a curative instruction which stated in "murder and attempted murder there can be no inference of malice by the use of a deadly weapon. If there's self-defense, there's no inference that can be associated with the use of a deadly weapon.... That's not proper in self-defense if it's established" which any reasonable juror would have understood withdrew the inadvertent instruction?

   a. The issue is not preserved for appeal since the only relief timely requested at trial was the curative instruction.

   b. The issue is not preserved for appeal since the defense counsel found acceptable the curative instruction and did not ask for a mistrial at that time.

   c. The issue is not preserved for appeal since the first complaint about the curative instruction was made after the verdict in a motion for new trial.

   d. Any challenge to the instructions on the inadvertent inference of malice is harmless error on the manslaughter conviction since the jury did not find the existence of malice concerning the death of Jamal McFadden.

   e. Any challenge to the effect of the inadvertent inference of malice charge concerning the attempted murder conviction concerning the assault on Damien Canty's life is harmless error where the attempt to kill Canty involved overwhelming evidence of malice, not limited to the use of a deadly weapon.

RESPONDENT'S STATEMENT OF THE CASE

The Appellant, Armando K. Chestnut, was indicted at the August 2012 term of the Court of General Sessions for Horry County for murder (2012-GS-26-3115), attempted murder (2012-GS-26-3116), pointing and presenting a firearm (2012-GS-26-3117), and assault and battery by mob-second degree-serious bodily injury (2012-GS-26-3118). R.p. __. The State had sought by written notice life without parole pursuant to S.C. Code § 17-25-45 on December 7, 2012 and April 2013. Tr. p. 961-62.

The matter was called to trial on July 15, 2013 before the Honorable Steven H. John and a jury. The Appellant was represented by Barbara Pratt, Esquire of the Horry County Bar. The prosecution was handled by Brad C. Richardson, Senior Assistant Solicitor of the Fifteenth Circuit Solicitor's Office.

On July 19, 2013, the jury found the Appellant guilty of the lesser included offense of voluntary manslaughter on murder indictment concerning the death of Jamal McFadden. Tr. p. 948-955. The Appellant was found guilty of attempted murder regarding victim Damien Canty, assault and battery in the second degree and pointing and presenting a firearm. Id. However, the jury found the Appellant not guilty on indictment 2012-GS-26-3118 on assault and battery by a mob second degree serious bodily injury of Damien Canty and assault and battery by a mob third degree bodily injury on Damien Canty and assault and battery first degree on Damien Canty. Tr. p. 950, ll. 1-15.

The trial judge concluded that under S.C. Code § 17-25-45 he sentenced the Appellant to life imprisonment without parole on voluntary manslaughter and attempted murder. Tr. p. 960-62, 972-72. Judge John sentenced Appellant to concurrent sentences of five (5) years concurrent

for pointing and presenting a firearm and three (3) years concurrent on assault and battery with intent to kill. Tr. 974-75.

The Appellant made a motion for new trial. A hearing on the motion was held on September 4, 2013 and the motion for new trial and motion to reconsider the sentence September 4, 2013. Tr. p. 1-22. On September 26, 2013, Judge John entered a written order denying the motion to reconsider the denial of the motion for new trial and sentence. Order Denying Motion for New Trial, Amended, September 27, 2013. R.p. __.

The notice of appeal was served October 4, 2013. This appeal and briefing follows.

RESPONDENT'S STATEMENTS OF THE FACTS

This case involves a series of assaults on March 6, 2012 at the 3rd Avenue Sports Bar in Myrtle Beach, South Carolina. On that date there was an altercation inside the bar arising from a dispute during a pool game. The altercation led to a fight between a group from Myrtle Beach and a group from Hemingway/Kingstree/Williamsburg County. The bar owner kicks them out of the bar where beginning fighting anew in the parking lot. Evidence is presented that the Appellant is seen going to his car prior to the shooting is then seen with something silver in his hand. During the altercations, Damien Canty was involved in a fight with Thoro and Corey Myers. At some point during the fight in the parking lot of the bar, a shot was fired and Canty was struck on the elbow. Appellant admits he fired that shot. He fires a couple more times. The altercation continued inside the bar where Canty was knocked to the floor by Mike Spivey and at some point during the beating became unconscious while he continued to be kicked and stomped on by the appellant and others. Chestnut continued to kick him until the owner of the bar pushed him off the victim, and then attempted to strike the victim some more. At some point Jamal McFadden was struck with a bullet during the scuffles. A bullet entered his left

lower chest area through the liver and exited the body.. Tr. 481-482. This resulted in Mr. McFadden death . Tr. 488.

Videos of the crime scene were used at trial to identify the various incidents. The Appellant's weapon was recovered at the time of his arrest after it was dropped from the vehicle. 294-302.

ARGUMENT

I. A new trial is not warranted based upon an initial inadvertent instruction on the inference of malice through use of a deadly weapon where the trial judge granted defense counsel's request for a curative instruction which stated in "murder and attempted murder there can be no inference of malice by the use of a deadly weapon. If there's self-defense, there's no inference that can be associated with the use of a deadly weapon.... That's not proper in self-defense if it's established" which any reasonable juror would have understood withdrew the inadvertent instruction.

a. The issue is not preserved for appeal since the only relief timely requested at trial was the curative instruction.
b. The issue is not preserved for appeal since the defense counsel found acceptable the curative instruction and did not ask for a mistrial at that time.
c. The issue is not preserved for appeal since the first complaint about the curative instruction was made after the verdict in a motion for new trial.
d. Any challenge to the instructions on the inadvertent inference of malice is harmless error on the manslaughter conviction since the jury did not find the existence of malice concerning the death of Jamal McFadden.
e. Any challenge to the effect of the inadvertent inference of malice charge concerning the attempted murder conviction concerning the assault on Damien Canty's life is harmless error where the attempt to kill Canty involved overwhelming evidence of malice, not limited to the use of a deadly weapon.

The Appellant contends that Judge John erred in refusing to grant a new trial based upon an inadvertent initial jury instruction concerning the inference of malice through the use of a deadly weapon and an assertion that the curative instruction given upon defense counsel's request was confusing and exacerbated the prejudice of the inadvertent instruction. Respondent submits that the trial judge recognized immediately that the inference of malice instruction that he gave was improper under State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) and corrected the instruction with the assistance of the language defense counsel propounded. As set forth fully below, this issue concerning the propriety and effect of the curative instruction as being confusing because it was never timely presented at the time of the trial. Rather, the defendant's counsel requested the language used, specifically accepted the language used and did

not object to the curative instruction or request a mistrial until after the guilty verdict. Respondent submits that the appeal is without merit due to this lacking preservation.

Further, at the outset, his challenge to the inferred malice and subsequent curative instruction can have no effect on the conviction for voluntary manslaughter since the jury expressly could not be deemed a to have found the existence of malice in reliance upon any inference instruction. Further, for reasons set forth below respondent's additionally submit that any error concerning the instructions must be deemed harmless error as it relates to the attempted murder conviction.

STANDARD OF REVIEW

When an incorrect charge is given, the court must withdraw it; "[m]erely superimposing a correct statement of law over an erroneous charge only fosters confusion and prejudice." State v. Patrick, 289 S.C. 301, 308, 345 S.E.2d 481, 485 (1986); State v. Peterson, 287 S.C. 244, 335 S.E.2d 800 (1985); State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981). **When an incorrect charge is given, the court must withdraw it;** "[m]erely superimposing a correct statement of law over an erroneous charge only fosters confusion and prejudice." State v. Robinson, 306 S.C. 399, 412 S.E.2d 411 (1991)[1], State v. Patrick, 289 S.C. 301, 308, 345 S.E.2d 481, 485 (1986); State v. Peterson, 287 S.C. 244, 335 S.E.2d 800 (1985)[2]; State v. Adams, supra.[3]

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[1] In Robinson, the Supreme Court found error where the judge gave an incorrect "mere presence" instruction although in the remainder of the charge he gave correct instructions. The Court found error because of repeated requests by counsel, the trial judge never retracted the incorrect statement. Here, the incorrect statement was immediately corrected in the curative instruction which declared, contrary to the initial that declaring " in particular, murder and attempted murder, there is no inference of malice by the use of a deadly weapon..." Tr.p. 941. Any reasonable juror would have considered the improper language withdrawn.

[2] In Peterson, the Court was faced with a situation where the trial court gave an erroneous burden shifting presumption charged that had been abandoned by the court in State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983).

In reviewing jury charges for error, this Court considers the trial court's jury charge as a whole and in light of the evidence and issues presented at trial. State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 604 (2011). A jury charge is correct if, when read as a whole, the charge adequately covers the law. *Id.* "A jury charge that is substantially correct and covers the law does not require reversal." State v. Logan, 405 S.C. 83, 90-91, 747 S.E.2d 444, 448 (2013). 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).

Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error. *State v. Smith,* 315 S.C. 547, 446 S.E.2d 411 (1994). 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, 343 S.C. 20, 26-27, 538 S.E.2d 248, 251 (2000); Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990).

HOW THE ISSUE WAS PRESENTED AT TRIAL

As noted previously, this case involves the effect of a curative instruction being given by the trial judge after an unintended charge concerning the inference of malice through the use of a

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In State v. Elmore, *supra,* the Supreme Court set forth a then exemplary malice charge (now abrogated after Belcher In Peterson, the trial judge followed the erroneous instructions with the *Elmore* charge. Instead of replacing the unconstitutional malice charge, the *Elmore* charge was simply added to the end of the charge. Merely superimposing correct instructions over erroneous ones serves only to foster prejudice and confusion, citing State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981).. See State v. Peterson, 287 S.C. 244, 247-48, 335 S.E.2d 800, 802 (1985) overruled by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

[3] In Adams, the Court held that " a full curative instruction should immediately have been given to the jury". Id. In the Appellant's case, the instruction was immediately given declaring " in particular, murder and attempted murder, there is no inference of malice by the use of a deadly weapon..." Tr.p. 941.

deadly weapon being given. Respondent respectfully submits that the issue presented in the Appellant's brief is barred from appellate consideration due to a lack of the timely objection to the requested curative instruction and failure to request a mistrial.

THE INITIAL CHARGE CONFERENCE

At the outset of the jury charge conference, defense counsel Pratt stated that "obviously if we were using self-defense, there's no inference of malice with a deadly weapon." Tr. 832, lines 16-25. There was no other request concerning or discussing the inference of malice prior to closing arguments. Tr. 833-850.

THE CLOSING ARGUMENT

During the prosecution closing argument, Deputy Solicitor Richardson stated :

> . . . On March 6th, 2012, the Defendant got the last word in and he spoke loudly, once, twice, three times. Did he go out that night and say I'm gonna go and kill Jamal McFadden? No, But when he went to that car and armed himself, not for self-defense but to get the last word in, that's malice, folks. From where he's sitting in the car, he can't even see the fight that's going on. And you see his reaction, he's not worried about a fight going on until he's already armed. He got the last word in that night, but not today.

Tr.902, lines 5-14.

THE SECOND CHARGE CONFERENCE

After the argument, defense counsel Pratt made the following request:

> MS. PRATT: Okay. I do want to ask - and I would - sir, just a second. I want to ask for an additional charge because the Solicitors made an inference in the statement that he made that the fact that Armando armed himself and that that was malice. I would ask that the Court charge that if he is acting in self-defense, there is no inference of malice by the use of a deadly weapon and I believe that that case - - -

The COURT: I don't think him gonna charge that at all that there's an inference.

MR. RICHARDSON: I think that's been stricken from the charge, hasn't it, Your Honor?

The COURT: I'm sorry.

MR. RICHARDSON: I think that inference is been stricken from the charges.

The COURT: I'm not going to say that.

MR. RICHARDSON: Yes, sir.

MS. PRATT: I believe, I understand that, but I believe that Court should charge that, that the arming of himself is not malice because he said in closing that it was.

The COURT: That's a that's a comment on the facts. I can't do that. That's making a direct comment on the facts. I cannot do that.

MR. RICHARDSON: Your Honor.

THE COURT: Once again, I'd be saying he armed himself. It may be very well be that he said he did; that's for the jury. I – I'm not gonna talk about the facts of the case. So I'm not gonna do that. . . .

Tr. 904, line 21- p. 905, line 22.

THE INITIAL INSTRUCTIONS

During the jury instructions, Judge John defined malice as follows:

Malice, that's hatred, ill-will, hostility towards another person. It's the intentional doing of a wrongful act without just cause or excuse and with the intent to inflict an injury or under circumstances the law would infer some evil intent.

Malice aforethought does not require that malice exist for any particular time before it's committed but malice must exist. It must exist in the mind of the Defendant just before and at the time the act is committed. There has to be this combination of the evil intent and the act.

Now, malice aforethought can be expressed or inferred. What that means is you look at whether it's been established to you by direct evidence or circumstantial evidence which was been proved, again, beyond a reasonable doubt.

> Expressed malice, that could be, as an example, a person speaking words which expressed hatred or ill-will or when another person or a person prepares beforehand to do the act which was later accomplished. Malice can be inferred from conduct that shows a total disregard for human life. **Inferred malice can also arise when the deed is done with a deadly weapon . A deadly weapon is any kind of article, instrument or substance which is likely the cause of death or great bodily harm. Whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case.**

Tr. p. 917-918. (emphasis added). Similar language was given during the instruction on "attempted murder" and malice. Tr. p. 921, l. 14-19. ("and inferred malice can also arise when that deed is done with a deadly weapon"). The charge was completed at 11:49 am and the jury was advised to not start its deliberations yet. Tr. 935, l. 14-24.

THE OBJECTION AND REQUEST FOR CURATIVE INSTRUCTION

After the charge was completed, defense counsel Pratt made an exception to this portion of the charge. Tr. 938. She cited State v. Frazier, 410 S.C. 224, 736 S.E.2d 301 ( ) which stated in a situation of self-defense "it is not inferred malice in regard – juries shall [not] be charged that malice may be inferred from the use of a deadly weapon where evidence if presented that would reduce mitigate, excuse, or justify a homicide caused by the use of a deadly weapon." Tr. 938, line 1-12. When asked by the trial judge what she wanted to be done, counsel Pratt requested a curative instruction and stated:

> I think a charge that states that if they find — if they believe the Defendant to have acted in self-defense then there is no inference of malice in the use of deadly weapon because it is a complete defense. Does that make sense? Am I thinking correctly?

Tr. 938, l. 20-24. She also had sought an instruction that self-defense was applicable to each charge. Tr. 938-940.

Judge John then went through his corrective instructions upon which defense counsel confirmed acceptance:

THE COURT: All right. Very good. To every crime charged. All right. And then if self-defense has been established, I probably ought to say again it's the State's burden to - the State's burden to disprove self-defense beyond a reasonable doubt. **It is a complete defense and in murder and attempted murder, there can be no inference of malice by the use of a deadly weapon. Would that be acceptable?**

MS. PRATT: **Yes, Your Honor.**

Tr. 939, l. 12-20. Solicitor Richardson sought clarification on the re-instructions as it related to pointing and presenting a firearm. Judge John clarified:

THE COURT : Okay. Well, the first thing I'm gonna say is self-defense is applicable to every crime charged. That's the very first thing I'm gonna say. All right. I'm not gonna pick a crime because I think that give undue influence to them. So, I'll just say it's applicable to every crime. Then I'm gonna say, if self-defense has been established and I remind you, it's the State's burden to disprove beyond a reasonable doubt self-defense. It is a complete defense and in murder or attempted murder, there can be no inference of malice by use of a deadly weapon. Or if you want me to say, Ms. Pratt, in any crime there can be no inference of malice by the use of a deadly weapon. I don't — if you want me to say that.

MS. PRATT: I would rather you say the murder and attempted murder since the other one is specifically –

THE COURT: All right, fine, I will. That's great, I will say that then, that's fine, murder and attempted — so, anything else from the State that you - - -

MR. RICHARDSON: No, sir. Your Honor.

THE COURT: All right. From the Defense, anything else. Ms. Pratt?

MS. PRATT: No, your Honor.

Tr. 940, l. 6- 941, l. 1. No request for mistrial was made by the defense.

THE CURATIVE INSTRUCTION WITHOUT OBJECTION

The jury then returned before deliberations began 10 minutes after the initial instructions at 11:59 a.m.. Tr. 941. Judge John then instructed:

> THE COURT: All right. Ladies and gentlemen, it's been called to my attention that I should bring something to your attention and I believe it's proper to do so and it's in regards to self-defense. Self-defense is applicable to every crime charged, just to be clear about that. It's applicable to every single crime charged in this matter. Now, if self-defense has been established - and I remind you now, it's the State's burden to disprove self-defense beyond a reasonable doubt. Again, the State has that burden on everything. **It is a complete defense. And in particular, murder and attempted murder, there can be no inference of malice by the use of a deadly weapon. If there's self-defense, there is no inference that can be associated with the use of a deadly weapon. It's not — that's not proper in self-defense if it's established.** And again, the State has the burden of disproving it beyond a reasonable doubt.

Tr.p. 941, l. 7-22. After the instruction, defense counsel Pratt confirmed that she had no further additions to the charge. Tr. 942, l. 12-17. No request for mistrial was made.

INSTRUCTION AFTER JURY REQUEST

The jury returned and made a further charge request for murder and manslaughter. Tr. 943-945. The defense requested re-instruction on self-defense.. Id. The trial judge agreed to reinstruct on self-defense if the jury asked for it. Tr. 944. At that point, Judge John re-instructed on murder and voluntary manslaughter. In the re-instruction, he limited his discussion of malice as follows:

> A Defendant being charged with the crime of murder, the State has to prove to you beyond a reasonable doubt that the Defendant killed another person with malice aforethought. Malice is hatred, ill-will, hostility, hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or it's under circumstances that the law will infer an evil intent. Malice aforethought does not require that malice exist in the mind of the Defendant for any particular time before the act is committed but malice must and has to exist in the mind of the Defendant just before and at

the time the act is committed, the murder. Therefore, there has to be this combination of evil intent and the act.

Now malice aforethought can be shown to you by the State beyond a reasonable doubt either expressed or inferred. Example of - -it's either like direct evidence or by circumstantial evidence. Expressed malice can be shown when a person speaks words which express hatred or ill-will for another person or when the person prepares beforehand to do the act, the murder which was later accomplished. An example of that could be lying in wait for a person to commit a murder or any other acts of preparation going to show that the deed was within the Defendant's mind. **And now malice can be inferred from a showing by the State beyond a reasonable doubt of conduct that shows a total disregard for human life. Now, that's the definition of murder.**

Tr. 945, l. 10- 946, l. 10. (emphasis added). [As revealed in the instruction, it did not include the inference of malice through the use of a deadly weapon].

At the conclusion of the instructions, he inquired of the jury whether they wanted instruction on any other aspect of the law. Tr.p. 945-47. ***No further requests were made. Again, no objection was made by the defense concerning additions or deletions from the charge. Tr.p., 948, l. 1-6.***

VERDICT

The jury returned an hour and ten minutes later with its convictions on voluntary manslaughter and attempted murder. Tr. 948-951.

POST-VERDICT MOTIONS

After the jury retired, counsel Pratt made a motion in arrest of judgment. She stated that she renewed all previous motions and objections and exceptions. Tr. 955. In addition, she asserted the following related to the inference of malice:

MS. PRATT: . . .I would also respectfully state that the statement regarding the inference of malice in regards to a deadly weapon in the first jury charge, while the Court gave a curative instruction, was not enough

to remove the taint and therefore, even there though was a second jury charge, which did not include that inference, that there is a danger that that affected the due process in regards to that charge. So therefore, respectfully. Your Honor, I would ask that this Court grant my motion in arrest of judgment and set aside and direct a verdict of not guilty.

Tr. 956, l. 6-15. Judge John denied the request, treating it as a motion for new trial stating:

THE COURT: Regarding the matter of malice, the Court did give what I believed to be a proper curative instruction and in fact the jury came back again and asked for the definitions of murder and voluntary manslaughter and the Court gave an instruction that was clear and without that issue so there's no question that they understood and knew exactly what it was that they were considering.

On all those issues, I do not find there's any reason presented that a new trial should be granted in this matter. I do find that it was properly conducted, proper evidence was presented to the jury, they considered the evidence, had sufficient time to do so, there was more than sufficient evidence in the record to convict the Defendant of all of the crimes of which he was convicted beyond a reasonable doubt. Therefore, I respectfully decline to grant your motion for a new trial.

Tr. 958, l. 12- p. 959, l. 2.

MOTION FOR NEW TRIAL AND HEARING

Subsequent to the trial, the Appellant made a notice of Notice and Motion to Reconsider the Sentence. A hearing on the motion was held on September 4, 2013. Sept. 4, 2013 Tr. 1-22. One of the assertions in the motion for reconsideration of the denial of the motion for new trial was that the judge's inferred malice instruction in the initial instruction coupled with the read charge to the jury was hopelessly confusing. See Notice of Motion and Motion to Reconsider Sentence. ROA _.

At the hearing defense counsel urged that the judge's instructions that malice was most troubling. Counsel cited to State v. Belcher, 385 S.C. 397, 685 S.E.2d 802 (2009). Defense counsel referred to the portion of the judge's jury instruction which stated that "inferred malice may also arise from the deed is done with a deadly weapon " Sept. 4, 2013 Tr.p. 6, l. 9-19, citing to Trial Tr.p. 918, l. 10-16. The appellant to urge that under the decision in Belcher, when self-defense is being raised the inference of malice with regard to a deadly weapon should not be charged to the jury. September 4, 2013 Tr. 6, lines 20-25. She pointed out that it was instructed initially with both murder and attempted murder. Sept. 4, 2013 Tr. 6-7.

Defense counsel complained that she did not think that the matter could be cured in the manner the trial judge did. She stated that if there was self-defense, then there is no "presumption" and contended that that was the way the trial court couched it in the curative instruction. Sept. 4, 2013 Tr. 7. She complained – for the first time – that "I'm not sure that Belcher talks about an " if – then" statement, because Belcher talks about an absolute prohibition. She contended that since the inference was stated twice in the initial instructions, it was difficult to un-ring the bell. She contended that this was revealed by the inconsistent verdicts, although she acknowledged that the crimes involved two different people. Sept. 4, 2013 Tr. 8, l. 1-11. She acknowledged that the voluntary manslaughter verdict on McFadden's death showed no malice even though there was a deadly weapon, but that on the attempted murder of Canty they found malice which she contends is the problem. Sept. 4, 2013 Tr. 8, l. 15-23.

Judge John declared that he had told her that he had that language deleted, but when he was reading it from the screen it came up and he read it. September 4, 2013 Tr. 9. Judge John confirmed that in the curative instruction he stated " and in particular murder and attempted murder, there can be no inference of malice by use of a deadly weapon." Judge John found that

"that statement is clear" and he stressed that "if there's self-defense or is no inference that can be associated with the use of a deadly weapon." September 4, 2003 Tr. 9, l. 1-16.

Counsel asserted that part of the problem in Belcher was it the court found that the self-defense instructions and inferred malice instructions were confusing and contended that when you use the "if, then" statement it still confusing and prejudicial to the jury. She restated that she believed that the inconsistent verdicts revealed that confusion based upon the same behavior.

However the Court rejected the "same behavior" or "same act" assertion. He stated that he had different actions as to each of the two [victims]. Counsel Pratt contended that it was clear that self-defense was the issue in regards to Canty because he was the one that started by attacking Thoro , but also is in the process of attacking and fighting with Corey when the gunfire started. The defense contended this was more likely with respect to the Canty incident and its self-defense was not necessarily involved in the McFadden death. She stated her client absolutely denied the bullet from his gun was the one that hit McFadden in was concerned because the bullet that may have gone through McFadden was never tested for DNA. September 4, 2013 Tr. 10-11. She stated that this pointed out the problem with the jury charge because of the jury believed that there was malice in regards to Canty then there was no reason for them to not find malice in regards to McFadden and lesser just confused about what they could do was self-defense and malice. Id.

In response, the prosecution asserted that they understood that since 2009 under Belcher in self-defense cases the inference of malice by use of a deadly weapon cannot be charged. September 4, 2013 Tr. 13-14. However he noted that court went further by noting that an error can be corrected and deemed cured if the curative instruction is given. The State cited State v.

Greene, 330 S.C. 551, 499 S.E.2d 817 (Ct. App. 1997), which held that an instruction to disregard competent evidence make here and error in a mistrial may yet be required depending upon the facts of a particular case of the defendant notwithstanding the curative instruction, suffered some prejudice. The State urged that in this case there was no prejudice, citing State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996), holding the determination of prejudice must be based on the entire record and the result would generally turn on the facts of each case. Counsel further at for erred to State v. Douglas, 367 S.C. 498, 523 S.E.2d 59 (2006) and State v. Harris, 340 S.C. 63, 530 S.E.2d 628 (2000).

The prosecution urged that the curative instruction compensated for any error in the initial instruction that included the inference by mistake after the defense properly raised an objection. September 3, 3013 Tr.p. 14. The prosecution noted that the curative instruction plainly stated that there was no inference by the use of a deadly weapon in self-defense cases. Sept. 4, 2013 Tr. 15. [This is actually stronger than Belcher requires which allows the state to still argue in self-defense cases that the particular use of a deadly weapon may create an inference of malice]. The state noted that after that curative instruction the jury retired and then was recharged on murder and manslaughter and those charges did not include any reference to an inference of malice through the use of a deadly weapon. Sept. 4, 2013, Tr. 15. The State urged that the defendant has failed to show prejudice by the instructions because the jury did not return a verdict of murder which required malice but returned a verdict of voluntary manslaughter which requires a showing of no malice. The State further urged that a mistrial should only be granted when absolutely necessary and that here the defense did not meet their burden.

Deputy Solicitor Richardson urged that the argument concerning inconsistent verdicts was faulty because they were two separate victims. He stated that the shot that kills Jamel McFadden as the defendant rushed in, no doubt inflamed at that moment and he pops him when time. The State urged the court to reconsider the video which showed the appellant running back out into the parking lot, firing multiple times and then chasing Mr. Canty the victim of the attempted murder into a club where he beats on him. The State urged that that action shows "malice." Sept. 4, 2013 Tr. 16. He states that the appellant keeps going after a when there's no more threat to Thoro in only the threat to Canty. Id. The State urged that the curative instruction was exhaustive and sufficiently cured any potential prejudice. Sept. 4, 2013 Tr. p. 16-17.

At the hearing, Judge John orally denied the motion related to the jury instruction. He stated:

> As to the jury charge, again, I said that at the time of the trial when the matter was raised to the Court's attention after the charge. **I had deleted it, it came back on the screen, I read it, I shouldn't have, I acknowledged that at the time**. I called the jury back in. **I was very clear telling them it was not part of the case. I think it was a proper curative instruction immediately after the charge**. Thereafter the jury, on its own, several hours later, came back and asked for a recharging of murder and voluntary manslaughter, and I indicated at the time we weren't going to go back and make the same error that I had made previously, and I charged them properly on murder and voluntary manslaughter.
>
> They did not hear anything that they should not have. I specifically asked the jury if they wanted any other things charged to them. I asked them, you know, including but not limited to self-defense, did they want to hear that again. The jury foreman clearly indicated to the Court at that point in time that what I instructed them was what they wanted to hear; they didn't want to hear anything else, even though I had specifically asked them, do you want to hear anything else, including, but not limited to self-defense, and the forelady, on behalf of the jury, indicated no, they heard what they wanted to hear.
>
> I had responded to their request, and properly charged them. The matter was raised to the Court, I gave a curative instruction, again, the jury, on its own, asked for instructions, proper instructions were given to them. I just cannot see any prejudice to the Defendant in this particular matter. On the facts of this particular case I just don't see any prejudice to the Defendant. Based on the facts -

> - and there are different facts for -- as I explained to the jury. They were trying a number of trials in one, and I specifically talked to them about that, and the facts on each one of them, and what the State had to prove to them beyond a reasonable doubt was different on each one of them, and I just don't see the prejudice to the Defendant in this particular matter.

September 4, 2013 Tr. 19, l. 16 – p. 21, l. 1.

On September 23, 2013, Judge John issued a written order denying the motion with similar findings and conclusions. *State v. Chestnut, Order, September 26, 2013.* ROA _. In the written order on this issue, he concluded:

> 3. Regarding the jury instruction concerning the inference of Malice: while the Court should not have given this instruction, when objected to by that Defendant, the Court gave the proper curative instruction; further, upon request by the jury to be recharged on "Murder" and "Voluntary Manslaughter," the Court properly omitted any reference to the inference of Malice by Use of a Deadly Weapon and offered to give a further charge of Self-Defense, which offer was rejected by the former to the jury;"

State v. Chestnut, Order, September 26, 2013, p.2. ROA _ .

ANALYSIS

The Supreme Court in State v. Belcher, 385 S.C. 597, 600, 685 S.E.2d 802, 803-04 (2009), held that a jury charge instructing that malice may be inferred from the use of a deadly weapon "is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide." Judge John initially included the inference of malice by use of a deadly weapon charge in his instructions by mistake because self-defense was being presented, as well as lesser included offenses.[4] After objection and aware of his mistake, he immediately corrected the mistake with the curative instruction. The Supreme Court had held "when an incorrect charge is given, the court must withdraw it; "[m]erely superimposing a correct statement of law over an erroneous charge only fosters confusion and prejudice." State v.

[4] Both parties were of the opinion that the inference of malice was not going to be charged. Tr.p. 832, 904. The trial court had agreed that it would not be charged. Tr.p. 904-905. Judge John later blamed a computer glitch on it being included in the initial instruction. September 4, 2013 Tr.pp. 9, 19-21.

Patrick, 289 S.C. 301, 308, 345 S.E.2d 481, 485 (1986); State v. Peterson, 287 S.C. 244, 335 S.E.2d 800 (1985); State v. Adams, supra. Here, the instruction was withdrawn, not superimposed over an erroneous charge. A new trial is not warranted.

THE POWERFUL CORRECTIVE CURATIVE INSTRUCTION REMOVED ANY ERROR BY REMOVING THE INFERENCE OF MALICE FROM THE USE OF A DEADLY WEAPON FROM THE JURY'S CONSIDERATION.

Here, Judge John conceded that he mistakenly gave the instruction on inference of malice by the use of a deadly weapon. However, he immediately corrected the mistake and gave a corrective and curative instruction directing the jury that there was no inference of malice in the murder and attempted murder case. Specifically he stated:

> **And in particular, murder and attempted murder, there can be no inference of malice by the use of a deadly weapon. If there's self-defense, there is no inference that can be associated with the use of a deadly weapon. It's not — that's not proper in self-defense if it's established.** And again, the State has the burden of disproving it beyond a reasonable doubt.

Tr.p. 941, l. 7-22.

Respondent submits that no reasonable juror listened to the instructions would have thought otherwise. The court's recantation of the initial charge was quick and unambiguous **"there can be no inference of malice by the use of a deadly weapon."** This curative instruction was more powerful that Belcher required and more favorable to a defendant by precluding the inference of malice by the use of a deadly weapon. **Belcher allowed the State to still argue the inference. This firm curative instruction would have been interpreted to have removed that inferred malice through the use of a deadly weapon basis!** Simply put, the curative instruction benefitted the defendant beyond what Belcher would have required. It was

not confusing. See U.S. v. Olano, 507 U.S. 725, 740, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (noting "the almost invariable assumption of the law that jurors follow their instructions") (quoting Richardson v. Marsh, 481 U.S. 200, 206, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987)).

Contrary to the claims within the brief of appellant, Judge John did withdraw the inadvertent instruction by the strong curative instruction. It was not superimposed over a bad instruction. To the contrary, it rejected the prior language of the inference with clear directives to the jury. More importantly, it was done immediately after the initial instructions and prior to the beginning of deliberations. In addition, when the jury asked for re-instruction on murder and manslaughter, the language did not include the "inference of malice through use of a deadly weapon" and only referred to any inference of malice as "malice can be inferred from a showing by the State beyond a reasonable doubt of conduct that shows a total disregard for human life." Tr. 945, l. 10- 946, l. 10. (emphasis added). A new trial is not warranted.

DEFENSE RECEIVED THE ONLY REQUESTED RELIEF OF THE CURATIVE INSTRUCTION AND DID NOT REQUEST A MISTRIAL

As reflected in the summary of how the issue was presented, it is clear that no request for mistrial was made at the time of the initial instructions and the sole remedy sought was a curative instruction. This instruction included the language that the defense counsel requested:

> I think a charge that states that if they find — **if they believe the Defendant to have acted in self-defense then there is no inference of malice in the use of deadly weapon because it is a complete defense.**

Tr. 938, l. 20-24.

Here , the trial judge sustained the objection concerning his mistaken inclusion of the inference language. The matter was later discussed at length among trial counsel and the trial

judge. The defense sought no further relief below beyond the curative instruction that she partially drafted.[5]

> **It is a complete defense. And in particular, murder and attempted murder, there can be no inference of malice by the use of a deadly weapon. If there's self-defense, there is no inference that can be associated with the use of a deadly weapon. It's not — that's not proper in self-defense if it's established.** And again, the State has the burden of disproving it beyond a reasonable doubt.

Tr.p. 941, l. 7-22. Inasmuch as the Appellant obtained the only relief he sought, this Court has no issue to decide. State v. Brown, 274 S.C. 48, 260 S.E.2d 719 (1979); State v. Sinclair, 275 S.C. 608, 610, 274 S.E.2d 411, 412 (1981).[6] Relief must be denied.

ISSUE NOT PRESERVED BY TIMELY OBJECTION TO THE CURATIVE INSTRUCTION

Appellant made no objections to the form of the curative charge when given. Tr.p. 938-94, 948, An error is deemed to be cured if a curative instruction is given. State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996), cert. denied, 520 U.S. 1123, 117 S.Ct. 1261, 137 L.Ed.2d 340 (1997). A contemporaneous objection to the sufficiency of a curative charge must be made to preserve the issue for appellate review. Id. Since Appellant made no objection to the curative charge as given, this issue is not preserved for our review. See State v. Greene, 330 S.C. 551, 561, 499 S.E.2d 817, 822 (Ct. App. 1997).[7] To the contrary, the defense endorsed the curative

[5] Concerning the curative instruction which she proposed, a party cannot complain of error his own conduct has induced. State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998)(appellant may not on appeal object to use of substituted phrase in jury charge because he asked for change and judge agreed); State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984).

[6] A party cannot seek and receive a particular result at trial and then challenge it on appeal. Bowman v. Bowman, 357 S.C. 146, 591 S.E.2d 654 (Ct. App. 2004).

[7] In Greene, the defense asserted for the first time in the appeal that a second curative instruction failed to properly correct an error of the first curative instruction. Like Appellant in this case, Greene made no objection to the forms of the curative charge, in fact giving the language to the trial judge. See Tr. 938, l. 20-24. In particular, defense counsel found the language of the curative instruction to be acceptable when asked. Tr.p. 939, l. 12-120. See also, Tr.p. 940-941 (no addition or objection); p. 942 (no addition or objection after the curative charge); p.

instruction and advised the trial court that it was acceptable. Tr. 939, l. 12-10. See State v Moyd, 321 S.C. 256, 468 S.E.2d 7 (Ct. App. 1996)(if the objecting party accepts the ruling of the trial judge and does not contemporaneously object to the sufficiency of the curative instruction or move for a mistrial, error deemed cured and issue not preserved for appellate review); Kalchthaler v. Workman, 316 S.C. 499, 450 S.E.2d 621 (Ct. App. 1994); State v. Morris, 307 S.C. 480, 415 S.E.2d 819 (Ct. App. 1991)(no issue preserved for appellate review if objecting party accepts judge's ruling on evidence and does not make an additional objection to the sufficiency of the curative charge or move for a mistrial).

Because a trial court's curative instruction is considered to cure any error regarding improper testimony, a party must contemporaneously object to a curative instruction as insufficient *or* move for a mistrial to preserve an issue for review. State v George, 323 S.C. at 510, 476 S.E.2d at 912; State v Patterson, 337 S.C. at 226, 522 S.E.2d at 850. Therefore, this issue may not be preserved for review because the trial court sustained defense counsel's objections and gave a thorough curative instruction without objection or request for a mistrial. See State v. Walker, 366 S.C. 643, 658-59, 623 S.E.2d 122, 130 (Ct. App. 2005).

Here, it appears that the mistrial request based upon the curative instruction and second instruction was first made after the verdict. Tr.p. 956. Until the verdict against him had resulted in a guilty verdict on attempted murder, Chestnut had not asserted the curative instruction was confusing in combination with the inadvertent inference instruction.[8] One may not take his

945-946 (no additions or requests after the jury requested re-instruction on murder and manslaughter which did not include the inference of malice through the use of a deadly weapon instruction).

[8] The reason why the defense did not object is self-evident since the curative instruction could be read to remove the possibility of the inference of malice through the use of a deadly weapon, something that Belcher authorized a prosecutor to argue. To the extent the prosecution argument could be construed to have argued this, the curative

chance of a favorable verdict and, after an unfavorable one, raise an objection that should have been made before the verdict was rendered. State v. Mayfield, 235 S.C. 11, 23-24, 109 S.E.2d 716, 724 (1959). When an instruction as given is allegedly inadequate, a party must request further instructions or object at the completion of the instructions in order to preserve the issue for review. State v. Avery, 333 S.C. 284, 509 S.E.2d 476 (1999); State v. Ard, 332 S.C. 370, 505 S.E.2d 328 (1998)(appellant argued for first time on appeal that trial judge's instructions to "assume" life imprisonment and death sentence should be understood in their ordinary and plain meanings was error); State v. Hornsby, 326 S.C. 121, 484 S.E.2d 869 (1997)(appellant did not request trial judge instruct jury that the sentencing consequences for a guilty or guilty but mentally ill verdict are the same; therefore, could not complain that the jury was misled because they thought guilty but mentally ill was a lesser verdict).

The Appellant parses the curative instruction and contends that it was unworkable and confusing because he contends that if the jury were to determine that he was not guilty of self-defense then it could not apply the inference of malice. This is not confusing, but correct under Belcher. However, defense counsel ignores the more powerful ameliorating language in the instruction that "in particular, murder and attempted murder, there can be no inference of malice by the use of a deadly weapon." However, the Appellant then challenges the language that the defense counsel propounded to the trial judge in a self-defense case there can be no inference of malice. He misreads the instruction as a whole. The trial judge's self-defense component supports the previous sentence that there can be no inference of malice by a deadly weapon in a murder or attempted robbery case which includes cases of self-defense, not limited to cases of

---

instruction underline a basis for the state's case! The defense had been given a windfall in the curative instruction due to Judge John's inadvertent error.

self-defense as he now suggests. Again, his argument before this court is the opposite of what she argued in requesting the similar instruction when Judge John made it. This instruction included the language that the defense counsel requested:

> I think a charge that states that if they find — **if they believe the Defendant to have acted in self-defense then there is no inference of malice in the use of deadly weapon because it is a complete defense.**

Tr. 938, l. 20-24. A party cannot seek and receive a particular result at trial and then challenge it on appeal. Bowman v. Bowman, 357 S.C. 146, 591 S.E.2d 654 (Ct. App. 2004).

This issue is also further not preserved because it was raised for the first time in the post-verdict oral motion for new trial. See Tr.p. 956, See State v. Robinson, 238 S.C. 140, 150, 119 S.E.2d 671, 676 (1961) (stating South Carolina does not permit a party disappointed by a verdict to employ a motion for a new trial to raise, for the first time, an error committed at trial). Failure to contemporaneously object to the question now advanced as prejudicial cannot be later bootstrapped by a motion for a mistrial. State v. Lynn, 277 S.C. 222, 226, 284 S.E.2d 786, 789 (1981)[9]; State v. Groome, 274 S.C. 189, 262 S.E.2d 31 (1980); State v. Atchison, 268 S.C. 588, 235 S.E.2d 294 (1977), cert. denied 434 U.S. 894, 98 S.Ct. 273, 54 L.Ed.2d 181 (1977).

ANY ERROR WAS HARMLESS ERROR

Respondent submits that any error in the instructions was harmless error. Erroneous jury instructions are subject to a harmless error analysis. State v. Belcher, 385 S.C. 597, 611, 685

[9] In Lynn, the Court found an objection to evidence was waived when first presented in a later motion for a mistrial. Lynn alleged that the trial court erred in refusing to grant a mistrial when evidence of appellant's bad moral character was introduced by two of the State's witnesses. The first witness volunteered testimony concerning appellant's involvement with the law in Florida. No objection was made to the introduction of the testimony, but appellant's counsel moved for a mistrial after the State completed its case. State v. Lynn, 277 S.C. 222, 226, 284 S.E.2d 786, 789 (1981). Like Lynn, here no motion for mistrial was made until after the verdict.

S.E.2d 802, 809 (2009).[10] Jury instructions should be considered as a whole, and 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). A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied. State v. Burkhart, 350 S.C. 252, 263, 565 S.E.2d 298, 304 (2002).; State v. Logan, 405 S.C. 83, 94, 747 S.E.2d 444, 449 (2013).

Error in charging a proposition of law is not necessarily reversible. In order to constitute reversible error, the court must be satisfied that there are reasonable grounds for supposing that the jury might have been misled to the prejudice of the appellant. State v. Martin, 122 S.C. 286, 115 S.E. 252; State v. Washington, 80 S.C. 376, 61 S.E. 896; State v. Johnson, 159 S.C. 165, 156 S.E. 353; State v. Woods, 189 S.C. 281, 1 S.E.2d 190, 194-95 (1939).

As to the manslaughter verdict, it is incontestable that any inference of malice instruction would necessarily be harmless error. Since the jury did not find the necessary element of malice with a manslaughter verdict, the inadvertent malice instruction could not have contributed to the verdict. Since the jury did not find malice, they did not infer malice from the use of a deadly weapon Here, the jury found that Appellant acted without malice by convicting Appellant of voluntary manslaughter. *See* State v. Pilgrim, 320 S.C. 409, 414, 465 S.E.2d 108, 111 (Ct.App.1995), *overruled on other grounds,* State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996) ("The distinction between murder and manslaughter is the presence of malice in murder and the

[10] In Belcher, the Supreme Court observed that often in murder cases there will be overwhelming evidence of malice, apart from the use of a deadly weapon. *Id.* at n. 8 ("In many, if not most, murder cases the [inferred malice from the use of a deadly weapon] charge will be harmless, even if couched in terms of a presumption. Here, the evidence of malice in the attempted murder case is not limited to the use of a deadly weapon. *See Belcher,* 385 S.C. at 612, 685 S.E.2d at 810 ("It is entirely conceivable that the only evidence of malice was Belcher's use of a handgun."). See State v. Stanko, 402 S.C. 252, 264, 741 S.E.2d 708, 714, reh'g denied (Apr. 3, 2013), cert. denied (Oct. 7, 2013), cert. denied, 134 S. Ct. 247, 187 L. Ed. 2d 183 (U.S.S.C. 2013)

absence of malice in manslaughter."). The jury's ultimate verdict demonstrates that the trial court's inadvertent inference from the use of a deadly weapon instruction did not preclude the jury from seriously considering the evidence of self-defense, justification and excuse presented at trial. Accordingly, we find the trial court's instruction that the jury could infer malice from Appellant's use of a deadly weapon was harmless error. Accord State v. Spriggs, No. 2013-UP-435, 2013 WL 8541581, at *3 (S.C. Ct. App. Nov. 27, 2013) rev'd, No. 2015-MO-034, 2015 WL 3649565 (S.C. June 10, 2015).

As to the attempted murder conviction, Respondent submits that the instructions were harmless error. As noted above, the inference was removed by the timely curative instruction that stated : "in particular, murder and **attempted murder**, there can be no inference of malice by the use of a deadly weapon. If there's self-defense, there is no inference that can be associated with the use of a deadly weapon. It's not- that's not proper in self-defense if it's established." Tr.p. 941. Further, even if the curative instruction was deemed inadequate, evidence of malice related to the Appellant's actions toward Canty to support the attempted murder conviction is overwhelming and not limited to the "use of a deadly weapon."

The evidence of malice in Appellant's actions against Canty as a victim were overwhelming. Section 16–3–29 of the South Carolina Code (Supp.2014) defines attempted murder: "A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." State v. King, 412 S.C. 403, 408, 772 S.E.2d 189, 191 (Ct. App. 2015), reh'g denied (June 5, 2015).

At the outset of the opening statement to the jury, the prosecution declared that Appellant was guilty of attempted murder of Damien Canty "for stomping [Damien] Canty's head into the

ground on a cold concrete floor." Tr.p. 54, l. 3-5. The prosecution describes the evidence in the case from a video from inside the bar as " Damien Canty, big old fellow, comes in and get knocked down by one of the defendant's friends. And then we'll see the defendant, Armando Chestnut, come in that bar. To be able did tell its him because of that very distinctive jacket he's got on, White and Black strike and you see him run in, run over and hit Damien Canty and stomping him again and again into a hard concrete floor. So as I said, Wayne Feaster backs them off and then you'll see him calmly get up and walk out." Tr.p. 56-57.

In the defense argument, defense counsel asserts that Damien Canty had continued to fight between his Hemingway/Kingstree/Williamsburg County group and the Myrtle Beach group by hitting Thoro from the Myrtle Beach group with a bottle in the parking lot after they were all sent out of the 3rd Avenue Sports Bar by the owner, Wayne Feaster after he claims the deceased Jamal McFadden (known as the man with dreadlocks) had initiated a fight over a pool game and money by grabbing a pool cue. The defense asserted that Canty had then viciously beat him. Tr.p. 61-62. He claims that Canty stopped fighting with Thoro and then started fighting with Corey Myers. He asserts that McFadden the n comes up looking at the fight and then Appellant fires a weapon in the air which stop the fight between Thoro and Canty. Tr.p. 62. Counsel then attempted to tie self-defense into his opening. Tr.p. 63. He claims the only thing that stopped the attack between Canty and Thoro was the Appellant's first shot. Id.

The bar's owner, Wayne Feaster, testified concerning some of the incident with Canty. He described that there was an argument March 6, 2012 between the "Myrtle Beach crowd against the Hemingway crowd." He testified it was about the pool game and money for bet during the game. Tr.p. 129-131. He stated that there was an altercation inside. He stated that after he escorted Thoro (Dewayne) was hit in the head with a bottle. Tr. 135. At that point he

described that everyone started fighting and then he saw a gun up in the air. He stated after the fight there were 2 people injured, one a skinny individual with dreadlocks who was killed and another who is around 5'10" and 220 pounds to he saw injured when he came back into the club. Tr. 137. Feaster stated the individual had come into the club swinging and the boys got into an altercation again and he stopped it after that man (Canty) was down and unconscious. Tr. 138. Feaster declared that he recognized the appellant by the name Barney. Tr. 145. In reviewing the videos from his business, he described seeing the pool stick grabbed that night and at that time he put the pool stick back on the wall and ordered the people to get out. Tr. 147-148. Feaster described viewing the video and seeing the appellant running toward the front door of the building. In a later video he sees the other victim fall on the floor and they were beating him. He stated that there was carpet underneath them and concrete underneath the carpet. Tr. 154. He further describes a video where feaster goes towards the appellant in pushes him off of the victim (Canty) because he was down and out. Tr. 156. He stated he saw one of the Myrtle Beach people initially knocked the victim down. Tr. 156. Feaster stated that he tried to assist the Hemingway fellow that a got knocked down. Tr. 161.

On cross-examination, Feaster confirmed that he saw Canty hit Thoro with a bottle on his head after he initially kicked everyone out of his club after the first altercation. Tr. 169, 184-185. He stated that Thoro was then jumped on by a bunch of guys. Tr. 170. He states that at some point outside he saw Corey Myers fighting and saw Corey with a weapon. Tr. 171. He stated that when there was a gunshot, that people started to move in different directions. Tr.p. 174.

He described seeing on the video Canty fighting with Thoro. Later he described that he sees on the video Canty initially advancing and then get knocked down by Mike Spivey. Tr.p. 187-188. He confirmed that it appeared to be mutual combat. Tr.p. 192.

Corey Myers testified that he was involved in the altercations that night and broke his thumb. Tr.p. 199-200. He was arrested after he turned himself in after he left the hospital. Tr. 200. Concerning the series of altercations after they were kick outside the club, he described seeing the big guy hit Thoro first. Tr. 209. Corey stated he tried to hit the guy with the gun that he had in his hand on Canty's head a number of times. Tr. 210, 226-27. After he heard a gunshot, everyone scattered. Tr. 211. He described the scene as a brawl. Because he had dropped his gun, Corey looked to see if it was being fired at him but it was still on the ground. Tr. 212. He stated that Feaster (Thoro) appeared to be picking the big guy up and leading him to leave because he was still fighting. Tr. 212, 228. Corey stated at that time he tried to hit the big guy again but he goes back into the bar any guess that the guy got into a fight in their again. Tr. 212. He stated that after he heard gunshots he saw him again unconscious on the floor in the bar. Tr. 213. Stated he drove his thumb during the fight. Tr. 214. Myers testified that when he started fighting with the big guy that they ended up on the ground with Myers over the victim. Tr. 226.

Testimony was presented that both victims, McFadden and Canty, for transported by ambulance to the hospital. Tr. 262.

Officer Michelle McSpadden, a crime scene unit with the Myrtle Beach Police Department testified that she was sent to the hospital to collect evidence from the 2 victims who are transported there. Through her testimony photographs of victim Damien Canty were introduced. Tr. 328 – 331. State Exhibits 88-91. These photographs were taken to document the laceration on Canty's forehead and wound to his right elbow. Tr. 329. A bullet from Canty's elbow was also introduced as evidence. Tr.p. 467-468.

A video was reviewed which showed individuals involved in the assault on Canty inside the club. Tr.p. 501. Officer Kitelinger testified that it lead to identifying Michael Spivey as the person who knocked Canty down. Tr. 501-502.

The record reflects that Damien Canty at around 1:15 am was knocked down and unconscious and stomped according to the video of the scene. Tr. 154 - 156, 288, 569. State Exhibit 1 at CH04-2012-03-06-00-55-12 @ 1:14 - 1:15:11. See also, State Exhibits 24-27. The Appellant's friend, Annaleise Testa testified that the photographs appeared to show the Appellant "stomping on something or someone." Tr. 288.

The Appellant claimed (contrary to the state's theory) that he arrived at the bar already with the gun. Tr. 734-735. He stated he heard a gunshot, so he then shot and claimed at that time that he had Canty in the arm. Tr. 735. However, he claimed that he did not intend to shoot Canty and was trying to scare him off. Tr. 759. He claimed he did not realize anyone was hit because he did not hear anyone holler. Tr. 759.

He described then going over to kick Canty after he was knocked on the ground by Spivey. Tr. 739-740. He testified that he did not know that Canty was unconscious when he was kicking him. Tr. 740. Her claimed he only kicked him one time and missed the other two kicks. Id.

According to the Appellant's statement, he and several others were hitting Canty at the same time and stomping on his head. Appellant admitted to kicking him along with the others. State Exhibit 122 (CD – Interview of Defendant).

During the cross-examination of the Appellant, he admitted that in his interview, he admitted kicking Canty. Tr. 780 -781. Despite what the video showed, Appellant denied that he

stomped on his head, but admitted hitting his shoulder. Tr. 815. He admitted that when Canty ran inside the club after the fight between Canty and Thoro, he went inside after him. Tr. 815.

Q: And you stomped at him at least twice more, right?

A: I stomped down but never hit him the second — the last two times.

Q: Were you aiming at the floor or at his head?

A: I was aiming really anywhere I could hit him at but I didn't hit him in the head.

Tr. 815-816. See Tr. 781-782. He described after he got pushed back off the victim by Feaster, he probably went back over to Canty again. Tr. 782, 816.

Respondent submits that the combined evidence of malice from the continued assault upon Mr. Canty while he was unconscious combined with the earlier admitted shot to Canty while he was fighting Myers supports a conclusion that the instruction was harmless error as it related to attempted murder.

CONCLUSION

For all the foregoing reasons, Respondent, the State, submits that the judgment and conviction and sentences of the lower court should be affirmed.

Respectfully submitted,

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Attorney General

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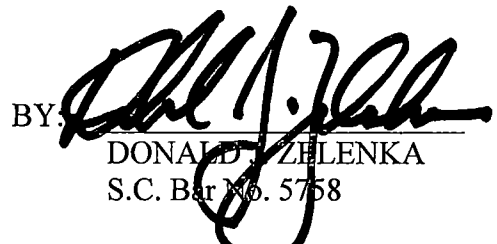
BY: 

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ATTORNEYS FOR RESPONDENT

September 18, 2015

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that a true copy of the Initial Brief of Respondent and Designation of Matter in the above referenced case has been served upon counsel for Appellant by depositing one copy of same in the United States Mail to:

Robert M. Dudek, Esq.
Chief Appellate Defender
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RECEIVED
SEP 23 2015
SC Court of Appeals

This 18th day of September, 2015.

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
SEP 23 2015
SC Court of Appeals

September 18, 2015

Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
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Re: The State v. Armando K. Chestnut
Appellate Case No. 2013-002123

Dear Ms. Kitchings:

Enclosed please find the Initial Brief of Respondent and Designation of Matter in the above-captioned matter for filing in your office. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Donald J. Zelenka
Senior Assistant Deputy Attorney General

DJZ/lbb
Enclosure

cc: Robert M. Dudek, Esquire
Jimmy A. Richardson, Solicitor
Trisha Allen, Victims Assistance

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