ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Honorable Robin B. Stilwell, Circuit Court Judge
Appellate Case No. 2009-147266

THE STATE,

Respondent,

vs.

KERWIN S. PARKER,

Appellant.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other Authorities:

STATEMENT OF ISSUE ON APPEAL

Any issue with the trial judge's jury instructions was not preserved for appellate review because defense counsel did not contemporaneously object to the jury charge during trial and, instead, indicated he had no objection to the charge as given. Additionally, the trial judge properly instructed the jury on the current and correct law in effect at the time of Appellant's trial, and a subsequent change in the law after the jury issued its verdict was not applicable to Appellant's case because no objections to the jury charge were raised during trial. Furthermore, any error resulting from the trial judge instructing the jury it could infer malice from the use of deadly weapon was entirely harmless in light of the jury's verdict, which reflected the jury did not believe the use of a deadly weapon alone mandated a finding of malice.

STATEMENT OF THE CASE

On November 20, 2006, Appellant Kerwin S. Parker was arrested following an investigation into an incident where several people were injured and one person was fatally shot. In April of 2007, the Lexington County grand jury indicted Appellant for one count of murder, one count of assault and battery with intent to kill, and one count of possession of a weapon during the commission of a violent crime. On September 14, 2009, a jury trial was commenced in the Lexington County court of general sessions with the Honorable Robin B. Stilwell, circuit court judge, presiding. At the conclusion of trial, the jury acquitted Appellant of murder and convicted Appellant of the other indicted offenses. Following the verdict, the trial judge deferred the sentencing proceedings. Thereafter, on October 21, 2009, a sentencing hearing was conducted in the Lexington County court of general sessions with Judge Stilwell again presiding. At the conclusion of the hearing, the trial judge sentenced Appellant to concurrent terms of imprisonment of twenty years for assault and battery with intent to kill and five years for possession of a weapon during the commission of a violent crime.[1] Appellant then timely filed a notice of appeal.

[1] Appellant's brother, Curtis T. Johnson, was indicted for one count of murder, two counts of assault and battery with intent to kill, and one count of possession of a firearm during the commission of a violent crime for his role in the incident, and he was jointly tried with Appellant. At the conclusion of trial, Johnson was convicted of one count of the lesser-included offense of voluntary manslaughter, two counts of the lesser-included offense of assault and battery of a high and aggravated nature, and one count of possession of a weapon during the commission of a violent crime. During the subsequent sentencing hearing, the trial judge sentenced Johnson to concurrent terms of imprisonment of thirty years for voluntary manslaughter and ten years for each of the assault and battery of a high and aggravated nature convictions along with a consecutive term of imprisonment of five years for possession of a weapon during the commission of a violent crime.

STATEMENT OF FACTS

At approximately 1:30 a.m. in the early morning hours of November 20, 2006, Jose Hernandez, a resident of the Church Hill Apartments in Lexington County, South Carolina, heard a loud noise coming from an area across from his apartment followed by several gunshots. (R. pp. 199-200; p. 226; pp. 230-231). Hernandez went outside to see what was going on and, when he did so, observed a vehicle stuck between a tree and the apartment building across from him. (R. p. 231). He then saw two individuals, one with long hair and one with short hair, standing on a patio behind the apartment near where the vehicle was located. (R. pp. 231-234). Hernandez continued to watch as the long-haired man walked back to the vehicle and the short-haired man remained on the patio while pointing a gun in a downward direction. (R. pp. 231-234). Hernandez then heard someone ask not to be shot before he saw the short-haired man fire two gunshots. (R. p. 232; pp. 235-236). Following the gunshots, a woman came out of the apartment and asked the men what they had done, and the men then walked down the street together. (R. pp. 233-234). Thereafter, Hernandez watched as the short-haired man left the area and the long-haired man returned to the apartment. (R. pp. 233-234). The long-haired man then kicked a man lying on the ground several times, returned to the crashed vehicle, attempted to leave in it, and then walked away. (R. p. 234).

Shortly thereafter, law enforcement officers were notified of the shooting and responded to the scene. (R. pp. 259-260; p. 276; pp. 294-295; p. 314). After they arrived, Deputy Teddy Xanthakus and Deputy Danny Lewis of the Lexington County Sheriff's Office observed a vehicle resting in the bushes next to the apartment building

and saw a long-haired man, Curtis T. Johnson, walking in the road "in a daze."[2] (R. pp. 259-263; pp. 276-277; p. 329). The officers then arrested Johnson and found a set of brass knuckles in his pocket. (R. pp. 262-263; pp. 277-278). Thereafter, Deputy Xanthakus moved to secure the apartment, found a severely-injured man on the apartment patio, observed a blood trail leading away from the apartment, and discovered the body of a deceased person sprawled out on the floor of the kitchen inside of the apartment. (R. pp. 263; pp. 265-268). Emergency medical personnel then arrived on the scene and began treating the injured victims, and the apartment was secured. (R. p. 272). Officers subsequently recovered numerous pieces of evidence from the scene, including a shotgun, a metal pipe, eight shell casings, a box of shotgun shells, numerous bullet fragments, and multiple fired bullets. (R. p. 267; pp. 358-360; pp. 363-364; p. 368; p. 374; p. 384; pp. 395-396; p. 400; p. 402; pp. 404-405).

As the investigation into the shooting progressed, officers learned Johnson's older brother, Appellant Kerwin S. Parker, was involved in the incident, and they went to his residence to apprehend him. (R. p. 31; pp. 295-296; p. 540). Upon arriving, officers found a man standing in the yard of the residence, and he advised them Appellant was inside. (R. pp. 301-302; p. 306). The officers then entered the residence, located Appellant and his mother, and detained Appellant.[3] (R. p. 302; p. 307). Following his arrest, Appellant's mother provided the officers with Appellant's shoes and informed them Appellant's gun was in a vehicle located in the yard of the residence. (R. pp. 302-

[2] During the investigation into the shooting, Deputy Wilson Matthews of the Lexington County Sheriff's Office examined the crashed vehicle and determined the vehicle drove through the road, hit a curb, continued through shrubbery, and struck the apartment wall with sufficient force to move the wall to the right approximately two feet. (R. pp. 284-291).

[3] At the time of his arrest, Appellant had short hair, was not wearing any shoes, and did not appear to have any injuries. (R. p. 298; p. 302; p. 304; 307; p. 428; pp. 627-628). Likewise, at the time of his arrest, Johnson had no visible injuries. (R. p. 615). Furthermore, Johnson was wearing a black sweatshirt and Appellant was wearing a gray sweatshirt when they were arrested. (R. p. 221; p. 330).

303; pp. 309-310). Officers then discovered a forty-caliber handgun in the glove box of the vehicle, and it was later confirmed to belong to Appellant. (R. p. 317; p. 321; pp. 483-484).

After Johnson and Appellant were arrested, officers collected the sweatshirts they were wearing at the time and performed gunshot residue tests on their hands and clothing.[4] (R. pp. 329-330; pp. 334-335; p. 355; p. 366). Upon analysis, gunshot residue was discovered on both of Johnson's hands and on the right and left sleeves of both sweatshirts that were submitted for testing. (R. pp. 455-456; pp. 459-460). Blood was also located on Appellant's shoes and Johnson's socks and shoes. (R. pp. 488-492). Jasper Humbert, a forensic D.N.A. analyst with S.L.E.D., determined the blood on Appellant's shoes belonged to Isaac and the blood on Johnson's socks and shoes belonged to A.J. and Isaac. (R. pp. 495-496; pp. 498-500). Furthermore, Appellant's gun and the fired cartridges, bullets, and bullet fragments recovered during the investigation into the shooting were analyzed by S.L.E.D. Agent David Black, an expert in firearms examinations. (R. pp. 468-470). Based on his analysis, Black concluded all seven of the recovered bullet cartridges were fired from Appellant's gun and three of the four recovered bullets were fired from the weapon.[5] (R. p. 470).

Meanwhile, the victims were taken to the hospital and treated for their injuries. (R. p. 501; pp. 505-506). The man who left the blood trail at the scene, Walter Gadson, suffered a femur fracture during the incident. (R. pp. 502-503). Likewise, the man found on the patio, A.J. Wilson ("A.J."), suffered numerous injuries, including injuries to his

[4] The gunshot residue test was not conducted on Appellant until approximately 6:30 a.m., which was roughly five hours after the shooting. (R. p. 366; pp. 457-458).

[5] Black was unable to determine what gun fired the final bullet because it was too damaged for proper analysis. (R. p. 470).

vertebrae, face, mouth, extremities, shoulder, flank, wrist, and thumb. (R. p. 162; p. 504; pp. 509-510). A.J.'s injuries were so severe that a person who saw him after the shooting stated "it looked like some of the part of, some of his mouth was gone." (R. p. 140). Furthermore, the lower portion of A.J. was paralyzed as a result of the shooting. (R. p. 163; pp. 509-510).

Subsequently, Dr. Janice Ross, an expert in forensic pathology, performed an autopsy on Isaac Wilson ("Isaac"), who was the person killed in the shooting. (R. pp. 512-513). During the autopsy, Dr. Ross located two gunshot wounds to Isaac's chest and gunshot powder burns on Isaac's clothing. (R. pp. 513-514). One bullet entered the right side of Isaac's chest, travelled through his lungs and heart, and left an exit wound that suggested Isaac was lying on concrete at the time he was shot. (R. pp. 515-516). The other bullet entered the left side of Isaac's chest and travelled through his left lung and stomach. (R. pp. 516-517). Based on her findings, Dr. Ross concluded Isaac bled to death as a result of the shooting. (R. p. 517). She further concluded Isaac was shot from a close distance and the gun was only four to twelve inches away from his body when the shots were fired. (R. pp. 514-515; p. 518).

Thereafter, Appellant was indicted for murder, assault and battery with intent to kill ("ABWIK"), and possession of a weapon during the commission of a violent crime, and he proceeded to trial with Johnson, who was charged with the same offenses along with an additional count of ABWIK. (R. p. 2; pp. 868-871; pp. 873-874). During the trial, which began on September 14, 2009, multiple accounts of the shooting were presented to the jury. (R. p. 1; pp. 100-118; pp. 151-162; pp. 230-236; pp. 570-579; pp. 799-813).

Gadson recounted he and Isaac got into a physical altercation with Johnson earlier in the evening prior to the shooting and Johnson threatened them as he was leaving the area. (R. pp. 96-98). He testified they then returned home before observing Appellant's vehicle near their apartment. (R. pp. 99-100). In response, Gadson stated he, Isaac, and A.J. exited the apartment after Isaac retrieved a shotgun. (R. pp. 103-104). Once outside, Gadson stated Johnson got out of the vehicle and blew its horn and then Appellant came around from the side of the apartment. (R. pp. 104-105). He testified he then spoke with Appellant, Appellant pulled his pants leg up and reached for something, A.J. yelled Appellant had a gun, A.J. and Isaac ran towards the patio, and Isaac tossed him the shotgun. (R. pp. 105-111). After that, Gadson indicated Johnson drove the vehicle towards him, he unsuccessfully tried to fire the shotgun to stop the vehicle, and he was struck and injured. (R. pp. 111-104). Thereafter, he stated he saw Johnson exit the vehicle armed with a pistol and then heard multiple gunshots as he crawled away from the scene. (R. pp. 114-117).

Similarly, A.J. testified he was at his apartment late on the night of November 19, 2006, when Isaac and Gadson arrived and stated they had been in a fight with Johnson. (R. pp. 148-149; pp. 170-171). Later that night, A.J. stated Johnson arrived at the apartment complex so they all went outside with Isaac armed with a shotgun. (R. pp. 151-152). Once outside, A.J. stated a man approached them and asked why they did something to his brother. (R. pp. 153-155). After that, A.J. testified the man reached for something and he responded by yelling that the man had a gun before running towards the apartment patio. (R. pp. 156-157). Thereafter, A.J. stated he heard gunshots, went inside the apartment, and then went back outside when he did not see Isaac. (R. p. 157). When he went outside, A.J. indicated he saw a long-haired man on top of Isaac and he

tried to get the man off of him. (R. pp. 158-159). When he did so, he testified the man who confronted them earlier pulled out a gun and shot him in the mouth, side, hand, and back. (R. pp. 159-163). A.J. further testified he selected the photograph of the shooter from a photographic line-up, and he identified Appellant in-court as the shooter and indicated he was certain of the identification.[67] (R. pp. 161-167).

Subsequently, Johnson testified in his own defense and offered a substantially different account of the incident from the testimony of A.J. and Gadson. (R. p. 540). Prior to the shooting, Johnson stated he was attacked by Gadson and Isaac while stopped at a red light and was kicked in the head by Gadson while he was still seated in the vehicle. (R. pp. 557-558). Johnson claimed he was then pulled from the vehicle during the altercation but was eventually able to escape.[8] (R. pp. 559-561). Thereafter, Johnson testified he returned home and told Appellant about the incident, and Appellant responded by saying he was going to go speak with the attackers. (R. pp. 564-565). Johnson indicated they then drove to Isaac's apartment, parked in the rear, and intended to resolve the dispute by talking to Isaac and Gadson. (R. pp. 568-572). Johnson testified Appellant then exited the vehicle and walked out of view before Isaac, Gadson, and A.J. approached his vehicle while carrying three different shotguns. (R. pp. 574-577). He claimed he then heard Isaac say he was going to shoot him, he honked the horn, and they stopped walking towards him. (R. pp. 577-578). When he honked the horn,

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[6] Detective Steve Collins of the Lexington County Sheriff's Office showed A.J. a photographic line-up while A.J. was still hospitalized from his injuries. (R. p. 198; pp. 200-203). A.J. selected Appellant from the line-up and indicated he was certain of his identification. (R. pp. 202-203; pp. 209-211).

[7] Consistent with A.J.'s testimony, Amy Fleming, who lived with Isaac and A.J. at the time of the shooting, stated she saw Appellant armed with a gun on the apartment patio after A.J. was shot, and she testified she heard Appellant state he should kill all of them. (R. p. 32; pp. 39-40).

[8] As a result of the attack, Johnson stated he suffered "a little nick" under his lip, dirt in his eye, and emotional pain. (R. pp. 562-563).

Johnson testified Appellant ran back to the vehicle, stopped when he saw the shotguns, and asked the men to put the guns down. (R. pp. 578-579; pp. 799-800). Johnson claimed Appellant then tried to convince Isaac to let them leave, but Gadson charged at Appellant with a shotgun. (R. pp. 800-802). Johnson stated he then drove towards Gadson and struck a wall. (R. pp. 802-805; p. 807). After hitting the wall, Johnson indicated he looked over at the patio and saw Isaac pointing a gun at Appellant while he was being held by A.J. (R. p. 808). Johnson claimed he then grabbed a gun from his vehicle's glove box and fired a warning shot out of the window before running over and shooting A.J. five times and Isaac two times.[9] (R. pp. 810-811). After the shooting, Johnson testified Appellant left to go get help while he went into the apartment and then walked in the roadway. (R. pp. 811-813).

At the conclusion of the evidentiary phase of trial, the trial judge conducted a charge conference and stated he intended to instruct the jury on voluntary manslaughter and self-defense. (R. p. 637). Thereafter, counsel for both Appellant and Johnson requested a jury instruction on the lesser-included offense of assault and battery of a high and aggravated nature ("ABHAN"), and the trial judge agreed to give the charge. (R. pp. 640-642). Subsequently, the trial judge instructed the jury on the applicable law, including on murder, voluntary manslaughter, ABWIK, ABHAN, self-defense, and defense of others, and explained malice in the context of murder and ABWIK as follows:

> [M]alice may be indicated from conduct showing a disregard for human life. An implication of malice may also arise when the deed is done with a deadly weapon. That implication is merely an evidentiary fact which may be taken into consideration along with any other evidence in this case. The deadly weapon is an article, instrument, or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case.

[9] Notably, Johnson also claimed he shot Appellant during the incident. (R. p. 604).

(R. pp. 714-729). After finishing his instructions to the jury, the trial judge asked the parties if there were any objections to the jury charge as given, and no objections were raised.[10] (R. pp. 731-732). Specifically, counsel for Appellant responded: "None, Your Honor." (R. p. 732).

At the conclusion of trial, the jury acquitted Appellant of murder, convicted Appellant of ABWIK and possession of a weapon during the commission of a violent crime, and convicted Johnson of possession of a weapon during the commission of a violent crime, the lesser-included offense of voluntary manslaughter, and two counts of the lesser-included offense of ABHAN. (R. pp. 740-741). The trial judge then deferred the sentencing proceedings to a later date. (R. pp. 742-743).

Thereafter, on October 21, 2009, a sentencing hearing was conducted. (R. p. 744; p. 747). At the outset of the hearing, counsel for Appellant moved for a new trial, arguing the trial judge's jury charge on inferring malice from the use of a deadly weapon was no longer an appropriate charge in light of the Supreme Court's decision in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), which he noted was decided subsequent to Appellant's trial. (R. pp. 748-749). Defense counsel asserted Appellant was entitled to the benefit of the decision in Belcher because his case was not considered final until he was sentenced. (R. p. 749). In response, the solicitor asserted the Supreme Court explicitly instructed in the Belcher opinion that the decision only applied to cases where the issue was preserved. (R. p. 750). The solicitor noted the issue was not preserved in

[10] After the jury subsequently began its deliberations, the jury submitted a request for explanations as to "the differences between murder and voluntary manslaughter" and "at what point does malice determine murder or voluntary manslaughter." (R. p. 734). In response to the questions, the trial judge re-instructed the jury on murder, malice, and voluntary manslaughter. (R. p. 737-738). Notably, just as with the initial jury charge, no objections were raised to the trial judge's supplemental instructions to the jury on inferring malice from the use of a deadly weapon. (R. pp. 738-739).

Appellant's case because Appellant raised no objection to the inference of malice charge during trial. (R. p. 750). In rebuttal, defense counsel contended any objection he potentially could have raised to the charge would likely have been found to be specious in light of the law in effect at the time of Appellant's trial, and he further asserted principles of judicial economy warranted the grant of a new trial because he maintained that relief would be granted through an ineffective assistance of counsel claim if not granted immediately. (R. pp. 750-751). After considering the issue, the trial judge denied Appellant's new trial motion, ruling he was not given an opportunity to grant a curative instruction or revise the jury charge due to the fact Appellant did not object to the charge during trial and further finding Appellant suffered no prejudice as a result of the charge in light of the jury's verdict and the evidence presented during trial. (R. pp. 751-752). The trial judge then sentenced Appellant to concurrent terms of imprisonment of twenty years for ABWIK and five years for possession of a weapon during the commission of a violent crime. (R. pp. 775-776).

ARGUMENT

Any issue with the trial judge's jury instructions was not preserved for appellate review because defense counsel did not contemporaneously object to the jury charge during trial and, instead, indicated he had no objection to the charge as given. Additionally, the trial judge properly instructed the jury on the current and correct law in effect at the time of Appellant's trial, and a subsequent change in the law after the jury issued its verdict was not applicable to Appellant's case because no objections to the jury charge were raised during trial. Furthermore, any error resulting from the trial judge instructing the jury it could infer malice from the use of deadly weapon was entirely harmless in light of the jury's verdict, which reflected the jury did not believe the use of a deadly weapon alone mandated a finding of malice or precluded a finding that the defendants' actions were excused, justified, or mitigated by the circumstances.

Appellant contends the trial judge erred in instructing the jury it could infer malice from the use of a deadly weapon. Appellant maintains the instruction was erroneous because evidence was presented that could have reduced, excused, mitigated, or justified his actions. Initially, any issue with the trial judge's jury charge was not preserved for appellate review because no objections to the jury charge were raised during trial. Instead, after the trial judge concluded his jury instructions, defense counsel specifically indicated he had no objection to the charge, which waived any issue with the propriety of the charge. Additionally, the trial judge committed no error in instructing the jury on inferring malice from the use of a deadly weapon because that instruction was a current and correct statement of the law at the time of Appellant's trial, and subsequent changes to the law were not applicable to Appellant's case because no contemporaneous objection was raised to the inference of malice jury instruction during trial. Furthermore, even if the issue had been preserved, any error resulting from the trial judge instructing the jury it could infer malice from the use of a deadly weapon was entirely harmless and had no impact on Appellant's case because the jury's verdict demonstrated it did not mistakenly believe the use of a deadly weapon alone required a finding of malice or

precluded a finding that the defendant's actions were excused, justified, or mitigated by the circumstances. Appellant's convictions should be affirmed.

A. Issue Preservation

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005). "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000).

Regarding the requirement that a timely objection be raised, a defendant must make a **contemporaneous** objection to a perceived error **during trial** in order to preserve the issue for further review. State v. Blalock, 357 S.C. 74, 79, 591 S.E.2d 632, 635 (Ct. App. 2003); see State v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) ("A contemporaneous objection is required to properly preserve an error for appellate review."). Thus, when a perceived error arises, the defendant must object at the first opportunity to do so or the issue is waived. State v. Sullivan, 310 S.C. 311, 314, 426 S.E.2d 766, 768 (1993); see State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) ("A defendant must object at his first opportunity to preserve an issue for appellate review."); see also State v. King, 349 S.C. 142, 157, n.1, 561 S.E.2d 640, 647 (Ct. App. 2002) ("[N]o objection was made contemporaneously with this testimony so as to preserve the issue for review. King's belated objection to subsequent testimony came

too late."). "It is axiomatic that an issue cannot be raised for the first time in a post-trial motion." Bank of New York v. Sumter County, 387 S.C. 147, 159, 691 S.E.2d 473, 479 (2010).

In addition to the general requirements of our issue preservation rules, the South Carolina Rules of Criminal Procedure also provide specific guidance in regards to raising and preserving an objection to a jury charge. See Rule 20, SCRCrimP (outlining the requirements for requesting jury instructions and objecting to a jury charge). Pursuant to our criminal procedure rules, a defendant must object to the jury charge as given or request an additional charge when afforded the opportunity to do so in order to properly preserve an objection to a charge. State v. Stone, 285 S.C. 386, 387, 330 S.E.2d 286, 287 (1985); see Rule 20(a), SCRCrimP ("All requests for legal instructions to the jury shall be submitted at the close of the evidence, or at such earlier time as the trial judge shall reasonably direct."); Rule 20(b), SCRCrimP ("Notwithstanding any request for legal instructions, the parties shall be given the opportunity to object to the giving or failure to give an instruction before the jury retires, but out of the hearing of the jury. Any objection shall state distinctly the matter objected to and the grounds for objection."). "The rule in this State is firmly established that failure to object to a charge, or failure to request an additional charge when the opportunity is afforded, constitutes a waiver of any right to complain on appeal of an alleged error in the charge." State v. Williams, 266 S.C. 325, 335, 223 S.E.2d 38, 43 (1976); see Rule 20(b), SCRCrimP ("Failure to object in accordance with this rule shall constitute a waiver of objection."). "[T]he right to have the law declared may be waived by the parties and, ordinarily, silence in the face of an omission from, or error in the charge amounts to waiver." Williams, 266 S.C. at 335, 223 S.E.2d at 43.

In the case sub judice, any issue with the propriety of the inference of malice jury instruction was not properly preserved for appellate review. Significantly, after the trial judge instructed the jury on the applicable law and explained that malice could potentially be inferred from the use of a deadly weapon, the trial judge inquired of counsel whether there were any objections to the jury charge as given, and counsel for Appellant responded: "None, Your Honor." Because defense counsel did not object to the inference of malice jury charge after it was given and, instead, indicated he had no objection to the charge, Appellant waived any issue he may have had with the giving of that instruction. See State v. Smith, 279 S.C. 440, 442, 308 S.E.2d 794, 794-795 (1983) ("Error is claimed by reason of the trial judge's charge to the jury concerning the implication of malice from the use of a deadly weapon. No objection to the jury instruction was raised at trial. The question therefore is not available for our review."); see also State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007) (finding any issue with the admission of a challenged piece of evidence was waived where Dicapua's counsel specifically stated he had no objection when the evidence was introduced during trial); see, e.g., State v. Burton, 326 S.C. 605, 613, 486 S.E.2d 762, 766 (Ct. App. 1997) ("This testimony was admitted without objection. Because Burton failed to object, he is barred from raising this issue on appeal.").

Thereafter, defense counsel first raised an objection to the inference of malice jury charge during a sentencing hearing conducted over a month **after** the jury returned its verdict and Appellant's trial had ended. Cf. Bowers v. Charleston & W. Carolina Ry. Co., 210 S.C. 367, 371, 42 S.E.2d 705, 706 (1947) (not reviewing an issue on appeal where the issue was not raised at the time the allegedly objectionable argument was made but, instead, was raised for the first time in a motion for new trial made **after** the jury

issued its verdict). However, because defense counsel's post-verdict and post-trial objection to the charge was not raised contemporaneously with the alleged error, the objection was untimely and, significantly, did not present the trial judge with any opportunity to effectively respond to the objection or correct the alleged deficiencies with his jury instructions since the trial had already concluded. See State v. Black, 319 S.C. 515, 521, 462 S.E.2d 311, 315 (Ct. App. 1995) ("It is a fundamental principle that a contemporaneous objection is required at trial to properly preserve an error for appellate review."); see also Williams, 266 S.C. at 335, 223 S.E.2d at 43 ("The rule in this State is firmly established that failure to object to a charge, or failure to request an additional charge when the opportunity is afforded, constitutes a waiver of any right to complain on appeal of an alleged error in the charge."). As a result, Appellant failed to properly preserve any issue with the jury charge for appellate review. See State v. James, 362 S.C. 557, 562, 608 S.E.2d 455, 457 (Ct. App. 2004) (holding an untimely argument did not preserve an issue for appellate review).

On appeal, Appellant appears to contend his post-trial motion for a new trial was sufficient to preserve the challenge to the inference of malice jury charge because that motion was based on the new rule announced in State v. Belcher and his case was not final due to the fact he had not yet been sentenced at the time the issue was raised. However, as the Supreme Court instructed in the Belcher opinion, the new rule regarding the inference of malice jury charge only applies to cases "which are pending on direct review or not yet final **where the issue is preserved**." State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009) (emphasis added). Because Appellant did not contemporaneously object to the giving of the inference of malice jury instruction, Appellant waived any issue he had with the instruction and failed to preserve it for

appellate review.[11] See State v. Rios, 388 S.C. 335, 342, 696 S.E.2d 608, 612 (Ct. App. 2010) ("Even after the trial court specifically asked if there were any objections to the charges given, Rios responded, 'None.' By failing to contemporaneously object to the jury charges, Rios has waived his right to allege error on appeal."). Accordingly, in light of the fact Appellant's challenge to the jury charge was not preserved, the decision in Belcher did not apply to Appellant's case, and his appellate challenge to the charge should not be considered or addressed on appeal. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("An issue that was not preserved for review should not be addressed by the Court of Appeals[.]"). For the foregoing reasons, Appellant's convictions should be affirmed.[12]

B. Propriety of the Trial Judge's Jury Instructions

In instructing the jury on the applicable law, "[t]he trial court is required to charge the correct law of South Carolina." State v. Rayfield, 357 S.C. 497, 505, 593 S.E.2d 486, 490 (Ct. App. 2004). A jury charge is appropriate if it is substantially correct and adequately covers the law applicable to the case. State v. Foust, 325 S.C. 12, 16, 479

[11] Notably, in State v. Miller, 397 S.C. 630, 636, 725 S.E.2d 724, 728 (Ct. App. 2012), this Court found the decision in Belcher to be applicable to Miller's case despite the fact it was decided after Miller's trial concluded because Miller's appeal was pending on direct review when the Belcher decision was issued. However, Miller's case is highly distinguishable from Appellant's case because, unlike Appellant, Miller specifically objected to the inference of malice jury instruction during his trial, which preserved the issue for appellate review in his case. See Miller, 397 S.C. at 636, 725 S.E.2d at 727 (noting Miller objected to the presentation of an inference of malice charge during trial).

[12] During the sentencing hearing, defense counsel argued Appellant should be granted a new trial in light of the Belcher decision despite the fact he did not object to the jury charge during trial because he believed Appellant would be entitled to a new trial through an ineffective assistance of counsel claim if he was not granted a new trial at that time. (R. pp. 750-751). Significantly though, the Supreme Court specifically stated in its Belcher opinion that the change in law announced in that case was not applicable to convictions challenged on post-conviction relief. See Belcher, 385 S.C. at 613, 685 S.E.2d at 810 ("Our ruling, however, will not apply to convictions challenged on post-conviction relief."). Furthermore, the Supreme Court has previously explained that counsel is not considered to be ineffective for failing to anticipate potential changes in the law. See State v. Harden, 260 S.C. 405, 408, 602 S.E.2d 48, 49 (2004) ("An attorney is not required to anticipate potential changes in the law which are not in existence at the time of the conviction."). Therefore, defense counsel's failure to foresee the change in the law regarding the inference of malice charge brought about by Belcher did not constitute ineffective assistance of counsel and would not entitle Appellant to any post-conviction relief.

S.E.2d 50, 52 (1996). In reviewing a trial judge's jury instructions, the appellate court must view the jury charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009). So long as the jury instructions presented are substantially correct and cover the applicable law, reversal is not warranted. See State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996) ("A jury charge which is substantially correct and covers the law does not require reversal.").

At the time of Appellant's trial, it was entirely proper for trial judges in South Carolina to instruct juries that malice could be inferred from the use of a deadly weapon. See Belcher, 385 S.C. at 600, 685 S.E.2d at 803 ("It has long been the practice for trial courts in South Carolina, **as sanctioned by this Court**, to charge juries in any murder prosecution that the jury may infer malice from the use of a deadly weapon." (emphasis added)); see also Sellers v. State, 362 S.C. 182, 188, 607 S.E.2d 82, 85 (2005) ("[M]alice may be implied if the defendant uses a deadly weapon."). However, subsequent to Appellant's trial but prior to the time Appellant was sentenced for his crimes, the Supreme Court revisited the issue of whether a trial judge should instruct the jury on inferring malice from the use of a deadly weapon through its decision in Belcher. During Belcher's trial, conflicting evidence was presented regarding the circumstances under which Belcher shot and killed the victim. Belcher, 385 S.C. at 601, 685 S.E.2d at 804. One view of the evidence suggested Belcher shot the victim without justification or excuse while another view of the evidence suggested Belcher shot the victim only after the victim confronted him with a gun without provocation. Id. The trial judge instructed the jury on inferring malice from the use of a deadly weapon over Belcher's objection, and Belcher was convicted of murder. Id. On appeal, Belcher contended the trial judge

erred in instructing the jury on inferring malice from the use of a deadly weapon in light of the fact the jury was also instructed on the law of self-defense. Id. The Supreme Court ultimately agreed, instructing:

> [W]here evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon. The permissive inference charge concerning the use of a deadly weapon remains a correct statement of the law where the only issue presented to the jury is whether the defendant has committed murder (or assault and battery with intent to kill).

Id. at 612, 685 S.E.2d at 810. Significantly though, the Supreme Court explained the new rule it announced through its decision would only be applicable to cases "pending on direct review or not yet final **where the issue [was] preserved.**" Id. at 597, 612, 685 S.E.2d at 810 (emphasis added).

In Appellant's case, the trial judge instructed the jury it was permitted to infer malice from the use of a deadly weapon, which was an accurate and proper statement of the law at that time. See State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998) ("Malice may be implied from the defendant's use of a deadly weapon."). Accordingly, the trial judge committed no error in instructing the jury in Appellant's case. See Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004) ("[T]he trial court is required to charge only the current and correct law of South Carolina."). However, pursuant to the decision Belcher, the new rule precluding trial judges from instructing juries on inferring malice from the use of a deadly weapon under certain circumstances would have rendered the trial judge's instruction erroneous and been applicable to Appellant's case **if** the issue had been preserved during trial. Critically though, the issue was not preserved due to the fact Appellant did **not** contemporaneously object to the

inference of malice charge during his trial. For that reason, the trial judge committed no error in instructing the jury without objection that it could infer malice from the use of a deadly weapon, which was a current and correct statement of the applicable law at the time of Appellant's trial. See Ezell, 321 S.C. at 425, 468 S.E.2d at 681 ("A jury charge which is substantially correct and covers the law does not require reversal."). Appellant's convictions should be affirmed.

C. Harmlessness of Any Error

After an error is discovered, the appellate court must then determine whether the error was harmless. See State v. Northcutt, 372 S.C. 207, 217, 641 S.E.2d 873, 878 (2007) ("Determining the trial judge committed error is the first step of our analysis. Next we must determine whether the error was harmless."). Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). The harmlessness of an error generally depends on the materiality of the error in relation to the case as a whole. State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003); see State v. Wiley, 387 S.C. 490, 497, 692 S.E.2d 560, 564 (Ct. App. 2010) ("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."). An error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008); see State v. Hariott, 210 S.C. 290, 298, 42 S.E.2d 285, 288 (1947) ("It is a rule of practically universal application in appellate procedure that an accused cannot avail himself of error as a ground for reversal where the error has not been prejudicial to him."). When a review of the entire record establishes an error is

harmless beyond a reasonable doubt, an appellate court should not reverse a conviction. State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003).

In the case at bar, even if erroneous, the trial judge's instruction to the jury that it could infer malice from the use of a deadly weapon was entirely harmless and had no impact on the ultimate outcome of Appellant's case based on the verdict returned by the jury. Despite the fact the jury was instructed it could infer malice from the use of a deadly weapon, its verdict reflected it was not misled to believe it could not find the existence of justification, excuse, or mitigation in a situation where a deadly weapon was used, which was the precise type of jury misunderstanding the Supreme Court's new rule in Belcher sought to avoid. See Belcher, 385 S.C. at 610, 685 S.E.2d at 808-809 ("[I]nferring malice form the use of a deadly weapon is indeed only a 'half-truth.' The absence of justification, excuse or mitigation cannot be inferred from the use of a deadly weapon standing alone. Other facts and evidence (or the absence of other facts and evidence) are required for the fulfillment of these component parts."). Critically, even though the evidence presented showed Isaac's death and A.J.'s injuries resulted from the use of a deadly weapon, the jury demonstrated it found Appellant's co-defendant's actions did not involve malice and were mitigated under the circumstances by convicting Johnson of the lesser-included offenses of voluntary manslaughter and ABHAN. Cf. Nation v. State, 252 Ga. App. 620, 623-624, 556 S.E.2d 196, 200-201 (Ga. Ct. App. 2001) (finding any error that resulted from the giving of an erroneous jury charge was harmless and did not contribute to the verdict where the jury's verdict demonstrated it was not impacted by the erroneous charge). Thus, the inference of malice jury instruction did not confuse the jury in Appellant's case or mislead them to believe the use of a deadly weapon alone mandated a finding of malice. See State v. Chambers, 194 S.C.

197, 203, 9 S.E.2d 549, 552 (1940) (finding any error resulting from the trial judge's jury instructions on malice was harmless where the jury convicted the defendants of lesser-included offenses of the offense of ABWIK and, thus, did not find the defendants acted with malice). As a result, any error that could have resulted from the giving of that instruction was entirely harmless and did not impact the verdict in Appellant's case. See Fletcher, 379 S.C. at 25, 664 S.E.2d at 484 ("Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained."). Appellant's convictions should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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February 7, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Honorable Robin B. Stilwell, Circuit Court Judge
Appellate Case No. 2009-147266

THE STATE,

Respondent,

vs.

KERWIN S. PARKER,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served. This 7th day of February, 2013.

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