STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Laurens County
Honorable Frank R. Addy, Circuit Court Judge

THE STATE,

Respondent,

vs.

DESHANNDON MARKELLE FRANKS,

Appellant.

Appellate Case No. 2016-002244

MEMORANDUM ON APPLICABILITY OF *STATE v. BURDETTE*, ___ S.C. ___, 832 S.E. 575 (2019)

On October 8, 2019, the Court ordered the parties to serve and file memoranda addressing the impact of the South Carolina Supreme Court's recent decision in *State v. Burdette*, ___ S.C. ___, 832 S.E.2d 575 (2019), on the trial judge's jury instruction (***R. p. 433, ll. 15-25***) that malice may be inferred from the use of a deadly weapon, where there was no evidence presented in Appellant's August, 2016, trial "that would reduce, mitigate, excuse, or justify the homicide." *Accord State v. Belcher*, 385 S.C. 597, 600, 685 S.E.2d 802, 803-04 (2009), *overruled, Burdette, supra.* Assuming *arguendo* that the Court rejects the argument that this error was not preserved for appellate review, FBOR at 40-42, Respondent submits that although the instruction was erroneous in light of *Burdette*, any error was harmless beyond a reasonable doubt for the following reasons.

Appellant relied on his right not to testify or present any evidence. So, the only evidence in this case was presented by the prosecution. The State's evidence tended to prove that the double homicides were murder and there was no evidence presented "that would reduce, mitigate, excuse, or justify the homicide." *Contra Burdette*, 832 S.E.2d at 579-81; *Belcher, supra.* This evidence showed that Appellant and his co-defendant, Tevin Hill, went to the mobile home in which his victims, Sammie Darryl Leake and Nikesha James, lived early in the morning of January 31, 2014. ***R. pp. 93-95; 194-95; 197; 199-200; 215-16.***

Witnesses testified that Appellant was drinking and they described him as "hyper" or "amped," both on the 30th before he went to the victims' residence (***R. p. 184; 212***)[1] and while he was there in the early morning hours of the 31st. ***R. pp. 197; 199; 216.*** Tamia Kinard testified that Appellant and Nikesha had a conversation at her residence "about something that she put on Facebook" and he asked her to talk to him about it "like a woman." ***R. p. 195.*** He and Nikesha went back to Nikesha's bedroom and continued their conversation for "maybe 10, 15 minutes." Hill went back there while they were talking because he was ready to leave, but Appellant and Nikesha soon finished this conversation. When they emerged from her bedroom, they were laughing and talking normally. ***R. pp. 195-97.***

Co-defendant Tevin Hill also witnessed Appellant's conversation with Nikesha. He confirmed that the conversation began in the main room, and that Appellant and Nikesha went back to her bedroom and continued their discussion. Hill could not hear them, he did not know what the conversation was about, and he did not even hear the tone of their voices. ***R. pp. 216-17.*** Because Hill was beginning to get tired and he was hungry, he readily agreed to give Tamia and

[1] Lavashta Pulley testified that when she saw him at Washes Club late on the night of the 30th, he also was displaying a black gun. ***R. 183; 185-90.***

her baby a ride when she asked him to take her home. ***R. pp. 217-18.*** Tamia testified that Appellant was sitting down, drinking gin and soda when they left Nikesha's trailer. Sammie and Nikesha were the only other people in the residence at that point. ***R. pp. 197-99.***

There were no witnesses to the murder, except for the two victims and the person who killed them, Appellant. Investigating officers found signs of a struggle in the living room[2] where both murders occurred, but there was no evidence either victim was armed. ***R. pp. 121-37.*** Moreover, Dr. James Fulcher, the forensic pathologist who performed autopsies on the victims' bodies, opined that Nikesha died as a result of a distant gunshot to the chest. The wound entered just below her right clavicle and angled "[sharply] downward." ***R. p. 153-54.*** It "[p]enetrated deeply into the chest to make some very large holes in the heart which ... [were] fatal. And then it ... significantly damage[d] the left lung before embedding in the fat of her back on the left side." ***R. pp. 151-52.***

Dr. Fulcher opined that Sammie Leake died from two gunshots to the head. Each wound penetrated into his brain and caused significant damage to his brain. Either would have been almost instantly fatal. Again, the manner of death was homicide and Dr. Fulcher found no evidence that these wounds were close range or contact wounds, such as stippling. ***R. pp. 154-58.***

Overruling its earlier decision in *Belcher*, the Court in *Burdette* held 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," *Burdette*, 832 S.E.2d at 583. *See also id.* at 582, and the Court extended this new rule to all cases "which are pending on direct review or

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[2] SLED Agent Mindy Worley testified, "The rug was folded over on itself, coffee mugs [were] in the floor, [a] picture frame [was] knocked on the floor. There was blood, especially around [Mr. Leake], on the floor." Also, "two of the couch cushions were off the couch. One [cushion] was on top of a third one, and the other was propped in front of the couch." ***R. p. 124.***

are not yet final, so long as the issue is preserved." *Id.* at 583. As argued in the Final Brief of respondent, Respondent submits that Appellant's objection at an unrecorded sidebar (***R. p. 410, l. 11***) failed to preserve the issue on appeal.

Moreover and consistent with earlier precedent, the Court in *Burdette* stated that the giving of this instruction is subject to harmless error analysis. *Id.* at 578-79. *See also State v. Stanko*, 402 S.C. 252, 265, 741 S.E.2d 708, 714–15 (2013) (finding instruction that malice could be inferred from use of deadly weapon was improper but concluding error was harmless), *overruled on other grds.*, *Burdette, supra*; *Belcher*, 385 S.C. at 611, 685 S.E.2d at 809. The Court in *Burdette* explained that:

> 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).

Burdette, at 578-79. The Court then applied this harmless error analysis but simply found, as it had in *Belcher*, that the error was not harmless based on the charge as a whole, including instructions on the lesser-included offenses of voluntary and involuntary manslaughter. *Burdette*, 832 S.E.2d at 579-82.

Applying the above harmless error standard to the charge given in this case, however, Respondent submits that any error must be viewed as harmless beyond any reasonable doubt. First, *Belcher* abandoned strict adherence to the common law inference of malice from use of a deadly weapon based on the Court's conclusion that this inference was "confusing and prejudicial where evidence is presented that would reduce, mitigate, excuse or justify the homicide." *Belcher*, 385

S.C. at 611, 685 S.E.2d at 809. It was the presence of such evidence that led the Court to hold the jury instructions in *Belcher* and *Burdette* were not harmless beyond a reasonable doubt. *See Burdette*, 832 S.E.2d at 579-82; *Belcher*, 385 S.C. at 604, 609-12, 685 S.E.2d at 806, 808-10. Appellant's case, however, does not present a concern of possible jury confusion because there was no evidence that the killing was in self-defense or that Appellant could be guilty of any lesser-included offense of murder. Accordingly, any error in giving the instruction was harmless beyond a reasonable doubt.

A second reason the instruction was harmless beyond any reasonable doubt is that the trial judge gave two alternative definitions of "malice" that support a conclusion that the killing was malicious. Specifically, he instructed jurors that:

> I instruct you, ladies and gentlemen, that malice is defined as hatred, ill-will or hostility toward another person. It's **the intentional doing of a wrongful act without just cause or excuse, and with an intent to inflict an injury, or under circumstances the law will infer an evil intent**. Malice aforethought does not require that malice exists 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.
>
> I instruct you that malice aforethought may be expressed or inferred. These terms expressed and inferred do not mean different kinds of malice, but merely the manner by which malice may be shown to exist. That's either by direct evidence or by inference from the facts and ... circumstances which are proven. Expressed malice is shown when a person speaks words which express hated or ill-will to another person, or when the person prepare[s] beforehand to do the act that was later accomplished. For example, laying in weight for a person or any other acts in preparation going to show that the deed was within the Defendant's mind with the expressed malice.
>
> **Malice may also be inferred from conduct showing a total disregard for human life.**

R. p. 432, l. 16 – p. 433, l. 15 (emphasis added).

Thus, the trial judge's charge on malice permitted the jury to infer or imply malice based on the above facts under two different scenarios, separate and apart from the inference of malice from use of a deadly weapon that is now at issue. Specifically, jurors could infer malice if they found that the victims' deaths were caused by "the intentional doing of a wrongful act without just cause or excuse, and with an intent to inflict an injury, or under circumstances the law will infer an evil intent." Likewise, jurors could infer malice if they found that the deaths were caused by "conduct showing a total disregard for human life."

Each of these definitions is supported by South Carolina case law. *See, e.g., Margolis v. Telech*, 239 S.C. 232, 238, 122 S.E.2d 417, 419-20 (1961) ("Malice is the deliberate, intentional doing of a wrongful act without just cause or excuse"); *id.* at 238, 122 S.E.2d at 420 ("Malice 'is implied where it shows a disregard of the consequences of the injurious act, without reference to any special injury which he may inflict on another', and 'in doing some illegal act for one's own gratification or purposes, without regard to the rights of others or the injury he may inflict on another'"); *State v. Murphy*, 86 S.C. 268, 68 S.E. 570, 570 (1910) ("'Malice is a term of art, implying wickedness, and excluding a just cause or excuse. It is implied from an unlawful act, willfully done, until the contrary be proved.' It has also been defined to be the willful or intentional doing of a wrongful act, without just cause or excuse"); *McBride v. Sch. Dist. of Greenville Cty.*, 389 S.C. 546, 565, 698 S.E.2d 845, 855 (Ct. App. 2010) ("malice is 'the deliberate intentional doing of a wrongful act without just cause or excuse'") (quoting *Eaves v. Broad River Elec. Coop., Inc.*, 277 S.C. 475, 479, 289 S.E.2d 414, 416 (1982) (internal quotation omitted)); *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 437, 629 S.E.2d 642, 649 (2006) (malice may be implied where the evidence reveals a disregard of the consequences of an injurious act, without reference to any special injury that may be inflicted on another person"); *State v. Young*, 238 S.C. 115, 124-25, 119

S.E.2d 504, 509 (1961), overruled on other grds, *State v. Torrence*, 305 S.C. 45, 60-69, 406 S.E.2d 315, 323-28 (1991) (Toal, J., (concurring in result) (abolishing in favorem vitae review). *See also, e.g., State v. Cottrell*, 421 S.C. 622, 644, 809 S.E.2d 423, 435 (2017) (finding trial judge properly instructed jurors that malice could be inferred from conduct showing a total disregard for human life), *reh'g denied* (Feb. 16, 2018), *cert. denied* (Oct. 1, 2018), *cert. denied*, 139 S.Ct. 174 (2018); *State v. Oates*, 421 S.C. 1, 20, 803 S.E.2d 911, 921 (Ct. App. 2017) ("Malice can be inferred from conduct [that] is *so reckless and wanton as to indicate a depravity of mind and general disregard for human life*") (emphasis in original), *reh'g denied* (Sept. 1, 2017), *cert. denied* (Mar. 7, 2018); *State v. Mouzon*, 231 S.C. 655, 662, 99 S.E.2d 672, 675 (1957); *In re Tracy B.*, 391 S.C. 51, 69, 704 S.E.2d 71, 80 (Ct. App. 2010). Each definition likewise fits the facts of this case.

Clearly, shooting a victim twice in the head or through the heart "without just cause or excuse" is malicious. Also, both of these actions reflect "conduct showing a total disregard for human life." Further, despite the unrecorded sidebar during which defense counsel objected to the inference being charged, (***R. p. 410, l. 11***), the defense did not contest whether the killing was malicious. Rather, the defense focused on whether the State had adequately established that Appellant was the shooter. Indeed, counsel's closing argument focused exclusively on the State's failure to prove identity and did not once mention the term "malice." ***R. p. 412, l. 8 – 422, l. 16.***[3] Accordingly, any error in charging the jury that malice could be inferred from the use of a deadly weapon was harmless beyond a reasonable doubt.

Respectfully submitted,

ALAN WILSON

[3] Although this was a circumstantial evidence case, the State's proof of identity was overwhelming. *See* FBOR pp. 8-20.

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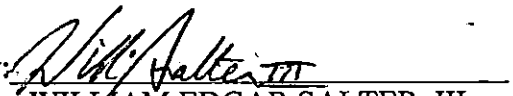
By: 
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ATTORNEYS FOR RESPONDENT

October 15, 2019.

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THE STATE,

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CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for Respondent, certify that I have served two (2) copies of the within Memorandum on Applicability of *State v. Burdette*, ___ S.C. ___, 832 S.E.2d 575 (2019), on counsel for the Appellant by depositing same in the United States mail, first class, postage prepaid, and addressed as follows:

Robert M. Dudek, Esq.
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This 15th day of October, 2019.

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October 15, 2019

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
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RE: State v. Deshanndon Markelle Franks
Appellate Case No: 2016-002244

Dear Ms. Kitchings:

Pursuant to the Court's October 8, 2019 letter, please find enclosed the original and six (6) copies of the State's Memorandum on Applicability of *State v. Burdette*, ____ S.C.____ 832 S.E.2d 575 (2019).

Sincerely,

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WES/ab

cc: Robert M. Dudek, Esquire
Victim Advocacy Division