STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Hampton County

Honorable Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DANIEL LEE FLUDD,

APPELLANT.

APPELLATE CASE NO 2018-002201

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in charging the jury that malice could be implied from the use of a deadly weapon in a case where the defendant received charges on self-defense and voluntary manslaughter?

STATEMENT OF THE CASE

A Hampton County grand jury indicted appellant Daniel Fludd for murder and a weapons charge and on December 3, 2018, appellant was tried before the Honorable Perry M. Buckner and a jury. Tr. 1. Tameaka Legette represented the State and Ian Deysach represented appellant. Tr. 1. The jury acquitted appellant of murder, but convicted him of voluntary manslaughter and the weapons charge. Tr. 552, l. 14 – 553, l. 3. Judge Buckner sentenced appellant to twenty years' imprisonment for manslaughter and five years' imprisonment on the weapons charge. Tr. 565, ll. 17 – 25. This appeal follows.

STANDARD OF REVIEW

"In criminal cases an appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id.

ARGUMENT

The trial court erred in charging the jury that malice could be implied from the use of a deadly weapon in a case where the defendant received charges on self-defense and voluntary manslaughter.

The trial judge charged the jury that "Malice may also be inferred, or may arise, when the deed is done with a deadly weapon." Tr. 533, l. 24 – 534, l. 13. Judge Buckner's erroneously-given full charge on implication of malice from use of a deadly weapon runs two paragraphs in the trial transcript. Tr. 533, l. 24 – 534, l. 13. Appellant received instructions on self-defense and on the lesser-included offense of voluntary manslaughter, of which he was eventually convicted. Tr. 526, l. 8 – 529, l. 14. Tr. 534, l. 14 – 536, l. 2. Tr. 552, ll. 16 – 23. Giving this implied malice charge when a defendant had a mitigating circumstance such as self-defense was forbidden by the Supreme Court nine years before appellant's trial. State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). During the pendency of this appeal, the Supreme Court forbade this implied malice charge in all circumstances. State v. Burdette, ___ S.C. ___, ___ S.E.2d ___, Op. No. 27910, 2019 WL 3437783 (July 31, 2019). No question exists that the trial judge erred in giving this charge.

The State will likely defend this case on appeal by claiming the error is not preserved or that it is harmless because appellant was not convicted of murder. The second question is easily answered by Burdette because the Supreme Court reversed despite the defendant being convicted of manslaughter on circumstances identical to appellant's case. Burdette at *5-6. Neither the Burdette trial court nor Judge Buckner instructed the jury that voluntary manslaughter was a "killing without malice." Id. Tr. 534, l. 14 – 536, l. 2. Also just like Burdette, appellant's jury was charged two times on voluntary manslaughter—both without being told that voluntary

manslaughter was a "killing without malice." Id. Tr. 534, l. 14 – 536, l. 2. Tr. 548, l. 4 – 549, l. 25.

The facts of the case also show the error cannot be harmless. Appellant's statement to the police was entered into evidence in which he described defending himself from the decedent who attacked him with a shovel. State's Ex. 101. The toxicology report showed the decedent had cocaine that had not yet metabolized in his bloodstream. Tr. 465, l. 10 – 470, l. 8. The decedent also tested positive for methamphetamine, benzodiazepine, codeine, and had a blood alcohol level of 0.069 percent. Tr. 465, l. 10 – 470, l. 8. Tr. 450, ll. 3 – 12.

The decedent precipitated the fight by keeping a necklace that belonged to appellant. State's Ex. 101. The State's star witness was a prostitute who sold herself to pay for the decedent's crack habit. Tr. 287, ll. 4 – 21. Tr. 344, l. 25 – 345, l. 16. The prostitute agreed that the decedent initially refused to return the necklace. Tr. 351, ll. 6 – 7. She agreed that appellant did not pull a knife until after the decedent broke the shovel over appellant's arm. Tr. 354, ll. 9 – 18. Appellant claimed in his statement that he stabbed the decedent with the remains of the broken shovel, but the prostitute's testimony and the pathologist strongly indicated that the decedent died from knife wounds. State's Ex. 101. Tr. 360, ll. 20 – 21. Tr. 458, l. 6 – 459, l. 4. But as defense counsel pointed out in closing, it "doesn't make a difference" if a person defends himself from a deadly attack with a shovel or a knife and that there was "nothing wrong with carrying a knife when you live in a country town." Tr. 513, ll. 3 – 14. This self-defense case where the State relied upon a prostitute who they put in a hotel for three nights and bought clothes for trial is not amenable to a harmless error analysis. Tr. 340, l. 22 – 341, l. 9.

As for the issue preservation question, this Court should reject any invitation from the State to punt this case into post-conviction relief because the State itself objected to the giving of

this charge. After Judge Buckner finished instructing the jury and excused them from the courtroom, he first asked the State if it had any exceptions. Tr. 542, l. 5 – 543, l. 19. The solicitor replied, "Your Honor, I think we may need to re-charge them on the State v. Belcher." Tr. 543, ll. 20 – 21. Judge Buckner replied, "On what?". Tr. 543, l. 22.

The solicitor responded, "The deadly weapon inference, where—I think you might need to re-charge them on the deadly weapon inference." Tr. 543, ll. 23 – 25. At this point, Judge Buckner firmly explained his reasoning for giving the forbidden charge. Tr. 544, ll. 1 – 18. The court first said, "I told them it was an evidentiary fact that could be rebutted." Tr. 544, ll. 1 – 2. The solicitor attempted to explain and Judge Buckner interrupted. Tr. 544, ll. 3 – 4. "And I—I've never charged it as an inference just because of the deadly weapon." Tr. 544, ll. 5 – 6. The trial judge continued:

> THE COURT: Yes, I charged them that the fact could be rebutted by the evidence in the case, based on your view of the evidence. The implication is just an evidentiary fact that must be proven beyond a reasonable doubt, and just because it's sufficient to raise an evidentiary fact to be taken into consideration by you, along with the other evidence in the case; and you may give it such weight as you determine it should receive, and it can be rebutted by the evidence in the case, based on your view of the evidence.

Tr. 544, ll. 9 – 18. The solicitor said, "Okay." Tr. 544, l. 19. Judge Buckner demanded, "You satisfied?" and the solicitor replied, "Yes, Your Honor," and stated she had no further objection to the charge. Tr. 544, ll. 20 – 23.

The State will likely seize on the fact that when Judge Buckner, after thoroughly explaining his reasons and intent to retain the implied malice charge, immediately turned to defense counsel and asked if he had any objections to the charge, defense counsel replied, "No, Your Honor." Tr. 544, l. 24 – 545, l. 1. Despite objecting to the charge below, the State will

likely now ask this Court to bypass this obvious error and find that defense counsel waived the issue.

The central tenet of error preservation is that the trial court must have an opportunity to rule on the issue. See Holy Loch Distrib., Inc. v. Hitchcock, 340 S.C. 20, 24-26, 531 S.E.2d 282, 284-85 (2000). The State raised the issue of the implied malice charge and Judge Buckner ruled. The most important requirement for the issue to be preserved is met. The issue was also timely raised and raised with specificity. See S.C. Dep't Transp. v. First Carolina Corp., 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) (stating four requirements for preserving an issue).

The State will seek to delay the reversal of appellant's conviction for many years until after a post-conviction relief hearing and a likely appeal (even if appellant wins) because of the issue preservation requirement, "raised by the appellant." Id. Several reasons countenance against this delay on a technicality. First, after Judge Buckner's thorough and confident explanation of his reasons for giving the implied malice charge and apparent exasperation with the solicitor ("You satisfied?"), any further objection would have been futile. See Fettler v. Gentner, 396 S.C. 461, 469-70, 722 S.E.2d 26, 30-31 (Ct. App. 2012).

"This Court does not require parties to engage in futile actions in order to preserve issues for appellate review." Staubes v. City of Folly Beach, 339 S.C. 406, 412-15, 529 S.E.2d 543, 546-47 (2000). Staubes is instructive because it shows that an appellate court can consider the rulings already made by the trial judge and the party asserting the procedural bar's own culpability. In Staubes, the City of Folly Beach argued a grant of summary judgment on Staubes' negligence claim was unpreserved because Staubes' original complaint lacked a negligence cause of action and Staubes never obtained a specific ruling from the trial court on his motion to amend his complaint. Id. The Supreme Court found the issue preserved, in part, based

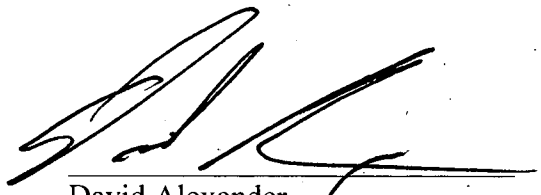
on the futility doctrine and because, "significantly, the City itself first raised the issue." Id. At the summary judgment hearing, the City suggested that Staubes was bringing a negligence claim and asked for summary judgment on that cause of action. Id. "Put simply, the City's own actions at the summary judgment hearing preclude any argument on appeal that it has been prejudiced by treating the pleadings as amended." Id.

The Staubes Court also found that any effort to seek a formal ruling on a motion to amend the complaint by Staubes would have been futile because "Staubes knew from the order that the trial court had decided to grant summary judgment for the City on any negligence claim he might raise." Id. "Thus, requesting permission to add a negligence claim to his complaint would have been futile." Id. Just like in Staubes, appellant knew from Judge Buckner's ruling that he did not intend to reverse course, bring the jury back into the courtroom, and tell them to disregard his implied malice charge. Objecting after Judge Buckner had forcefully ruled would have been futile and drawn the court's ire.

Judicial economy also favors addressing this issue now. Post-conviction relief actions are ubiquitous and clog our civil courts' dockets. It takes years for a defendant to get a new trial through PCR. Lawyers must be subpoenaed to testify and state and county governments must expend time and money on these cases. In this appeal, the Attorney General could agree that a new trial is inevitable for appellant and agree that the procedural bar should be waived, but in the event the State seeks delay, this Court should find that the substance of issue preservation is met and that the doctrines of futility and judicial economy weigh in favor of addressing this obvious error now. This Court should reverse.

CONCLUSION

For the foregoing reasons, appellant's convictions should be reversed and this case remanded for a new trial.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of October, 2019.

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DANIEL LEE FLUDD,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon William M. Blitch, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Daniel Lee Fludd, #378414, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 4th day of October, 2019.

David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of October, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: October 22, 2024.