

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

ORIGINAL

RECEIVED
OCT 18 2019
SC Court of Appeals

THE STATE,

RESPONDENT,

v.

DESHANNDON MARKELLE FRANKS,

APPELLANT

APPELLATE CASE NO. 2016-002244

**MEMORANDUM ON APPLICABILITY OF
STATE V. BURDETTE, ___ S.C. ___, 832 S.E.2d 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, Op. No. 27910, Shearouse's Adv. Sh. 31 at 8-19 (filed July 31, 2019), ___ S.C. ___, 832 S.E.2d 575 (2019), which 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. *overruling*, among other cases, State v. Belcher, 385 S.C. 597, 600, 685 S.E.2d 802, 803-04 (2009).

First, appellant is entitled to the benefit of the Supreme Court's opinion in in State v. Burdette, Op. No. 27910, Shearouse's Adv. Sh. 31 at 8-19 (filed July 31, 2019), ___ S.C. ___,

832 S.E.2d 575 (2019), since the present case is pending on direct appeal before this Court, and not yet final. See, e.g. Griffith v. Kentucky, 479 U.S. 314, 322 (1987) cited in State v. Burdette, Op. No. 27910, Shearouse's Adv. Sh. 31 at 19 (filed July 31, 2019).

In this case, Defense counsel objected to the court giving a Belcher instruction that the use of a deadly weapon could be used by the jury to infer malice. After the solicitor's closing argument, and before appellant's closing, the judge stated that he was going to charge the inference of malice because he reasoned it "would be appropriate in this case because there's no evidence tending to reduce the homicide to a voluntary or involuntary homicide." R. 410, l. 22 – 411, l. 18. The judge said he understood the defense objection to the Belcher instruction. "[I] do understand Mr. Wilkes' objection to that that he made at sidebar. Despite that objection, the Court has included that language." R. 410, ll. 13-16.

The judge instructed the jury that "inferred malice may also arise when the deed is done with a deadly weapon. A deadly weapon is defined under our law as an article, instrument, or substance which is likely to cause death or great bodily harm." R. 433, ll. 14-25.

Defense counsel again took exception the jury instruction after it was given. The judge responded, "Yes, of course. That objection, of course, is noted. Same rulings as before." R. 439, ll. 8-16. The objection to the jury instruction was well preserved.

Appellant's position now is much stronger than it was before State v. Burdette, Op. No. 27910, Shearouse's Adv. Sh. 31 at 8-19 (filed July 31, 2019), ___ S.C. ___, 832 S.E.2d 575 (2019), was decided since 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. The Court in Burdette also stated that the prosecution and defense remain free to argue that use or non-use of a deadly weapon showed whether or not malice existed -- in

their opinion -- but “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 810 n. 9 (quoting Bruce A. Antkowiak, *The Art of Malice*, 60 RUTGERS L. Rev. 435, 476 (2008)).” *State v. Burdette*, Op. No. 27910, Shearouse’s Adv. Sh. 31 at 17-1818 (filed July 31, 2019).

Regardless, even before *Burdette*, in this case, appellant here correctly argued that the judge erred by reasoning that merely because voluntary and involuntary manslaughter were not lesser-included offenses in this case that the implied malice from the use of a deadly weapon instruction was proper. That is true because under *Belcher*, *any evidence* that would “reduce, mitigate, excuse, or justify the homicide” made the implied malice from the use of a deadly weapon instruction improper. There was such evidence in this case. See Final Brief of Appellant at 22.

Again, as appellant has stressed, the jury in this case could have concluded that appellant was present at the murder scene with Tevin Hill but determined that appellant was not the shooter. Appellant did not have gunshot residue on the clothes he allegedly wore on the night of the shooting. R. 342, l. 18 - 345, l. 19

There was no DNA, fingerprints, or other forensic evidence linking appellant to the murder. R. 339, l. 8 – 342, l. 8. Further, evidence that appellant had a gun, and that he allegedly told Pulley it was nine millimeter “Ruger” on the night of the shooting, and that a nine millimeter Ruger was the murder weapon was speculation. The murder weapon was never found, and all the state’s witnesses could opine was that the same gun fired the shots that killed both victims.

If appellant was present with another person who shot the victims (Tevin Hill) or knew who may have shot the victims (James Morgan Hill) but he was not the shooter, that could be evidence appellant was guilty of some other crime with either Hill, but it mitigated or reduced

against a finding of his guilt for murder, even though it was not evidence of voluntary manslaughter or involuntary manslaughter which the judge erroneously found conclusive. R. 296, l. 2 – 298, l. 19; R. 336, l. 13 – 338, l. 11. The judge’s reasoning that because voluntary manslaughter and involuntary manslaughter were not lesser-included offenses to be charged in this case, that the jury instruction on implied malice from the use of a deadly weapon was therefore proper was erroneous.

The state admitted it could not point to a single reason why appellant would kill these two victims. Appellant understands that the state did not have to prove motive, but here the state admitted it knew of none, did not theorize of one, and none appeared in this record. A jury instruction that malice could be implied from appellant having a deadly weapon was consequently very prejudicial in a case where no motive to kill existed, and the evidence was purely circumstantial as to whom the shooter was in this case.

Further, the jury did not have to accept the state’s blind acceptance of the story of Tevin Hill to save himself, nor did it have to not have to focus on James Morgan Hill (the stalker) as a being the possible shooter because the judge would not allow the defense to pursue a full third-party guilt defense on James Hill being the stalker, and the shooter. R. 296, l. 2 – 298, l. 19; R. 336, l. 13 – 338, l. 11. Final Brief of Appellant at 22-23.

Any argument that there was no evidence in this case ““reduce, mitigate, excuse, or justify the homicide” is no longer relevant. As stated, appellant is entitled to the benefit of the Supreme Court’s opinion in in State v. Burdette, Op. No. 27910, Shearouse’s Adv. Sh. 31 at 8-19 (filed July 31, 2019), ___ S.C. ___, 832 S.E.2d 575 (2019), since this case is pending on direct appeal before this Court, and not yet final. See, e.g., Griffith v. Kentucky, 479 U.S. 314, 322 (1987) *cited in* State v. Burdette, Op. No. 27910, Shearouse’s Adv. Sh. 31 at 19 (filed July 31,

2019). Again, 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*. The judge gave that prohibited instruction in this case, that was prejudicial error to appellant, and he should be granted a new trial.

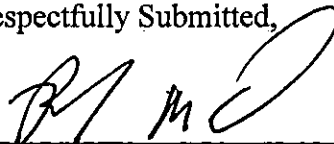
The error was not harmless. The jury also struggled over two days of deliberations to reach a verdict. The jury deliberated from 3:05 p.m until after 8:00 p.m when it went home for the evening on the first day of deliberations. The jury returned on day two and resumed deliberations at 9:04 a.m., and it did not reach a verdict until 12:49 p.m. R. 439, l. 4 – 446, l. 22. This was a hard and close case.

In State v. Heyward, 426 S.C. 630, 635, 828 S.E.2d 592, 635 (2019), the Supreme Court noted the length of the jury deliberations, and also refused to find the error cumulative to other evidence on domestic violence in rejecting the state's urging of harmless error, and concluding it constituted a "close" jury case. Further, the harmless error doctrine should be used guardedly and on a case-by-case basis. State v. Morris, 289 S.C. 294, 297, 345 S.E.2d 477, 479 (1986). Moreover, in the absence of overwhelming evidence of guilty the error should not be held harmless. State v. Singleton, 303 S.C. 313, 400 S.E.2d 487 (1991).

This was a highly unusual case that the jury struggled with during its deliberations. It was a close case. It is apparent that evidentiary instructions on how to interpret evidence are increasing disfavored by our Supreme Court, and appellant should be granted a new trial given the jury instruction error in this case. State v. Burdette, Op. No. 27910, Shearouse's Adv. Sh. 31 at 8-19 (filed July 31, 2019) See, also, State v. Cartwright, 425 S.C. 81, 819 S.E.2d 756 (2018)(attempted suicide instruction should no longer be charged); State v. Witherspoon, 418 S.C. 614, 795 S.E.2d 685 (2016) (jury instruction that the alleged victim's testimony did not

have to be corroborated was prejudicial error as announced in State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016).

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'R M D', written over a horizontal line.

ROBERT M. DUDEK
Chief Appellate Defender

This 18th day of October, 2019.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Laurens County

Honorable Frank R. Addy, Circuit Court Judge

RECEIVED
OCT 18 2019
SC Court of Appeals

THE STATE,

RESPONDENT,

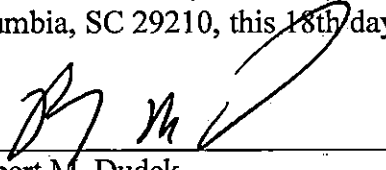
V.

DESHANNDON MARKELLE FRANKS,

APPELLANT

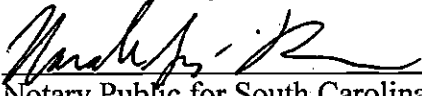
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the memorandum on the impact of State v. Burdette, ___ S.C. ___, 832 S.E.2d 575 (2019) in the above-entitled case has been served upon William Edgar Salter, III, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Deshanndon Franks, #370250, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 18th day of October, 2019.



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 18th day of October, 2019.



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



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

October 18, 2019

RECEIVED
OCT 18 2019
SC Court of Appeals

Honorable Jenny Abbot Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: The State v. Deshanndon Markelle Franks, Appellate Case No. 2016-002244
Oral Argument on Tuesday, October 22, 2019

Dear Ms. Kitchings:

Pursuant to the Court's October 8, 2019 letter, enclosed are the original and six (6) copies of appellant's memorandum on the impact of State v. Burdette, ___ S.C. ___, 832 S.E.2d 575 (2019), in the above-entitled case, which is scheduled for oral argument on Tuesday, October 22, 2019, at the Watt Family Innovation Center at Clemson University. Consequently, I appreciate you forwarding the memorandum to the applicable panel. Thank you for your assistance in this timely matter.

Please call me if you have any questions.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD/csb

Enclosure