STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Oconee County
J. Cordell Maddox, Jr., Circuit Court Judge

Opinion No. 2017-UP-237 (S.C. Ct. App. filed June 7, 2017)

2013-GS-37-01039

THE STATE,

RESPONDENT,

V.

SHANE ADAM BURDETTE,

PETITIONER

APPELLATE CASE NO. 2017-001990

BRIEF OF PETITIONER

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ISSUE PRESENTED

Did the Court of Appeals err in concluding Petitioner "suffered no prejudice" from the undisputed erroneous jury charge regarding inference of malice from the use of a deadly weapon based upon the charge as a whole, the erroneous language being charged twice, the evidence supporting the defense of accident, and the heightened risk of a compromise verdict based upon the erroneous charge?

STATEMENT

On October 28, 2013, an Oconee County grand jury indicted Petitioner for murder and possession of a weapon during the commission of a violent crime in a single indictment (2013-GS-37-1039). R. 492-493. The state, represented by David Wagner, Jr., called the case for trial before the Honorable J. Cordell Maddox, Jr., and a jury on February 23, 2015. R. 1. W. Wilson Burr represented Petitioner. R. 1. The jury found Petitioner guilty of the lesser-included offense of voluntary manslaughter. R. 473, ll. 19-21. The jury also found Petitioner guilty of possession of a weapon during the commission of a violent crime. R. 473, l. 22 – R. 474, l. 1. Judge Maddox sentenced Petitioner to twenty-five years' imprisonment suspended upon the service of fifteen years' imprisonment and probation for five years. R. 477, ll. 11-15; R. 494. He also sentenced Petitioner to five years' imprisonment to be served consecutively with the sentence for involuntary manslaughter. R. 477, ll. 20-24; R. 495.[1]

Petitioner served his notice of appeal on March 3, 2015. After briefing and argument, the Court of Appeals affirmed Petitioner's convictions and sentences. State v. Burdette, 2017-UP-237 (S.C. Ct. App. filed June 7, 2017); App. 1-5. On June 22, 2017, Petitioner filed a petition for rehearing. App. 6-26. The Court denied the petition on August 28, 2017. App. 27. Subsequently, Petitioner filed a petition for writ of certiorari asking this Court to review the decision of the Court of Appeals. In his petition, Petitioner raised four issues, three of which concerned the admissibility

[1] The trial judge explained he was sentencing Petitioner to a term of five years' imprisonment to be served *consecutively* to the other sentence based upon his understanding that the sentence *must* be served consecutively. R. 475, ll. 8-9; R. 476, ll. 13-15; R. 477, ll. 5-7. Pursuant to statute, a person who was in possession of a firearm during the commission of a violent crime "must be imprisoned five years, in addition to the punishment for the principal crime." S.C. Code Ann. § 16-23-490(A). "The court may impose this mandatory five-year sentence to run consecutively or concurrently." S.C. Code Ann. § 16-23-490(B). See also, Major v. South Carolina Dept. of Probation, Parole, and Pardon Services, 384 S.C. 457, 465-466, 682 S.E.2d 795, 799-800 (2009). Thus, the trial judge sentenced Petitioner to a consecutive term of years based upon a mistake of law. Trial counsel did not object, and the Court of Appeals found this issue unpreserved. App. 5.

of statements he made to law enforcement. The fourth issue related to an erroneous jury instruction. The state filed its return. On March 7, 2018, this Court granted the petition for a writ of certiorari as to Question IV, the jury instruction issue, but denied the writ as to the remaining questions. This brief of petitioner follows.

ARGUMENT

The Court of Appeals erred in concluding Petitioner "suffered no prejudice" from the undisputed erroneous jury charge regarding inference of malice from the use of a deadly weapon based upon the charge as a whole, the erroneous language being charged twice, the evidence supporting the defense of accident, and the heightened risk of a compromise verdict based upon the erroneous charge.

Relevant facts

State's case-in-chief

On July 8, 2013, Richard "Bubba" Bagwell and the deceased had been up for three or four days, using methamphetamine. R. 80, ll. 12-23. Evan Tyner, the deceased, Bubba, Josh Anderson, Ryanne "Nikki" Smith, and Tiffany Lee were at the home shared by Tiffany and Petitioner late at night on July 8, 2013. R. 78, ll. 2-4; R. 81, ll. 4-7; R. 132, ll. 8-25; R. 165, ll. 12-15; R. 166, ll. 18-20; R. 176, ll. 13-17.[2] Sometime between one and four o'clock in the morning of July 9, 2013, the deceased, Bubba, and Josh decided to go to the store to buy cigarettes. R. 81, ll. 16-23; R. 135, ll. 6-8; R. 135, ll. 21-22; R. 168, ll. 18-22; R. 180, ll. 4-6. However, none of them had a car. R. 82, ll. 6-7. They borrowed a car from Tiffany. R. 82, ll. 1-11; R. 180, ll. 5-6.

On the way to the store, the trio stopped by Petitioner's parents' home to pick up Tiffany's debit card from Petitioner because they did not have any money. R. 82, ll. 18-25; R. 135, ll. 23-25; see R. 181, ll. 3-8. After getting the card, the group continued on their way. R. 83, l. 3 – R. 84, l. 7; R. 136, ll. 5-11. However, the car suddenly would not go over ten miles per hour, forcing the group to pull over onto the side of the road. R. 84, ll. 5-10; R. 136, ll. 12-24; R. 137, ll. 3-5. They used

[2] Evan Tyner and Tiffany Lee were siblings. R. 76, ll. 20-21; R. 173, l. 25 – R. 174, l. 5. Tiffany and Petitioner were romantically involved. R. 77, ll. 5-8; R. 174, ll. 11-15.

the cell phone of a passerby to call Tiffany for help. R. 84, ll. 12-24; R. 125, l. 5 – R. 126, l. 9; R. 137, ll. 6-13; R. 180, ll. 13-24.

Petitioner drove by, seeing the group on the side of the road, but he did not stop to help. R. 85, ll. 2-5; R. 137, l. 21-23; R. 138, ll. 5-9. Bubba claimed Petitioner "flipped [them] a bird and waived [sic] and laughed." R. 85, l. 3. Petitioner's conduct angered the deceased. R. 85, l. 5. The deceased got an "idea" to "confront" Petitioner about not stopping. R. 85, ll. 7-8. The deceased "said he didn't care if the, uh, truck had, uh, was broke down or he didn't care if he had to push it the whole way he was gonna get up there and confront him about it." R. 85, ll. 8-11. Eventually, the trio arrived at Petitioner's parents' house, but Petitioner was not there. R. 85, ll. 11-13; R. 138, ll. 1-2; R. 138, ll. 23-25. Undeterred, the group waited for Petitioner to return. R. 86, ll. 17-19; R. 138, ll. 20-22.

When Petitioner arrived, words were exchanged between Petitioner and the deceased. R. 87, ll. 13-15. Bubba claimed Petitioner walked out of the house with a shotgun and fired a round. R. 91, l. Bubba ran. R. 91, ll. 10-19; R. 139, ll. 24-25. Josh claimed Petitioner initially "shot up under" the car. R. 139, ll. 17-19. Josh explained that the deceased also ran from the car. R. 139, ll. 24-25.

Bubba heard another shot, which made him look back. R. 92, l. 1. He saw Petitioner standing. R. 92, ll. 2-13. Josh claimed Petitioner "fired the gun the second time," "he just turned and threw the gun, it ... went off." R. 140, ll. 3-5. He clarified that Petitioner "just threw the gun up ... [h]e didn't turn and aim and gun the boy down." R. 140, ll. 7-8.

When Bubba finally left the woods, he saw the deceased on the ground. R. 93, ll. 3-13. Bubba and Josh got into Petitioner's truck to go get Tiffany. R. 94, ll. 1-6; R. 94, ll. 11-12; R. 141,

ll. 6-10; R. 182, ll. 15-22. Petitioner was on the phone while Bubba drove away in his truck – the only operable vehicle in the area. R. 94, ll. 5-6.

Josh stayed at Tiffany and Petitioner's home while Bubba, Tiffany, and Nikki returned to Petitioner's parents' house. R. 94, ll. 12-13; R. 141, ll. 9-13; R. 171, ll. 8-11; R. 171, ll. 17-18; R. 182, ll. 18-23. The police and paramedics were already there when they arrived. R. 94, ll. 13-14.

Tiffany hit Petitioner, asking why he had shot the deceased. R. 183, ll. 2-7. According to Tiffany, Petitioner said "they were after him ... that the gun was meant for him but he didn't mean to kill him." R. 183, ll. 2-10.

When Investigator Amanda Tinsley arrived on the scene, she began interrogating Petitioner. R. 256, ll. 8-15.[3] Petitioner explained to Tinsley that the deceased, Josh, Bubba, and Tiffany were at his home when he left to visit his friend and next door neighbor. R. 262, ll. 8-12; see R. 178, l. 21. When Petitioner returned home, he and his girlfriend, Tiffany, were discussing events from earlier in the evening in their bedroom. R. 262, l. 22 – R. 263, l. 1; see R. 179, ll. 1-6. Uninvited, the deceased entered the bedroom. R. 262, l. 25 – R. 263, l. 1; see R. 179, l. 6. When Petitioner walked out of the bedroom, he and the deceased "bumped shoulders and got into an argument." R. 263, ll. 1-3; see R. 179, ll. 6-11.

Petitioner went to his parents' house. R. 263, ll. 5-8.[4] He realized he still had Tiffany's debit card so he sent her a text message that he would place the debit card, $5, and some cigarettes in the freezer on the front porch of his parents' house for her to get. R. 263, ll. 8-11; see R. 181, ll.

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[3] Prior to Amanda Tinsley's arrival, Officer John Towery placed Petitioner into the back of a patrol car. R. 4, l. 14. Towery advised Petitioner of his rights, but he prefaced the advisement with his own admonition: "This does not mean anything, it's just somethin' the law [says] we gotta do." R. 9, ll. 8-11. Petitioner told Towery, "he didn't mean to do it." R. 6, ll. 22-24.

[4] Petitioner's father explained that he was away from home on a camping trip, but Petitioner was replacing the floors in the dining room and kitchen for him while he was away. R. 398, ll. 3-12.

3-7. The deceased, Josh, and Bubba, arrived at his parents' house. R. 263, ll. 12-13. Petitioner gave the debit card, money, and cigarettes to the deceased. R. 280, ll. 15-17. Petitioner was on the phone with Tiffany, while those who newly arrived spoke to Petitioner's friend. R. 263, ll. 13-15. Later, Petitioner and his friend left his parents' house. R. 263, ll. 17-18.

Between 4 and 4:30 a.m., Tiffany called Petitioner, explaining the deceased needed a ride because the car he had been driving had broken down. R. 263, ll. 23-24; R. 181, ll. 11-13. Petitioner refused. R. 263, l. 24 – R. 264, l. 1. On his way home to Tiffany, Petitioner saw the men on the side of the road, a short walk from the deceased's mother's house. R. 264, ll. 2-10. After speaking briefly to Tiffany at their home, Petitioner returned to his parents' house so that he could get his boots and go check on the pigs. R. 264, ll. 18-20; see R. 182, ll. 3-7. Upon arriving at his parents' house, he saw the deceased, Josh, and Bubba sitting in the car in his parents' driveway. R. 264, ll. 20-23; R. 285, ll. 4-8.

Petitioner saw his father's shotgun leaning up against the wall in the carport and the door going into the house open. R. 265, ll. 1-3; R. 285, ll. 9-10.[5] When Petitioner confronted the trio about entering his parents' home and stated he was calling the police, Bubba ran across the road and into the woods. R. 265, ll. 4-9; R. 280, ll. 23-25; R. 285, ll. 14-17. Then, Josh, the deceased, and Petitioner began arguing, with the deceased asking Petitioner if he were scared. R. 265, ll. 10-15; R. 281, ll. 4-5. The deceased began running down the road when Petitioner said he had "evidence." R. 265, ll. 14-16; R. 281, ll. 6-7.

Initially, Petitioner explained that he was frustrated and picked up the shotgun and threw it down on the ground. R. 265, ll. 16-17; R. 281, ll. 9-10. When the gun hit the ground, it fired. R. 265, ll. 18-20. Subsequently, Petitioner told police that he "held the shotgun above his head and to

[5] Later, Petitioner told police the shotgun was leaning against the door jamb between the kitchen and the living room and the bathroom window was open. R. 279, ll. 11-13; R. 285, ll. 12-13.

the left so if [the deceased] looked back, it [would] scare[] him." R. 285, ll. 24-25. To Petitioner's knowledge, the shotgun was unloaded. R. 286, l. 1. Petitioner was surprised and scared when the shotgun discharged when he pulled the trigger. R. 286, ll. 2-4. After some rest, Petitioner told the police that he fired a shot at the ground. R. 290, ll. 2-4. When he could not get the shell out of the gun, he used a knife to pry the shell out. R. 290, ll. 5-10. He threw the spent casing behind him, and put another shell in the gun. R. 290, ll. 10-14. He shot in the air. R. 290, ll. 17-19; R. 291, ll. 5-11; R. 293, ll. 12-13. He only wanted to scare the deceased. R. 290, ll. 18-19.

Upon seeing the deceased on the ground, Petitioner instructed Josh to call 911 and to get Tiffany. R. 265, ll. 21-22; R. 294, l. 7. Petitioner then took the phone from Josh. R. 265, ll. 22-23; R. 294, ll. 7-8; R. 140, ll. 22-25. Petitioner reported the shooting to law enforcement. R. 265, ll. 23-24. Petitioner flagged down a gentleman who was driving by. R. 266, ll. 1-4; R. 294, ll. 8-10; see R. 12-22 (Matthew Poore testifying that Petitioner flagged him down and Petitioner was "freakin' out tryin' to tell 911 where he was"); R. 116, ll. 12-21. He gave the gentleman the phone with instructions to tell law enforcement of their location. R. 266, ll. 4-5; see R. 115, ll. 14-18.[6]

Petitioner got a shirt and returned to the deceased where he used the shirt to apply pressure to stop the bleeding. R. 266, ll. 6-11; R. 294, ll. 10-11. Out of frustration, Petitioner grabbed the gun and threw it again. R. 266, ll. 7-8; R. 281, ll. 13-15. Petitioner flagged down Lisa Honea, a nurse who lived nearby. R. 266, ll. 12-13; see R. 120, ll. 7-20.[7] Honea arrived quickly, followed by Tiffany, Nikki, and Bubba. R. 266, ll. 13-15.

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[6] According to Matthew Poore, Petitioner said he accidentally shot. R. 116, l. 22 – R. 117, l. 11.

[7] According to Lisa Honea, Petitioner was not making sense, "like his thoughts were comin' faster than his words." R. 120, ll. 20-22. Petitioner told her he threw the gun, which Honea understood to mean that when he threw the gun, it went off, and hit the deceased. R. 121, ll. 6-15; R. 122, ll. 13-20; R. 123, ll. 17-18.

Dr. Brett Woodard, the pathologist who conducted the autopsy on the deceased's body, explained the deceased suffered a single shotgun pellet wound to the back of the right side of his neck. R. 159, ll. 22-24; R. 160, ll. 4-9. Specifically, the pellet went in the back of the neck approximately an inch away from the center line. R. 161, ll. 2-3. The pellet "went in an upward direction" crossing the center line. R. 161, l. 3-4. Dr. Woodard recovered the pellet from the deceased's high cervical spinal cord. R. 161, ll. 6-7. He described it as a "buckshot pellet, [] the large size pellets that shotguns shoot." R. 163, ll. 1-7. According to Dr. Woodard, the cause of death was "a buckshot wound to [] his spinal column." R. 163, ll. 11-14.

The police found the shotgun on the ground when they arrived at the scene. R. 198, ll. 8-9. The buttstock on the gun had an indention "where possibly the ... buttstock hit the ground." R. 199, ll. 2-5. The forearm of the stock to the shotgun had come off and was within a couple of feet of the shotgun. R. 199, ll. 18-23. The police also observed an "indention in the ground possibly by the barrel of the shotgun." R. 200, ll. 1-2. The barrel of the gun was plugged with dirt. R. 200, ll. 2-13. In the shotgun, the police found a fired shell. R. 200, ll. 23-24. On the backside of the residence, the police found a shotgun shell. R. 201, ll. 3-7. Based on its location, the officer who found it testified that a person could have "thrown it from the carport to that spot." R. 202, ll. 6-8.

In a truck that was in the road in front of the residence, the police found a live shotgun shell on the floorboard of the driver's side. R. 203, ll. 19-25; R. 207, ll. 20-24. There "was a spot in the gravel" between the car in which the trio had been riding and the carport that looked "like it had been shot with a shotgun or some other type of firearm to where the gravel had been disbursed [] to where you could see the indentation in the ground." R. 206, ll. 9-13.

The state's firearms expert examined the shotgun from this shooting. According to the expert, the shotgun worked "fine." R. 234, ll. 6-8. The state's expert explained it "would be

surprising" if the shotgun fired when it was closed. R. 246, ll. 6-10. However, it was undisputed that when defense counsel closed the shotgun, it fired. R. 222, ll. 9-11; R. 390, ll. 17-25. She admitted to having "a little bit of trouble trying to get shot shell out of it," but she claimed that did not "inhibit the function or the test fire of the item." R. 234, ll. 8-11. In her opinion, the safety and trigger worked appropriately. R. 235, ll. 6-8. She identified the two shot shells that were found at the scene to the shotgun. R. 236, ll. 23-24. She also determined the pellet removed from the deceased's body was consistent with the pellets that would have been in the empty shot shells – "double-ought buck." R. 239, ll. 9-25. However, she could not determine if the pellet was fired by the shotgun. R. 240, ll. 2-22.

The expert admitted the gun was made at least prior to 1964 because it did not have a serial number. R. 246, ll. 16-18. She also admitted the gun was "pretty well worn out" as evidenced by her having to pry out the empty shot shell after firing it. R. 247, ll. 9-14.

Defense's case-in-chief

Petitioner's gunsmithing expert inspected the shotgun. R. 387, ll. 14-18. He agreed with the state's expert that the shotgun was "worn." R. 387, ll. 19-25. He also agreed with the state's expert that the gun was old, determining it was manufactured prior to 1968 due to the lack of a serial number. R. 388, l. 25 – R. 389, l. 15. He estimated the gun was built "anywhere from 1938 to 1965." R. 389, ll. 8-9. The expert also agreed with the state's expert that the extractor did not work properly on the shotgun. R. 389, ll. 20-21.

Petitioner's expert explained the gun was "rusty" and it was "hard to open and close the breach of the barrel." R. 387, ll. 22-23. The safety lever, which was on the top of the shot gun, was worn and "very easy to move." R. 387, ll. 23-25; R. 388, ll. 22-24. The expert elaborated:

> This is the safety lever. In the downward position, the safety is on. Upwards, the safety is released. It moves very easy without a real positive detemp (phonetic). But

> also to close the gun, this hinge part right here is very stiff from years of sitting somewhere it was damp or lack of oil. In closing the firearm, as you can see, you have to slam it to close it. And in doing that, I have just moved the safety to the top or releasing the safety.

R. 388, ll. 9-18.

Allen Cartee conducted an elevation survey at the shooting site. R. 376, ll. 21-23. He explained that based upon his measurements, there was a drop of 13.5 feet between where Petitioner was standing when he fired the shotgun and where the deceased's body was found. R. 377, ll. 14-19; R. 378, ll. 22-23.

Charge conference

During the charge conference, the trial judge indicated he was going to charge murder, voluntary manslaughter, involuntary manslaughter, and accident. R. 406, ll. 16-17; R. 406, l. 20. The state responded, "I'm fine with those four choices." R. 407, l. 5.

After reviewing the printed version of the judge's intended instructions, defense counsel objected to the malice instruction. Specifically, counsel objected to charging the jury that "[i]nferred malice may also arise when the deed is done with a deadly weapon." R. 408, ll. 4-14. Defense counsel noted evidence had been presented to excuse or mitigate the offense, and that by allowing the jury to infer malice from the use of a deadly weapon, the judge was permitting the jury to make an improper conclusion. R. 408, ll. 21-23. The judge agreed "there's been evidence potentially that could reduce or mitigate," but noted "[t]here's also been evidence that they did not." R. 409, ll. 16-18. The judge expressed his thought that this was a "factual" issue for the jury to decide. R. 409, l. 25 – R. 410, l. 2. In discussing the proposed jury charge, the judge and defense counsel referred to a "footnote" on the printed proposed instructions. R. 409, l. 8. The judge explained the footnote stated, in part, that "'[w]here evidence is presented that will reduce, mitigate, excuse, or justify.'" R. 409, ll. 11-13. The judge stated "that should not have been in

there. That was a note to me." R. 409, ll. 13-14. Later, the judge said that was "a private note to me that was printed." R. 409, ll. 20-21. Ultimately, however, the judge concluded the charge regarding inferred malice was proper in the instant case. R. 409, ll. 18-20.

Defense's closing argument

Principally, defense counsel argued the shooting was an accident. He encouraged the jurors to look at the condition of the gun and the pellet. R. 419, ll. 11-14. The condition of the pellet – straight grooves that go from side to side – supported the defense of accident. R. 419, ll. 18-20. Further, defense counsel explained that after combining the elevation between the location of Petitioner and the deceased with the approximate distance of seventy yards between Petitioner and the deceased and the pathologist's testimony that the pellet was going up, the jury must conclude the shooting had to be an accident. R. 419, l. 21 – R. 420, l. 12.

> You've heard the testimony from Mr. Cartee today that the elevation of where the gun was to where the victim was hit - - and the numbers are there - - it's closer to 14 feet. It's taller than this ceiling here to the ground. 70 yards away.
>
> I don't care if [Petitioner] was the American Sniper. You shoot from 14 feet up 70 yards, gravity pulling, hit somebody with it, their witness testified, the medical examiner, that the pellet was going up. Nobody could fire a shot, make it drop or go that distance, that elevation, and then change direction to go up.
>
> Only way it could happen, your common sense will tell you, is that if it was a ricochet. Well, in some way that one magic pellet hit the ground and bounced back up. Only explanation. Throughout the trial you have heard "freak accident." This was a freak accident.

R. 419, l. 21 – R. 420, l. 12. Defense counsel argued Petitioner fired one shot intentionally into the ground. R. 421, ll. 21-23. When Petitioner closed the gun, it fired again. R. 422, ll. 1-2.

Defense counsel continued with this theme of accident, explaining that if the jury could "conclude the gun was defective, that it was a ricochet shot, that it was an accident." R. 424, ll. 14-16. He implored the jury there was "only one logical conclusion":

> This gun misfired when [Petitioner] put the second shell in it and snatched the bottom of it up. It went off, aimed down at the pavement, ricocheted - - you can look at the pellet - - and made just an absolute, just a freak accident of hitting this poor 21-year-old guy's spinal cord and cutting it in half. That was not intended. It couldn't be done if you did intend it. Look at the testimony of the medical examiner for which way it was traveling. Only one possible way for it to happen.

R. 426, l. 19 – R. 427, l. 3.

Jury instructions & deliberations

When instructing the jury regarding murder, the judge defined malice as "hatred, ill will, or 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 under circumstances that the law will ... infer an evil threat or intent." R. 453, ll. 8-13. Further, he instructed the jury that "[m]alice aforethought may be expressed or inferred." R. 453, l. 20. After explaining "[e]xpress malice," the judge told the jury that "[m]alice may be inferred from conduct showing a total disregard for human life. **Inferred malice may also arise when the deed is done with a deadly weapon.**" R. 453, ll. 8-10 (emphasis added). He then defined a deadly weapon for the jury, which included a shotgun. R. 454, ll. 11-21.

After deliberating for about one hour, the jury requested "a better understanding between voluntary and involuntary." R. 466, ll. 21-24. The jury also requested additional instruction on murder. R. 467, l. 3. Thereafter, the judge instructed the jury on the three charges using most of the same language of his earlier charge. R. 468, l. 1 – R. 472, l. 7. Included within the re-instruction was the language that permitted the jury to infer malice from the use of a deadly weapon. R. 469, ll. 5-6.

Discussion

Although the Court of Appeals held the trial judge erred by instructing the jury that malice may be inferred from the use of a deadly weapon because evidence was presented tending to reduce, mitigate, excuse, or justify the homicide, the Court held Petitioner "suffered no prejudice" from the

erroneous charge. App. 4-5. According to the Court, "the erroneous charge could not have contributed to the jury's verdict of the lesser-included offense, voluntary manslaughter." App. 5.[8] The Court of Appeals erred as its decision failed to consider whether the erroneous jury instruction was harmless in light of the overall instructions given, the erroneous language being charged twice, Petitioner's assertion of the defense of accident, and the increased risk of a compromise verdict in this case.

In State v. Belcher, 385 S.C. 597, 600, 685 S.E.2d 802, 803-804 (2009), this Court overruled prior 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." This 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." Id. 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," this Court held the permissive inference charge was not harmless error and Belcher was entitled to a new trial. Id. at 612, 685 S.E.2d at 810. Specifically, this Court stated the prejudice resulting from the charge was "highlight[ed]" because evidence of self-defense was presented. Id. This Court

[8] Respondent conceded error at the Court of Appeals, but argued the error was harmless. FBOR at 37. Respondent did not file a petition for rehearing challenging the finding of error by the Court of Appeals. Additionally, Respondent conceded error before this Court. Ret. at 19. According to Respondent, "[b]ecause the instruction pertained to the finding of malice, and the jury rejected the charge of murder, the instruction did not contribute to the verdict and the judge's error was harmless beyond a reasonable doubt." Ret. at 19.

concluded that it "need go no further than saying we cannot conclude the error was harmless beyond a reasonable doubt." Id.

In conducting its harmless error analysis, this Court relied upon Lowry v. State, 376 S.C. 499, 510-511, 657 S.E.2d 760, 766 (2008). Belcher, 385 S.C. at 612, 685 S.E.2d at 810. In Lowry, this Court explained that "[c]ertain constitutional errors may be harmless in terms of their effect on the fact-finding process at trial." Lowry, 376 S.C. at 507, 657 S.E.2d at 765. Thus, "an unconstitutional jury instruction will not require reversal of the conviction if the Court determines 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Id. (quoting Chapman v. California, 386 U.S. 18 (1967)). In Chapman, the United States Supreme Court placed the burden of proven harmless error on the "beneficiary of the error." Chapman, 386 U.S. at 24.

Examining whether a judge's erroneous instruction concerning implied malice from the use of a deadly weapon constituted harmless error, this Court explained that "[j]ury 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. Stanko, 402 S.C. 252, 264, 741 S.E.2d 708, 714 (2013). However, before examining the jury instruction as a whole, this Court looked for "overwhelming evidence of malice, apart from the use of a deadly weapon." Id. This Court found such – "uncontested evidence that [Stanko] shot the Victim, his elderly and unarmed friend, in the back using a pillow as a silencer," that Stanko "then robbed the Victim, and for the next several days used his automobile to travel across the state, where he engaged in social activities and drinking," and that Stanko was arrested in possession of the car and the gun used in the killing. Id.

Examining the jury charge as a whole, this Court explained the jury instructions were "consistent with the evidence presented," including verdict options of not guilty, not guilty by reason of insanity, guilty but mentally ill, and guilty. Id. at 265, 741 S.E.2d at 714. This Court emphasized that "[n]othing in the trial court's inferred malice charge would have prevented the jury from reaching" the other verdict options. Id. Additionally, the trial court instructed the jury that malice could be inferred from conduct showing total disregard for human life. Id. at 265, 741 S.E.2d at 715. According to this Court, the jury could have found that Stanko's conduct showed a total disregard for human life. Id. Therefore, this Court concluded, Stanko "could not have suffered prejudice from any separate inference that his use of a deadly weapon also give rise to an inference of malice." Id.

Jury instructions as a whole

In the present case, when instructing the jury regarding murder, the judge explained the state must prove malice. The judge defined malice as "hatred, ill will, or 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 under circumstances that the law will ... infer an evil threat or intent." R. 453, ll. 8-13. Further, he instructed the jury that "[m]alice aforethought may be expressed or inferred." R. 453, l. 20. After explaining "[e]xpress malice," the judge told the jury that "[m]alice may be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon." R. 453, ll. 8-10.

The judge then told the jury: "You are going to have to choose between murder and voluntary manslaughter and involuntary manslaughter." R. 454, ll. 22-24. He reiterated this limited number of choices: "So there are going to be *three* choices that you have to make a determination." R. 454, ll. 24-25 (emphasis added). Twice, he failed to mention the fourth choice – not guilty.

Next, the judge instructed the jury that if the jury determined the state failed to prove Petitioner committed murder, then the next step would be consideration of voluntary manslaughter. R. 455, ll. 1-7. The judge explained that voluntary manslaughter was "**included** within the offense of murder as a lesser charge." R. 455, ll. 6-7 (emphasis added). The trial judge told the jurors that "[t]o prove voluntary manslaughter, the state must prove beyond a reasonable doubt that the defendant took the life of another in the sudden heat of passion based on sufficient legal provocation." R. 455, ll. 8-11. He defined those terms, but he **never** told the jury that malice was **not** an element of voluntary manslaughter. Instead, his instruction specifically omitted this fact.

Finally, the judge told the jurors they had "the option of dealing with involuntary manslaughter," which the judge stated "again" was "a lesser included offense." R. 456, ll. 22-24. He told the jurors that involuntary manslaughter was "a lesser included charge of voluntary." R. 457, ll. 4-5. Immediately thereafter, he defined involuntary manslaughter, explaining that it was a killing "**without** malice." R. 457, ll. 6-13 (emphasis added). The phrase "without malice" appeared ***twice*** in his instruction on involuntary manslaughter. R. 457, ll. 6-13.

The jury instruction regarding voluntary manslaughter informed the jurors that voluntary manslaughter was a "lesser-included" offense of murder, but did not inform the jurors that it was a killing *without* malice. Juxtaposing the judge's instruction on voluntary manslaughter with the instruction on involuntary manslaughter – a "lesser-included" offense involving a killing without malice – evidences just how harmful the instruction was. The judge's erroneous instruction regarding inferring malice from the use of a deadly weapon permeated the instructions as to the lesser-included offenses. The instructions as a whole left the jury with the impression that it could use the inference of malice deriving from the use of a deadly weapon to arrive at a verdict of voluntary manslaughter. While the jury rejected the state's contention that Petitioner acted with

malice *aforethought*, the jury was misled to believe that malice was an element of voluntary manslaughter and may be inferred from the use of a deadly weapon. Thus, the jury was convinced to reject involuntary manslaughter as a verdict option because of the use of a deadly weapon and its accompanying inference of malice.

Error compounded

After deliberating for about one hour, the jury requested "a better understanding between voluntary and involuntary." R. 466, ll. 21-24. The jury also requested additional instruction on murder. R. 467, l. 3. Thereafter, the judge instructed the jury on the three offenses using most of the same language of his earlier charge. R. 468, l. 1 – R. 472, l. 7. Included within the re-instruction was the language that permitted the jury to infer malice from the use of a deadly weapon. R. 469, ll. 5-6. The re-instruction also included the language that voluntary manslaughter was "included" within murder as a "lesser offense." R. 469, ll. 13-15. Although defining voluntary manslaughter to include the sudden heat of passion and sufficient legal provocation, the judge did **not** inform the jury that voluntary manslaughter was the killing of another **without** malice. R. 469, ll. 16-22. However, just as the judge did previously, he instructed the jurors that involuntary manslaughter was the killing of another **without** malice. R. 471, ll. 3-11.

Thus, the jury heard the confusing, misleading, and erroneous instructions twice. The erroneous re-affirming of the inference of malice and the failure to correct the misimpression that voluntary manslaughter encompassed malice contributed to the jury's verdict.

Accident defense

Petitioner defended his conduct as an accident. "In South Carolina, the defense of accident requires a showing that the harm caused was unintentional, that the defendant was acting lawfully at the time of the incident, and due care was exercised in handling the weapon." State v. Harris, 382

S.C. 107, 116, 674 S.E.2d 532, 537 (Ct. App. 2010); see also State v. Wharton, 381 S.C. 209, 672 S.E.2d 786 (2009)(citing State v. Burriss, 334 S.C. 256, 259, 513 S.E.2d 104, 106 (1999)); State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994); State v. Brown, 205 S.C. 514, 32 S.E.2d 825 (1945).

Petitioner's statements to law enforcement, which were presented during the state's case-in-chief, supported this defense.[9] Additionally, he presented evidence regarding the elevation of the land where the shooting occurred and an expert witness who testified regarding the malfunctioning shotgun. He relied heavily upon the pathologist's examination showing the only pellet from the shotgun that struck the deceased was traveling up and the damage to the pellet to demonstrate the pellet had to have been a ricochet, and supportive of an accident defense. The judge's improper instruction is highlighted by the evidence of accident presented by Petitioner, which was negated by the judge's instruction allowing the jury to infer malice from the use of a deadly weapon. It was undisputed that Petitioner used a shotgun. Thus, the inference of malice from Petitioner's use of the shotgun was a foregone conclusion based upon the judge's instruction. This inference and its accompanying conclusion defeated Petitioner's accident defense.

Heightened risk of compromised verdict

"A compromise verdict is necessarily the result of the sacrifice by one or more jurors of their conscientious opinions in the case for the sake of agreeing upon a verdict. If the compromise is the result of improper directions or coercion by the Court, the verdict will be vacated on appeal."

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[9] The law to be charged is determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). Moreover, when determining whether the evidence requires a charge on a lesser included offense, the court views the facts in the light most favorable to the defendant. See Knoten, 347 S.C. at 302, 555 S.E.2d at 394 (requiring the trial court to view facts in the light most favorable to a defendant when determining whether to charge involuntary manslaughter).

Nelson v. Atlantic Coast Line R. Co., 191 S.C. 345, 4 S.E.2d 273, 279 (1939). The jury in the instant matter had four verdict options – guilty of murder, guilty of voluntary manslaughter, guilty of involuntary manslaughter, and not guilty. The confusing and misleading nature of the instructions heightened the likelihood of a compromised verdict. The judge affirmatively instructed the jury that murder required the state to prove the killing was done with malice aforethought. The judge affirmatively instructed the jury that involuntary manslaughter was the killing of another without malice. The judge instructed the jury regarding voluntary manslaughter and involuntary manslaughter in such a way as to include the element of malice from murder in voluntary manslaughter, but not involuntary manslaughter. In other words, the judge's instruction left the impression that voluntary manslaughter was the killing of another with malice in sudden heat of passion with sufficient legal provocation. The judge's confusing and misleading instruction encouraged the jury to compromise on a verdict by intimating that malice is an element of voluntary manslaughter and could be inferred from the use of a deadly weapon. Jurors believing Petitioner committed involuntary manslaughter would likely compromise their verdicts in favor of voluntary manslaughter due to the judge's affirmative instruction on the inference of malice.

Conclusion

In ruling that the trial judge's erroneous jury instruction permitting malice to be inferred from the use of a deadly weapon was harmless beyond a reasonable doubt solely because Petitioner was convicted of voluntary manslaughter, the Court of Appeals failed to consider the actual language charged to the jury, the erroneous language being charged twice, the evidence supporting the defense of accident, and the heightened risk of a compromise verdict based upon the erroneous charge. At a minimum, the state has not proven beyond a reasonable doubt that the erroneous jury charge did not contribute to the verdict.

CONCLUSION

In light of the judge's erroneous jury instruction, Petitioner respectfully requests this Court reverse his convictions and remand for a new trial.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 6th day of April, 2018.

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Oconee County
J. Cordell Maddox, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SHANE ADAM BURDETTE,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon Susannah R. Cole, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner has been served on Shane Adam Burdette, #356957, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 6th day of April, 2018.

Susan B. Hackett
Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 6th day of April, 2018.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.