

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Steven H. John, Circuit Court Judge

RECEIVED

OCT 21 2015

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

ARMANDO K. CHESTNUT,

APPELLANT

APPELLANT CASE NO. 2013-002123

FINAL BRIEF OF APPELLANT

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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?

STATEMENT OF THE CASE

Appellant was indicted by the Horry County Grand Jury for one count of murder, one count of attempted murder, assault and battery in the first degree, assault and battery by a mob in the second degree with serious bodily injury, and pointing and presenting a firearm. R. 845 – R. 852 His case was called to trial on July 15, 2013 before the Honorable Steven H. John, and a jury. Barbara Pratt represented appellant. Bradley Richardson and Travis Hyman were the solicitors. R. 1.

On July 19, 2013 the jury found appellant guilty of voluntary manslaughter on the murder indictment as to Jamal McFadden. The jury found appellant guilty of the attempted murder as to Damien Canty. The jury also found appellant guilty of assault and battery in the second degree, and pointing and presenting a firearm. The jury found appellant not guilty as to the other serious bodily injury verdict options. R. 808, l. 14 – 809, l. 24.

Judge John then stated if he had discretion, given appellant's prior record, he would sentence him to thirty years imprisonment for voluntary manslaughter. However, the judge ruled that pursuant to South Carolina Code § 17-25-45 he did not have any discretion and he sentenced appellant to life imprisonment without parole for voluntary manslaughter and attempted murder. The judge imposed concurrent sentences on the assault and battery in the second degree, and pointing and presenting a firearm counts. R. 820, l. 15 – 821, l. 6.

This appeal follows.

ARGUMENT

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.

Relevant Facts

This case involves the March 6, 2012 shooting at the 3rd Avenue Sports Bar in Myrtle Beach. John Wayne Feaster, Jr. was the owner of the bar. R. 70, l. 12 – 71, l. 15. Feaster remembered that Monday, March 5, 2012 was "Jamaican Night." R. 72, ll. 20-23. Feaster testified that there were Jamaicans who came to Myrtle Beach every summer and frequented his bar. R. 73, ll. 4-23.

Feaster recalled there was an argument that late March 6, 2012 night between the "Myrtle Beach crowd against the Hemingway crowd." The argument was about a pool game, and the money bet on it. R. 74, ll. 2-15. Feaster remembered seeing "arguing at a pool table and then they start fighting, pushing and stuff. I went over there and escorted them outside." R. 75, ll. 2-8.

Feaster claimed that his bouncers searched everyone entering into the club. He also had twelve video cameras around the bar. R. 75, l. 15 – 76, l. 21.

Feaster said once outside the club he remembered "Thoro," a friend of appellant, being hit with a bottle. "Everybody start fighting. I seen a gun go up in the air." Feaster also "thought" he heard a gunshot. Feaster admitted that after watching the videotape of the

incident his memory of what he thought had happened was not as clear anymore. R. 78, l. 5 – 79, l. 8.

Feaster acknowledged that Thoro had left the bar and walked to his car before he was attacked. Feaster said the videotape showed that Canty, one of the victims, "Hit Thoro with the bottle. . . and hits him right over the head. . . And Thoro goes down pretty hard." R. 110, l. 7 – 112, l. 19. Feaster acknowledged that three to four men had jumped on Thoro outside the club that evening. R. 113, ll. 13-16.

Feaster also recalled that the man who was killed outside the bar, Jamal McFadden, had earlier been arguing inside the bar about the pool game. Somebody wielded a pool stick during the argument. R. 79, l. 7 – 80, l. 13. One of the "Hemingway boys" with dreadlocks had "grabbed the pool cue," and started fighting with one of the other men. R. 110, l. 7 – 111, l. 10.

The videotape from the bar, "six video clips," was played for the jury. It is now on file with this Court. R. 83, l. 11 – 84, l. 18. Feaster identified appellant as one of the men on the videotape. R. 95, ll. 10-11.

On cross-examination, Feaster said about ten to twelve men from Hemingway arrived at about 11:00 or 11:30 that night. R. 108, ll. 3-13. Feaster said the Hemingway men and the Myrtle Beach men: "All of them know each other." R. 108, ll. 14-20. He identified men on the videotape that he knew as "Thoro, Barney and Gucci." Appellant explained to the jury what happened that evening. R. 108, l. 25 – 109, l. 9. He had his "small gun" in his pocket the entire time he was at the bar.

Appellant told the jurors that he had lived in Myrtle Beach all his life. He lived only four or five minutes away from the 3rd Avenue Sports Bar. R. 601, ll. 4-11.

He remembered on March 5, 2012 his girlfriend, Annaliese, wanted to go to the 3rd Avenue Sports Bar, "and all the other clubs" that appellant frequented. R. 602, l. 8 – 603, l. 1. They first went to Sam's Beer Garden, then to the Jet Age, and finally to the 3rd Avenue Sports Bar. They arrived about 12:30. R. 603, ll. 1-11.

When they got to the Sports Bar "everything was cool when I first got there." Appellant bought two drinks. He and his girlfriend were sitting by the window while "some guys were shooting pool." R. 603, l. 16 – 604, l. 20. Appellant saw his friends Thoro, Gremlin, and "Gucci" inside the bar. He also remembered seeing a lot of "Jamaican people." R. 605, l. 1 – 606, l. 7.

Appellant remembered that Gucci was shooting pool, and he thought they were placing a "\$100 bet" on each game. "Gucci won the game," and "Thoro was wanting to bet more, wanted to bet on another game. . . he wanted to bet like two or three more hundred dollars on the next game." R. 606, ll. 2-23. "[I] know Thoro, you know; I'm telling him like chill out, man, like you got the money . . . Like you won the bet so you got the money, leave it alone. . ." R. 607, ll. 5-22. Appellant told his girlfriend not to worry about the situation, the men were just betting on the pool game, and that's why they started arguing.

Instead, however, "the argument got real out of hand and then one of the guys grabbed a pool stick." The man who grabbed the pool stick was a slim black man with dreadlocks. R. 608, ll. 9-21.

Appellant referred the jury to the videotape of the incident. He told the jurors: "[I]f you watch the camera closely, you will see Michael Spivey come from the back of the pool table and grab the pool stick and then you see, well you see the bouncer and Mike get there

about the same time, but Mike [is] right behind the guy with the pool stick.” R. 608, l. 9 – 609, l. 4.

Appellant remembered that the arguing continued. “I heard some guys was like saying they was going to get their guns and this and that, what not, . . .” R. 609, ll. 8-18. The fighting escalated, and appellant testified that he did not notice Thoro leaving the club. Appellant’s girlfriend told him she thought Thoro had gone to the restroom, and he continued to look around for Thoro. R. 609, l. 22 – 611, l. 24.

Appellant did not see Thoro get hit in the head with the beer bottle, but he did see two or three men jumping on Thoro. R. 612, ll. 1-9. Appellant told the jury that he had his “little gun” in his pocket the entire evening including when they went into the bar. “We never got searched because I guess the bouncer wasn’t there at the door at the time.” R. 612, l. 18 – 613, l. 7.

Appellant went to his girlfriend’s car during the argument, and “I put the phone up and I put the weed up” in the car. He ran to help Thoro, and “I see Corey got the gun in his hand. At first I didn’t know it was Corey. I thought it was, I thought it was one of them but then I looked again and it was Corey. . . Corey was coming down hitting one of the guys with the gun. And when they fell . . . like before I turned this curve right here, a gunshot [went] off.” Appellant did not know who was shooting. R. 614, l. 6 – 615, l. 15.

Appellant testified: “I was going over there to scare the guys off Thoro. But when I heard the gunshot, I shot and I hit Canty in the arm.” R. 616, ll. 8-10. Appellant did not immediately know he had hit Canty but that “everybody that was on Thoro and Corey backed off.” Appellant shot because he was defending Thoro and Corey who had come to Thoro’s aid. R. 616, ll. 16-24. Appellant testified that he shot only three times. He

admitted he shot Canty in the elbow, and he also shot the window out of a van. R. 618, l. 5 – 620, l. 6.

Appellant pointed the jury to the videotape and told them that the film clearly showed a big man “swung at me and I did not swing at him first.” A larger man hit appellant, and appellant admitted he kicked another man. However, appellant did not know this man was unconscious when he kicked him. Appellant pointed out that the video showed that Feaster, “the owner of the club, was pushing me. If you could look and see the camera, I don’t even hit him but one kick. That’s the only thing I get - - I hit him with was one kick. The other two kicks, I didn’t never, they never landed on him.” Appellant said his girlfriend was upset by the situation and that Feaster, the bar owner, was “pushing me away.” “We got in the car and we left.” R. 621, ll. 2-20.

Appellant said he explained to his girlfriend that the men were jumping on Thoro, his friend, and he came to Thoro’s aid. Appellant said that Thoro could have been killed during this violent encounter. R. 621, l. 23 – 622, l. 21. Appellant told his girlfriend he did not think he hit anybody “but I did scare everybody off Thoro.” R. 622, ll. 1-21.

Appellant’s girlfriend, Annaleise Testa, as a state’s witness confirmed that appellant later told her “they were arguing over the pool game and money and how the shooting happened outside and his friend was getting jumped. And I asked him if he fired his gun and he said yes.” Annaleise said appellant told her that “he thought he fired it at the one with dreads . . . He told me he fired once.” She said she did not know who the man in dreads was at the time, but at the time of trial thought it might be Jamal McFadden. R. 229, l. 20 – 230, l. 17.

On cross-examination, Annaleise admitted appellant told her that "somebody hit his friend in the head . . . [and] people were outside shooting." She entered into a proffer agreement with the state through her attorney Fran Humphries, and she agreed to testify for the state. R. 249, ll. 2-21.

The following day appellant was driving his girlfriend home when a police car pulled in behind him. Appellant said he was scared, and "I threw the gun out the window." The police stopped him and arrested him, "and he asked me what I threw out the window." Appellant acknowledged he knew it was a crime to carry a gun, and that is why he discarded it when he saw the police. R. 627, l. 25 – 629, l. 24.

Appellant maintained that the videotape supported his testimony that he did not shoot the man who eventually died, McFadden, in the incident. R. 636, ll. 1-19. Appellant said he repeatedly told the police that he was responsible for Canty getting shot in the elbow. However, he did not shoot the man that died. R. 640, ll. 4-22.

Appellant told the jury that the videotape "itself showed" that he had not killed anyone. He only went to the bar to have "a drink with my girlfriend," he was not expecting anything to happen, and he only went to the aid of his friends. R. 648, l. 1 – 649, l. 18. Appellant said he was sorry for the family of dead man but that he was only attempting to "scare those fellows off," and that he did not kill the man that died. R. 649, ll. 1-18.

On cross-examination appellant told the solicitor that he had smoked marijuana that evening, and that he had been drinking before the police interrogated him. Appellant told the solicitor that he honestly admitted he shot a man in the elbow but he again added that he was not responsible for shooting the man who died. R. 663, l. 14 – 664, l. 24. Appellant repeatedly told the solicitor that his main concern was Thoro getting throttled in the parking

lot. However, he did not go to his car to get his gun because he had it with him the entire time inside the bar.¹ R. 691, l. 8 – 692, l. 25.

Jury Instructions

The judge told the attorneys he was going to charge self-defense based on the evidence. R. 706, l. 16 – 711, l. 1.

Following the solicitor's closing argument defense counsel said she was concerned because the solicitor had argued that malice could be inferred from appellant being armed since self-defense was involved in this case. The judge said that he did not think he was going to instruct about an inference of malice, and the solicitor agreed that the inference of malice instruction had been "stricken from the charge." The judge responded: "I'm not going to say [charge] that." R. 762, l. 20 – 764, l. 10. At this point it appeared there would be no problem with the jury instruction, and that a State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) instruction would not be given.

However, the judge did, in fact, instruct that "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 to cause the death or great bodily harm [to another person]. Whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case." R. 777, ll. 10-16.

¹ Defense counsel moved for a directed verdict on self-defense as a matter of law. She told the judge: There's clearly evidence of self-defense from their own witnesses, from Cory, from statements made by Mr. Feaster who are the fact witnesses. And from obviously reviewing the video, there are issues of defense -- of self-defense and defense of others." The solicitor argued: I believe the state has at least met its burden with regard to a directed verdict. The judge denied the directed verdict motion after a lengthy ruling. R. 486, l. 16 – 492, l. 8.

The judge would acknowledge at the subsequent new trial hearing that he knew he made a mistake as soon as he read this instruction to the jury because it had not been removed from his charge book on murder. R. 840, l. 16 – 841, l. 6.

Exceptions to the charge

Defense counsel took exception to the judge charging the inference of malice based on a deadly weapon since this was a self-defense case. Defense counsel also said the judge should charge the jury that self-defense was applicable to each crime charged in this case. R. 797, l. 18 – 799, l. 5.

The judge responded that he was going to charge the jury that self-defense was applicable to each charge, and “there can be no inference of malice by use of a deadly weapon.” R. 799, ll. 6-18.

However, the judge then instructed the jury as follows:

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 its established.** And again, the State has the burden of disproving it beyond a reasonable doubt.

R. 800, ll. 7-22 (emphasis added).

The jury later returned requesting a further charge on murder and voluntary manslaughter. Defense counsel also asked the judge to instruct that self-defense was a

complete defense. The judge stated he would only ask the jury if they wanted any further instruction on self-defense. R. 802, l. 20 – 804, l. 2. The judge then instructed the jury again on the elements of murder and voluntary manslaughter. He concluded by saying “is there any other aspect of the law that you would like the court to go over including but not limited to self-defense or any other aspect of law? Anything else?” The jury apparently did not make any further requests. R. 804, l. 5 – 806, l. 25.

An hour and ten minutes later the jury reached its verdict of guilty of voluntary manslaughter and guilty of attempted murder.

Motion for a new trial

Appellant moved for a new trial because, inter alia the judge’s Belcher “inferred malice instruction” coupled with his recharge to the jury was hopelessly confusing. A hearing on the new trial motion was held on September 4, 2013. Barbara Pratt again represented appellant and Bradley Richardson was the assistant solicitor. Defense counsel argued that the judge’s instruction that malice could be inferred from the use of a deadly weapon was “most troubling to the defense.” She reminded the judge that State v. Belcher held that in a self-defense case it was improper to charge the inference of malice from the use of a deadly weapon. R. 827, l. 9 – 828, l. 11. Defense counsel argued that the judge’s Belcher instruction, **and then** his discussion of self-defense and the inference of malice was “confusing and prejudicial.” R. 830, l. 17 – 833, l. 5.

The solicitor maintained that the judge’s subsequent instruction solved any prejudice. R. 833, l. 7 – 837, l. 17. The judge responded:

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.

R. 840, l. 16 – 841, l. 6.

The judge refused to grant a new trial based on the erroneous “inference of malice from the use of a deadly weapon” instruction, and counsel’s argument that his instructions in full were confusing and prejudicial as to self-defense and an inference of malice. R. 843, 22, ll. 2-7.

Written Order

In his order denying a new trial, the judge ruled:

“Regarding the jury instruction concerning the inference of Malice: while the Court should not have given the instruction, when objected to by the 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 foreman of the jury;

Supp. R. 1-2 (Order Denying Motion for New Trial – Amended).

Discussion

As seen, the trial judge acknowledged his error in charging that malice could be implied from the use of a deadly weapon. The State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) instruction clearly was improper in this case since self-defense was also an issue. Obviously, self-defense is a complete defense to the charge of murder, and the prejudice

from such an "implied malice" instruction is enormous. The jury was instructed that if the victim was shot with a deadly weapon it could infer malice from the shooting. The victims were clearly shot with a deadly weapon. The self-defense instruction therefore was hopelessly confusing when coupled with the "inference of malice" from the use of the deadly weapon instruction. A person shooting in self-defense cannot also be acting with malice since he was engaged in the legal activity of saving himself, or another, from an illegal aggressor. Yet the jury was instructed if a deadly weapon was involved, that malice could be inferred from the shooting.

The trial judge acknowledged that the motion for a new trial hearing that he knew as soon as he gave the Belcher instruction that he had committed error. As was argued at the motion for a new trial hearing, simply omitting the "inference of malice" language from the re-charge to the jury did not cure the prejudice, and the language of the re-charge instead exacerbated the problem with the instruction. As see above, the judge's instructed that: "If there's self-defense, there's 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." This instruction was very confusing because the jury was somehow to determine if appellant was not guilty by reason of self-defense, and if he was not guilty by reason of self-defense, then it would not apply the inference of malice to the shooting. This was a totally non-workable jury instruction.

Here, the jury was only instructed that if it found this was a self-defense case, then and only then would there be no inference of malice "that can be associated with the use of a deadly weapon." The inference of malice was only not proper if "self-defense" was established. R. 800, ll. 7-22.

The purpose of jury instructions 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. See, State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987), *citing* State v. Hewitt, 205 S.C. 207, 31 S.E.2d 257 (1944). By any standard, the malice instruction coupled with the self-defense instruction, and then the instruction not to apply an inference of malice if self-defense was established was sure to confuse the jury.

The judge never withdrew the offensive jury instruction on inferred malice. Further, merely superimposing a correct statement of law over an erroneous charge only fosters prejudice and confusion. State v. Patrick, 289 S.C. 301, 345 S.E.2d 481 (1986)²; 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). In this case, the trial judge superimposed bad law over more bad law and that surely fostered prejudice and confusion.

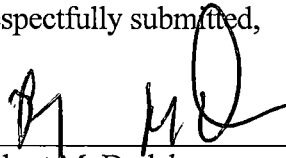
Appellant should be granted a new trial.

² *Overruled on other grounds*, Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991).

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed,
and this case remanded to the Horry County Court of General Sessions for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', is written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 21st day of October, 2015.

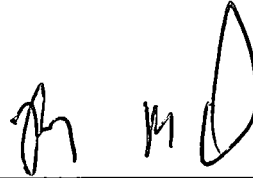
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CERTIFICATE OF COUNSEL

OCT 21 2015

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

October 21, 2015



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ARMANDO K. CHESTNUT,

APPELLANT

APPELLANT CASE NO. 2013-002123

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, Office of Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, on this 21st day of October, 2015.

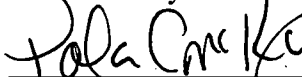


Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me

This 21st day of October, 2015.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.