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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal From Oconee County
Hon. J. Cordell Maddox, Jr., Circuit Court Judge
Appellate Case No. 2017-001990

The State,

Respondent,

v.

Shane Adam Burdette,

Petitioner.

PETITION FOR REHEARING

On July 31, 2019, this Court reversed and remanded Petitioner's conviction finding the trial court's jury instructions prejudiced Petitioner and were not harmless beyond a reasonable doubt. This Court misapprehended or overlooked its own relevant case law regarding the elements of the crime of voluntary manslaughter as well as the presumption a jury follows the law as given by the trial court. Additionally, this Court conflated a sentencing statute with an element of the crime, thereby either changing the definition of voluntary manslaughter or adding an element the State has to establish. Finally, the Court overlooked or misapprehended the logical result reached by the jury, and instead engaged in utter speculation regarding possible confusion where no such evidence existed. Accordingly, pursuant to Rule 221(a), SCACR, the Court should grant the petition for rehearing; find that while the trial court erred in giving a jury instruction that the jury could infer malice from the use of a deadly weapon, the charge was entirely harmless beyond a reasonable doubt because the jury acquitted of murder and clearly

found the requisite elements to support a conviction for voluntary manslaughter which would preclude a finding of involuntary manslaughter; and affirm Petitioner's conviction and sentence for voluntary manslaughter.

It is significant that, even after objecting to the giving of the charge that malice may be implied through the use of a deadly weapon based solely on the existence of evidence presented regarding accident, counsel for Petitioner **never** objected to the overall charge given by the trial court. (R.408; 464). He **never** asked the trial court to alter his charge on voluntary manslaughter to make it clear that malice was not required, nor did he ask the court to change any aspect of his charge. Trial counsel never asserted the charge as given was confusing because of the manner in which voluntary manslaughter was charged or that a verdict rendered after the charge would be the result of the jury's confusion regarding the need to find malice. His sole objection related to the interplay between the inference and the charge of accident. (R.408-409). As a result, the trial court was never asked to make the change this Court is demanding and has based a reversal of this conviction upon. This Court should not reverse a trial judge, reverse a conviction, and require a new trial on the basis of what it perceives to be a better charge when there was never an objection to the charge given regarding voluntary manslaughter. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (recognizing the imposition of issue preservation requirements is "meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments" (emphasis added)); see also State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005) ("The rule is well established that if asserted errors are not presented to the lower Court, the question cannot be raised for the first time on appeal." (emphasis added)).

Had the trial court been told the charge was confusing, or had trial counsel requested the trial court charge the jury that voluntary manslaughter is a killing without malice, the court may have altered its charge. It was never given the opportunity. Critically, the reason our courts have consistently imposed preservation requirements is because it is manifestly unjust to fault a trial judge for failing to act on an argument that was simply never advanced during trial. See State v. Stone, 376 S.C. 32, 36, 655 S.E.2d 487, 488-489 (2007) ("Because Appellant did not argue these grounds in support of his objection at trial, Appellant's argument is not preserved for review. . . . If a pitch was never thrown at trial, we cannot review whether the trial court made the proper call." (emphasis added)); see also I'On, 338 S.C. at 421-422, 526 S.E.2d at 724 ("An appellate court may not, of course, reverse for any reason appearing in the record. The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments."); Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 372-373, 628 S.E.2d 902, 919 (Ct. App. 2006) ("The rationale for the [error preservation] rule is that until the trial court considers the matter and makes a ruling, an appellate court is unable to find error. Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." (citation omitted)). Reversal of the trial judge's decision and reversal of this conviction on the basis of the alleged confusion and failure to include "without malice" in the jury instruction is improper because it was never a basis set forth at trial.

Even considering the merits of the argument raised for the first time on appeal, the trial court's jury instructions on murder, voluntary manslaughter, and involuntary manslaughter were proper and not confusing. As a result, the error in giving the charge that malice may be implied through the use of a deadly weapon was entirely harmless in light of the clear and logical verdict rendered by the jury finding the State proved the elements of voluntary manslaughter beyond a reasonable doubt which does not require a finding of malice and which precluded a finding by the jury of involuntary manslaughter. 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 instructions on malice was harmless when the jury convicted the defendants of lesser-included offenses of which malice was not an element).

The trial court's jury instructions were legally correct and properly presented the jury with all the required elements of murder, voluntary manslaughter, and involuntary manslaughter. While this Court premises its holding on the failure of the trial court to charge the jury that voluntary manslaughter is an unlawful killing without malice, the charge was not necessary and most importantly was not asked for by Petitioner. As this Court noted in its opinion, it was "particularly important for the trial court to clearly explain the elements of all three offenses in this case." Based on numerous opinions from this Court, that is precisely what the trial court did in this case.

The trial court properly explained the required elements of murder, voluntary manslaughter, and involuntary manslaughter as this Court has found them. The trial court began by charging the indicted offense of murder. He explained the elements, defined malice aforethought, and then unfortunately instructed malice could be implied from the use of a deadly

weapon. This Court finds no fault with the general instruction on murder, only the error acknowledge by all in the giving of the implied malice from a deadly weapon charge.

The trial judge then explained voluntary manslaughter and defined it and its elements the same way this Court has defined voluntary manslaughter innumerable times. He explained: "To prove voluntary manslaughter, the State must prove beyond a reasonable doubt that the defendant took the life of another in the sudden heat of passion based on sufficient legal provocation." This Court has used this language, or incredibly similar language, without a reference to malice to define voluntary manslaughter in many cases over many years. See e.g., Cook v. State, 415 S.C. 551, 556, 784 S.E.2d 665, 668 (2015) ("Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation.") (quoting State v. Walker, 324 S.C. 257, 260, 478 S.E.2d 280, 281 (1996)); State v. Niles, 412 S.C. 515, 522, 772 S.E.2d 877, 880 (2015) ("Voluntary manslaughter is the intentional and unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation.") (quoting State v. Smith, 391 S.C. 408, 412–13, 706 S.E.2d 12, 14 (2011)); State v. Sams, 410 S.C. 303, 309, 764 S.E.2d 511, 514 (2014) ("Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation.") (quoting State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000)); State v. Pittman, 373 S.C. 527, 572, 647 S.E.2d 144, 167 (2007) ("Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation."); State v. Johnson, 333 S.C. 62, 508 S.E.2d 29 (1998) ("Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation."); State v. Ivey, 325 S.C. 137, 142, 481 S.E.2d 125, 127 (1997) ("Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon a sufficient legal provocation.") (citing State v. Kornahrens, 290 S.C. 281,

350 S.E.2d 180 (1986)); State v. Gilliam, 296 S.C. 395, 397, 373 S.E.2d 596, 597 (1988) ("Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation."); State v. Robinson, 276 S.C. 435, 436, 279 S.E.2d 372, 373 (1981) ("We have defined voluntary manslaughter as the unlawful killing of a human being in sudden heat of passion upon a sufficient legal provocation.") (citing State v. Norris, 253 S.C. 31, 168 S.E.2d 564 (1969)); State v. Harvey, 220 S.C. 506, 515, 68 S.E.2d 409, 413 (1951) ("Voluntary manslaughter is usually defined as the unlawful killing of a human being in sudden heat of passion upon a sufficient legal provocation."); State v. Foster, 66 S.C. 469, 45 S.E. 1, 3-4 (1903) (finding the approved definition of manslaughter under the common law was "Manslaughter is taking the life of a fellow being in sudden heat and passion, superinduced upon a sufficient legal provocation,").[1] In the vast majority of this Court's opinions defining voluntary manslaughter, just as in the charges in this case, the fact it is an unlawful killing of another without malice is not mentioned. The trial court had no reason to add to the charge all things not included as elements.

After defining the elements of voluntary manslaughter for the jury, the trial court then defined involuntary manslaughter in the same way this Court has in many cases. See State v. Sams, 410 S.C. 303, 309, 764 S.E.2d 511, 514 (2014) ("Involuntary manslaughter is defined as the unintentional killing of another without malice while engaged in either (1) the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm, or (2) the doing of a lawful act with a reckless disregard for the safety of others.").

[1] Significantly, the charge given by the trial judge instructing on voluntary manslaughter is the exact charge provided to circuit court judges as found in the Jury Instructions in Criminal Cases of the Criminal Trial Benchbook, pages 219-221 published by the judicial department.

The statutory language of section 16-3-50 of the South Carolina Code is not required to be charged as if it were an element of voluntary manslaughter.[2] First, this statute is the penalty statute for voluntary manslaughter and is not a statute designed to explain the substantive elements of the crime of voluntary manslaughter. Further, the fact the killing happened in the heat of passion upon sufficient legal provocation satisfies any requirement imposed by section 16-3-50 that the killing be without malice. The lack of malice is not an element to be found by the jury, but instead is merely a means of describing the legal distinction between murder and manslaughter. The jury understood the clear difference between murder and voluntary manslaughter based on the charge given. This Court has never required the charging of the language in section 16-3-50. Further, it has never required a court to explain to a jury the elements of one charge not included in that charge, even if a lesser included offense. Adding these extra requirements only seeks to cause more confusion and not less for a jury.

This Court has long found that the charge given by the trial court in this case was sufficient to properly instruct the jury on voluntary manslaughter. In Foster, the Court was asked to determine whether the failure to charge the "without malice" language of the then existing statute was error. This Court concluded the charge which centered solely on the sudden heat of passion upon sufficient legal provocation was sufficient. In explaining why, this Court stated: "Under the theory of the law, 'sudden heat and passion upon sufficient legal provocation' rebuts the implication of malice arising from an intentional homicide, and mitigates the crime from murder to manslaughter, which latter is distinguished from murder by the absence of malice." Id. at ___, 45 S.E. at 4. In other words, this Court found that by explaining the killing occurred in

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[2] Additionally, reliance on section 16-3-50 by this Court is improper because it was never raised to the trial court, the Court of Appeals, or even to this Court in Petitioner's Brief of Petitioner. The statute has not been cited and should not have been relied on by the Court as a basis for reversal in this case when it had not previously been considered.

the heat of passion with sufficient legal provocation it was without malice and nothing more needed to be told to the jury. The same holds true in this case.

Even if the charge as given could have confused the jury because of the inclusion of the implied malice charge, the trial court's instructions eliminated any confusion. After giving the instruction on murder, including the implied malice from a deadly weapon charge, the trial court told the jury:

> I just explained murder to you. I charge you that if you find that the State has failed to prove beyond a reasonable doubt that the defendant committed murder, you may consider whether the State has proven beyond a reasonable doubt that the defendant committed voluntary manslaughter, which is included within the offense of murder as a lesser charge.

(R.455). The trial court indicated a clear separation from the murder charge and the jury's need to determine whether the State proved murder beyond a reasonable doubt, and the charge applicable to voluntary manslaughter. The court's statement delineating murder from voluntary manslaughter made it abundantly clear to the jury that the implied malice charge was only applicable to their determination of murder. Any confusion was properly alleviated by the trial court's charge. As a result, the error in including the implied malice charge as it related to murder was entirely harmless because the jury convicted Petitioner of voluntary manslaughter in which they were told the implied malice did not apply.

"A jury is presumed to follow instructions. Therefore, without some showing the jurors disregarded these instructions, this Court declines to presume prejudice." Foye v. State, 335 S.C. 586, 590 n.1, 518 S.E.2d 265, 267 n.1 (1999) (internal citation omitted); see also, CSX Transp., Inc. v. Hensley, 556 U.S. 838, 841 (2009) ("The jury system is premised on the idea that rationality and careful regard for the court's instructions will confine and exclude jurors' raw emotions. Jurors routinely serve as impartial factfinders in cases that involve sensitive, even life-

and-death matters. In those cases, as in all cases, juries are presumed to follow the court's instructions."); Weeks v. Angelone, 528 U.S. 225, 234 (2000) ("A jury is presumed to follow its instructions."). This Court seems to dispense with "the almost invariable assumption of the law that jurors follow their instructions which we have applied in many varying contexts." Richardson v. Marsh, 481 U.S. 200, 206 (1987) (citing Francis v. Franklin, 471 U.S. 307, 325, n. 9 (1985)). Instead, it improperly assumes the jury did not follow the trial court's instruction to consider the implied malice charge only as it related to murder and then, if it found the State failed to prove murder beyond a reasonable doubt, properly consider the historical common law elements of voluntary manslaughter—the defendant took the life of another in the sudden heat of passion based on sufficient legal provocation.

This Court's determination of prejudice also seems to overlook the clear logic resulting from the jury's verdict even if the Court's fear that the jurors found malice based on the implied malice charge is accurate. The trial court clearly charged the jury on the elements of voluntary manslaughter. As just discussed, the jury is presumed to follow the instructions provided by the court unless there is an "overwhelming probability" that the jury will be unable to follow the court's instructions. Greer v. Miller, 483 U.S. 756, 767 n.8 (1987). There is no evidence the jury in the instant case was confused by the jury charge. "To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions." Opper v. United States, 348 U.S. 84, 95 (1954). The trial court made it clear in order to find Petitioner guilty of voluntary manslaughter, the jury had to find the State proved beyond a reasonable doubt the elements of voluntary manslaughter including that the defendant took a life in the heat of passion upon sufficient legal provocation. The court

defined these terms and never indicated a finding of malice was required. Petitioner was not prejudiced by the giving of the implied malice from a deadly weapon charge because the jury found the required elements of voluntary manslaughter which do not require a finding of malice.

The jury's request to have "better understanding" of the various charges does not indicate confusion, but instead, a desire to ensure proper deliberation occurs. Had this been evidence of confusion, a recharge of what they had already heard would not have been sufficient, and they would have requested additional instruction. See Armstrong v. Toler, 11 Wheat. 258, 279, 6 L.Ed. 468 (1826) (opinion of Marshall, C. J.) ("Had the jury desired further information, they might, and probably would, have signified their desire to the court. The utmost willingness was manifested to gratify them, and it may fairly be presumed that they had nothing further to ask"). "[A] jury is presumed to understand a judge's answer to its question . . . . To presume otherwise would require reversal every time a jury inquires about a matter of constitutional significance, regardless of the judge's answer." Weeks, 528 U.S. at 234.

Even accepting this Court's theory of how the jury applied the instructions by the trial court would merely result in the jury finding malice based on the use of a deadly weapon **in addition to** finding the defendant took the life of another in the sudden heat of passion based on sufficient legal provocation in order to convict of voluntary manslaughter. As a result, the only conclusion based on this Court's interpretation of the charge is that the jury found **more** elements than it needed to in order to convict for voluntary manslaughter.[3] Any conclusion that the jury reached a compromise verdict, or anything other than the jury concluding the State proved the required elements of voluntary manslaughter, would be rank speculation. "It would be absurd to upset a verdict upon a speculation that the jury did not do their duty and follow the

[3] To the extent the jury found malice in addition to the required elements of voluntary manslaughter, it is akin to an inconsistent verdict which is not prohibited in South Carolina. See State v. Alexander, 303 S.C. 377, 383, 401 S.E.2d 146, 150 (1991) (abolishing the rule prohibiting inconsistent verdicts in this state).

instructions of the court." Graham v. United States, 231 U.S. 474, 481 (1913). Petitioner was not prejudiced by a jury finding all the required elements of voluntary manslaughter and an additional finding of malice based solely on the implied malice charge. He was still properly convicted of voluntary manslaughter.

In the instant case, the giving of the incorrect jury instruction had to be harmless beyond any reasonable doubt. The jury found the elements of voluntary manslaughter as expressed by this Court's significant case law, which precluded a finding of involuntary manslaughter and which did not require a finding of malice, so a charge regarding the inference of malice should have played no role in the jury's determination if they followed their instructions as they are presumed to do. Further, the worst case scenario is that the jury found both the required elements of voluntary manslaughter as well as malice. In this case, Petitioner still has failed to demonstrate prejudice because the jury found more than necessary to convict of voluntary manslaughter. The only means of creating prejudice is to resort to conjecture and speculation regarding the actions of the jury and whether they followed their instructions. This Court should not create a basis for reversal when one does not appear in the record. Instead, this Court should affirm Petitioner's conviction and sentence because the jury properly found him guilty of voluntary manslaughter without any improper influence from the improper charge regarding implied malice from the use of a deadly weapon.

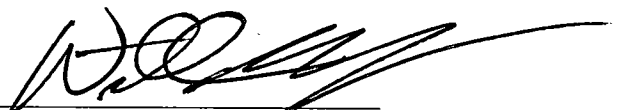
CONCLUSION

For all of the foregoing reasons, the State requests the Court grant the petition for rehearing; find, while the trial court erred in giving a charge that the jury could infer malice from the use of a deadly weapon, the error was entirely harmless because Petitioner was properly convicted of voluntary manslaughter and the improper charge could not reasonably have impacted the outcome; and affirm Petitioner's convictions and sentences.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General

BY: 
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August 15, 2019

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal From Oconee County
Hon. J. Cordell Maddox, Jr., Circuit Court Judge
Appellate Case No. 2017-001990

The State,

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Shane Adam Burdette,

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PROOF OF SERVICE

I, William M. Blitch, Jr., certify that I have served the within Petition for Rehearing by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Susan B. Hackett, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.
This 15th day of August, 2019.

WILLIAM M. BLITCH, JR.
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RECEIVED
AUG 15 2019
S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

August 15, 2019

VIA HAND DELIVERY
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: State v. Shane Adam Burdette,
Appellate Case No. 2017-001990

Dear Mr. Shearouse:

Please find enclosed for filing the original and six (6) copies of the Petition for Rehearing, with proof of service, in the above-referenced case.

Sincerely,

William M. Blitch, Jr.
Senior Assistant Deputy Attorney General
S.C. Bar No. 15608

Enclosures
cc: Susan B. Hackett, Esquire (2 copies enclosed)
Victim Advocacy Division (enclosure)