

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KERWIN PARKER,

APPELLANT

Appellate Case No. 2009-147266

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The trial judge erred in instructing the jury that the use of a deadly weapon implied malice in connection with the assault and battery with intent to kill charge given at trial because this instruction was confusing and prejudicial in light of the submission of evidence that clearly reduced, mitigated, excused or justified appellant's actions in the case

STATEMENT OF THE CASE

Appellant Kerwin Parker was convicted per jury trial of assault and battery with intent to kill and possession of a firearm during the commission of a violent crime per a jury trial held during the September 2009 term of the Lexington County General Sessions Court before Judge Robin B. Stilwell. Appellant received an aggregate twenty-year prison term at his sentencing hearing held during the October 2009 term of the Lexington County General Sessions Court. Appellant was represented by Jack Duncan at his trial and sentencing proceedings.

Appellant appealed. This brief follows.

ARGUMENT

The trial judge erred in instructing the jury that the use of a deadly weapon implied malice in connection with the assault and battery with intent to kill charge given at trial because this instruction was confusing and prejudicial in light of the submission of evidence that clearly reduced, mitigated, excused or justified appellant's actions in the case.

Appellant and codefendant Curtis Johnson were tried together for charges emanating from a shoot-out that occurred on November 20, 2006. Based on the evidence presented at trial, it appeared as though appellant and his brother Curtis Johnson went to Isaac Wilson's apartment on that night to discuss and/or settle a few matters: one of which was Isaac Wilson's and Walter Gadson's alleged attack on Curtis Johnson, and another was Curtis Johnson's ex-girlfriend's involvement with Isaac Wilson. Sentencing Transcript p. 23, lines 5-10. A melee between these men ensued after appellant and Curtis Johnson arrived at Isaac Wilson's residence. The men who participated in the incident were Isaac Wilson, Walter Gadson, AJ Wilson, appellant, and Johnson. After the gunfire ceased, Isaac Wilson was fatally shot, Walter Gadson was injured by a vehicle, and AJ Wilson was shot, but not killed.

At trial, Walter Gadson testified that while he, Isaac Wilson, and Johnson were all stopped at a traffic light at Monticello Road on November 20, 2006, a verbal and physical altercation erupted where he (Gadson) and Isaac Wilson, both of whom were roommates, confronted Curtis Johnson because Johnson had been threatening Isaac Wilson since he (Isaac Wilson) had become involved with his (Johnson's) ex-girlfriend Rebecca Fleming. Gadson stated that he and Isaac Wilson struck Johnson and Johnson yelled "y'all gonna get y'all's." Then, later on that evening when Gadson and Isaac Wilson arrived at their apartment, Johnson and his brother Kerwin Parker (appellant) appeared in an SUV at their place. Gadson stated that he and Isaac Wilson went to the

patio to investigate. Following the shoot-out that occurred thereafter, Isaac Wilson was shot dead, and AJ Wilson, who was also present at the scene, was shot, but lived, and Gadson sustained injuries after having been struck by the SUV. Gadson stated that Isaac Wilson was in possession of a shotgun, but that he (Gadson) took the gun from Isaac Wilson. Gadson explained that around the same time that he was struck by the vehicle, he saw Johnson (who drove the SUV) exit the vehicle and noted that Johnson was armed with a pistol. Immediately thereafter, Gadson stated that he heard gunshots being fired. R. 86, l. 4-p. 117, l. 22.

AJ Wilson testified that he had been living with Isaac Wilson (who was his cousin) and was present on the scene when the events in question occurred. AJ Wilson added that he walked outside onto the patio with Isaac Wilson and Gadson when Johnson and appellant arrived. AJ Wilson stated that he did not see appellant with a gun, but nonetheless yelled that appellant had a gun and then ran back inside the apartment. AJ Wilson added that when he heard gunshots being fired, he came back outside the apartment, and that it was at that point when appellant pointed a gun at him and shot him. AJ Wilson stated that he also saw Johnson standing over Isaac Wilson in the kitchen. R. 146, l. 1-p. 163, l. 24.

Amy Flemming, who lived with Gadson and Isaac Wilson, testified that she heard gunshots on the night in question and stated that she heard Isaac Wilson declare that he had been shot after Johnson and appellant made their way to the apartment. Also, Flemming added that she heard Johnson accuse Isaac Wilson of sleeping with his (Johnson's) girlfriend Rebecca Flemming. Amy Flemming stated that she saw both appellant and Isaac Wilson with guns. R. 30, l. 9-p. 40, l. 4.

Rebecca Flemming testified that in November, 2006, she and Johnson were no longer together and that she had started spending time with Isaac Wilson. Rebecca was present at Isaac Wilson's apartment when the shootings in question took place. Rebecca stated that AJ Wilson,

Gadson, and Isaac Wilson, who was armed with a shotgun, all went outside the apartment when Johnson and appellant arrived there. Rebecca Flemming added that she saw someone come up to the patio and shoot, and that she saw someone flying in the air after the SUV drove up, and that she saw Isaac get shot and fall down in the kitchen while Johnson was in the kitchen. R. 53, l. 16-p. 67, l. 5.

Appellant did not testify in his defense at trial, but co-defendant Curtis Johnson testified at trial. Johnson explained that he was assaulted by Gadson and Isaac Wilson on Moticello Road on the night in question and that shortly thereafter, he and appellant went to Isaac Wilson's residence to try and talk peacefully. However, when he and appellant arrived, they saw three armed men appear outside the apartment, and they heard Isaac Wilson threatening to shoot them. Johnson stated that appellant exited the vehicle first, and that he exited after he drove the SUV up to the point where he saw guns pointed at appellant. R. 539, l. 2-p. 579, l. 23. See Reconstruction Hearing R. 801, lines 1-25. Johnson stated that minutes later, he saw AJ Wilson holding appellant down while Isaac Wilson was pointing a gun at appellant. Johnson stated that he fired his gun and that he then shot AJ Wilson five times and then shot Isaac Wilson two times. Reconstruction Hearing R. 801, l. 1-p. 819, l. 17.

At the close of the case, both counsels for appellant and co-defendant Johnson requested charges on self defense and aggravated assault and battery. R. 632, l. 21-p. 643, l. 7. The trial judge granted counsels' requests to charge the jury on the law of self defense, mutual combat, the defense of others, and aggravated assault and battery. Appellant was found not guilty of murder, but convicted of the assault and battery with intent to kill AJ Wilson. The trial judge's assault and battery with intent to kill charge follows:

In order to prove assault and battery with intent to kill, the State must prove, beyond a reasonable doubt, that the defendant committed an unlawful act of a violent nature to the person of another with malice aforethought. The difference between assault and battery with intent to kill and assault and battery of a high and aggravated nature is the presence or absence of malice. Malice, as I have previously defined to you, is ill will or hostility towards another person and the intentional doing of a wrongful act without just cause or excuse with the intent to inflict an injury or under circumstances that the law will infer an evil intent.

R. 719, l. 21-p. 721, l. 15.

Malice is hatred, ill will, or hostility towards another person. [Malice] is the intentional doing of a wrongful act without just cause or excuse and with the intent to inflict an injury or under certain circumstances that the law will implicate an evil intent. Malice aforethought may be expressed or inferred. Express malice is shown when a person speaks words which express hate or ill will. Malice 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.

R. 715, l. 2 – p. 716, l. 5.

At sentencing, appellant's counsel moved for a new trial due to error based on the trial judge's jury instruction that charged them that they "may infer malice from the use of a deadly weapon in a prosecution for murder and/or assault and battery with intent to kill" per the new rule in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). Sentencing Hearing Transcript p. 747, l. 19-p. 749, l. 20. The motion was denied. Sentencing Hearing Transcript p.751, l. 5 – p.752, l. 4.

A.) **NEW RULE**

On October 12, 2009, the Belcher Court handed down a clear break from an historical instruction that the use of a deadly weapon implied malice and held that a jury charge that instructs the jury that malice maybe inferred from the use of a deadly weapon is no longer good law where evidence is presented that would reduce, mitigate, excuse or justify the homicide. The Belcher Court held further that because the crime of assault and battery requires malice, this new rule

would apply to that offense as well. The Court looked to the word “intent” as part of its analysis as follows:

The use of the term “intentional” is instructive. Say, for example, a homicide occurs by the use of a deadly weapon under circumstances warranting a self-defense instruction. The killing would be intentional, yet under our currently sanctioned charge, the jury would be permitted to find malice merely because “if one intentionally kills another with a deadly weapon, the implication of malice may arise.” *Elmore*, 279 S.C. at 421, 308 S.E.2d at 784. That highlights the “half-truth” nature of the charge.

One appellate court has described this jury charge as “half-truth.” *Glenn v. State*, 68 Md. App. 379, 511 A.2d 1110, 1126 (1986). In discussing its meaning behind this observation, *Glenn* notes that malice includes the absence of justification, excuse and mitigation. *Glenn*, 511 A.2d at 1122. When malice is viewed in light of these component parts, it becomes clear that inferring malice from 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.

See also *State v. Miller*, 725 S.E.2d 724 (2012), where the court held that since the jury was charged with voluntarily manslaughter, then there was evidence to reduce or mitigate murder (gun present), which in turn rendered the malice inference instruction improper.

Under *Belcher*, the test is whether there is evidence presented that would reduce, justify or mitigate the killing. In the case at bar, there were many pieces of evidence presented that would have reduced, justified or mitigated the actions assigned to appellant. Clearly, guns were in the hands of Isaac Wilson, AJ Wilson, Gadson and Johnson. There was no definite conclusion drawn as to whether appellant was in possession of a gun on the night in question. For example, Gadson testified that appellant was in possession of a rod/stick, but could not admit that he saw a gun in his (appellant’s) possession. R. 106, l. 7-20; R. 110, lines 2-9. AJ Wilson testified that he “imagined” that appellant had a gun, but that he did not see a gun. R. 156, lines 5-9; Then, AJ

testified that appellant shot him. R. 160, lines 5-13. However, since AJ testified that appellant shot him, it is possible that appellant reacted in self defense based on AJ Wilson's aggression as witnessed by Johnson. Johnson stated that AJ Wilson and Isaac Wilson held appellant at gun point. Reconstruction Hearing R. 808, l. 6 – p. 809, l. 11. Moreover, there was evidence in the record indicating that AJ Wilson's identification of the shooter was incorrect because Johnson testified that he shot AJ Wilson in defense of his brother, i.e. appellant. R. 809, l. 6 – p. 811, l.3. Note that Johnson's counsel admitted to the jury during the opening arguments that Johnson shot AJ Wilson. R. 22, lines 17-24. There was also evidence in the case that appellant may have reacted in defense of Johnson because when he exited the truck first, he saw all three men pointing guns at them. Resentencing Transcript 798, l. 25 – p. 799, l. 16. Furthermore, there was evidence presented suggesting that mutual combat was in progress on that night in question. Thus, under any scenario, evidence was presented that would have reduced, mitigated, excused or justified the assault and battery to kill charge, but the jury instruction regarding how to process the use of a deadly weapon prejudiced appellant if the jury inferred malice due to the use of a deadly weapon as this negated evidence of justification, excuse, or mitigation on the offense of assault and battery with intent to kill charged against appellant. And finally, it is completely conceivable that the jury might have interpreted the scenario to find that appellant was not guilty or only guilty of aggravated assault, but the inference of malice from the use of a deadly weapon charge (in the event they found that appellant possessed a weapon) would have operated to confuse the jury and possibly precluded an acquittal of a jury verdict on aggravated assault.

B.) HARMLESS ERROR ANALYSIS OF NEW RULE

Error is harmless if could not have affected the result of the trial. State v. Mitchell, 378 SC 305, 662 S.E.2d 493 (2008). The Belcher Court held that since evidence of self-defense was

presented to the jury in the case, then the inferred malice instruction connected to the deadly weapon charge could not be considered harmless. See Miller, supra, where the court reversed due to the erroneous malice inferred instruction and found that the error was not harmless because there was evidence of involuntary manslaughter, which was charged, that could have reduced or mitigated the murder, and because there was no overwhelming evidence of malice in the case. Here, the inferred malice instruction connected to the deadly weapon charge was not harmless error because the same prejudiced appellant to the extent that it conflicted with self defense and the defense of others evidence that would have reduced, mitigated, excused or justified the assault and battery with intent to kill charge. This was a convoluted set of events that did not present clear cut or overwhelming evidence of malice apart from the use of a deadly weapon. We cannot conclude that the malice inferred instruction did not affect the jury verdict in appellant's case.

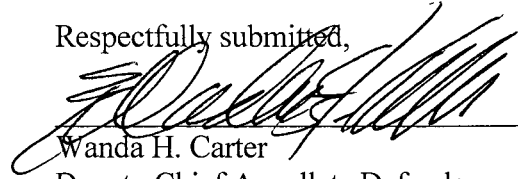
C.) RETROACTIVE APPLICATION OF NEW RULE

When counsel moved for a new trial prior to the pronouncement of sentencing due to error per the new rule announced in Belcher, counsel added that the request was timely entered "as this case is not final." Sentencing Transcript p. 749, lines 18-20. Appellant was convicted on September 18, 2009, and sentenced on October 21, 2009. Belcher was decided on October 12, 2009. The Belcher Court held that "because our decision represents a clear break from our modern precedent, [the] ruling is effective... for all cases which are pending on direct review or not yet final where the issue is preserved." See Miller, which was decided on February 16, 2012, where the court held that Belcher applied as it (Miller case) was pending on direct review when Belcher was decided on October 12, 2009.

CONCLUSION

Due to the circuit court judge's error in denying appellant's Belcher claim, this case should be reversed and remanded to the trial court for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', is written over a horizontal line.

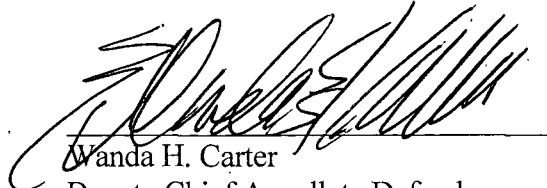
Wanda H. Carter
Deputy Chief Appellate Defender
Attorney for Appellant

This 26th day of February, 2013.

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 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."

February 26th, 2013



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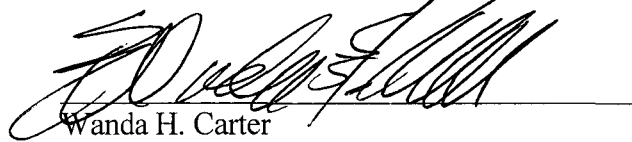
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CERTIFICATE OF SERVICE

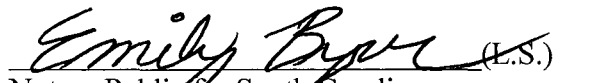
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mark R. Farthing, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 26th day of February, 2013.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 26th day of February, 2013.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: November 16, 2022.