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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Marlboro County

Michael G. Nettles, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROEMAIN JAMAIL BRUNSON,

APPELLANT

APPELLATE CASE NO. 2014-002665

ANDERS BRIEF OF APPELLANT

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial judge err in charging the jury that attempted murder did not require a specific intent to kill in violation of Appellant's right to require the state to prove all elements of the offense beyond a reasonable doubt?

II. Did the trial judge err in instructing the jury that malice could be inferred from the use of a weapon where evidence in the record mitigated the offense and supported Appellant's claim of self-defense?

STATEMENT OF THE CASE

On November 19, 2013, a Marlboro County grand jury indicted Appellant for two counts of attempted murder (2013-GS-34-626 & -627), possession of a weapon during the commission of a violent crime (2013-GS-34-628), and kidnapping (2013-GS-34-630). R. 314-315; 317-318; 320-321.[1] The state, represented by Mia David and Mary Thomas Johnson-Lee, called the case for trial on December 8, 2014, before the Honorable Michael G. Nettles and a jury. R. 29.[2] Julie Swilley and Matthew Swilley represented Appellant. R. 29. The jury found Appellant guilty of one count of attempted murder, guilty of assault and battery of a high and aggravated nature (ABHAN), a lesser-included offense of attempted murder, guilty of possession of a weapon, and guilty of kidnapping. R. 299, lines 4-17.[3]

Pursuant to an agreement between the state and the defense, Judge Nettles "categorized" the matter "as guilty but mentally ill." R. 307, line 11 – R. 309, line 20; R. 316; 319; 322.[4] Judge Nettles sentenced Appellant to twenty-five years' imprisonment for attempted murder, twenty years' imprisonment for ABHAN, five years' imprisonment

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[1] Appellant was indicted for burglary in the first degree as well. However, the jury found him not guilty of this offense. R. 32, lines 10-11; R. 299, lines 7-8.

[2] On November 18, 2014, the parties convened for a judicial determination of Appellant's competency. Comp. 1. Ultimately, the judge found Appellant was competent to stand trial. R. 27, lines 20-23.

[3] Although Appellant was indicted for only one count of possession of a weapon during the commission of a violent crime and the indictment was not specific as to which of the violent crimes it referred or to which of the alleged victims it referred, the jury considered the offense as it related to both of the alleged victims. R. 299, lines 9-10; R. 299, lines 16-17. Nevertheless, Appellant was sentenced only on one count. R. 312 line 24 – Dec. 10, R. 313, line 3.

[4] The jury had not been presented with the option of considering any verdicts other than guilty and not guilty.

for possession of a weapon during the commission of a violent crime, and twenty-five years' imprisonment for kidnapping. R. 312, line 14 – R. 313, line 7; R. 316; 319; 322; 325. He ordered the sentences to be served concurrently. R. 312, line 14 – R. 313, line 7; R. R. 316; 319; 322; 325.

Appellant filed a notice of appeal. This brief follows.

STATEMENT OF FACTS

Fred David and Wanda Johnson lived next door to Appellant in a trailer park in Marlboro County. R. 112, lines 6-14; R. 117, lines 10-14; R. 134, line 2; R. 139, lines 1-9. David and Johnson were friendly with Appellant, including helping him with his trash disposal and transporting him to the grocery store. R. 112, lines 19-24; Dec. 9, R. 117, lines 15-18; R. 134, lines 3-4; R. 143, lines 17-19. Johnson and Appellant were so close that Appellant called Johnson "mama." R. 113, lines 5-6; R. 134, lines 4-5; R. 143, lines 15-16.

By all accounts, Johnson had a serious drug problem. After initially claiming he had never seen Wanda do drugs, David finally admitted that he had observed Johnson "smoke[] a little weed, but that's it." R. 120, lines 17-25. David even saw Johnson use marijuana the week before Appellant's trial. R. 121, lines 4-13.[5] Johnson admitted she "was addicted to cocaine." R. 137, lines 19-20; R. 144, lines 2-6. However, she claimed she was no longer using cocaine at the time of the trial. R. 137, line 24. In fact, she claimed she had stopped using cocaine almost a year prior to the trial. R. 144, lines 7-8.

According to David, Appellant either knocked or kicked on the door of their trailer "real hard." R. 109, lines 2-4; R. 113, lines 7-8. David heard the person knocking say "mama." R. 109, lines 4-5; R. 113, lines 7-8. David claimed he did not realize Appellant was the person knocking. R. 109, line 5. According to David, he opened the door, Appellant "jerked the door," and David "jerked it back." R. 109, lines 6-7. David further claimed that Appellant "forced his way in." R. 109, lines 8-9; R. 113, line 12.

[5] Johnson denied using marijuana the week before the trial. R. 147, lines 19-23.

Thereafter, Appellant hit David "in the face, in the forehead." R. 109, lines 9-10.[6] David claimed Appellant had "a little knife," and the two men began "tussling." R. 109, lines 16-17; R. 118, lines 1-5. During the fight, David was struck by the "little small kitchen knife." R. 109, lines 17-25.[7]

David claimed that during the fight, Appellant "ran over to the kitchen and got - - to the sink, and got the other butcher knife." R. 110, lines 5-7; R. 118, line 22 – Dec. 9, p. 39, line 1. Oddly, David stated that David was the one who grabbed the butcher knife, but ended up with a cut finger. R. 110, lines 7-8; R. 119, lines 12-22. Although the two "kept on tussling" and David was "tired," he somehow managed to run across the street to a neighbor. R. 110, lines 9-13. At the first door, no one responded to David's request. R. 110, lines 12-14.[8] At the next house, the occupant answered, but refused to call the police. R. 110, lines 15-18. Nevertheless, when David returned to the trailer, he found the police there. R. 110, lines 18-20; R. 99, lines 19-20.

The police found Appellant inside the residence with Johnson. R. 100, lines 2-4. When the police ordered Appellant to release the knife, he complied. R. 100, lines 6-7; R. 105, lines 14-18. Thereafter, the police arrested Appellant. R. 100, lines 8-9; R.101, lines 20-25.

Johnson's testimony differed in several dramatic ways from David's testimony. First, she claimed that Appellant initially knocked on her bedroom window. R. 135, lines 5-8. Johnson claimed Appellant wanted a cigarette, but she told him she did not have any

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[6] David did not tell the police that he was hit in the face. R. 116, lines 18-23.

[7] David told the police that Appellant had a "large knife." R. 118, lines 6-9.

[8] This neighbor may have called the police despite not answering the door. R. 126, lines 8-15.

and Appellant left. R. 135, lines 15-18. Next, she stated that she heard Appellant knocking loudly on her front door and ran to the door. R. 131, lines 9-11; R. 135, lines 18-20. She saw Appellant walk through the door, hit David in the face, and *then* hit her in the face. R. 131, lines 13-14; R. 136, lines 13-14. She ran to her bedroom and propped her feet against the door to call for help. R. 131, lines 15-17; R. 136, lines 14-15. Then, Appellant entered her room and stabbed her. R. 131, lines 18-20. Unlike David, Johnson claimed Appellant ran between the front room and her bedroom during this period. According to Johnson, Appellant left her room and returned to the front of the house after stabbing her initially. Although Appellant was not present in the room with Johnson for substantial periods of time, Johnson claimed she was unable to run because she had been stabbed in the knee. R. 131, line 24 – R. 132, line 2.

Johnson further claimed Appellant was upset with Johnson's son regarding the son seeing Appellant's girlfriend. R. 132, lines 3-7. Appellant cut Johnson's face when she denied the accusations. R. 132, lines 10-11. Johnson claimed that Appellant left her again and went to the front room. R. 132, lines 13-14. When Appellant returned to her, he "kept talking" to her and "just stabbing" her. R. 132, lines 14-22. Appellant then dragged her to the front room where he continued to stab her until the police arrived. R. 132, line 23 – R. 133, line 24.

Despite her admitted cocaine addiction, Johnson claimed she used no drugs on the night of the incident. R. 138, lines 8-9. She persisted that she had only two drinks with David that evening. R. 138, lines 9-10. She "probably" used drugs earlier in the week, however. R. 138, lines 10-11. She testified that she used drugs only on the weekends at the time of the incident. R. 138, lines 17-22. However, when Johnson was confronted

with her medical records, she stated she did "drugs the night before" the incident, but denied using drugs the night of the incident. R. 146, lines 6-11; R. 146, lines 16-22 (specifying that she used crack).[9]

Appellant never denied stabbing Johnson and David. However, he acted in self-defense. Appellant, like Johnson, was addicted to drugs. R. 95, lines 17-18. On the night of the incident, he was using cocaine in his car. R. 95, lines 14-17. R. 198, line 15 – R. 199, line 2; R. 260, line 10. Johnson called Appellant to her house because she wanted some cocaine. R. 95, lines 19-23; R. 260, lines 11-12. Appellant visited with Johnson and David for ten minutes without incident. R. 96, lines 2-9; R. 260, lines 18-20. Appellant left his cocaine in his car because he feared Johnson and David would want to take his drugs. R. 260, line 25 – R. 261, line 3. Suddenly, David attacked Appellant with a knife. R. 96, lines 9-10; R. 261, lines 4-6. Appellant got the knife from David and stabbed David in self-defense. R. 96, lines 11-14; R. 261, lines 6-9. David ran from the house. R. 261, lines 8-9. Johnson then attacked Appellant, provoking Appellant to stab her. R. 261, line 9. When Appellant was arrested, he had suffered cuts to his arms and required medical treatment. R. 171, lines 12-15; R. 176, lines 16-21; R. 181, line 11; R. 197, line 18 – R. 198, line 7.

[9] Johnson's medical records indicated that she rarely used alcohol and had last consumed alcohol on the Friday before the incident. Further, she indicated that she used cocaine twice a month and had last used cocaine on the Friday before the incident. R. 168, lines 5-22.

ARGUMENT

I. Violating Appellant's right to require the state to prove all elements of the offense beyond a reasonable doubt, the trial judge erred in charging the jury that attempted murder did not require a specific intent to kill.

Relevant facts

While instructing the jury on the elements of attempted murder, the judge told the jury that "[a] specific intent to kill is not an element of attempted murder." R. 280, lines 21-22. He further instructed the jury that only a "general intent to commit serious bodily injury" was required. R. 280, lines 22-23. Concerning "intent," the judge told the jury the term meant "intending the result which actually occurs, not accidentally or involuntarily." R. 280, lines 23-24. He told the jury that "[i]ntent may be shown by acts or conduct of the Defendant and other circumstances which you may naturally and reasonably infer intent." R. 280, line 24 – R. 281, line 2. The jury could consider "[e]vidence of the character of the act, the character of the instrument used, the manner in which it was used, the purpose to be accomplished, and the resulting wounds or injuries." R. 281, lines 2-6. Finally, the jury could infer intent if the "defendant voluntary and willfully committed an act, the natural tendency of which is to destroy another's life." R. 281, lines 6-9.[10]

[10] Appellant admits trial counsel posed no objection to the jury charge. R. 292, lines 4-5. However, Appellant respectfully requests this Court address the merits of the issue in the interest of judicial economy in light of the obvious error and the likelihood of success in a post-conviction relief action based on ineffective assistance of counsel for failure to object. See State v. Johnston, 333 S.C. 459, 463-464, 510 S.E.2d 423, 425 (1999); State v. Vick, 384 S.C. 189, 202-203, 682 S.E.2d 275, 281-282 (Ct. App. 2009); State v. Bonner, 735 S.E.2d 525, 526, 400 S.C. 561, 564 (Ct. App. 2012).

The jury requested "clarification/definition on all charges" shortly after starting its deliberations. R. 293, lines 13-14. The judge provided the jury with a written copy of his instructions concerning the "charge of the substantive law." R. 293, line 15 – R. 295, line 21.

Discussion

The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed...." U.S. Const. Am. VI. The Fourteenth Amendment forbids states to "deprive any person of life, liberty, or property, without due process of law." U.S. Const. Am. XIV. Pursuant to this Due Process Clause, the United States Supreme Court held an individual's right to a jury trial pursuant to Sixth Amendment is applicable to the states. Duncan v. Louisiana, 391 U.S. 145, 149-150 (1968); see also State v. Warren, 273 S.C. 159, 255 S.E.2d 668 (1979). Additionally, South Carolina's Constitution provides that "Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury." S.C. Const. Art. I, § 14.

The South Carolina General Assembly recently created the crime of attempted murder. Lawmakers defined the offense as: "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." S.C. Code Ann. § 16-3-29 (emphasis added). The statute became effective on June 2, 2010. According to the Act, attempted murder replaced the common law crime of assault and battery with intent to kill: "wherever in the 1976 Code reference is made to the assault and battery with intent to kill, it means attempted murder as

defined in Section 16-3-29." 2010 Act No. 273, § 7.C. Thus, the General Assembly was aware of the prior offense of assault and battery with intent to kill and the case law defining the common law offense.

Previously, assault and battery with intent to kill was defined as "an unlawful act of a violent nature to the person of another with malice aforethought, either express or implied." State v. Hinson, 253 S.C. 607, 611, 172 S.E.2d 548, 550 (1970). Although assault and battery with intent to kill was a common law offense, a statute provided for its punishment: "The crime of assault and battery with intent to kill shall be a felony in this state and any person convicted of such crime shall be punished by imprisonment not to exceed twenty years." S.C. Code Ann. § 16-3-620 (2009).

In State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996), the South Carolina Supreme Court analyzed the offense of assault and battery with intent to kill and discussed the required elements of the offense. Based upon the traditional comparison of assault and battery with intent to kill to murder – that if the offense would have been murder had the victim died – and the lack of a specific intent requirement for murder, the Court held "the logical inference is that, likewise, a specific intent is not required to commit" assault and battery with intent to kill. Id. at 14-15, 479 S.E.2d at 51. The Court explained that although the offense required both an intent to kill and malice, the offense did not require a specific intent to kill. Id. at 15, 479 S.E.2d at 51. Thus, the Court held it sufficient "if there is some general intent, such as that heretofore applied in cases of murder in this state." Id.

In State v. Sutton, 340 S.C. 393, 398, 532 S.E.2d 283, 286 (2000), the South Carolina Supreme Court refused to recognize the offense of attempted murder. The Court explained that an attempt to commit murder requires a specific intent to kill. Specifically,

the Court stated "[i]n general, '[a]ttempt is a specific intent crime.'" Id. at 397, 532 S.E.2d at 285 (citing 21 Am.Jur.2d Criminal Law § 176 (1998)). Further, the Court explained "'[t]he act constituting the attempt must be done with the intent to commit that particular crime.'" Id. (quoting 21 Am.Jur.2d Criminal Law § 176). "In the context of an 'attempt' crime, specific intent means that the defendant consciously intended the completion of acts comprising the choate offense." Id. at 397, 532 S.E.2d at 285. The Court then distinguished attempted murder from assault and battery with intent to kill: "Attempted murder would require the specific intent to kill and conduct towards that end. ABIK requires an unlawful act of violence to the person of another with malice. Clearly, each offense has an element the other does not." Id.

Repeatedly, South Carolina's appellate courts held that attempt crimes require specific intent to complete the acts comprising the principal offense. See State v. Green, 397 S.C. 268, 283, 724 S.E.2d 664, 671-672 (2012); State v. Reid, 393 S.C. 325, 329, 713 S.E.2d 274, 276 (2011); State v. Evans, 216 S.C. 328, 332, 57 S.E.2d 756, 758 (1950) (stating "[t]he law does not concern itself with the mere guilty intention, unconnected with any overt act"); State v. Quick, 199 S.C. 256, 19 S.E.2d 101 (1942) (same); State v. Atieh, 397 S.C. 641, 725 S.E.2d 730 (Ct. App. 2012); State v. Nesbitt, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001).

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). Under the plain meaning rule, the court should not alter the meaning of a clear and unambiguous statute. In re Vincent J., 333 S.C. 233, 235, 509 S.E.2d 261, 262 (1998) (citations omitted). Where the statute's language is plain and

unambiguous, conveying a clear and definite meaning, the rules of statutory interpretation are not needed and the court should not impose another meaning. Id. (citing Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

The clear and unambiguous meaning of the statute concerning attempted murder is a requirement of specific intent: "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." S.C. Code Ann. § 16-3-29 (emphasis added). If this Court determines the statute is ambiguous, then a review of South Carolina's case law demonstrates the legislature intended to require a specific intent to kill when it created attempted murder. The Supreme Court had held repeatedly that attempted murder required a specific intent to kill. In fact, our appellate courts had long maintained that attempt crimes are specific intent crimes. The legislature was aware of South Carolina's case law concerning attempted murder specifically, and attempt crimes in general. Therefore, the legislature understood that by creating the crime of attempted murder, the legislature was requiring a showing of specific intent.

On November 18, 2014, less than one month before Appellant's trial, this Court heard arguments in State v. King concerning the issue presented by this appeal. On that date, King argued the trial judge erred in charging the jury that a specific intent to kill is not an element of attempted murder but it must be a general intent to commit serious bodily injury. On April 22, 2015, this Court decided State v. King, 412 S.C. 403, 772

S.E.2d 189 (S.C. Ct. App. 2015).[11] This Court held the phrase "with intent to kill" failed to "clearly indicate what level of intent the Legislature meant to require the state to prove because the word 'intent' can mean anything from purpose to negligence." Id. at 408, 772 S.E.2d at 192. Thus, this Court "look[ed] beyond the words of the statute and use[d] our rules of statutory construction to determine what the Legislature intended." Id. Relying upon the Legislature's undisputed knowledge of the history of our courts requiring the state to prove specific intent as an element of attempt crimes, this Court held the Legislature intended to require a showing of specific intent for the offense of attempted murder. Id. at 409-411, 772 S.E.2d 192-193. This Court found the trial judge erred in failing to charge the jury that attempted murder required the state to prove specific intent. Thus, this Court reversed King's conviction. Id. [12]

Similarly, this Court should reverse Appellant's conviction for attempted murder based upon the trial judge's erroneous instruction. See State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010) ("To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant."); State v. Lee-Grigg, 374 S.C. 388, 405, 649 S.E.2d 41, 50 (Ct. App. 2007) ("A trial court has a duty to give a requested instruction that is supported by the evidence and correctly states the law applicable to the issues."); State v. Buckner, 341 S.C. 241, 247, 534 S.E.2d 15, 18 (Ct. App. 2000) ("In making a harmless error analysis, [the Court's] inquiry is not what

[11] Concerning this issue, the state filed a petition for rehearing, which was denied on June 5, 2015. On June 15, 2015, the state filed a petition for writ of certiorari. Respondent filed a return on August 6, 2015. The state's petition remains pending with the South Carolina Supreme Court.

[12] Appellant should benefit from the King ruling as his case was tried shortly after the King argument and just five months prior to the King opinion. See Griffith v. Kentucky, 479 U.S. 314, 328 (1987).

the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered."). Further, this Court should reverse Appellant's conviction for ABHAN, kidnapping, and possession of a weapon because the erroneous instruction regarding attempted murder tainted the jury's understanding of the other offenses as well.

II. <u>The trial judge erred in instructing the jury that malice could be inferred from the use of a weapon where evidence in the record mitigated the offense and supported Appellant's claim of self-defense.</u>

Relevant facts

When the trial judge instructed the jury concerning the offense of attempted murder, the judge told the jury that the state was required to prove Appellant "intended to kill another person with malice aforethought, either express or implied." R. 279, lines 2-7. He defined malice as "hatred, ill-will, hostility towards another person." R. 279, lines 7-8. Additionally, he told the jury that malice "is the intentional doing of a wrongful act without just cause or excuse with an intent to inflict an injury or under circumstances that the law would infer an evil intent." R. 279, lines 8-11.

After explaining "express" malice, the judge told the jury about "inferred" malice. According to the judge "[m]alice might be inferred from conduct showing a total disregard for human life." R. 280, lines 3-5. Thereafter, the judge improperly charged the jury that "[i]nferred malice may also arise when the deed is done with a deadly weapon." R. 280, lines 5-6. He defined a deadly weapon to include "any article, instrument, or substance which is likely to cause death or great bodily harm." R. 280, lines 6-8. He also provided examples of deadly weapons, which included a knife. R. 280, lines 11-14.

Concerning this inference, the judge instructed the jury: "If the facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, the inference would be simply an evidentiary fact to be considered by you, the jury, along

with the other evidence in the case and you may give it the weight that you decide it should receive." R. 280, lines 15-20.[13]

Thereafter, the judge instructed the jury on the lesser-included offenses of assault and battery in the first degree and assault and battery of a high and aggravated nature. R. 281, lines 10-24. Finally, the judge charged the jury with the law of self-defense. R. 284, line 14 – R. 285, line 2.

As mentioned previously, the jury requested "clarification/definition on all charges." R. 293, lines 13-14. In response, the judge provided the jury with a written copy of his instructions concerning the "charge of the substantive law." R. 293, line 15 – R. 295, line 21.

Discussion

The Fifth, Sixth, and Fourteenth Amendments require that the state must prove each element of a crime beyond a reasonable doubt. See State v. Brown, 360 S.C. 581, 595, 602 S.E.2d 392, 400 (2004) ("[T]he United States Supreme Court recently has re-emphasized the constitutional protections of surpassing importance contained in the Fourteenth Amendment's due process clause ant the Sixth Amendment right to a jury trial, which indisputably entitle a defendant to a jury determination that he is guilty of every element of the crime which he is charged, beyond a reasonable doubt.")(internal

[13] Appellant admits trial counsel failed to object to the jury charge, including the erroneous portion permitting the jury to infer malice from the use of a deadly weapon. R. 292, lines 4-5. Appellant respectfully requests this Court address the merits of the issue in the interest of judicial economy in light of the obvious error and the likelihood of success in a post-conviction relief action based on ineffective assistance of counsel for failure to object. See State v. Johnston, 333 S.C. 459, 463-464, 510 S.E.2d 423, 425 (1999); State v. Vick, 384 S.C. 189, 202-203, 682 S.E.2d 275, 281-282 (Ct. App. 2009); State v. Bonner, 735 S.E.2d 525, 526, 400 S.C. 561, 564 (Ct. App. 2012).

quotations omitted); see also In re Winship, 397 U.S. 358 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); Jackson v. Virginia, 443 U.S. 307, 314 (1979) ("A meaningful opportunity to defend, if not the right to trial itself, presumes as well that a total want of evidence to support a charge will conclude the case in favor of the accused."). When a jury charge creates a mandatory presumption and impermissibly shifts the burden of proof to the defendant, the Due Process Clause of the Fourteenth Amendment is violated. Sandstrom v. Montana, 442 U.S. 510, 524 (1979); Mullaney v. Wilbur, 421 U.S. 684, 703-704 (1975).

In State v. Belcher, 385 S.C. 597, 600, 685 S.E.2d 802, 803-804 (2009), our Supreme Court overruled settled law and 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."

Belcher was convicted of murder and possession of a firearm during the commission of a violent crime following the shooting of his cousin. Belcher, 385 S.C. at 600, 685 S.E.2d at 803. The jury was charged with the offenses of murder and voluntary manslaughter, as well as self-defense. Id. The Court noted that of special importance was the jury instruction that permits an inference of malice from the use of a deadly weapon. Id.

Belcher argued on direct appeal that because the evidence presented a jury question on self-defense, the trial judge committed error by charging the jury that it may infer malice from the use of a deadly weapon. Belcher, 385 S.C. at 601, 685 S.E.2d at

804. Belcher asserted that the permissive inference charge violated South Carolina common law and the state's constitutional prohibition against charging juries on the facts. Belcher, 385 S.C. at 602, 685 S.E.2d at 804.

After an extensive review of the state's jurisprudence in this area, our Supreme Court discovered that when the permissive inference charge first developed in the late nineteenth century it was subject to "some qualification," specifically "the recognition that some facts will not permit the inference of malice from the use of a deadly weapon." Belcher, 385 S.C. at 604, 685 S.E.2d at 806. The Supreme Court stated, "We are persuaded . . . that this qualification relates to homicide prosecutions where the evidence shows the death may have been something less than murder—that is, mitigated, excused or justified." Belcher, 385 S.C. at 605, 685 S.E.2d at 806. The Court recognized that it later "began a slow, and at first almost imperceptible, retreat" from above established law and that "by the 1970s, juries were routinely charged in any murder prosecution involving a deadly weapon that 'malice is presumed from the use of a deadly weapon.'" Belcher, 385 S.C. at 605-608, 685 S.E.2d at 806-807.

Believing that the earlier cases more closely reflect the "proper application of the charge," the Supreme Court concluded "that instructing a jury that 'malice may be inferred by the use of a deadly weapon' [was] confusing and prejudicial where evidence [was] presented that would reduce, mitigate, excuse or justify the homicide. A jury charge [was] no place for purposeful ambiguity." Belcher, 385 S.C. at 611, 685 S.E.2d at 809. In light of the evidence of self-defense presented at Belcher's trial and it was "conceivable that the only evidence of malice was Belcher's use of a handgun," our

Supreme Court held the permissive inference charge was not harmless error and Belcher was entitled to a new trial. Belcher, 385 S.C. at 612, 685 S.E.2d at 810.

In effect, the Belcher ruling "return[ed] to the rationale" of prior South Carolina jurisprudence on the matter dating back to the late nineteenth century, and overturned existing case law to the contrary that occurred in the intervening century. Id. Because the rule in Belcher marked a "clear break from our modern precedent," the Supreme Court applied its effect to "all cases which [were] pending on direct review or not yet final where the issue [was] preserved." Id. (citing Griffith v. Kentucky, 479 U.S. 314, 328, 107 S.Ct. 708 (1987)("hold[ing] that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review or not yet final")).

There is no question that evidence was presented in this case that reduced the crime from attempted murder to a lesser crime, including ABHAN or assault and battery in the first degree. Further, the state consented to the judge instructing the jury regarding the lesser-included offenses based on the clear and unambiguous evidence in the record to reduce the charged offense. Additionally, the state's evidence pointed to self-defense. Thus, the judge instructed the jury on self-defense, and the state posed no objection to such a charge at least as to one of the alleged victims. Self-defense would completely excuse the homicide. In light of the evidence in the record tending to reduce, mitigate, and excuse the charge, the judge violated Appellant's right to due process of law pursuant to the Fifth, Sixth, and Fourteenth Amendments, by shifting the burden of proof to Appellant and diluting the state's burden to prove each element of a crime beyond a reasonable doubt

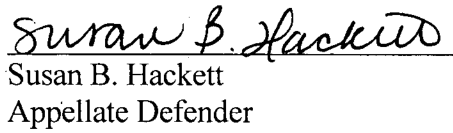
As in Belcher, the erroneous instruction that malice may be inferred from the use of a deadly weapon cannot be considered harmless here. The erroneous inference of malice

from the use of a deadly weapon jury instruction was reversible error because it was not harmless beyond a reasonable doubt. See Rose v. Clark, 478 U.S. 570 (1986). When the jury was instructed that it could infer malice from the use of a deadly weapon, its consideration of the defense and the lesser-included offenses was precluded because the use of a deadly weapon – a knife – was undisputed. The evidence against Appellant was not overwhelming. The jury heard testimony that Appellant was acting in self-defense and during a drug-induced altered state of mind. The evidence presented supported both theories – the state's that Appellant was the aggressor and Appellant's theory that he was acting in self-defense. The jury's verdict was contingent upon the jury's credibility determinations. The judge's erroneous instruction permitting the jury to infer malice tainted the jury's verdict as to the other offenses as well. Thus, this Court should reverse Appellant's convictions and remand for a new trial.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand for a new trial.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of December, 2015.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Marlboro County
Michael G. Nettles, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROEMAIN JAMAIL BRUNSON,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Roemain Brunson states:

1. She is an appellate defender for the South Carolina Office of Appellate Defense, and was appointed to represent Roemain Brunson.

2. She has reviewed (1) the transcript of Appellant's trial before Judge Michael G. Nettles, on December 8-10, 2014, and (2) the transcript of the competency hearing held on November 18, 2014. In her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. Pursuant to Anders v. California, 386 U.S. 738 (1967), she has briefed two arguable legal issues that arose during the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Roemain Brunson.

Respectfully submitted,

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

This 29th day of December, 2015.