STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GREGORY BROOKS,

APPELLANT

APPELLATE CASE NO 2016-002301

FINAL 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) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF ISSUES ON APPEAL

I. Did the trial judge err by instructing the jury that malice may be inferred from the use of a deadly weapon where the evidence presented would reduce, mitigate, excuse, or justify the homicide because the instruction impermissibly shifted the burden of proof to Appellant and reduced the state's burden of proving each element of the offense beyond a reasonable doubt?

II. Did the trial judge err by excluding two photographs of a .22 caliber gun as irrelevant and confusing or misleading to the jury, because the photographs (1) were found by police on the phone of a patron of the bar, where the shooting occurred and who was present during the shooting, (2) showed a gun of the same caliber as the shell casings found at the scene, and (3) the owner of phone had been in communication with an official suspect in the shooting and the defense was presenting evidence of third party guilt?

STATEMENT OF THE CASE

On June 1, 2015, a Lexington County grand jury indicted Appellant for possession of a weapon during a violent crime (2015-GS-32-1347) and murder (2015-GS-32-1349). R. 544-545; R. 547-548. The state, represented by Rhonda Patterson and Lester "Gill" Bell, called the case for trial before the Honorable Eugene C. Griffith and a jury on October 31 – November 3, 2016. R. 1. The jury found Appellant guilty as charged. R. 537, ll. 12-19. Judge Griffith sentenced Appellant to thirty-five years' imprisonment for murder and five years' imprisonment for the weapon. R. 538, ll. 13-17; R. 546; R. 549. He ordered the sentences to be served concurrently. R. 538, ll. 13-17; R. 546; R. 549.

On November 14, 2016, Appellant served his notice of appeal. This brief follows.

STATEMENT OF FACTS

When Appellant was sixteen years old, he was shot. R. 313, ll. 14-17. One of the bullets struck his right hand, breaking the bones. R. 313, ll. 18-22. As a result, he had a difficult time grasping things with his right hand. R. 313, ll. 23-24. Unfortunately, Appellant was right-handed, and the injury seriously hindered his abilities. R. 313, l. 25 – R. 314, l. 1. As a result, Appellant did not own a gun and was scared of guns. R. 314, ll. 11-18.

On February 1, 2014, Appellant spent the day helping his girlfriend and her family move. R. 296, ll. 1-4; R. 296, ll. 20-24; R. 297, ll. 2-3; R. 297, ll. 9-23. Later that night, he and his friends, Eric Brown and Arnold Banks, met at the Cockpit Bar and Grill. R. 403, l. 18 – R. 404, l. 25; R. 417, ll. 12-14; R. 431, ll. 14-22; R. 431, ll. 23-24. Appellant rode to the bar with Eric in a dark gray Eclipse. R. 404, ll. 10-20.

Also at the Cockpit were Rickena Knightner, Brandon Ratliff, Andre Bunch, and Fred Moss. R. 127, ll. 12-25; R. 158, ll. 11-14; R. 357, ll. 3-7; R. 431, ll. 23-24. Andre kept a loaded a nine-millimeter Smith and Wesson semiautomatic handgun in his car, which he drove to the Cockpit. R. 129, ll. 2-5; R. 136, ll. 16-21; R. 142, ll. 11-22. After the shooting later in the night, the police found the gun along with a magazine and eight unspent rounds in the glove box of his car. R. 118, ll. 15-17; R. 119, ll. 2-6; R. 120, ll. 12-14; R. 228, ll. 14-20. The gun could hold fifteen rounds. R. 122, ll. 1-3.

Fred and Brandon arrived at the bar in Fred's car. R. 158, l. 24 – R. 159, l. 7. Brandon had a .40 caliber gun that he was known to carry in a holster. R. 146, ll. 4-20; R. 155, ll. 10-16; R. 176, ll. 8-9. In fact, Fred assumed Brandon had a .45 caliber gun in the glove compartment of Fred's car while they were at the Cockpit. R. 197, ll. 2-8. After the shooting, inside Fred's car,

the police found Brandon's holster, but no gun, on the passenger side floorboard. R. 108, ll. 22-24; R. 109, ll. 13-15; R. 197, ll. 16-19; Defendant's Exhibit #22.

Arnold and Rickena were involved in a sexual relationship. R. 311, ll. 2-14; R. 429, l. 19 – R. 430, l. 5.[1] Rickena was very intoxicated and continued to press Arnold to leave the club with her, but Arnold refused, upsetting Rickena. R. 432, ll. 7-13.

Shortly before the bar closed, there was an altercation between two people or two groups of people. R. 129, ll. 6-10; R. 407, ll. 10-14; R. 434, ll. 9-15. By all accounts, Fred was involved in the altercation inside the bar. R. 129, ll. 17-19. According to Fred, he saw a "female at the bar so [he] indulged in conversation" with her. R. 165, ll. 16-19. Within minutes of indulging in this conversation, "the whole floor" of people in the bar were looking his way. R. 165, ll. 19-23. Fred claimed a guy with long dreads approached him, saying "something slick." R. 166, ll. 3-9. Suddenly, Brandon appeared, telling Fred that it was time to go. R. 167, ll. 8-21.

Rickena claimed Appellant and Eric were involved in the argument as well. R. 359, l. 19 – R. 360, l. 4. After she allegedly tried to convince Arnold not to get involved and he refused, she and her friend decided to leave. R. 360, ll. 18-21. Her friend went to the restroom as Rickena went outside to wait by the car. R. 360, ll. 21-25.

After security separated the men, Brandon, Fred, and their friends were escorted outside by security. R. 130, ll. 11-12; R. 148, ll. 1-6; R. 408, ll. 5-9; R. 434, ll. 15-17. Within ten or fifteen minutes, the bar announced it was closing so the patrons started to leave. R. 156, ll. 9-15; R. 408, ll. 10-12. Andre closed his tab and walked out approximately five minutes after his friends left. R. 130, ll. 13-19.

---

[1] Rickena Knightner denied ever dating Arnold Brown. R. 374, ll. 20-25.

Fred and Brandon walked toward Fred's car. R. 168, ll. 4-5. Fred claimed the "same guys" from inside the bar had followed him out and were behind him. R. 168, ll. 12-13. He claimed he saw two men with dreadlocks. R. 168, ll. 13-15. Initially, Fred was talking big to the men and pretending he was armed. R. 199, l. 11 – R. 200, l. 1. However, Fred saw one of the men with dreadlocks flash a black nine-millimeter gun. R. 169, ll. 17-22; R. 199, l. 11 – R. 200, l. 1. This shut Fred up and stopped his posturing. R. 169, ll. 9-12; R. 199, l. 11 – R. 200, l. 1. Suddenly, the other man, not the one who had flashed the gun, started shooting while walking backwards with the gun. R. 170, l. 23 – R. 171, l. 4; R. 193, ll. 24-25; R. 194, ll. 16-25. Fred ducked. R. 171, ll. 5-6.

Rickena saw some of the men who had been arguing standing outside of the bar at the top of a hill. R. 362, ll. 13-23. She claimed a commotion at the top of the hill caught her attention. R. 363, ll. 1-5. She further claimed she saw Appellant with a gun. R. 363, ll. 5-25. When she yelled out to Appellant, he told her to get down, which she did. R. 363, l. 24 – R. 364, l. 4. According to Rickena, Appellant got into a car that pulled up not far from her. R. 364, ll. 5-8. After the shooting, she and her friend ran up the hill to see whom had been shot. R. 365, ll. 5-15. Upon realizing they did not know the person, they returned to Rickena's car, and she called 911. R. 365, ll. 14-21.

Arnold walked out of the bar after the men who were arguing left. R. 434, l. 24 – R. 435, l. 2. When he was walking by the men to get to his car, he heard them continuing to argue. R. 435, ll. 1-2. Arnold did not see Appellant or Eric near the men. R. 437, ll. 2-5. Within five minutes of leaving the bar, Arnold heard gunshots. R. 438, ll. 5-11. Arnold heard shots from more than one gun. R. 438, ll. 20-23. Fearful, he jumped into his truck and left the area for home. R. 438, ll. 18-19; R. 439, ll. 4-5.

While Eric was leaving the bar around closing time, he heard gunshots. R. 408, ll. 17-18. He heard more than one gun firing shots. R. 408, l. 18. He ran to his car. R. 408, l. 19. As he was driving toward the exit, Appellant knocked on his passenger side window asking to be let in to the car. R. 409, ll. 6-8. The shots were still firing. R. 409, ll. 12-13. Eric stopped his car so that Appellant, who was unarmed, could get inside. R. 409, ll. 14-15. He and Appellant then went to Eric's house. R. 409, ll. 18-19.

Andre claimed that when he walked outside of the bar, he saw a group of men fussing with Fred. R. 130, ll. 23-25. Brandon was standing nearby at Fred's car. R. 131, ll. 4-13. As Andre walked to his car, he heard gunshots. R. 133, ll. 1-2. Andre jumped into his car and headed toward where Fred and Brandon had been because he was concerned for them as they had been arguing. R. 133, ll. 9-20. Andre arrived at the area within seconds. R. 134, l. 2. He saw Brandon on his back in the middle of the highway in front of the bar. R. 134, ll. 8-14; R. 175, ll. 4-6. Andre picked up Brandon, placed him in his backseat and drove to the hospital. R. 135, ll. 17-21; R. 176, ll. 5-7. Fred accompanied them. R. 135, ll. 17-21; R. 176, ll. 5-7. Brandon died as a result of exsanguination due to laceration of the heart by a gunshot wound to the chest. R. 216, ll. 3-6.

The identification of Appellant as the shooter by Fred and Rickena depended largely on his having dreadlocks. R. 177, ll. 23-24; R. 184, ll. 2-10; R. 328, l. 18 – R. 329, l. 9; R. 330, ll. 11-15; R. 344, l. 8 – R. 345, l. 11; R. 348, ll. 20-22; R. 367, ll. 1-3; R. 370, ll. 8-20; R. 372, ll. 14-20. However, as the evidence made clear, Appellant was far from the only person at the bar with dreadlocks. R. 147, ll. 8-14. Eric had dreadlocks a little longer than Appellant's. R. 410, ll. 2-7. Dashun Curry also had dreadlocks, which were slightly longer than Appellant's. R. 313, ll. 6-8; R. 410, ll. 8-12.

On April 21, 2014, months after the shooting, the police interviewed Dashun. R. 347, ll. 11-16. Without explaining how, the police eliminated Dashun as a suspect. R. 347, l. 25 – R. 348, l. 11. The police seized Dashun's cell phone, but did not explain if a search of that phone exonerated Dashun. R. 348, ll. 4-11. The police claimed Dashun did not meet the description of the shooter provided by Fred and Rickena. R. 348, ll. 12-14. There was a reward offered for anyone offering information to assist the investigation. R. 411, ll. 19-24; Defendant's Exhibit #44. A $10,000 reward was paid "for a name." R. 353, ll. 13-21; R. 479, ll. 1-11.

The police tracked down one of the people who had called 911 to report the shooting. R. 248, ll. 6-20. This person told the 911 operator and the police that her name was "Shontay Jones" and that she "was standing right by the shooter." R. 248, ll. 19-25; R. 365, l. 24 – R. 366, l. 9; R. 375, l. 24 – R. 376, l. 8. Several days after the shooting, the police met with "Ms. Jones." R. 249, ll. 1-2. "Ms. Jones" provided a description of the shooter – "short, black male that had small eyes and that had dreads." R. 249, ll. 16-18; R. 376, ll. 11-15. "Ms. Jones" did not provide the police with a name, despite the fact that at trial, she claimed she knew the shooter's name and had known him for quite some time. R. 366, ll. 17-25; R. 367, ll. 4-10; R. 370, ll. 21-25. In fact, "Ms. Jones" told the police she did not know who the shooter was. R. 378, ll. 8-12. "Ms. Jones" even agreed to meet with a sketch artist to provide a description for a composite drawing. R. 250, ll. 9-21; R. 367, ll. 11-14. Eventually, the police learned "Ms. Jones" was not whom she claimed to be. R. 249, ll. 19-23. She had lied about her identity. R. 249, ll. 22-23. In fact, "Ms. Jones" was Rickena Knightener. R. 366, ll. 6-9.

Despite Rickena's claims to the police otherwise, Rickena was very familiar with Appellant. R. 358, ll. 4-23; R. 359, ll. 1-8.

When the police arrived at the bar, there was mass confusion and chaos as people left in cars and on foot as quickly as possible. R. 35, l. 18 – R. 36, l. 25; R. 40, l. 23 – R. 41, l. 4; R. 42, ll. 4-9. "[C]ars and people [were] everywhere." R. 55, ll. 20-24. The bar's patrons continued to run even after the police "secured the scene." R. 46, ll. 9-12; R. 56, ll. 9-15.

The police found ten .22 caliber spent shell casings along a diagonal line from the bar's front door to the blood in the roadway. R. 57, ll. 17-22; R. 71, ll. 12-16. The casings were obviously altered in some way – probably run over by cars or stepped on by people fleeing the area. R. 105, ll. 4-17. The police also found "eight patterns of blood in the roadway right outside the bar." R. 76, ll. 20-23. Additionally, the police found three projectiles in the right side of Fred's car, which was parked at the bar. R. 79, ll. 4-5; R. 88, ll. 5-11. All three were consistent with a .22 caliber. R. 89, ll. 22-23.

One of the first people interviewed by police at the bar was Josie Paxton. R. 30, ll. 19-24; R. 247, ll. 18-24. Paxton provided the police with information that established her ex-boyfriend, Antonio "Bling" Williams, as a suspect. R. 30, l. 25 – R. 31, l. 9; R. 256, l. 18 – R. 257, l. 4; R. 461, ll. 4-13; R. 468, ll. 2-3. When the police met with Paxton, the officer took photographs of text messages from Paxton's phone. R. 253, ll. 2-10; Defendant's Exhibits #29, #30, #31. The police claimed they eliminated Bling as a suspect because he did not fit the description of the shooter, which had been provided by Moss and Knightner. R. 257, ll. 5-10. According to police, Bling "was a taller black male" with long dreads, not "a black male, small stature, small eyes and dreads," which was the description the police had. R. 257, ll. 11-17; see also R. 468, ll. 18-24. The police collected Paxton's phone. R. 262, ll. 2-4.

Over the course of the investigation, the police interviewed Brittainy Dilworth, who was Brandon's girlfriend, and her friend, Shalana Weise. R. 259, l. 21 – R. 260, l. 13; R. 324, ll. 17-

20; R. 466, ll. 13-18. Brittainy told the police to investigate Appellant, Jermiel Gartrell and two other people for whom she could only provide "street names." R. 261, ll. 3-8; R. 325, ll. 2-7. There was no indication that Brittainy or Shalana were at the Cockpit during the shooting. However, they had obtained these names from a co-worker, but refused to reveal the name of the co-worker and the police did not attempt to speak directly to the co-worker. R. 264, ll. 16-18.

ARGUMENT

I. The trial judge erred by instructing the jury that malice may be inferred from the use of a deadly weapon where the evidence presented would reduce, mitigate, excuse, or justify the homicide because the instruction impermissibly shifted the burden of proof to Appellant and reduced the state's burden of proving each element of the offense beyond a reasonable doubt.

Relevant facts

The solicitor requested the trial judge instruct the jury concerning the lesser-included offense of voluntary manslaughter. R. 475, l. 17 – R. 476, l. 18. Defense counsel agreed. R. 477, ll. 11-14. The judge indicated he would include voluntary manslaughter as a lesser included offense on the verdict form and in his instructions to the jury. R. 477, ll. 15-20.

During the solicitor's closing argument, she informed the jurors that malice could be "implied by the use of a deadly weapon." R. 495, ll. 22-23. According to the solicitor, malice could "also be implied by shooting that deadly weapon into somebody." R. 495, ll. 23-24. Defense counsel interrupted the argument and requested a bench conference. R. 495, l. 25. Thereafter, an off-the-record conference ensued. R. 496, l. 2.

At the conclusion of the solicitor's closing argument, the judge stated he had "re-read Belcher." R. 508, l. 25. According to the judge's reading of Belcher, "that inference of malice with proof or use of a weapon is not proper when self defense is presented to the jury. … If self defense is not presented to the jury, then use of a weapon is allowable as an inference of malice." R. 508, l. 25 – R. 509, l. 6. Defense counsel argued that "if there were any mitigating circumstances surrounding the event," then the inferred malice from the use of a deadly weapon charge was not permitted. R. 509, ll. 8-16.

Thereafter, the judge instructed the jury that malice may "rise when a deed is done by the use of a deadly weapon." R. 519, ll. 21-22. He reminded the jurors that he had "defined ... a deadly weapon [as] any article or instrument which is likely to cause death or great bodily harm." R. 519, ll. 22-25. He also stated that "a gun or a knife or a weapon such as that is an example of a deadly weapon." R. 520, ll. 2-3.

At the conclusion of his instructions, the judge asked if the lawyers had "[a]ny exceptions or additions to the instructions." R. 527, ll. 4-5. Defense counsel explained she wanted to "make sure" she "renewed [her] Belcher position." R. 527, ll. 21-24.

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 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), the South Carolina Supreme 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."

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 South Carolina's jurisprudence in this area, the 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 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 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," the 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. Examining a case arising after its opinion in Belcher, the Court noted that it was "unclear" what more it could have said "to better indicate to the trial court the impropriety of an instruction that malice could be inferred from the use of a deadly weapon" when there is "evidence which could have reduced, mitigated, or excused" the murder charge. State v. Stanko, 402 S.C. 252, 263, 741 S.E.2d 708, 714 (2013). According to the Court, its mandate was "clear, that when this type of evidence is submitted, an instruction regarding inferred malice from the use of a deadly weapon is improper." Id.; see also, State v. Frazier, 401 S.C. 224, 237, 736 S.E.2d 301, 308 (Ct. App. 2013).

There is no question that evidence was presented in this case that reduced the crime from murder to a lesser crime – voluntary manslaughter. In fact, it was the state requesting such a charge. There was evidence of a heated, and at times, physical argument inside the bar. The argument continued outside. Although Fred claimed that he only pretended to be armed, the police found a holster missing its gun in Fred's car, and it was undisputed that Brandon carried a gun in his holster. It was also undisputed that Brandon's friend, Andre, was armed with a gun. 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. 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," the 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. Specifically, the Court stated the prejudice resulting from the charge was "highlight[ed]" because evidence of self-defense was presented. Id. Here, there was evidence of a lesser-included offense of voluntary manslaughter. Thus, there was evidence of sufficient legal provocation and sudden heat of passion. Therefore, it is conceivable that the evidence to support a finding of malice was the use of the weapon – just as the state argued in closing.

The erroneous inference of malice from the use of a deadly weapon jury instruction was reversible error because the state cannot prove the error was harmless beyond a reasonable doubt. See Rose v. Clark 478 U.S. 570 (1986). The instruction occurred shortly after the judge told the

jurors about criminal intent. After telling the jurors about reasonable doubt, the judge instructed the jury on criminal intent. R. 517, l. 19 – R. 518, l. 15. He explained that intent could not be proven to a mathematical certainty. R. 517, ll. 23-24. He told the jurors to look at the "circumstances surrounding the situation" to determine criminal intent. R. 517, ll. 21-23. In fact, he said that "[c]riminal intent is always a matter that must be determined by the jury from the circumstances surrounding the situation." R. 517, ll. 21-23. Thus, the judge inserted the use of a gun as one of the circumstances the jury could use to determine intent.

The judge told the jury that "[c]riminal intent is a state of mind that operates jointly with an act or omission in the commission of a crime" and that it "is a mental state of conscious wrongdoing." R. 518, ll. 6-9. He explained the jury would have to "determine what the defendant intended to do based upon the circumstances shown to have existed." R. 518, ll. 9-11. Those circumstances necessarily included the use of a gun.

Thereafter, the judge instructed the jury on the offense of murder. He immediately told the jurors that murder required a showing of malice. R. 518, ll. 16-20. Similar to language used to define criminal intent, the judge 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 will infer as an evil intent." R. 518, ll. 21-24. This segued nicely into his instruction on when the law permits an inference of malice. The judge explained that the law permitted malice to be inferred when the "deed is done by use of a deadly weapon." R. 519, ll. 20-22. Thus, the placement of the inferred malice instruction not only diluted the state's burden as to malice, but also diluted the state's burden concerning criminal intent. The jury heard repeatedly about the requirement that it use the circumstances, which undisputedly involved the use of a gun, to reach conclusions as to intent and malice. In light of the record evidence demonstrating sudden heat of passion and

sufficient legal provocation, the jury conceivably based its verdict for murder on the evidence of the use of a gun.

II. The trial judge erred by excluding two photographs of a .22 caliber gun as irrelevant and confusing or misleading to the jury, because the photographs (1) were found by police on the phone of a patron of the bar, where the shooting occurred and who was present during the shooting, (2) showed a gun of the same caliber as the shell casings found at the scene, and (3) the owner of phone had been in communication with an official suspect in the shooting and the defense was presenting evidence of third party guilt.

Relevant facts

After the state rested its case, but prior to the initiation of the defense's case-in-chief, the state objected to the relevancy of several cell phone videos and two photographs sought to be admitted by the defense. R. 386, ll. 17-22. Per the judge's request, defense counsel explained the videos and photographs were removed from the cell phone of Josie Paxton by the police during the investigation of the shooting. R. 386, l. 25 – R. 387, l. 1. According to the data available, the videos were taken on February 2, 2014, between the hours of 3:10 a.m. and 9:13 a.m. R. 387, ll. 2-4. The videos showed the scene at the club prior to and after the shooting. R. 387, ll. 4-13.

The photographs, including the metadata for the photographs, showed a .22 caliber gun that held nine bullets. R. 387, ll. 15-19. According to the metadata available for the photographs, the photos appeared on the phone on February 3, 2014, the day after the shooting. R. 387, ll. 18-22. Defense counsel explained the evidence was "relevant in establishing third party guilt." R. 387, ll. 22-23.

When asked why the proffered evidence was not relevant, the state argued the videos were "very chaotic" and noisy. R. 388, ll. 23-24. Additionally, the state argued the people in the videos were not identifiable and the videos contained "a lot of cursing, slurred speech." R. 388,

ll. 24; R. 389, ll. 9-11. Additionally, the state argued the evidence should be excluded under Rule 403, SCRE, because it was "cumulative," "confusing," and "a waste of time" to show the videos as the scene had been described by the witnesses. R. 392, ll. 7-16. Ultimately, the judge allowed the videos to be presented to the jury. R. 463, l. 21 – R. 464, l. 7.

Turning to the photographs, defense counsel explained that Paxton had two photographs of a .22 caliber gun that held nine .22 caliber bullets on her phone. R. 392, l. 24 – R. 393, l. 2. Witnesses had described the gun used in the shooting as a semi-automatic and the police collected nine shell casings, which was "exactly the number of bullets" held by the gun in the photograph on the phone. R. 393, ll. 6-12. Defense counsel explained Paxton was at the club during the shooting and was "associated with Antonio Williams," who was initially a suspect in the shooting. R. 393, ll. 24 – R. 394, l. 3. Paxton had told police that Antonio said his "home dog just shot [his] other home dog." R. 395, ll. 20-21.

The judge responded that if the state were "trying to get a picture of a gun off the cell phone," into evidence, defense counsel "would be standing there with a head of hair on fire." R. 394, ll. 11-14. The judge refused to allow the photographs to be introduced, concluding they were just pictures "on someone's cell phone." R. 394, ll. 15. The judge noted the photographs would be "confusing to the jury" because there was a picture of a gun, but the state had not presented a gun into evidence. R. 394, ll. 17-20. The judge summarized the evidence: "There's a .22 caliber. There's testimony the gun that was fired was a .22 caliber because the shell casings were there and there's a .22 recovered from the victim. Aside from that that's about all we got." R. 394, ll. 20-23. Despite the fact that the shell casings found at the scene were .22 caliber, the judge concluded that photographs of a .22 caliber gun on the phone of a person who present during the shooting was too "far removed" to be admissible. R. 394, l. 24 – R. 395, l. 3.

Discussion

South Carolina imposes a system of rules to afford litigants and criminal defendants a fair judicial system. The Rules of Evidence govern how the parties present evidence and the admissibility of evidence in general. The Rules of Evidence have been designed to eliminate the introduction of unreliable evidence.

Relevant evidence

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Generally, "[a]ll relevant evidence is admissible." Rule 402, SCRE. "Evidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986)(citing Toole v. Salter, 249 S.C. 354, 361, 154 S.E.2d 434, 437 (1967)). "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears, and it is not required that the inference sought should necessarily follow from the fact proved." State v. Sweat, 362 S.C. 117, 126, 606 S.E.2d 508, 513 (Ct. App. 2004).

According to this Court, "evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." State v. Lyles, 379 S.C. 328, 337, 665 S.E.2d 201, 206 (Ct. App. 2008). Stated another way, "[e]vidence is relevant if it tends to establish or to make more or less probable some matter in issue upon which it directly or indirectly bears." Schmidt, 288 S.C. at 303, 342 S.E.2d at 403.

In Lyles, supra, this Court explained the analysis for determining the relevancy and admissibility of evidence. The state made a motion *in limine* to exclude any comments regarding drug use or the existence of drugs at the alleged victim's apartment. Lyles, 379 S.C. at 335, 665

S.E.2d at 205. Following a proffer, "[t]he state objected and the trial judge conducted an inquiry to determine the relevance of the testimony." Id. at 336, 665 S.E.2d at 205. Thereafter, the judge excluded the testimony finding it was not "'relevant in any fashion in this case.'" Id. According to this Court, "the testimony [did] not serve as a defense to any of the offenses charged in this case nor [did] it excuse or mitigate [the defendants'] actions. It was not probative of any issue material to reaching a verdict. This absence of a logical connection to the facts in debate ma[de] the evidence irrelevant and inadmissible." Id.

The South Carolina Supreme Court held the introduction of evidence of a vendetta to establish motive, bias, and prejudice on the part of the alleged victim and her family by a criminal defendant "was clearly relevant and should have been admitted." Schmidt, 288 S.C. at 303, 342 S.E.2d at 403. The defendant's "entire defense at trial was that he did not commit the alleged act and that the child's story was concocted by her parents because of a 'vendetta' against him." Id. at 303-304, 342 S.E.2d at 403. The Court held "the trial court's ruling on the motion to limit the testimony and its refusal to allow [the defendant]'s proffer of testimony effectively denied [the defendant] a fair and impartial trial because he was not allowed to present his defense." Id. at 304, 342 S.E.2d at 403.

The Supreme Court dealt with multiple pieces of erroneously admitted irrelevant evidence in State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). The deceased, Joseph Barefoot, disappeared on May 25, 1997. Id. at 119, 551 S.E.2d at 243. Barefoot's body was found on September 16, 1997. Id. at 120, 551 S.E.2d at 243. Three of Saltz's friends provided statements implicating Saltzin Barefoot's death. Id. Appellant gave "seven consecutive statements" that were "highly contradictory" and one of which was "factually improbable." Id. at 120, 551 S.E.2d at 243-244.

The Court held the trial judge erred in admitting Saltz's attendance record showing he was absent from school on May 29, 1997. Id. at 127-128, 551 S.E.2d at 247-248. According to the Court, the fact Saltz "was absent from school on Thursday, May 29, 1997, did not tend to make 'the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.'" Id. at 127, 551 S.E.2d at 247 (citing Rule 401, SCRE). The Court rejected the state's argument that the evidence showed Saltz's "whereabouts on that date were [as] unknown as" the Barefoot's. Id. at 127-128, 551 S.E.2d at 247 (alterations in original). "[T]he state presented no evidence Thursday, May 29, 1997, had any consequence to this case." Id. at 128, 551 S.E.2d at 247. Rather, "introduction of this irrelevant evidence encouraged the jury to speculate that Thursday, May 29, 1997, must be significant to the case in some way unknown to them." Id. at 128, 551 S.E.2d at 248. Also, "admission of this irrelevant evidence served to portray [Saltz] as a delinquent." Id.

Recently, this Court reversed a trial judge's decision to exclude testimony from a witness as irrelevant. State v. Page, 406 S.C. 272, 750 S.E.2d 623 (Ct. App. 2013). Page was charged with criminal sexual conduct when a woman alleged he raped her. Id. at 280, 750 S.E.2d at 627. Page wanted to call the woman's boyfriend as a witness to examine the boyfriend about a voicemail he left for the woman in which he claimed the woman told him she fabricated the allegations against Page and that the sexual encounter was consensual as it involved a trade of sex for drugs, which was what Page told the police. Id. at 281, 750 S.E.2d at 628. The state objected, arguing the boyfriend's testimony was not relevant because he told police the voicemail was not true. Id. The judge excluded the testimony, finding "not a scintilla of relevancy" in the testimony to Page's trial. Id. at 281-282, 750 S.E.2d at 628.

This Court found the boyfriend's testimony was relevant to whether Page's encounter with the woman involved consensual sex, which was what Page maintained and the boyfriend's voicemail supported. Id. at 288, 750 S.E.2d at 632. This Court was not persuaded that the boyfriend's claim that the voicemail was a "pure fabrication" rendered his testimony irrelevant. Id. According to this Court, testimony about whether the woman told her boyfriend that she engaged in sexual acts in exchange for drugs would certainly assist the jury in arriving at the truth of the issue because, if the jury believed the boyfriend was telling the truth in his voicemail, then the boyfriend's testimony "undoubtedly would have tended to make a determination that [Page] engaged in consensual sex with [the woman] more probable." Id. at 288-289, 750 S.E.2d at 632. Additionally, this Court held boyfriend's testimony was relevant to the credibility of the woman because her testimony conflicted with what she allegedly told the boyfriend. Id. at 289, 750 S.E.2d at 632.

The photographs on Paxton's phone were relevant to Appellant's third-party guilt defense. The police told the jury that Paxton was a patron at the bar when the shooting occurred. The police told the jury that Paxton was on the phone with Bling when the police arrived on the scene. The police told the jury that Paxton indicated the police should investigate Bling as a suspect in the shooting. However, the police had eliminated Bling as a suspect simply because he did not fit the description of the shooter provided by Rickena and Moss. Based on the police testimony, it appeared the police eliminated Bling because he was "taller" and the description was of someone who was "smaller," and Bling had an "L" tattooed on his forehead. The photographs complemented Paxton's testimony as she explained that she told police that Bling had information about the shooting. R. 467, ll. 11-12.

The photographs showed a .22 caliber gun, which was the same caliber as the shell casings found at the scene. The gun also held the same number of bullets as shell casings that were found at the scene. The police had not recovered a gun that could be associated with the shooting. In fact, the police could not connect any guy to Appellant. The photographs of the .22 caliber gun found on Paxton's phone tended to show that Appellant was not the shooter, but that Bling was the shooter. The photographs were relevant to Appellant's defense of third party guilt.

Rule 403, SCRE

Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE; see also State v. Orozco, 392 S.C. 212, 218, 708 S.E.2d 227, 230 (Ct. App. 2011). The first step requires a determination of the probative value of the evidence. The second step requires an evaluation of the danger of confusion of the issues or of the jury being misled by the introduction of the evidence. The third step requires balancing of the probative value and the danger of confusion or misleading. "When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case." Lyles, 379 S.C. at 338, 665 S.E.2d at 206.

The starting point for analyzing evidence under Rule 403 is determining the probative value of the evidence offered. "'Probative' means '[t]ending to prove or disprove.'" State v. Gray, 408 S.C. 601, 609, 759 S.E.2d 160, 165 (Ct. App. 2014). According to this Court, "'[p]robative value' is the measure of the importance of that tendency to the outcome of a case." Id. at 610, 759 S.E.2d at 165. The probative value of evidence is directly related to the how important that evidence is in assisting the jury in rendering a verdict. Id. Thus, when analyzing the probative value of evidence, the court must consider the importance of the evidence as it relates to the issues presented in the case. State v. Lee, 399 S.C. 521, 528, 732 S.E.2d 225, 228 (Ct. App. 2012).

After determining the probative value of the evidence, the court must next evaluate the danger of confusion of the issues or of misleading the jury by presenting the evidence. Very little case law exists in South Carolina regarding these aspects of Rule 403, SCRE. In Wilson v. Rivers, 357 S.C. 447, 453-454, 593 S.E.2d 603, 606 (2004), the Supreme Court held it was error to exclude the testimony of a biomechanics expert based on a contention that the testimony would be confusing. The case involved an automobile accident and the question before the jury was whether the plaintiff's back problems were caused by the accident. Id. at 449, 593 S.E.2d at 603-604. The defendant sought to introduce the testimony of an expert in the field of biomechanics to refute the plaintiff's claims. Id. at 450, 593 S.E.2d at 604. The Court held the testimony would not have been confusing to the jury because the expert considered the "damage to the car," "depositions, medical records, photographs, impact tests, and the accident report in reaching his conclusion." Id. at 453, 593 S.E.2d at 606. The expert discussed "fully explained the method he used to reach his conclusion and did not contradict himself." Id. at 453-454, 593 S.E.2d at 606.

In Lyles, 379 S.C. at 340, 665 S.E.2d at 207, this Court explained that evidence "potentially insinuating a key witness for the state is a drug dealer and drugs were present next to the victim" could "cloud the issues." The proffered testimony "would have established drugs were offered for sale outside of the apartment several months before the shooting by an individual known only as C.C." Id. This Court held "evidence of the mere presence of marijuana, without further indication of impairment, could mislead the jury" in a case asking the jury to decide whether the plaintiff, who was involved in an automobile accident and had marijuana in his system, was entitled to recover damages from the other driver. Kennedy v. Griffin, 358 S.C. 122, 128-129, 595 S.E.2d 248, 251 (Ct. App. 2004). The blood test performed that detected the marijuana in his system "did not measure the quantity of marijuana" or "how recently [he] had been exposed to marijuana." Id. at

128, 595 S.E.2d at 251. Additionally, there was no marijuana found in or near the plaintiff's truck and there was no testimony that he smelled of marijuana. Id.

Once a court has determined the probative value and the danger of confusing or misleading by the evidence, the court must balance the two. State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013). Only after balancing the two may the court determine if the danger of unfair prejudice outweighs the probative value of the proffered evidence as required by Rule 403, SCRE.

The probative value of the photographs of the .22 caliber gun on Paxton's phone was highly probative to Appellant's third-party guilt defense. Paxton was connected to Bling and had told the police to investigate Bling, who gave incriminating information to Paxton. Bling was a black male with dreads, which was the description provided by witnesses to the shooting. The shell casings at the scene were .22 caliber, just like the gun on Paxton's phone. The photograph of the gun appeared on Paxton's phone the day after the shooting. The police did not recover a gun connected to the shooting. Thus, the probative value of the photographs of the gun on Paxton's phone was highly probative as it tended to cast doubt on Appellant's guilt and supported his claim of third party guilt.

The danger of confusing or misleading the jury by presenting the photographs was very low. The jury was aware that Paxton was at the bar when the shooting occurred, was speaking to Bling when the police arrived, and had told the police to investigate Bling as a suspect in the case. The jury was aware that Paxton was sending text messages to Brandon's girlfriend about Bling's involvement. Those text messages occurred on the same day of the shooting and just one day prior to the photographs of the gun appearing on the cell phone. The jury would not have been confused by the photographs or misled into believing the photographs purported to be anything except what they were – evidence of a gun capable of shooting the same caliber of bullets as those shot at Brandon and of holding the same number of bullets as shell casings found at the scene.

Balancing the high probative value of the photographs against the low danger of confusing or misleading the jury required admission of the photographs of the .22 caliber gun on Paxton's cell phone. The photographs would have assisted the jury in determining whether Appellant was the person who shot Brandon or whether someone else was the triggerman. Although the state presented two eyewitnesses, their testimony was compromised. One witness repeatedly lied to the police and the other was motivated to lie for a conviction because of his relationship with Brandon. The description of the shooter provided by those witnesses was so vague as to cover almost every patron of the bar that night. There was no other evidence connecting Appellant to the crime. Although the judge had permitted Appellant to present some evidence of third party guilt – and the state had not objected to that evidence – the judge forbade Appellant from presenting the evidence that was the lynchpin of his third-party guilt defense. The photographs would have a tendency to show Appellant was not the shooter as the gun in the photographs could be connected to Bling, a suspect in the shooting, was of the type of gun used in the shooting, and held the exact number of bullets as shell casings found. The judge erred in excluding the evidence.

CONCLUSION

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

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of May, 2018.

CERTIFICATE OF COUNSEL

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."

May 18, 2018

Susan B. Hackett

Susan B. Hackett
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589