

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Jasper County

Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRETT HOWARD,

APPELLANT

APPELLATE CASE NO. 2012-212059

ANDERS BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

RECEIVED

APR 16 2013

SC COURT OF APPEALS

TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES	2
STATEMENT OF ISSUE ON APPEAL	3
STATEMENT OF THE CASE	4
ARGUMENT	5
CONCLUSION	7
PETITION TO BE RELIEVED AS COUNSEL	8

TABLE OF AUTHORITIES

Cases

<u>State v. Belcher</u> , 385 S.C. 597, 685 S.E.2d 802 (2009)	5
---	---

STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in charging the jury that inferred malice may also arise when the deed is done with a deadly weapon when in, closing argument, Appellant argued that the shooting was an accident?

STATEMENT OF THE CASE

In January of 2010, the Jasper County Grand Jury indicted Howard for murder and possession of a weapon during the commission of a violent crime, indictments #2010-GS-27-00014, 00015. On May 14, 2012, Howard proceeded to jury trial before the Honorable Perry M. Buckner. Attorneys Robert Hughes and Stephen Plexico represented Howard at trial. Attorneys Sean Thornton and Tameaka Leggette prosecuted the case on behalf of the State. The jury returned verdicts of guilty and Judge Buckner sentenced Howard to 40 years for murder and 5 years consecutive for the weapons charge. A timely notice of intent to appeal was served on May 18, 2012. This appeal follows.

ARGUMENT

The trial judge erred in charging the jury that inferred malice may also arise when the deed is done with a deadly weapon when, in closing argument, Appellant argued that the shooting was an accident.

The jury found Howard guilty of fatally shooting Woodrow “Woody” Bradley inside Missy’s Lounge in Ridgeland. In closing argument counsel for Howard argued, “There is a big difference between murder and killing. We do not have a murder; we have a killing. It is a death not brought about by malice, not brought about by evil intent. It is brought about by accident.” (R. p. 377, lines 3-6). In the charge to the jury the trial judge said, “Malice may be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon. A deadly weapon is any – the article, instrument or substance which is likely to cause death or great bodily harm.” (R. p. 391, lines 7-12). The trial judge did not charge the jury on the law of accident. The judge erred in charging the jury that malice could be inferred from the use of a deadly weapon when Appellant argued the shooting was an accident.

In State v. Belcher, 385 S.C. 597, 610, 685 S.E.2d 802, 809 (2009), the South Carolina Supreme Court wrote, “Under our policy-making role in the common law, we hold that the ‘use of a deadly weapon’ implied malice instruction has no place in a murder (or assault and battery with intent to kill) prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing (or the alleged assault and battery with intent to kill).” When asked if there were any exceptions to the charge, counsel for Howard stated, “The other thing, about your charging, though, I – forgive me if I am wrong, I had thought I knew that the use of a weapon to indicate malice had been removed.” (R. p. 400, lines 22-24). The judge responded, “I don’t think I said it indicated use. I said it was an example of

inferred from conduct showing a total disregard for human life.” (R. p. 400, line 25 – p. 401, lines 1-2). Defense counsel responded, “Okay. I might have misheard that, your Honor. If I did, I apologize. That was my only thing as far as the charge, your Honor.” (R. p. 401, lines 3-5).

The judge then elaborated and said, “What I said was, malice may be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon. A deadly weapon is any article, instrument, or substance which is likely to cause death or great bodily harm. I think that’s the correct charge.” (R. p. 401, lines 6-12). Defense counsel agreed¹. (R. p. 401, lines 13-20).

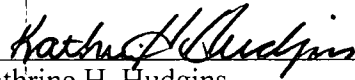
Evidence in the record shows that, after calling Brantley a racist, Howard pulled the gun and walked toward Brantley pulling the trigger but the gun did not fire. (R. p. 240, line 5 – p. 241, lines 1-9; p. 252, line 16 – p. 253, lines 1-16). The gun did not fire until Howard was very close to Brantley. (R. p. 241, lines 1-9). In closing, defense counsel argued that the inference to be drawn from the evidence was that Howard was joking around with what he thought was an unloaded gun and, by accident and unknown to Howard, a bullet remained in the gun. (R. pp. 375-377). Based on the facts of this case, the judge erred in charging the jury that malice can be inferred from the use of a deadly weapon.

¹ As there was no argument made that, based on Belcher, the inference of malice charge was error because counsel argued accident in closing, the issue may need to be raised in post conviction relief.

CONCLUSION

Based on the above argument, Howard's sentence and conviction should be reversed and the case remanded for a new trial.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Kathrine H. Hudgins", is written over a horizontal line.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of April, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Jasper County

Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRETT HOWARD,

APPELLANT

APPELLATE CASE NO. 2012-212059

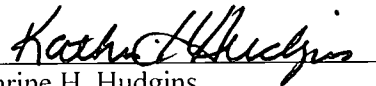
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Brett Howard states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Perry M. Buckner, which was held on, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Brett Howard.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of April, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Jasper County

Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRETT HOWARD,

APPELLANT

APPELLATE CASE NO. 2012-212059

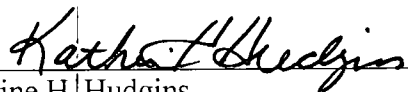
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictments and sentencing sheets;
- (2) Trial transcript.

I certify that this designation contains no matter which is irrelevant to this appeal.

April 16th, 2013


Kathrine H. Hudgins
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Jasper County

Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

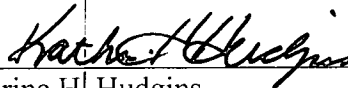
BRETT HOWARD,

APPELLANT

APPELLATE CASE NO. 2012-212059

CERTIFICATE OF SERVICE

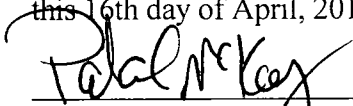
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and also served up Mr. Brett Howard # 350845 Perry Correctional Institution 430 Oaklawn Road Pelzer, SC 29669 this 16th day of April, 2013.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 16th day of April, 2013.



(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.