

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Appeal from Marlboro County
Court of General Sessions
Edward B. Cottingham, Circuit Court Judge

S.C. SUPREME COURT

Supreme Court Case No. 2016-001161
Opinion No. 27826

THE STATE,

PETITIONER,

V.

TYRONE J. KING,

RESPONDENT.

STATE'S PETITION FOR REHEARING

In Opinion No. 27826, this Court reversed Respondent Tyrone J. King's convictions for murder and possession of a weapon during the commission of a violent crime. Petitioner, the State of South Carolina, respectfully petitions for rehearing to ask the Court to address the following points and arguments that may have been misapprehended or overlooked:

1. The State respectfully submits the majority opinion misapprehends the review that is required in assessing whether admission of improper evidence is harmless. As was correctly found by Acting Chief Justice Hearn in her dissenting opinion, the failure to redact King's mention of a prior murder charge was harmless beyond a reasonable doubt because there was otherwise overwhelming evidence establishing his guilt. As noted in the dissenting opinion in the Court of Appeals and adopted fully by Justice Hearn:

Victim's grandson saw King point the gun at Victim immediately prior to the gun's discharge. After shooting Victim, King pistol-whipped Wife, pointed the gun at Cousin's chest, and hung up the telephone Wife was using to speak to a 911 operator. When the 911 operator called back, King told the operator one of his homeboys shot Victim. When King learned police had arrived at the home, he fled the home and attempted to hide from police. King initially told police that McLaughlin shot Victim; only in his second statement to police did he allege that he shot Victim by accident.

State v. King, Op. No. 27826 (S.C. Sup. Ct. filed July 18, 2018) (Shearouse Adv. Sh. No. 29 at 22).

Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). Error is harmless beyond a reasonable doubt **where it did not contribute to the verdict obtained.** Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (emphasis added). “Whether an error is harmless depends on the circumstances of the particular case.” State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). “No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it ‘could not reasonably have affected the result of the trial.’ ” Id. (quoting State v. Key, 256 S.C. 90, 93, 180 S.E.2d 888, 890 (1971)). The Supreme Court has considered, in the absence of the offending testimony, whether a reviewing court could “conclude that the ‘minds of an average jury’ would not have found the State’s case significantly less persuasive had the testimony ... been excluded.” Schneble v. Fla., 405 U.S. 427, 432 (1972) (emphasis added).

While no particular formula rules, it is consistently acknowledged that assessing the harm of error requires looking at the particular case before the jury. Where no defense evidence is presented at all, the average juror would have no defense evidence to consider in regard to the State’s case. This Court has set out: “[O]ur jurisprudence requires us not to question whether the

State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict.” State v. Tapp, 398 S.C. 376, 389–90, 728 S.E.2d 468, 475 (2012).

The majority opinion here improperly blurs trial burdens and appellate review. It is hard to fathom how a brief, unprompted mention of alleged prior murder charges made by King could have contributed to the guilty verdict on his murder charge. Contrary to the inference made by the majority, there was no evidence regarding any other alleged murder charge for the jury to consider. No such evidence was presented to the jury. There was no discussion regarding any details to the alleged murder charges referred to by King. Neither the State nor King made any mention of any alleged murder charge outside of the murder of James Galloway. In light of the very limited nature of the mention made by King, along with the vagueness of his mention of the alleged other charges, any error in its admission was harmless. See State v. Johnson, 306 S.C. 119, 126, 410 S.E.2d 547, 551 (1991) (finding improper admission of minimal testimony about prior bad act was harmless in capital murder trial); see also State v. Parker, 315 S.C. 230, 235, 433 S.E.2d 831, 833 (1993); cf. State v. King, 349 S.C. 142, 161, 561 S.E.2d 640, 650 (Ct. App. 2002)(noting single improper mention of defendant’s invocation of right to silence harmless error);. This argument should be reheard by this Court.

2. The State respectfully submits this case should be reheard because the majority opinion misapprehends the impact of the evidence presented at trial on King’s defense of accident. The majority opinion’s finding that there was not overwhelming evidence disproving King’s defense of accident is not supported by the record. The testimony and evidence presented at trial clearly reflected the shooting was not the result of King’s assertion in his second statement that it was an

accident. Mrs. Galloway's testimony reflected there was no apparent attempt by King to sell the gun to the victim, James Galloway:

And so he [the victim] got up. He cut the hall light on and got up, and I guess he asked who was at the door and he proceeded to open the door. He came back in the room, and I said, "Who is that?" He said it was Tyrone. So I just laid in the bed. I was awake, but I was just laying there.

And he put his shorts on. He went back out the room, and he said, "Naw, man, I don't have" and I just heard a pop. And I jumps up out the bed, and by the time I jumps up out of the bed and started he runs in the room on me pointing the gun in my face saying, "Whose in here with you? Whose in here with you?" And I was like — then he hits me in the top of my head and I sit down on the bed.

(App. 92, l 17 – App. 93, l 4). Mrs. Galloway later reiterated she heard nothing reflecting that King was attempting to sell the gun to Mr. Galloway: "Well, I didn't hear them talking. He came back in the room and put his shorts on. And he came back out the room and he said, 'Naw, man, I don't have nothing,' and he just shot him." (App. 99, ll 2-5).

Similarly, the victim's grandson's testimony reflected King intentionally pointed the gun at the victim, and it was not part of a gun sale gone wrong.

Q. So you knew who Tyrone was when you saw him?

A. Yes.

Q, You did. Okay. What did you see Tyrone do while he was in your house?

A. He asked for some beer or liquor.

Q. He asked for some beer or some liquor. And then what happened?

A. He shot James.

Q. And who is James?

A. My granddaddy.

Q. James is your granddaddy. And how did you see him shoot James.

A. He just shot him.

Q. You saw him with the gun?

A. Yes.

Q. And where did he have that gun? How did you see the gun.

A. In his pants.

Q. You saw it in his pants. Did he pull the gun out?

A. Yes.

Q. How did he pull it out? Can you show us? Stand up and show us?

THE COURT: Stand up and show up how he did it.

THE WITNESS: The front side.

BY MS. DAVID:

Q. Yeah, and then what did he do?

A. He shot him.

Q. He shot him. How did he take it out?

A. Like that.

Q. He took it out and then did what?

A. Pointed the gun and shot him.

Q. He pointed the gun at your grandfather and shot him. And then what did you hear?

A. A pop,

Q. You heard a pop. And what did you do?

A. I jumped.

(App. 112, l 19 – App. 114, l 4). And while during cross-examination, the grandson would state he did not see the shot when it was fired, his testimony again reflected King intentionally pointed

the gun at the victim. His testimony also contradicted King's much later assertion that the shooting was accidental during an alleged gun sale.

Q. Did you see him point the gun?

A. Yes.

Q. Where did he point the gun at?

A. On his stomach.

Q. His stomach. You remember him shooting the gun?

A. Uh-uh. No.

Q. You didn't see the shot. Okay. You weren't watching when he — you heard the noise?

A. Yes, sir. I heard the noise,

Q. You heard the noise. Were you looking at him when you heard the noise?

A. No.

(App. 118, 123 – App. 119, 19).

King's defense of accident was also completely undermined by his actions taken immediately after the shooting. King's first action after the shooting was to assess other potential witnesses, and not to aid the victim. As reflected in Karen's testimony, his first statement to her after the shooting was asking who else was in the house. (App. 93). King also attempted to cover his actions very early by alleging someone else shot the victim. Reggie Cousar, who walked from the bathroom after hearing Karen's screams, testified,

I came out of the bathroom, and I saw Mr. King holding the gun to Karen's face. I was asking him what was going on. What was going on, and **he started talking some of his boys did that. One of his boys did it. One of his boys did that.** And I'm asking him what's going on. Still asking him what's going on. Then I hear Karen on the phone talking about, "My husband's been shot. My husband's been shot." I look over there and see James on the floor. I rush to him, and then all of a sudden he runs out the door.

(App. 105, ll 15-24). Further, in the 911 calls, King could be heard claiming that someone else shot the victim. (See App. 96, 266). He continued blaming a different person through his first statement to law enforcement. (App. 164; State's Exhibit 5). His evasive efforts starting almost immediately after the shooting were strong evidence of his guilt of murder. See generally State v. Martin, 403 S.C. 19, 29-30, 742 S.E.2d 42, 47 (Ct. App. 2013) (recognizing evasive conduct by a defendant as evidence of consciousness of guilt).

Furthermore, King's effort to evade apprehension when law enforcement arrived shortly after the shooting also constituted evidence of his guilt. Deputy Timothy Shaw of the Marlboro County Sheriff's Office was the first to arrive at the scene. He arrived shortly after the 911 call. Shaw stated,

When I got out of my parole[sic] car I walked around the front of it. When I got to this corner right here there were people on the front porch saying somebody was still inside. Before I could start towards the front door one of the people on the front porch said he's running for the back door. I stopped. Actually ran to the back of the residence and I could hear someone running inside the residence.

When I got to the back corner the back door was still closed, but when I rounded the back corner before I could get to the back door the back door pulled open and someone run out of it. I yelled to them, "Sheriff's Department. Stop. Get on the ground." They did not. They started running on foot.

...

The subject ran out. I actually pursued him on foot. He jumped this fence. There are actually houses on the side of the street. I did not want him to be able to be able to clear this side of the fence and run towards the street without me being able to see him. I did not jump the fence. I actually ran around the side of the residence.

When I was still in foot pursuit I come to the corner of the fence. I was running across this yard. I could see someone run past the gap in between these next two homes. When I got to this corner of the residence I stopped because I didn't know where he was at.

I blocked the way to make sure he was not standing at the corner of the residence here closed in the backyard. I actually seen him slide up under this

truck. I started shouting to him, "Show me your hands. Show me your hands." I actually could tell he had something in one of his hands.

(App. 122, ll 6-19; App. 122, l 23-App. 124, l 15). This too was evidence of King's guilty conscience. State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (evidence of flight admissible to show guilty knowledge, intent, and that defendant sought to avoid apprehension).

Law enforcement recovered a telephone that was identified as belonging to the victims' house and a liquor bottle near the truck where King was apprehended. (App. 136). The liquor bottle was of the same type found in the victim's closet in the master bedroom. (App. 136). There was a bullet hole in the master bedroom, which led to the den and to the roof of the residence. (App. 136-37). A nine millimeter handgun with an extended clip was found in the wooded area behind King's residence. (App. 137). A projectile was also recovered from the living room of the victims' residence. (App. 138-39, 145, 151). Also, two cartridge casings were found, one in the living room and one in the master bedroom. (App. 155, 156). Round lead particles were found in King's right palm. (App. 226, 228-29). The two cartridge casings recovered from the scene, along with the projectile recovered from the wall in the living room, were all fired from the gun found in King's back yard. (App. 233-36, 365).

Altogether, when viewed in the context as a whole, the record reflects the State disproved King's argument that the shooting was an accident. No other rational conclusion could be reached. This case should therefore be reheard and reconsidered by this Court.

3. The State respectfully submits this case should be reheard because the majority opinion misapprehends the evidence establishing malice that was presented at trial. "Malice' is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong." In re Tracy B., 391 S.C. 51, 69, 704 S.E.2d 71, 80 (Ct. App. 2010) (quoting State v.

Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998)). “It is the doing of a wrongful act intentionally and without just cause or excuse.” Id. (emphasis added) (quoting Tate v. State, 351 S.C. 418, 426, 570 S.E.2d 522, 527 (2002)). “In the context of murder, malice does not require ill-will toward the individual injured, but rather it signifies ‘a general malignant recklessness of the lives and safety of others, or a condition of the mind [that] shows a heart regardless of social duty and fatally bent on mischief.’” State v. Oates, 421 S.C. 1, 20, 803 S.E.2d 911, 921 (Ct. App. 2017) cert. denied (Mar. 7, 2018) (quoting In re Tracy B., supra).

Here, the majority opinion seemingly disregards the ample evidence of malice that was presented at trial. First, Mrs. Galloway’s testimony regarding the discussion she heard between her husband and King prior to the shooting indicated some ill will on the part of King. (See App. 92). This assessment was further bolstered by King’s immediate actions after the shooting. Second, the victim’s grandson testified he saw King pull out the gun from his pants and point the gun at Mr. Galloway. (App. 113). This testimony, at the very least, shows a general malignant recklessness of the life and safety of the victim. It further reflects the actions taken by King were not accidental, and his actions were without just cause or excuse. That the grandson did not see the fatal shot fired a few moments later does not diminish the import of his testimony.

Furthermore, as noted in regards to the majority’s assessment of the evidence relating to the defense of accident, when viewed in context of all of the evidence presented as a whole, the record clearly supports a determination that the error in admitting the mention of the alleged prior murder charges was harmless. As outlined above, King’s actions from shooting the victim until his apprehension reflected the shooting was done with malice. No other rational conclusion could be reached.

Wherefore, premises considered, for the reasons stated in this petition, the State respectfully requests this Court to reconsider its determination that the error in admitting the mention of alleged prior murder charges were not harmless.

Respectfully submitted,

ALAN WILSON
Attorney General

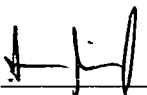
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August 2, 2018

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Appeal from Marlboro County
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S.C. SUPREME COURT

Opinion No. 5390 (S.C. Ct. App. filed March 16, 2016)
Rehearing Denied May 2, 2016
Supreme Court Case No. 2016-001161; Court of Appeals Case No. 2012-213461

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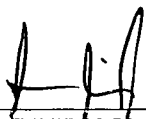
RESPONDENT.

PROOF OF SERVICE

I, Alphonso Simon, Jr., counsel for the Petitioner, certify that I have served the within Petition for Rehearing on the Respondent by depositing two (2) copies of the same via U.S. mail, first class, postage prepaid to his attorneys of record, Howard W. Anderson, III, Esq., 176 E. Main Street, P.O. Box 661, Pendleton, SC 29670, and to Robert M. Dudek, Esq., SCCID/Division of Appellate Defense, 1330 Lady Street, Suite #401, Columbia, SC 29201.

I further certify that all parties required by Rule to be served have been served.

This 2nd day of August, 2018.



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