

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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ORIGINAL

SHANE ADAM BURDETTE,

RECEIVED  
PETITIONER

AUG 23 2019

V.

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-001990

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Appeal from Oconee County

J. Cordell Maddox, Jr., Circuit Court Judge

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Opinion No. 27910

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RETURN TO PETITION FOR REHEARING

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On July 31, 2019, this Court issued its opinion in State v. Burdette, Op. No. 27910 (Shearouse Adv. Sh. No. 31 at 8) (S.C. Sup. Ct. filed July 31, 2019). In a well-reasoned opinion, this Court held (1) the trial judge erred by instructing the jury that malice could be inferred from the use of a deadly weapon, (2) the state failed to prove the error was harmless beyond a reasonable doubt, and (3) regardless of the evidence presented at trial, a trial court shall no longer instruct a jury that malice may be inferred from the use of a deadly weapon. On August 15, 2019, the state filed its petition for rehearing. In its petition, the state only challenged this Court's harmless error analysis. The state did **not** challenge this Court's holding that the judge

erred by giving the instruction; rather, the state conceded at the Court of Appeals and this Court that the instruction was erroneous. Further, and importantly, the state did **not** request rehearing on the portion of this Court's opinion holding that regardless of the evidence presented at trial, a trial court shall not instruct the jury that it may infer the existence of malice when the deed was done with a deadly weapon. Therefore, these sections of the opinion stand.

As mentioned, the state only challenged this Court's determination that the state failed to prove beyond a reasonable doubt that the admittedly erroneous instruction was harmless. More specifically, the state accused this Court of (1) reaching an unpreserved issue, (2) overlooking the "logical result reached by the jury," (3) conflating a sentencing statute with an element of a crime, which added an element to the offense, and (4) overlooking its own case law regarding the elements of voluntary manslaughter and the presumption that juries follow the law as instructed. Petitioner will address each in turn.

### ***Error preservation***

The state found it "significant" that trial counsel "**never** objected to the overall charge given by the trial court" and "**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." According to the state, trial counsel's failure to make these objections rendered the issue on appeal unpreserved. To quote the state directly, "[r]eversal 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." The state's argument on this point is a red herring.

The issue on appeal – whether the trial judge erred by instructing the jury that malice may be inferred from the use of a deadly weapon where there was evidence to reduce, mitigate, or

excuse the offense – was preserved for appellate review. In fact, although the state never advocated against the jury instruction *at the trial*, the state conceded error *on appeal*. The only issue this Court was required to resolve was whether the state proved beyond a reasonable doubt that the error was harmless. In its petition for rehearing, the state conflated issue preservation with harmless error analysis in hopes of distracting this Court from the conceded error. This Court has long held that to determine whether a judge’s erroneous instruction constituted harmless error, “[j]ury instructions should be considered as a whole, and if as a whole, they are free from error, any isolated portions which may be misleading do not constitute reversible error.” State v. Stanko, 402 S.C. 252, 264, 741 S.E.2d 708, 714 (2013). Contrary to the state’s assertion, this Court’s analysis precisely followed precedent by examining the charge as a whole to determine if the admitted error contributed to the verdict. See State v. Middleton, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (“When considering whether an error with respect to a jury instruction was harmless, we must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict”) (internal quotation omitted).

In its attempt to distract this Court from the conceded error, the state reframed the issue as whether the trial judge erred by not defining voluntary manslaughter as the killing of another “without malice.” In fact, the state claimed this Court held the trial court erred by not defining voluntary manslaughter as a killing of another “without malice,” and that this Court’s opinion must be read to require trial judges to define voluntary manslaughter as such. This Court did no such thing.

The analysis of the voluntary manslaughter instruction was necessary as part of the required harmless error review. The fact that the judge failed to inform the jurors that voluntary manslaughter is the killing of another without malice demonstrated why the erroneous instruction

contributed to the verdict. Had the judge instructed the jury that voluntary manslaughter is the killing of another without malice, the state most assuredly would have relied upon the instruction to carry its burden in the harmless error analysis. As will be discussed in greater detail *infra* and was discussed in great detail in this Court's opinion, one of the ways the erroneous malice instruction contributed to the jury's verdict of voluntary manslaughter was because the judge failed to inform the jurors that voluntary manslaughter was the killing of another without malice.

Under the state's formulation for error preservation, the *trial judge* would undertake the harmless error analysis. Essentially, the state asked this Court to alter its long-standing harmless error analysis and to sanction a trial judge knowingly making an error as long as the trial judge determined that such an error was harmless.

### ***The jury's verdict***

According to the state, this Court's holding overlooked "the clear logic resulting from the jury's verdict." The state asserted there was "no evidence the jury in the instant case was confused by the jury charge." In the state's view, the jury's request for a "better understanding" of the charged offenses was simply "a desire to ensure proper deliberations occur[ed]." In other words, the jury may not be taken at its word that it needed a better understanding of the charges. Instead, the state construed the jury's note, which specifically requested a *better* understanding of the charges, as an expression of the jury's desire to engage in proper deliberations. However, the jury did *not* ask how to engage in proper deliberations or whether certain conduct would be considered proper deliberations. Instead, the jury asked very specifically for a better understanding of the charged offenses. The jury had been instructed by the judge on the elements of the offenses, and yet, the jury desired a *better* understanding of those offenses. The judge refused to provide the jury with a better understanding; rather, the judge simply re-iterated

his previously provided instructions, including the erroneous instructions and the confusing language.

As this Court held, the jury's verdict was the product of the erroneous jury instruction. The evidence presented a case of involuntary manslaughter or accident. The erroneous jury instruction prevented the jury from considering them, however. Several facts were undisputed at trial. The deceased was angry at Petitioner and wanted to confront him prior to the shooting. The deceased and others actually waited for Petitioner to appear so the deceased could confront him. Petitioner shot and killed the deceased with a "pretty well worn out" shotgun that was made at least prior to 1964. According to the pathologist, the deceased died from a single shotgun pellet wound to the back of the neck. After the shooting, Petitioner immediately went to the deceased's aid. Petitioner even called the authorities for help and flagged down passersby for assistance. In light of the undisputed facts and the state's inability to show overwhelming evidence of voluntary manslaughter, the erroneous instruction contributed to the verdict because the jury was convinced to reject involuntary manslaughter and accident as verdict options due to of the use of a deadly weapon and its accompanying inference of malice.

***No additional elements***

The state accused this Court of conflating the sentencing statute for voluntary manslaughter with the elements of voluntary manslaughter, and thereby, adding an element to the offense. According to the state, the "statute is a penalty statute for voluntary manslaughter and is not a statute designed to explain the substantive elements of the crime of voluntary manslaughter." The South Carolina General Assembly has declared that a person "convicted of manslaughter, or the unlawful killing of another without malice, express or implied, must be imprisoned not more than thirty years or less than two years." S.C. Code Ann. § 16-3-50. In its opinion, this Court noted the

General Assembly declaration and that the trial judge failed to explain that malice was not a required element of voluntary manslaughter. Not once in its well-reasoned opinion did this Court hold that a judge must instruct a jury that the state must prove beyond a reasonable doubt that voluntary manslaughter does not involve malice.

Instead, this Court undertook the harmless error analysis required by clearly established and long-standing case law. The trial judge's failure to instruct the jury that voluntary manslaughter was the killing of another without malice was significant in this case because of the entirety of the instruction as explained *infra*. The fact that voluntary manslaughter is the killing of another without malice is not mere conjecture or esoteric legal theory. Rather, it is the solemn law of this state as determined by the South Carolina General Assembly.

***Comprehensive analysis of the instructions as given***

In conducting the harmless error analysis – reviewing the charge as a whole – this Court painstakingly reviewed the instructions delivered by the trial judge. In the present case, when instructing the jury regarding murder, the judge explained the state must prove malice. The judge defined malice as “hatred, ill will, or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under circumstances that the law will ... infer an evil threat or intent.” R. 453, ll. 8-13. Further, he instructed the jury that “[m]alice aforethought may be expressed or inferred.” R. 453, l. 20. After explaining “[e]xpress malice,” the judge told the jury that “[m]alice 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.” R. 453, ll. 8-10.

The judge then told the jury: “You are going to have to choose between murder and voluntary manslaughter and involuntary manslaughter.” R. 454, ll. 22-24. He reiterated this limited

number of choices: “So there are going to be *three* choices that you have to make a determination.” R. 454, ll. 24-25 (emphasis added). Twice, he failed to mention the fourth choice – not guilty.

Next, the judge instructed the jury that if the jury determined the state failed to prove Petitioner committed murder, then the next step would be consideration of voluntary manslaughter. R. 455, ll. 1-7. The judge explained that voluntary manslaughter was “**included** within the offense of murder as a lesser charge.” R. 455, ll. 6-7 (emphasis added). The trial judge told the jurors that “[t]o 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.” R. 455, ll. 8-11. He defined those terms, but he **never** told the jury that malice was **not** an element of voluntary manslaughter. Instead, his instruction specifically omitted this fact.

Finally, the judge told the jurors they had “the option of dealing with involuntary manslaughter,” which the judge stated “again” was “a lesser included offense.” R. 456, ll. 22-24. He told the jurors that involuntary manslaughter was “a lesser included charge of voluntary.” R. 457, ll. 4-5. Immediately thereafter, he defined involuntary manslaughter, explaining that it was a killing “**without malice.**” R. 457, ll. 6-13 (emphasis added). The phrase “without malice” appeared *twice* in his instruction on involuntary manslaughter. R. 457, ll. 6-13.

This Court explained that voluntary manslaughter and involuntary manslaughter were not lesser-included offenses of murder pursuant to the “elements test.” Rather, the two were lesser-included offenses because they were traditionally considered to be lesser-included offenses of the greater offense charged. Thus, the elements of the lesser offense were not wholly contained within the greater offense, giving rise to “greater potential for jury confusion.” Although the state agreed with this Court’s assessment that it was “particularly important for the trial court to clearly explain the elements of all three offenses,” the state claimed the trial court’s instructions were clear and

precise. However, even a casual observer of the judge's instructions in this case would detect the confusing and ambiguous nature of the instructions as given, and this Court's detailed the exact ways in which the instructions were confusing in its thorough opinion.

As this Court explained, the jury instruction regarding voluntary manslaughter informed the jurors that voluntary manslaughter was a "lesser-included" offense of murder, but did not inform the jurors that it was a killing *without* malice. Juxtaposing the judge's instruction on voluntary manslaughter with the instruction on involuntary manslaughter – a "lesser-included" offense involving a killing without malice – evidenced just how harmful the instruction was. The judge's erroneous instruction regarding inferring malice from the use of a deadly weapon permeated the instructions as to the lesser-included offenses. This Court concluded the instructions as a whole left the jury with the impression that it could use the inference of malice deriving from the use of a deadly weapon to arrive at a verdict of voluntary manslaughter.

After deliberating for about one hour, the jury requested "a better understanding between voluntary and involuntary." R. 466, ll. 21-24. The jury also requested additional instruction on murder. R. 467, l. 3. Thereafter, the judge instructed the jury on the three offenses using most of the same language of his earlier charge. R. 468, l. 1 – R. 472, l. 7. Included within the re-instruction was the language that permitted the jury to infer malice from the use of a deadly weapon. R. 469, ll. 5-6. The re-instruction also included the language that voluntary manslaughter was "included" within murder as a "lesser offense." R. 469, ll. 13-15. Although defining voluntary manslaughter to include the sudden heat of passion and sufficient legal provocation, the judge did **not** inform the jury that voluntary manslaughter was the killing of another **without** malice. R. 469, ll. 16-22. However, just as the judge did previously, he instructed the jurors that involuntary manslaughter was the killing of another **without** malice. R. 471, ll. 3-11.

Thus, as this Court explained, the jury heard the confusing, misleading, and erroneous instructions *twice*. The erroneous re-affirming of the inference of malice and the failure to correct the misimpression that voluntary manslaughter encompassed malice contributed to the jury's verdict. The judge's error and the confusing nature of the instruction was "compounded" by the judge's repeat of his original instructions.

This Court should deny the state's request for rehearing.

Respectfully Submitted,

  
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SUSAN B. HACKETT  
Appellate Defender

This 23<sup>rd</sup> day of August, 2019.

STATE OF SOUTH CAROLINA  
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STATE OF SOUTH CAROLINA,

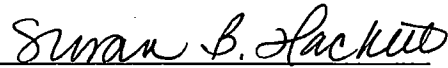
RESPONDENT

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CERTIFICATE OF SERVICE

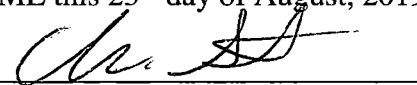
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The undersigned attorney hereby certifies that a copy of the Return to Petition for Rehearing in the above-entitled case has been served upon William M. Blich, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Shane Adam Burdette, #356957, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 23<sup>rd</sup> day of August, 2019.



Susan B. Hackett  
Appellate Defender  
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE  
ME this 23<sup>rd</sup> day of August, 2019.

 (L.S)

Notary Public for South Carolina  
My Commission Expires: October 26, 2019.