ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

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Appeal from Edgefield County

Honorable Eugene C. Griffith, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

WILLIAM C. (BILLY) SELLERS,

APPELLANT

APPELLATE CASE NO. 2018-001667

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# INITIAL BRIEF OF APPELLANT

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2.

Whether the court erred by instructing the jury on accomplice liability, "the hand of one is the hand of all," since it was improper to instruct accomplice liability on the theory that the jury may believe some of the evidence and disbelieve other evidence, it improperly invited speculation as to another person being the shooter and appellant being guilty as a participant where the evidence did not justify this instruction?

3.

Whether the court erred by admitting State's Exhibits 58-59, where they were irrelevant since they were not probative of whether crucial state's witness Phillip Griffin received consideration from the state for his testimony against appellant?

## STATEMENT OF THE CASE

Appellant was indicted by the Edgefield County Grand Jury for the offense of murder. R. p. *. His case was called to trial on August 27, 2018, before the Honorable Eugene C. Griffith, and a jury. Bennett Castro and Elizabeth Fullwood represented appellant. Suzanne Mayes and Robert McNair were the assistant solicitors. Tr. 1.

On August 31, 2018, the jury found appellant guilty. Tr. 907, ll. 2-3. Judge Griffith sentenced appellant to life imprisonment based upon his prior conviction in Florida for entering a dwelling while armed. Tr. 909, l. 16 – 910, l. 11.

This appeal follows.

## STANDARDS OF REVIEW

**Jury instructions (Issues 1&2)**

"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.

**Admission of evidence (Issue 3)**

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). " An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

## STATEMENT OF FACTS

The indictment in this case alleged that "William C. (Billy) Sellers, did in Edgefield County on or about October 9, 2014, feloniously, willfully, and with malice aforethought, kill Johnny Hydrick, the victim, by means of beating and that the said victim died in Edgefield County as a proximate result thereof . . ." R. p. *. There were no co-defendants in this allegation, and no conspiracy was alleged. The state's case was circumstantial.

The state's theory of the case was that appellant had been buying oxycontin from the decedent. The decedent was found dead inside his home tied with his hands bound in duct tape. The decedent had suffered blunt force trauma and a fractured nose. He died of a closed head injury. Tr. 530, l. 7 – 535, l. 25.

The pathologist, Dr. Janice Ross, opined that the decedent may have been beaten with "a rod or something with a straight edge." Tr. 536, l. 25 – 573, l. 6. Dr. Ross also said that some of the decedent's injuries could have come from a fist, and that the decedent had "oxycodone and oxymorphone in his system." Tr. 540, l. 17 – 541, l. 16.

Richard Hydrick, the decedent's brother, found the decedent's body on October 11, 2014, and he called 911. Tr. 154, l. 20 – 155, l. 5. Richard had talked to his decedent brother the night before and "everything was fine." The decedent was on disability status after being in a car accident and he taking prescription pain medications. He was dating Jessica Reeder. However, Reeder was also living with Travis Murray at the time. Tr. 155, l. 1 – 160, l. 23.

Richard testified that Reeder had gotten into an argument with the decedent in August or September of that year. Richard believed that Reeder hit the decedent on the side with a baseball bat during the argument. Tr. 161, l. 5 – 162, l. 24. Defense counsel later argued to the jury that Reeder and her jealous live-in boyfriend Travis Murray actually killed the decedent, and

appellant was blamed for it. "If Billy didn't have the motive, then who did? Two people. Travis Murray and Jessica Reeder. The same two people that had the motive to kill Johnny Hydrick" Tr. 847, l. – 851, l. 21.

Richard said he talked with investigator Ireland on October 16, 2014, about items he believed were stolen from his decedent brother's house during the burglary-murder. There was no sign of forced entry, however. So, subterfuge to gain entry may have been involved by someone he knew. The stolen items included guns. A slot machine that the decedent played for pleasure in his home was also "busted up in pieces." Tr. 162, l. 22 – 167, l. 23.

On October 11, 2014, Officer Joseph Wood responded to the scene at the decedent's home in Edgefield County. Wood said there was no obvious signs of forced entry. Tr. 172, ll. 9-11. Blood was found in several locations "all throughout the house . . ." Tr. 172, l. 22 – 173, l. 9. The decedent's hands were bound with duct tape and there was a blanket covering him. Tr. 175, ll. 2-15.

The decedent wore an electronic monitor (GPS device) apparently because he was on probation with the Department of Probation, Parole, and Pardon Services. Tr. 183, ll. 2-25. The monitor ceased working at 1:43 a.m. on October 10, 2014. The theory was that the monitor quit working when the decedent died at 1:43 a.m. on October 10, 2014. Tr. 192, l. 17 – 194, l. 13.

Investigator Curtis Morris testified appellant's DNA was *not* found inside the home of the decedent. Neither appellant's DNA nor his fingerprints were found on the duct tape. Tr. 290, l. 21 – 295, l. 3. Appellant's DNA was also *not* found on a .38 caliber Titan Tiger gun. Tr. 302, l. 5 – 303, l. 5. The blanket covering the body of the decedent was not sent to SLED for testing. The baseball bat allegedly used by Jessica Reeder to hit the decedent on a prior occasion was also not collected by law enforcement at the time of his death. Tr. 298, l. 7 – 299, l. 22.

When the decedent's brother, Richard Hydrick, later brought that baseball bat to the police, no blood was found on that bat. Tr. 299, l. 3 – 300, l. 5.

The state presented various jailhouse snitches who claimed they received information about the murder from appellant. Dennis Amerson admitted he had been addicted to methamphetamines. Tr. 315, l. 3 – 316, l. 8. Amerson said he met appellant for the first time in the Edgefield County jail. Tr. 316, l. 24 – 317, l. 7.

Amerson related that appellant showed him photographs of his children "and stuff and was like telling me where that he was gonna (sic) get called up and that he was worried that they were gonna find stuff in his van to convict him of the charges because he had told me that he was being convicted of murder." Tr. 317, l. 20 – 318, l. 1. Amerson claimed appellant also said "he hopes his wife don't find out that he had done it . . . that she wouldn't have nothing to do with him." Tr. 318, ll. 8-17.

Amerson claimed appellant told him that the decedent "was tied up and I think beat. I think that's what it was." Amerson also said appellant confided that "a slot machine . . . pills, and some change or something like that . . ." were stolen. Appellant also allegedly told Amerson "they had got rid of them [the stolen items]." Tr. 319, ll. 13-24.

In addition, Amerson maintained that appellant told him that a drug dealer had been arrested in Aiken "or somewhere like that and he had told on him to try to get hisself (sic) out of trouble." Tr. 320, l. 22 – 321, l. 6. Amerson contended that appellant confessed to him that he committed the murder and stole pills, money, and a slot machine. Amerson denied that appellant merely told him what he was accused of doing these things. Tr. 327, ll. 18-25.

**Phillip Griffin**

Phillip Griffin was arrested on November 21, 2014. He also was addicted to methamphetamines. Tr. 338, l. 23 – 343, l. 13.

Griffin testified that he became cellmates with appellant and they began talking "about each other's charges." Griffin said appellant told him "at first it wasn't him and then that kind of changed towards the end. . . . His story would change a little bit and he kind of started putting himself involved in the case." Tr. 343, l. 17 – 344, l. 11.

Griffin testified appellant asked him questions about DNA evidence. Griffin said appellant mentioned a time "when the guy Johnny fell down the steps and kind of broke his nose, broke his nose and he went to help him up and he said if there was any blood like on the passenger side, that's what that would be from because he tried to help him in the van. He was going to take him to the hospital and the guy Johnny was like no. No. I'll be fine." Griffin thought appellant was talking about an incident from September 2014 involving the decedent and the van. Tr. 345, l. 6 – 346, l. 16.

Griffin opined that appellant's story "changed a lot." Griffin said appellant told him he "went there" to commit a robbery and that they were going to "pull a lick." They knew the decedent "just got his prescriptions filled and he was gonna go get his pills. If he had any money, he wanted it, too." The rumor was that a man named "Gee" – who was never located and may not even exist -- was allegedly involved with appellant in the robbery. Tr. 346, l. 13 – 348, l. 4.

Griffin alleged appellant told him, "They went to his house and they taped him up and was asking him where the pills were and they were pistol whipping him until he told them where

the pills were." Tr. 348, ll. 5-14. Griffin maintained that appellant was surprised he was charged with murder "because he said when he left, the guy was still alive." Tr. 350, ll. 4-24.

Finally, Griffin said that appellant in addition to talking about a person named "Gee" also mentioned a person named "Jersey." Tr. 353, ll. 19-23.

**Griffin's sentencing exposure**

Griffin admitted he had a sentencing exposure of *fifty years imprisonment* at the time, but he denied he received any sentencing exposure assistance for testifying against appellant. Tr. 369, ll. 9-20. He admitted some charges were dropped, and he got a lenient sentence with probation on other charges, but he nonetheless denied the sentencing judge knew of his agreement to testify in this case. Tr. 367, l. 4 – 369, l. 20.

After Griffin claimed he received no sentencing consideration for testifying against appellant, the state sought to introduce two of Griffin's guilty plea sentencing sheets which had "no negotiation" checked on the form. Defense counsel objected on the grounds of relevance, and that objection was overruled. The sentencing sheets were therefore admitted. Tr, 372, l, 16 – 374, l. 1. R. p. *.

Hakim Talib testified that he sold marijuana to "the whole neighborhood" and that appellant began buying marijuana from him also. He was "Jersey." Tr. 440, l. 24 – 441, l. 5. Hakim said that appellant at one point approached him about buying "a shotgun, pills, and a .38." Tr. 445, ll. 11-15. Hakim maintained that he told appellant he did not want to buy a shotgun, "I ain't interested in no shotgun. I can't flip no shotgun like that. I don't want no big giant gun. I don't need no big gun." Tr. 446, ll. 15-20.

Hakim said he talked to Investigator Ireland about what he knew about this case and he told him about "Gee." Hakim said he thought Gee was a "real person" but he did not know his real name. Tr. 467, l. 21 – 469, l. 21.

Wesley Brown had been convicted of trafficking in crack. Tr. 591, l. 1 – 592, l. 13. Brown met appellant when he was his cellmate in the detention center. Tr. 592, ll. 11-19.

Brown testified that in "general conversation" appellant mentioned Shawn Nicholson, who was known as "Bald Head." Brown told appellant he was very close to Shawn and appellant allegedly told Brown "that Shawn was his alibi and that, you know, he just went to talking about, you know, all kind of small stuff about saying that a guy named Jersey was the reason he was locked up. Said Jersey got caught with some stuff, some drugs or something, got busted in Aiken and told on him." Tr. 594, l. 1 – 595, l. 19.

Brown contended that appellant wanted Brown to talk to the investigator "and basically tell the investigator that Jersey was the one who killed this guy." Tr. 595, l. 20 – 596, l. 2. Brown also contended appellant wanted him "to say that I met Jersey and sold him some drugs and he tried to sell me some guns and Jersey was supposed to tell me that, you know, guns came from the guy that got killed and all of this stuff. He wanted me to tell the investigator that Jersey gave me all the information about the murder." Tr. 596, ll. 3-9.

Brown testified appellant "gave me a piece of paper that he had done wrote down what he wanted me to say." Tr. 597, ll. 1-16. Brown claimed that appellant told him that "they did it with a .38" but he did not know the other person -- "who that could be" -- appellant may have alleged was also involved. Tr. 598, ll. 1-25.

However, Brown maintained appellant wanted him to "pin it on Jersey." Tr. 599, ll. 3-4. Brown testified that appellant told him they used a .38 "not to shoot him but to beat him with it. They beat him with a .38." Tr. 599, ll. 15-18. Brown said the letter he wrote said:

> "Sometime in the middle of October I went to serve some reefer to a guy named Jersey, a/k/a Hakim Talib. After I served him, he began to ask me if I was interested in buying a shotgun, a .38 revolver or some pain pills. He said he had beat some dude's ass who owe him some money. Beat him unconscious with a .38 he was trying to sell so he took the guy's shotgun and pills as payment. Told me that had it been him he'd have given everything that he had to avoid a beating like that. Jersey said he had his cousin handle it like pros, that there was no way it would come back on them. I said I didn't need anything like that. A couple of weeks later I was visiting a friend who told me Jersey got busted with a pound of reefer and some gun. I went to his house off Alfred Street and he told me that he was gonna get probation he thought because he told the police about the guy he beat who ended up dying and set up a white boy he used to sell reefer to. Jersey said he found out from the white boy dude named Billy that he was questioned by the Edgefield police about the death of his pill guy so Jersey had his cousin who was serving the white guy at the time start putting certain information in the white boy's phone but didn't say what. It said that the white boy was a duck and trusted anyone. He said he was a meth head and was an easy fall guy. Jersey then asked if I could get him right with some reefer and I said I'll see what I could do. I'll see what was up."

Tr. 600, l. 19 – 601, l. 18.

Brown claimed he wrote the letter because appellant told him he could get out of jail if he provided good information to law enforcement. Tr. 626, ll. 4-14. Brenda Heath, the questioned documents examiner, testified appellant was the author of State's Exhibit 84, the letter. Tr. 637, ll. 7-10.

Investigator Phillip Ireland testified he spoke to appellant on October 25, 2014. Tr. 654, l. 2 – 656, l. 3. Ireland said appellant asked him, "Have you found anyone else besides me who did this, or do you feel like it's just me?" Tr. 657, ll. 15-24.

Ireland related that during his investigation he learned that Travis Murray and Jessica Reeder had a strained relationship and that Travis was very jealous of her. Tr. 678, l. 12 – 685, l. 5. Ireland testified that the decedent provided Jessica Reeder with pills and money. Ireland also learned that Jessica Reeder had hit the decedent with a baseball bat on a prior occasion. Tr. 683, l. 5. – 685, l. 5.

Appellant admitted to Ireland that he had purchased pills from the decedent. Finally, Ireland offered that Travis Murray and Jessica Reeder were both arrested for the first degree burglary of the decedent's home and for the murder of the decedent. Tr. 696, ll. 17-23. Ireland finally opined he believed that "Gee" was a real person although law enforcement was never able to locate him. Tr. 691, l. 18 – 692, l. 4.

Shawn Nicholson testified that appellant was his neighbor for a year or a year and a half. They both got high smoking marijuana "and things of that sort." Tr. 730, l. 12 – 731, l. 6.

Nicholson testified that he, Travis Murray, and appellant went to an abandoned house to "scrap for metal" to sell to the recycling plant. Tr. 732, l. 4 – 735, l. 9. Nicholson heard appellant and Travis talking about a man "Travis girlfriend was dealing with" at the time. Tr. 737, ll. 1-22. Nicholson said he never learned the name of the man they were talking about but he thought it was someone having sex "with his [Travis's] girlfriend" and they were talking about "doing a lick." Nicholson thought "they was just talking trash," and that they were not serious about robbing this man. Tr. 739, l. 1 – 740, l. 9.

Nicholson testified that on the night of October 9, 2014, appellant came to his house and said he had been in an argument with his girlfriend or wife. Tr. 740, l. 10 – 747, l. 6. While appellant stayed at Nicholson's house that night, Nicholson maintained that appellant was gone from about midnight to 3 a.m. that morning. Tr. 744, l. 9 – 749, l. 11.

Joseph Lowe testified he had sold meth to appellant in the past. Tr. 782, l. 2 – 783, l. 14. Lowe said appellant "wanted to know if I wanted to do a lick with him." This apparently involved the robbery of a disabled man who "gets drunk and gets pilled up and passes out and he'll be an easy target and I told him I didn't want no part of it." Tr. 784, ll. 2-6. Lowe said he "cut ties with him [appellant]" at that point. Tr. 784, ll. 10-15.

Lowe also testified that appellant called him on the phone late at night and asked him "if I wanted to trade him some, he said I think a shotgun and a rifle and some pills that he had gotten, uhm, and I didn't want them . . ." Tr. 784, l. 25 – 785, l. 6. Lowe maintained appellant told him "for a beating like that he would have give everything he had to not get a beating like that but he didn't have but a dollar in his wallet." Lowe said he thought appellant told him "a shotgun and a rifle and some pills were stolen." Tr. 785, ll. 22-25.

Lowe thought that appellant wanted to trade the stolen items for "crystal meth." Tr. 786, ll. 4-8. Lowe said he contacted Tommy Brock, a longtime family friend, with the Aiken police department to tell him about what appellant had said about the incident. Tr. 788, l. 11 – 800, l. 23. Lowe admitted he had only known appellant for about two weeks when he claimed appellant asked him about "doing this lick." Tr. 800, ll. 5-20. Lowe also maintained that he only continued talking to appellant so that Investigator Ireland could find appellant and arrest him. Tr. 804, ll. 4-22.

**The charge conference – malice and accomplice liability**

Defense counsel Fullwood objected to the judge charging the jury that malice is the "intentional doing of a wrongful act without just cause or excuse and [or] with an intent to inflict an injury under circumstances that the law will infer an evil intent [or malice]." Counsel argued that the phrase "*without just cause or excuse*," could be construed as burden shifting. Defense

counsel Fullwood also observed, "I know it's in the charge books but I always object to it because I think it's wrong." Tr. 883, l. 20 – 884, l. 21.

The judge then stated, "That's how charges get amended and changed." However, after the solicitor said she had no comment or objection to the "standard charge," the judge overruled counsel's objection to the "without just cause or excuse" malice instruction. "I'm gonna stick with the standard charge. Do you know how oddly I have my granddad's old charge book and he retired in '67 and this charge is in there still. . . ." Tr. 883, l. 20 – 884, l. 21.

Defense counsel Fullwood then said she was not waiving her objection to the "without just cause or excuse" jury instruction but she asked the judge to modify it with the preface that it could "lead to an inference of malice depending on your view of the evidence" if the judge was going to charge it. The judge said he "would think about it." Tr. 884, l. 22 – 885, l. 13.

Defense counsel Fullwood also objected to charging the hand of one is the hand of all, or, the accomplice liability instruction. She noted that there was no evidence "[t]hat there was anyone else involved. There's no testimony that this was the act of more than one person." Counsel argued that "references" or "suggestions" and "innuendo" did not constitute evidence which was needed for an accomplice liability instruction. Tr. 818, ll. 13-22.

The state argued while there were not any indicted co-defendants, that appellant's statements could be interpreted to mean he did not act alone. Defense counsel then cited Wilds v. State, 407 S.C. 432, 756 S.E.2d 387 (2014), in support of her argument that accomplice liability should not be charged in this case. Counsel noted the very real problem that the Supreme Court recognized in Wilds was that "the jury might believe this part and this part, not this part, but if we can patch it together, they might think that, and that's what Wilds says you can't do to be entitled to a charge on accomplice liability." Tr. 818, l. 4 – 821, l. 23.

The judge said he understood the defense objection to the hand of one, hand of all charge but stated he was going to charge it over appellant's objection. Tr. 818, l. 13 – 822, l. 5; tr. 885, l. 14 – 886, l. 11.

**The jury charge**

The judge charged the jury, "In order to sustain a conviction for murder the state must prove beyond a reasonable doubt that he, a person, the defendant killed another person with malice aforethought. Now, I tell you that malice is defined as hatred, ill will, hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse or with an intent to inflict danger or under the circumstances which the law infers an evil intent or malice. . . ." Tr. 898, l. 21 – 899, l. 7. (emphasis added).

The judge also instructed that "hand of one is the hand of all," specifically, inter alia, the judge instructed, "Two people can be guilty of killing another person when only one of the two had a gun and there's only one bullet, only one of the two fired the shot that caused the death but if the two or more people are acting together assisting each other in committing the offense, the act of one is the act of all or as it is sometimes said the hand of one is the hand of all." Tr. 900, l. 4 – 901, l. 11.

## ARGUMENT

1.

The court erred by instructing the jury that malice "is the intentional doing of a wrongful act without just cause or excuse" since it could be reasonably interpreted as shifting the burden to appellant to prove a justification or excuse for his wrongful acts thereby rendering the instruction violative of appellant's Due Process constitutional rights

**Discussion**

As seen, defense counsel objected to the judge charging the jury that malice was the "intentional doing of a wrongful act without just cause or excuse." Defense counsel correctly noted that this instruction could reasonably be interpreted by the jury to be burden shifting. Meaning, that appellant intentionally doing a wrongful act without just cause or excuse constituted malice and shifted the burden to appellant to prove just cause or excuse. Tr. 883, l. 20 – 885, l. 13.

This instruction should not have been given. In State v. Burdette, Op. No. 27910, Shearouse's Adv. Sh. No. 31 at pp. 8-19, the Supreme Court held that "Regardless of the evidence presented at trial, a trial court shall not instruct a jury that it may infer the existence of malice when the deed was done with a deadly weapon." State v. Burdette, Op. No. 27910, Shearouse's Adv. Sh. No. 31 at p. 17. This opinion overruled State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), which allowed he inference of malice instruction from the use of a deadly weapon unless there was evidence which would reduce, mitigate, excuse or justify the killing or assault and battery with intent to kill.

The Supreme Court's decision in Burdette was consistent with its pattern of disapproving of jury instructions on how the jury should interpret certain evidence. For example, the Court in

Burdette cited State v. Grant, 275 S.C. 404, 407-08, 272 S.E.2d 169, 171 (1980), where it held it was improper for the trial court to charge the jury that the defendant's flight may be considered evidence of guilt. State v. Burdette, Op. No. 27910, Shearouse's Adv. Sh. No. 31 at pp. 16-17. The Court also cited State v. Hughey, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000), where it held that the trial judge correctly refused the defendant's request to charge specific examples of voluntary manslaughter that might be considered evidence of legal provocation.[1]

Further, in State v. Cheeks, 401 S.C. 322, 328-29, 737 S.E.2d 480, 484 (2013), the Supreme Court held that the trial court must not charge the jury that actual knowledge of the presence of drugs is strong evidence of a defendant's intent to control their disposition or use. State v. Burdette, Op. No. 27910, Shearouse's Adv. Sh. No. 31 at p. 17.

Finally, in State v. Cartwright, 425 S.C. 81, 819 S.E.2d 756 (2018), the Supreme Court held that in the future, even in the rare event when evidence is permitted of the defendant's attempted suicide, that it will still be improper for the trial court to instruct the jury by way of a limiting instruction or otherwise about that suicide evidence. The Court noted that under the South Carolina constitution, "Judges shall not charge juries in respect to matters of fact, but shall declare the law." State v. Cartwright, 425 S.C. 81, 93, 819 S.E.2d 756, 762 (2018), *citing* S.C. Const. Art. V, § 21.

Here, the objectionable jury charge was that malice went beyond the may raise an "inference of malice" as defense counsel noted. The instruction was that malice was "the intentional doing of a wrongful act without just cause or excuse." As with the other cases cited above this instruction was an unnecessary and problematic as it was about how the jury should interpret evidence. The solicitor was free to argue there was no excuse or justification for

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[1] Overruled on other grounds in Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009).

appellant being involved in drug transactions with the decedent, or him allegedly entering the decedent's home with the intent to harm him, or by brutally beating him, and that the jury could find this evidence constituted malice. However, it was quite different and improper for the Court to *charge it, and* it was burden shifting.

The instruction that the intentional doing of a wrongful act without just cause or excuse was burden shifting as defense counsel correctly argued. As defense counsel argued, the state must prove a defendant's guilt beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). Any jury instruction that has the effect of relieving the state of its burden of proof beyond a reasonable doubt as to every essential element of the crime is impermissible. See, Sandstrom v. Montana, 442 U.S. 510 (1979).

In High v. State, 300 S.C. 88, 386 S.E.2d 463 (1989), the Supreme Court held that defense counsel was ineffective for failing to object to a burden shifting instruction. In High, the judge charged involuntary manslaughter as "the unintentional cause of the death of another through mere criminal negligence." The judge defined intent as "to act knowingly." The judge then charged the jury that the law presumes the intent from the doing of an unlawful act. Citing Yates v. Aiken, 484 U.S. 211 (1988) and Sandstrom v. Montana, 442 U.S. 510 (1979), the Supreme Court found the instruction was "clearly erroneous." See, High v. State, 300 S.C. 88, 89, 386 S.E.2d 463, 464 (1989).

Here, the judge defined malice as "the intentional doing of a wrongful act without just cause or excuse." Defense counsel correctly objected that a reasonable juror could interpret this instruction as shifting the burden to appellant to show "just cause or excuse" for his intentional doing of a wrongful act.

In this case, those wrongful acts could include the selling or buying of drugs. They also could include burglary. In addition, they could include an alleged plan to do "a lick," or the beating of the decedent prior to his death.

Our Supreme Court has disapproved instructions on malice where, as here, they tend to have inferences of malice that can be derived from evidence that exists in the case such as the use of a deadly weapon. Burdette and Belcher. The instruction in this case *defined* malice as "the intentional doing of a wrongful act without just cause or excuse." That was even stronger than an inference of malice instruction, it was burden shifting to appellant, and it should be condemned or disapproved by this Court. Again, there certainly was a variety of evidence of unlawful or wrongful acts that this jury instruction impermissibly called upon appellant to show "just cause or excuse" for in this case. Appellant should be granted a new trial.

2.

The court erred by instructing the jury on accomplice liability, "the hand of one is the hand of all," since it was improper to instruct accomplice liability on the theory that the jury may believe some of the evidence and disbelieve other evidence, it improperly invited speculation as to another person being the shooter and appellant being guilty as a participant where the evidence did not justify this instruction

As seen above, the solicitor argued that even though there were no co-defendants or co-conspirators in this case that an instruction on accomplice liability was proper. The solicitor said some of appellant's statements themselves implied another person or others may have been involved. Tr. 818, l. 13 – 822, l. 5; tr. 885, l. 14 – 886, l. 11.

Defense counsel countered that pursuant to this Court's opinion in Wilds v. State, 407 S.C. 432, 756 S.E.2d 387 (Ct. App. 2014) that it was improper to give an instruction on accomplice liability on the theory that the jury may believe some of the testimony and disbelieve other parts of the testimony. Further, the innuendo and rumors about someone else being involved were just rumors. Tr. 818, l. 13 – 822, l. 5; tr. 885, l. 14 – 886, l. 11.

Appellant alone was indicted for murdering the decedent. There was no indictment or allegation of conspiracy. A man named "Gee" was mentioned but at the end of the trial the fact of whether such a man – "Gee" -- even existed was still being discussed. While defense counsel blamed the murder on Travis Murray and Jessica Reeder in this closing argument the motive to kill the decedent was their motive, independent of appellant.

The instruction on accomplice liability based on speculation that someone else or others may have been involved was improper. In Wilds v. State, there was no evidence anyone other than the defendant was the shooter. While the evidence in this case was not as dramatically clear

cut, there was still no evidence presented by the state that anyone other than appellant was the killer -- if appellant was the killer. The state's case was circumstantial, and there was no circumstantial evidence that someone else was the killer. The jury should have been forced to decide if the state proved beyond a reasonable doubt that appellant killed the decedent. Allowing a guilty of murder verdict based on a theory – accomplice liability – where the evidence did not support that theory was error. Wilds v. State. 407 S.C. 432, 438, 756 S.E.2d 387, 390 (Ct. App. 2014).

Further, defense counsel correctly argued that the jury instruction was improper on the basis the jury may find an alternate theory of liability because the jury "may believe some of the evidence and disbelieve other evidence." Wilds v. State, 407 S.C. 432, 438, 756 S.E.2d 387, 390 (Ct. App. 2014) *citing* Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 438 (2011). In many murder cases innuendo and rumors are alive – that does not justify a jury instruction and a verdict based on "accomplice liability." Most respectfully, "the hand of one is the hand of all" is a very dangerous jury instruction given its broad interpretation -- such as the "one bullet" multiple person's being guilty instruction in this case.

Appellant was indicted for murder. The jury's task was to decide whether appellant killed the decedent with malice aforethought in violation of S.C. Code § 16-3-10. Allowing the jury to convict appellant on an improper alternative theory of liability by inviting speculation based on the jury believing some evidence but not believing other evidence presented by the state impermissibly invited speculation. Wilds v. State, 407 S.C. 432, 756 S.E.2d 387 (Ct. App. 2014). Appellant should be granted a new trial.

3.

The court erred by admitting State's Exhibits 58-59, the guilty plea sentencing sheets where they were irrelevant since they were not probative of whether crucial state's witness Phillip Griffin received sentencing consideration from the state for his testimony against appellant

As seen, the judge allowed sentencing sheets, State's Exhibit 58 and State's Exhibit 59, into evidence over the defense objection that they were irrelevant. The sentencing sheets has the boxed checked for "without Negotiations or Recommendation." R. p. *. The context of what occurred here is clear. Phillip Griffin was being questioned for his sentencing exposure and he was denying that his testimony was affected by or that he was biased or had a motive to misrepresent the truth because he had received leniency from the state. In State's Exhibit 58, it showed that Griffin pled guilty to grand larceny $2,000 to $10,000 "without negotiation or recommendation" since that box was checked on the sentencing sheet. State's Exhibit 59 involved another guilty plea. R. p. *.

The sentencing sheets were not relevant because the negotiation or recommendation was an "official position" taken by the government in court when a defendant pleads guilty. It is widely known that suspects and defendants can be given sentencing consideration in many other ways besides on the record in a courtroom at the time of a guilty plea. While the review of a plea agreement is limited to only those terms on the record following State v. Thrift, 312 S.C. 282, 295, 440 S.E.2d 341, 348 (1994), using a sentencing sheet of a state's witness in a separate case in such a misleading fashion should respectfully not be approved by this Court.

State's Exhibits 58 and 59 for that reason were simply not relevant to the issue at hand, which was whether Griffin in fact received sentencing consideration for his testimony, and he

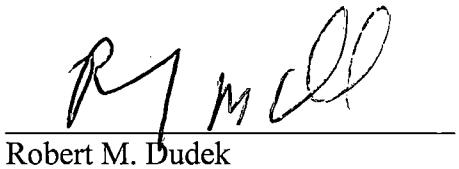
therefore may well have had a motive to misrepresent the truth. Since the sentencing sheets were irrelevant and impermissible, they should not have been allowed into evidence.

In State v. Martin, 403 S.C. 19, 742 S.E.2d 42 (Ct. App. 2013), this Court found the judge erred in admitting evidence the defendant gave a police officer false identifying information because there was no nexus between the false information and the underlying crime, bank robbery. Here, the sentencing sheets showing Phillip Griffin pled guilty "without negotiation or recommendation" to two crimes were irrelevant because they had no nexus to the real issue at hand – whether Philip Griffin received sentencing consideration for his extraordinarily damaging testimony against appellant. For this reason, State's Exhibits 58 and 59 were not relevant and they were inadmissible under Rule 401, SCRE. See, State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986).

Griffin was a very important witness for the state, who claimed appellant told him they went to the decedent's house where "they taped him up and was asking him where the pills were and they were pistol whipping him until he told them where the pills were." Tr. 348, ll. 5-14. Griffin's claim that appellant told him these "facts" was devastating to the defense. Griffin's bias to help the state because of his own legal troubles where he faced 50 years in prison was of critical importance to the jury, and the admission of these two irrelevant sentencing sheets to allegedly show Griffin was not getting sentencing consideration for his testimony was highly irrelevant, and extremely prejudicial to the defense. The error therefore was not harmless.

## CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed and this case remanded to the Edgefield County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of October, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

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Appeal from Edgefield County

Honorable Eugene C. Griffith, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

WILLIAM C. (BILLY) SELLERS,

APPELLANT

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CERTIFICATE OF SERVICE

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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 Melody J. Brown, 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 William C. Sellers, #377621, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 2nd day of October, 2019.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 2nd day of October, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028