



The Supreme Court of South Carolina

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September 27, 2019

The Honorable Beverly H. Whitfield
Clerk of Court, Oconee County
PO Box 678
Walhalla SC 29691-0678

REMITTITUR

Re: The State v. Shane Adam Burdette
Lower Court Case No. 2013GS3701039
Appellate Case No. 2017-001990

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

CLERK

cc:

Susan Barber Hackett, Esquire

Alan McCrory Wilson, Esquire

Donald J. Zelenka, Esquire

Susannah Rawl Cole, Esquire

Melody Jane Brown, Esquire

David Rhys Wagner, Jr., Esquire

William M. Blich, Jr., Esquire

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

The State, Respondent,

v.

Shane Adam Burdette, Petitioner.

Appellate Case No. 2017-001990

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Oconee County
J. Cordell Maddox Jr., Circuit Court Judge

Opinion No. 27910
Heard February 21, 2019 – Filed July 31, 2019

REVERSED AND REMANDED

Appellate Defender Susan Barber Hackett, of Columbia,
for Petitioner.

Attorney General Alan McCrory Wilson, Deputy
Attorney General Donald J. Zelenka, Senior Assistant
Deputy Attorney General Melody Jane Brown, Senior
Assistant Attorney General William M. Blich Jr., and
Assistant Attorney General Susannah Rawl Cole, all of
Columbia; and Solicitor David Rhys Wagner Jr., of
Anderson, all for Respondent.

JUSTICE JAMES: Shane Adam Burdette was indicted and tried for murder and possession of a weapon during the commission of a violent crime. Over Burdette's objection, the trial court charged the jury that it could infer the element of malice from the use of a deadly weapon. The jury convicted Burdette of the lesser-included offense of voluntary manslaughter and possession of a weapon during the commission of a violent crime. The court of appeals affirmed Burdette's conviction, holding that although the trial court erred in giving the inferred malice jury instruction, Burdette suffered no prejudice. *State v. Burdette*, Op. No. 2017-UP-237 (S.C. Ct. App. filed June 7, 2017). We granted Burdette's petition for a writ of certiorari to review the court of appeals' decision. We hold the trial court's erroneous jury instruction was not harmless beyond a reasonable doubt. We therefore reverse and remand for a new trial on the offenses of voluntary manslaughter and possession of a weapon during the commission of a violent crime. We also hold, 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.

I. FACTUAL AND PROCEDURAL HISTORY

Burdette shot and killed Evan Tyner (Victim). Victim died from a single shotgun pellet wound to the back of his neck. After the shooting, Burdette gave several inconsistent statements to law enforcement. The State's theory of the case and Burdette's theory of the case were substantially different. The State claimed murder; Burdette claimed accident. Burdette was indicted for murder and possession of a weapon during the commission of a violent crime.

At trial, evidence was presented in support of both the State's and Burdette's theories of the case. Following the close of the presentation of evidence, the trial court informed the parties it intended to charge the jury on the law of murder, voluntary manslaughter, involuntary manslaughter, and accident. The trial court gave the parties a copy of its proposed jury charge for review. Burdette objected to the trial court's proposed instruction that inferred malice could arise when a deadly weapon is used. Citing *State v. Belcher*,¹ Burdette argued the instruction was inappropriate because there was evidence presented that could reduce, excuse, justify, or mitigate the homicide. The trial court gave the charge over Burdette's objection.

¹ 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009).

The trial court charged the law of murder, voluntary manslaughter, involuntary manslaughter, and accident. When charging the law of murder, the trial court defined murder as a killing with malice aforethought and stated to the jury, "Inferred malice may also arise when the deed is done with a deadly weapon." When charging the law of voluntary manslaughter, the trial court did not specifically inform the jury that malice is not an element of that offense. However, when charging the law of involuntary manslaughter, the trial court specifically informed the jury that malice is not an element of that offense. Of course, malice is not an element of either voluntary or involuntary manslaughter.

After deliberating for about one hour, the jury requested additional instruction from the trial court on the law of murder, voluntary manslaughter, and involuntary manslaughter to provide the jury with "a better understanding" of the different charges. The trial court essentially repeated its previous instruction and again included in the murder instruction that the jury could infer the element of malice from the use of a deadly weapon. The trial court again did not inform the jury that malice is not an element of voluntary manslaughter but did inform the jury that malice is not an element of involuntary manslaughter.

The jury found Burdette not guilty of murder but guilty of voluntary manslaughter and possession of a weapon during the commission of a violent crime. The trial court sentenced Burdette to twenty-five years in prison, suspended upon the service of fifteen years and five years' probation for voluntary manslaughter. The trial court also sentenced Burdette to a consecutive prison term of five years for the weapon possession charge.

Burdette appealed, arguing the trial court erroneously instructed the jury that malice may be inferred from the use of a deadly weapon because evidence was presented tending to reduce, mitigate, excuse, or justify the homicide. The court of appeals affirmed in an unpublished opinion. *State v. Burdette*, Op. No. 2017-UP-237 (S.C. Ct. App. filed June 7, 2017). Although the court of appeals agreed the inferred malice jury instruction was erroneous, it held Burdette "suffered no prejudice" from the erroneous instruction. *Id.* The court of appeals reasoned Burdette was convicted of voluntary manslaughter—not murder—and because malice is not an element of voluntary manslaughter, the inferred malice instruction could not have contributed to the verdict. *Id.* This Court granted certiorari to review the court of appeals' decision.

II. ISSUES PRESENTED

1. Did the trial court err in giving the inferred malice instruction?
2. If error, was the error harmless beyond a reasonable doubt?
3. Does the inferred malice instruction continue to have validity?

III. DISCUSSION

A. The Inferred Malice Jury Instruction

1. Was the Jury Instruction Erroneous?

There was evidence presented at trial that tended to reduce, mitigate, excuse, or justify Burdette's killing of Victim—making the trial court's inferred malice instruction inappropriate. *See State v. Stanko*, 402 S.C. 252, 260, 741 S.E.2d 708, 712 (2013) ("A jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse, or justify the homicide." (citing *State v. Belcher*, 385 S.C. 597, 600, 685 S.E.2d 802, 803-04 (2009))). The State rightly concedes this point. The court of appeals therefore correctly held the giving of the instruction in this case was error.

2. Was the Trial Court's Error Harmless?

An erroneous instruction alone is insufficient to warrant this Court's reversal. "Errors, including erroneous jury instructions, are subject to harmless error analysis." *Belcher*, 385 S.C. at 611, 685 S.E.2d at 809. "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.'" *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (quoting *State v. Kerr*, 330 S.C. 132, 144-45, 498 S.E.2d 212, 218 (Ct. App. 1998)). "In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered." *Id.* (quoting *Kerr*, 330 S.C. at 145, 498 S.E.2d at 218).

The State maintains, and the court of appeals held, Burdette was not prejudiced by the trial court's erroneous inferred malice instruction (1) because Burdette was convicted of voluntary manslaughter, and (2) since malice is not an element of voluntary manslaughter, the inclusion of the inferred malice instruction in the jury instruction on murder could not have contributed to the verdict. Burdette argues a reading of the jury charge as a whole compels the conclusion that the trial court's error was not harmless. We agree with Burdette.

The trial court's charge to the jury of the elements of murder, voluntary manslaughter, and involuntary manslaughter take up a mere six pages of the overall trial transcript. Absent a self-defense instruction, that is the typical length of this portion of the jury instruction. As is customary, the trial court first instructed the jury on the offense of murder, then the lesser-included offense of voluntary manslaughter, and then the lesser-included offense of involuntary manslaughter.

In many instances, a lesser-included offense is deemed to exist because the lesser offense is "one whose elements are wholly contained within the crime charged." *State v. Dickerson*, 395 S.C. 101, 118, 716 S.E.2d 895, 904 (2011) (citing *State v. Northcutt*, 372 S.C. 207, 215, 641 S.E.2d 873, 877 (2007)). This is known as the "elements test." See *Northcutt*, 372 S.C. at 215, 641 S.E.2d at 877. In those cases, the trial court simply explains to the jury that the lesser offense includes all of the elements of the greater offense except for one or more elements, and the trial court then lists those elements that are not included in the lesser offense. In those cases, the trial court is able to explain the distinction between the greater and lesser offense in an orderly and very understandable fashion. For example, possession of cocaine is a lesser-included offense of possession of cocaine with intent to distribute (PWID) because possession of cocaine contains all the elements of PWID except for the intent to distribute.

In other instances, such as in the case at bar, one offense may be considered a lesser offense of another not by virtue of the elements test, but rather because it "has traditionally been considered a lesser included offense of the greater offense charged." *Northcutt*, 372 S.C. at 216, 641 S.E.2d at 877-78. In those instances, the elements of the lesser offense are not "wholly contained" within the greater offense, and the trial court cannot simply list for the jury those elements not included in the lesser offense. Therefore, there is greater potential for jury confusion when the lesser offense has traditionally been considered a lesser offense of the greater offense. Because there is greater potential for jury confusion, there

is a great need for clarity when the trial court explains the greater and lesser offenses to the jury.

Voluntary manslaughter is a lesser offense of murder not by virtue of the elements test, but because it has traditionally been considered a lesser offense of murder. Therefore, a trial court must allow the jury to consider the lesser offense of voluntary manslaughter if there is evidence from which it could be inferred that a defendant committed voluntary manslaughter rather than the greater offense of murder. "Voluntary and involuntary manslaughter are both lesser-included offenses of murder." *State v. Sams*, 410 S.C. 303, 309, 764 S.E.2d 511, 514 (2014). Obviously, neither of these offenses are considered lesser offenses of murder by virtue of the elements tests, as the elements of neither offense are "wholly contained" in the elements of murder.

In *State v. Scott*, we repeated the general rule that involuntary manslaughter is "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." 414 S.C. 482, 487, 779 S.E.2d 529, 531 (2015) (quoting *Sams*, 410 S.C. at 309, 764 S.E.2d at 514). Involuntary manslaughter mandates a showing of criminal negligence, defined as "the reckless disregard of the safety of others." S.C. Code Ann. § 16-3-60 (2015). "Recklessness is a state of mind in which the actor is aware of his or her conduct, yet consciously disregards a risk which his or her conduct is creating." *State v. Pittman*, 373 S.C. 527, 571, 647 S.E.2d 144, 167 (2007).

When considering whether an incorrect jury instruction constitutes harmless error, we are required to review the trial court's charge to the jury in its entirety. *See Stanko*, 402 S.C. at 264, 741 S.E.2d at 714 ("Jury 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."). We will therefore review the trial court's instructions on the offenses of murder, voluntary manslaughter, and involuntary manslaughter. Because voluntary and involuntary manslaughter are lesser offenses of murder under the more cumbersome "traditional" test, it was particularly important for the trial court to clearly explain the elements of all three offenses in this case.

As to the count of murder, the trial court charged the following points to the jury: the State must prove the defendant killed another person with malice aforethought; 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 an intent to inflict an injury or under circumstances that the law will infer an evil intent; malice need not exist for any particular time before the act is committed, but malice must exist in the mind of the defendant just before and at the time the act is committed; therefore, there must be a combination of the previous evil intent and the act; malice aforethought may be expressed or inferred, but the terms "expressed" or "inferred" do not mean different kinds of malice, but instead mean the manner in which the malice can be proven to have existed, and that is by direct or circumstantial evidence; "expressed malice" is shown when a person speaks words which express ill will or hatred for another, or when the person prepared beforehand to do the act which was later accomplished, with the examples being given of a person "lying in wait" for a person or other acts of preparation going to show that the deed was in the defendant's mind ahead of time; malice may be inferred from conduct showing a total disregard for human life; "inferred malice" may arise when the deed is done with a deadly weapon; the trial court defined "deadly weapon" and gave examples of deadly weapons.

The trial court then instructed the jury that if it found the State failed to prove beyond a reasonable doubt that the defendant committed murder, it must consider whether the State proved beyond a reasonable doubt that the defendant committed the lesser-included offense of voluntary manslaughter. The trial court charged the following: the State must prove beyond a reasonable doubt that the defendant took the life of another person in the sudden heat of passion based on sufficient legal provocation; both heat of passion and sufficient legal provocation must be present at the time of the killing; sudden heat of passion may, for a time, affect a person's self-control and temporarily disturb a person's reason; this sudden heat of passion must be the type that would make an ordinary person unable to coolly reflect on his actions and would produce an uncontrollable influence or impulse to do violence; sufficient legal provocation must be the type that would make a person of ordinary reason and caution become enraged and lose control temporarily; such provocation necessary for voluntary manslaughter must come from some act by the victim or related to the victim; words alone are insufficient to support legal provocation; where death is caused by the use of a deadly weapon, the words must be accompanied by some overt threatening act which could have produced the heat of passion; exercising a legal right, no matter how offensive it may be to another, is never sufficient legal provocation to support voluntary manslaughter; if the heat of passion cools or if there was enough time between the provocation and the killing for the passion of a reasonable person to cool, the killing would not be voluntary manslaughter; when considering whether a reasonable person would have had enough time to cool down or cool off, all of the

circumstances surrounding the killing must be considered; it is permissible to consider the nature of the provocation, if any, the defendant's mental and physical state, and the circumstances and relationship between the parties.

Importantly however, the trial court did not explain to the jury that malice is not an element of voluntary manslaughter, despite section 16-3-50 of the South Carolina Code (2015) referring to "manslaughter" as "the unlawful killing of another without malice, express or implied."

After concluding the voluntary manslaughter instruction, the trial court instructed the jury that if it found the State failed to prove beyond a reasonable doubt that the defendant committed murder or voluntary manslaughter, it must consider whether the State proved beyond a reasonable doubt that the defendant committed the lesser-included offense of involuntary manslaughter. Specifically, the trial court instructed the jury: the State must prove beyond a reasonable doubt that the defendant unintentionally killed the victim "without malice" but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm, or that the defendant unintentionally killed the victim without malice while engaged in a lawful activity with reckless disregard for the safety of others; "unintentional" means the defendant did not intend for anyone to be killed or seriously injured; "reckless disregard for the safety of others" requires more than mere negligence or carelessness; "mere negligence" or "carelessness" is the failure to use the care that a person of ordinary reason would use under the same or similar circumstances; "recklessness" is a conscious failure to use ordinary care; exercising "reckless disregard for the safety of others" means that one is not interested in the consequences of his acts or the rights and safety of others; if a person who knows or should know that ordinary care requires certain precautions to be taken for the safety of others when using a dangerous instrumentality such as a gun or car, but that person fails to use those precautions without concern, the person's actions are considered reckless; the State must prove beyond a reasonable doubt that the defendant's act was the proximate cause of death; "proximate cause" is direct, immediate, and efficient cause; "proximate cause" is the cause without which the death of the person would not have resulted; there must be a chain of causation from the time of the injury inflicted by the defendant until the time of the victim's death; proximate cause does not necessarily mean that it occurred immediately prior to the victim's death.

The trial court twice instructed the jury on voluntary manslaughter but did not include the fact that it is a killing without malice. The trial court twice instructed the jury that involuntary manslaughter is the unintentional killing of

another *without malice*. Burdette contends that while the trial court correctly charged the law of involuntary manslaughter, the trial court should have similarly instructed the jury that malice is not an element of voluntary manslaughter. Burdette claims the charge as a whole likely led the jury to incorrectly believe that malice is an element of voluntary manslaughter. Consequently, Burdette argues, the jury was left with the impression that it could use the inference of malice deriving from the use of a deadly weapon as a basis for convicting him of voluntary manslaughter.

After consideration of the jury instructions as a whole, we are compelled to agree with Burdette. When the trial court instructed the jury that malice was not an element of involuntary manslaughter, but did not instruct the jury that malice was not an element of voluntary manslaughter, the jury was left with the incorrect impression that malice is an element of voluntary manslaughter, which allowed the jury to use the improperly charged inference of malice from the use of a deadly weapon to find Burdette guilty of voluntary manslaughter. The prejudice stemming from the erroneous and confusing instructions was compounded when, during deliberations, the jury requested the trial court to provide a "better understanding" of the charges of murder, voluntary manslaughter, and involuntary manslaughter, and the trial court repeated its original instructions which (1) included the erroneous inferred malice instruction and (2) did not include an instruction that malice is not an element of voluntary manslaughter. The charge as a whole necessarily resulted in confusion that contributed to the verdict that Burdette was guilty of voluntary manslaughter. Therefore, we cannot conclude the trial court's erroneous instruction was harmless beyond a reasonable doubt.

B. Continuing Validity of the Inferred Malice Instruction in South Carolina

In *Belcher*, we held the trial court could no longer give the inferred malice from the use of a deadly weapon charge in cases in which evidence was presented that would reduce, mitigate, excuse, or justify a homicide or an assault and battery with the intent to kill. 385 S.C. at 612, 685 S.E.2d at 810. We now consider whether the permissive inference charge may be given in *any setting*, even those in which no evidence is presented that would reduce, mitigate, excuse, or justify the commission of an offense containing the element of malice. We have held in other settings that it is improper to give examples of conduct the jury may consider when determining whether the State has proven an element of a crime or when determining whether certain other facts have been proven or disproven. *See, e.g., State v. Grant*, 275 S.C. 404, 407-08, 272 S.E.2d 169, 171 (1980) (holding it was

improper for the trial judge to charge the jury that the defendant's flight may be considered as evidence of guilt); *State v. Hughey*, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000) (holding, in a voluntary manslaughter case, the trial court correctly refused the defendant's request to charge the jury specific examples of conduct that might be considered as evidence of legal provocation, as the giving of such examples would be an impermissible charge on the facts), *overruled on other grounds by Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009); *State v. Cheeks*, 401 S.C. 322, 328-29, 737 S.E.2d 480, 484 (2013) (holding, in a drug trafficking case, that the trial court must not charge the jury that actual knowledge of the presence of a drug is strong evidence of a defendant's intent to control its disposition or use).

In *Cheeks*, we noted, "Simply because certain facts may be considered by the jury as evidence of guilt in a given case where the circumstances warrant, it does not follow that [the jury] should be charged that these facts are probative of guilt. It is always for the jury to determine the facts, and the inferences that are to be drawn from these facts." 401 S.C. at 328, 737 S.E.2d at 484. When the trial court tells the jury it may use evidence of the use of a deadly weapon to establish the existence of malice, a critical element of the charge of murder, the trial court has directly commented upon facts in evidence, elevated those facts, and emphasized them to the jury. Even telling the jury that it is to give evidence of the use of a deadly weapon only the weight the jury determines it should be given does not remove the taint of the trial court's injection of its commentary upon that evidence. Such an instruction is no different than an instruction that the jury may use evidence of flight as evidence of guilt. A jury instruction that malice may be inferred from the use of a deadly weapon is an improper court-sponsored emphasis of a fact in evidence—that the deed was done with a deadly weapon—and it should no longer be permitted.

We decide this issue solely under the common law; pursuant to our policy-making role under the common law, we hold, 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. Of course, whether the deed was done with a deadly weapon or not, the State and the defendant are free to argue the existence or nonexistence of malice based on the evidence in the record. For example, if evidence is introduced that the deed was done with a deadly weapon, the State is free to argue to the jury that it should infer the existence of malice based on that fact and any other facts that would naturally and logically

allow a jury to conclude the defendant acted with malice aforethought.² Similarly, if the deed was not done with a deadly weapon, a defendant is free to argue the absence of malice based on that fact and any other facts that would naturally and logically allow a jury to conclude the State failed to prove beyond a reasonable doubt that the defendant acted without malice aforethought. "It is axiomatic that some matters appropriate for jury argument are not proper for charging. 'Do jurors need the court's permission to infer something? The answer is, of course not.'" *Belcher*, 385 S.C. at 612 n.9, 685 S.E.2d at 810 n.9 (quoting Bruce A. Antkowiak, *The Art of Malice*, 60 RUTGERS L. REV. 435, 476 (2008)).

Of course, our ruling does not prohibit a trial court from citing outside the presence of the jury the proposition that malice may be inferred from the use of a deadly weapon. For example, when ruling on a defendant's motion for directed verdict on the ground the State failed to prove the element of malice, a trial court may take into account the fact that the deed was done with a deadly weapon.

IV. CONCLUSION

We hold the trial court's erroneous inferred malice instruction was not harmless beyond a reasonable doubt. We reverse Burdette's convictions and remand for a new trial on the charges of voluntary manslaughter and possession of a weapon during the commission of a violent crime. Because Burdette was acquitted of murder, he cannot be retried for murder. *See State v. Parker*, 391 S.C. 606, 612, 707 S.E.2d 799, 801 (2011) (providing that pursuant to the law of double jeopardy, a defendant may not be prosecuted for the same offense after an acquittal).

We further overrule our precedent to the extent it permits a jury instruction that malice may be inferred from the defendant's use of a deadly weapon.³

² However, we repeat our comment in *State v. Cartwright*: "We do not suggest there are no limits to a party's jury argument, for the law provides limits, as enhanced by Due Process protections." 425 S.C. 81, 93 n.3, 819 S.E.2d 756, 762 n.3 (2018).

³ Our decision today overrules in part a considerable amount of South Carolina case law. We overrule those cases insofar as it can be construed that we have approved a trial court's charge that a jury may infer the existence of malice from the defendant's use of a deadly weapon. The following represents a non-exhaustive list of such cases: *Gibson v. State*, 416 S.C. 260, 786 S.E.2d 121 (2016); *State v.*

Regardless of the evidence presented at trial, trial courts shall not instruct a jury that the element of malice may be inferred when the deed is done with a deadly weapon. Our ruling today is effective in this case and in those cases which are pending on direct review or are not yet final, so long as the issue is preserved. See *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (holding "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review or not yet final"). However, today's ruling will not apply to convictions challenged on post-conviction relief. See *Belcher*, 385 S.C. at 613, 685 S.E.2d at 810 (citing *Teague v. Lane*, 489 U.S. 288 (1989)).

REVERSED AND REMANDED.

BEATTY, C.J., KITTREDGE, HEARN, and FEW, JJ., concur.

Stanko, 402 S.C. 252, 741 S.E.2d 708 (2013); *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009); *Sheppard v. State*, 357 S.C. 646, 594 S.E.2d 462 (2004); *Gibson v. State*, 355 S.C. 429, 586 S.E.2d 119 (2003); *Tate v. State*, 351 S.C. 418, 570 S.E.2d 522 (2002); *State v. Harvin*, 345 S.C. 190, 547 S.E.2d 497 (2001); *State v. Von Dohlen*, 322 S.C. 234, 471 S.E.2d 689 (1996); *Plyler v. State*, 309 S.C. 408, 424 S.E.2d 477 (1992); *Carter v. State*, 301 S.C. 396, 392 S.E.2d 184 (1990); *State v. Smith*, 288 S.C. 329, 342 S.E.2d 600 (1986); *State v. Peterson*, 287 S.C. 244, 335 S.E.2d 800 (1985); *State v. Lucas*, 285 S.C. 37, 328 S.E.2d 63 (1985); *State v. Campbell*, 287 S.C. 377, 339 S.E.2d 109 (1985); *State v. Woods*, 282 S.C. 18, 316 S.E.2d 673 (1984); *State v. Jennings*, 280 S.C. 62, 309 S.E.2d 759 (1983); *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983); *State v. Koon*, 278 S.C. 528, 298 S.E.2d 769 (1982); *State v. Friend*, 276 S.C. 552, 281 S.E.2d 106 (1981); *State v. Hyman*, 276 S.C. 559, 281 S.E.2d 209 (1981); *State v. Crocker*, 272 S.C. 344, 251 S.E.2d 764 (1979); *State v. Robinson*, 149 S.C. 439, 147 S.E. 441 (1929); *State v. Portee*, 122 S.C. 298, 115 S.E. 238 (1922); *State v. Jackson*, 36 S.C. 487, 15 S.E. 559 (1892); *State v. Levelle*, 34 S.C. 120, 13 S.E. 319 (1891); *State v. King*, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015); *State v. Frazier*, 401 S.C. 224, 736 S.E.2d 301 (Ct. App. 2013); *State v. Price*, 400 S.C. 110, 732 S.E.2d 652 (Ct. App. 2012); *State v. Kinard*, 373 S.C. 500, 646 S.E.2d 168 (Ct. App. 2007); *State v. Franklin*, 310 S.C. 122, 425 S.E.2d 758 (Ct. App. 1992); *State v. Merriman*, 287 S.C. 74, 337 S.E.2d 218 (Ct. App. 1985). We have not included the cases that were previously overruled by *Belcher*.

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Shane Adam Burdette, Appellant.

Appellate Case No. 2015-000513

Appeal From Oconee County
J. Cordell Maddox, Jr., Circuit Court Judge

Unpublished Opinion No. 2017-UP-237
Heard May 1, 2017 – Filed June 7, 2017

AFFIRMED

Appellate Defender Susan B. Hackett, of Columbia, for
Appellant.

Attorney General Alan M. Wilson, Chief Deputy
Attorney General John W. McIntosh, Senior Assistant
Deputy Attorney General Donald J. Zelenka, and
Assistant Attorney General Susannah R. Cole, all of
Columbia, for Respondent.

PER CURIAM: Shane Adam Burdette appeals his convictions of voluntary
manslaughter and possession of a weapon during the commission of a violent

crime, arguing the trial court erred in (1) admitting his custodial statements,¹ (2) refusing to qualify his witness as an expert in ballistics, (3) instructing the jury that malice may be inferred from the use of a deadly weapon, and (4) sentencing him to consecutive terms of imprisonment. We affirm.

1. We find no error by the trial court in admitting Burdette's custodial statements. "On appeal, the conclusion of the trial judge as to the voluntariness of a statement will not be reversed unless so erroneous as to show an abuse of discretion." *State v. Miller*, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007).

"[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). "When seeking to introduce a confession, the State must prove that the statement was voluntary and taken in compliance with *Miranda*." *State v. Goodwin*, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009).

"In South Carolina, the test for determining whether a defendant's confession was given freely, knowingly, and voluntarily focuses upon whether the defendant's will was overborne by the totality of the circumstances surrounding the confession." *State v. Moses*, 390 S.C. 502, 513, 702 S.E.2d 395, 401 (Ct. App. 2010).

Courts have recognized appropriate factors that may be considered in a totality of the circumstances analysis: background; experience; conduct of the accused; age; maturity; physical condition and mental health; length of custody or detention; police misrepresentations; isolation of a minor from his or her parent; the lack of any advice to the accused of his constitutional rights; threats of violence; direct or indirect promises, however slight; lack of education or low intelligence; repeated and prolonged nature of the questioning; exertion of improper influence; and the use of physical punishment, such as the deprivation of food or sleep.

Id. at 513-14, 702 S.E.2d at 401.

¹ We combine Burdette's first and second issues on appeal.

In *Missouri v. Seibert*, the Court addressed the admissibility of a post-*Miranda* statement obtained by questioning a suspect until incriminating information was elicited, administering *Miranda* warnings, and then—following the warnings—leading the suspect to cover the same incriminating information a second time. 542 U.S. 600, 604 (2004). The Court held a statement repeated after a warning in such circumstances was not admissible. *Id.*

Our supreme court in *State v. Navy* also emphasized the *Miranda* warnings requirement cannot be skirted by interrogative tactics that undermine the very purpose of *Miranda*. 386 S.C. 294, 302, 688 S.E.2d 838, 841 (2010). To determine whether a constitutional violation occurred in this setting, a court must analyze the following factors:

- 1) the completeness and detail of the question and answers in the first round of interrogation;
- 2) the timing and setting of the first questioning and the second;
- 3) the continuity of police personnel; and
- 4) the degree to which the interrogator's questions treated the second round as continuous with the first.

Id. at 302, 688 S.E.2d at 841-42.

We find no error by the trial court in admitting Burdette's three written statements. As to the written statements being tainted by Officer John Towery's comment to Burdette that the *Miranda* warnings did "not mean anything, it's just somethin' [under] the law we gotta do," we find the subsequent readings of the *Miranda* warnings and Burdette's waivers cured any taint. As to the length of interrogation and Burdette's alleged intoxication, we find these were factors to consider in determining if the statements were voluntarily made; however, we do not find either rendered the statements involuntary. We further find the request for Burdette to sign his statement after he invoked his right to counsel did not render that statement or subsequent statements involuntary. Thus, we affirm the admission of the written statements.

2. We likewise find no error by the trial court in refusing to qualify Burdette's witness as an expert in ballistics. "All expert testimony must satisfy the Rule 702 criteria" *State v. White*, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009). The South Carolina Rules of Evidence state,

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of opinion or otherwise.

Rule 702, SCRE.

Burdette offered his witness as an expert in ballistics. The witness testified to his education and experience in gunsmith repair, firearm safety training, concealed weapon permit training, and daily experience in collecting pellets at the gun club as part of his participation in a lead removal and recycling program. He did not testify to any experience, training, or education specifically related to ballistics. The trial court allowed the witness to testify as an expert gunsmith, but it refused to qualify the witness as an expert in ballistics. We find no abuse of discretion. *See State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) ("The decision to admit or exclude testimony from an expert witness rests within the trial court's sound discretion.").

3. We next find Burdette suffered no prejudice from the trial court's erroneous instruction to the jury that malice may be inferred from the use of a deadly weapon despite evidence that would reduce, mitigate, excuse, or justify the killing.²

"A jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse, or justify the homicide." *State v. Stanko*, 402 S.C. 252, 260, 741 S.E.2d 708, 712 (2013). The erroneous instruction of inferred malice from the use of a deadly weapon charge is subject to a harmless error analysis. *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009). "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.'" *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432,

² The State conceded the jury charge was erroneous.

435 (2014) (quoting *State v. Kerr*, 330 S.C. 132, 144-45, 498 S.E.2d 212, 218 (Ct. App. 1998)).

Here, we find no prejudice because the erroneous charge could not have contributed to the jury's verdict of the lesser-included offense, voluntary manslaughter. "Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." *State v. Cole*, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000). Malice is not an element of voluntary manslaughter; thus, we find any error in the malice instruction could not have contributed to the verdict. *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).

4. Finally, we find Burdette's remaining issue—the trial court erred in sentencing him to consecutive terms of imprisonment based on a mistaken belief that it was required under the law—was not preserved for appellate review. *See State v. Johnston*, 333 S.C. 459, 462, 510 S.E.2d 423, 425 (1999) (stating "a challenge to sentencing must be raised at trial, or the issue will not be preserved for appellate review").

AFFIRMED.

WILLIAMS and KONDUROS, JJ., and LEE, A.J., concur.