

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

RECEIVED

MAY 03 2018

S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

SHANE ADAM BURDETTE,

PETITIONER,

Appellate Case No. 2017-001990

BRIEF OF RESPONDENT

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PETITIONER'S QUESTION PRESENTED

Did the Court of Appeals err in concluding Petitioner "suffered no prejudice" from the undisputed erroneous jury charge regarding inference of malice from the use of a deadly weapon based upon the charge as a whole, the erroneous language being charged twice, the evidence supporting the defense of accident, and the heightened risk of a compromise verdict based upon the erroneous charge?

RESPONDENT'S COUNTER QUESTION PRESENTED

Did the Court of Appeals err in finding Petitioner suffered no prejudice from the trial court's erroneous instruction that malice may be inferred from the use of a deadly weapon in light of the jury's rejection of the verdict of murder in favor of voluntary manslaughter?

RESPONDENT'S STATEMENT OF THE CASE

An Oconee County grand jury indicted Petitioner, Shane Adam Burdette, in October 2013, for murder and possession of a weapon during a violent crime. (R. pp. 492-493.) On February 23, 2015, Petitioner's case was called to trial before the Honorable J. Cordell Maddox, Jr. (R. p. 1.) W. Wilson Burr, Esquire, represented Petitioner during the trial. (R. p. 1). Assistant Solicitor David Wagner, Jr., represented the State. (R. p. 1.) The jury returned a verdict of guilty of the lesser included charge of voluntary manslaughter and guilty of the charge of possession of a weapon during a violent crime. (R. p. 473.) Judge Maddox sentenced Petitioner to twenty-five years' imprisonment suspended upon the service of fifteen years' imprisonment and five years' probation. (R. p. 477, lines 11-19.) Judge Maddox also sentenced Petitioner to a consecutive term of five years' imprisonment for the possession of a weapon charge. (R. p. 477, lines 20-24.)

Petitioner filed a timely notice of appeal. Following briefing and oral argument, the Court of Appeals affirmed Petitioner's convictions and sentence in Unpublished Opinion No. 2017-UP-237 (Ct. App. June 7, 2017). (App. pp. 1-5.) A Petition for Rehearing followed and was denied on August 28, 2017 (App. pp. 6-27.)

Petitioner next timely sought a Petition for Writ of Certiorari. The Supreme Court of South Carolina granted the Petition as to Question IV and denied the Petition as to the remaining questions. Petitioner filed his Brief of Petitioner on April 6, 2018. This Brief of Respondent follows.

RESPONDENT'S STATEMENT OF FACTS

The victim, Evan Tyner, was killed on July 9, 2013, near Mount Pleasant Baptist Church in the Westminster area of Oconee County. (R. p. 188, lines 4-10.) The Petitioner's father lived in the nearby parsonage, and Petitioner would stay there from time to time. (R. p. 185, lines 1-6.) Petitioner's fiancé (Tiffany), with whom he had two children, was the sister of the victim. (R. p. 77, lines 5-14.)

The hostility between the victim and Petitioner escalated the day before the killing at Tiffany's house. The two men began shoving each other, and Evan and his friend Bubba made Petitioner leave the house. (R. p. 80, lines 4-11.) Petitioner returned a few hours later with his friend Ken, but Evan made him leave again. (R. p. 81, lines 9-11.) Petitioner screamed, "it isn't over," and before he left pointed in the victim's direction and said, "I got somethin' for his ass." (R. p. 81, lines 12-14; p. 168, lines 1-9.)

Evan and his friends decided they wanted to get some cigarettes, so they left Tiffany's house in her green SUV to go to Walmart. (R. p. 81, line 16 – p. 82, line 17.) As the men drove off, they began to have car trouble. (R. p. 84, lines 7-9.) They pulled into a driveway and borrowed someone's phone to call Tiffany, who said she would find someone to pick them up. (R. p. 84, lines 7-24.) The men fell asleep in the car waiting, and when they awoke they noticed Petitioner driving by -- waving, laughing and making rude gestures. (R. p. 84, line 24 – p. 85, line 3.) This infuriated Evan, who was determined to drive the car back to the parsonage to confront Petitioner, despite the noises coming from the car's engine. (R. p. 85, lines 7-13.)

When the men arrived at the parsonage, Petitioner's car was not there, so they waited for him to return. (R. p. 86, lines 17-20.) After about five minutes, Petitioner drove up and parked his car behind the men. (R. p. 86, line 18 – p. 87, line 5.) Petitioner walked over to Evan's side of

the car, and they began arguing. (R. p. 87, lines 14-17.) Petitioner told Evan he “had something for [them].” (R. p. 86, line 19.) Petitioner walked into the house and was gone for about ten minutes. (R. p. 90, lines 1-16.) Petitioner returned from the house via the carport with a shotgun. (R. p. 91, lines 1-3.) Petitioner yelled, “You’re not taking my kids,” and fired a round. (R. p. 91, lines 5-9.) Bubba got out of the car and ran into the woods but noticed Petitioner change his position from the left side of the car to the right side of the car to fire again. (R. p. 92, lines 1-7.) When Bubba looked up, he saw Evan lying on the ground. (R. p. 93, lines 4-9.) Bubba then saw Petitioner toss the shotgun onto the ground. (R. p. 93, lines 16-20.) Bubba heard Petitioner telling his parents he was “goin to jail for layin the law down.” (R. p. 94, lines 15-23.)

Evan died from a single shotgun pellet to the back of the right side of his neck. (R. p. 160, lines 6-9.)

How the Issue Presented at Trial

After the trial judge’s questioning of Petitioner concerning the waiver of his right to testify, the court offered copies of his jury charge to counsel. The court informed the parties it would charge the jury on murder, voluntary manslaughter, and involuntary manslaughter, as well as the defense of accident. (R. p. 406, lines 14-23.) The judge and defense counsel then engaged in the following discussion:

THE COURT: Any changes, objections from the State?

MR. WAGNER: No, sir.

THE COURT: From the defense?

MR. BURR: Yes, your Honor. On page 19 of your instructions --

THE COURT: Hold on a second. Okay.

MR. BURR: First full paragraph, second paragraph, "Malice may be inferred from conduct showing a total disregard for human life."

THE COURT: Yep.

MR. BURR: "Inferred malice may also arise when the deed is done with a deadly weapon." I would object to that portion of that instruction, your Honor.

THE COURT: Why?

MR. BURR: I don't think we can infer there was a total -- based on the evidence presented, there's no -- we can't have any inference of total disregard for human life.

THE COURT: Say that again.

MR. BURR: There's been evidence presented on accident which would be in mitigation. So this inference leads to an improper conclusion.

THE COURT: Okay. Let me look at accident. Because, basically, we're giving them the option, and I took some language out of the accident portion -- hold on a second. Okay. I understand why you'd want that. I mean, it goes to the weight and goes to one of the things they have got to decide is whether or not there was a total disregard, but --

MR. BURR: Your Honor, if I may.

THE COURT: Yeah.

MR. BURR: The footnote that goes with that --

THE COURT: Right

MR. BURR: -- kind of excludes that.

THE COURT: Well, it says, "Where evidence is presented that will reduce, mitigate, excuse or justify." Actually that should not have been in there. That was a note to me. "But with intent to kill, the jury shall not be charged." Well, there's been evidence potentially that could reduce or mitigate. There's also been evidence that they did not. And I'll be very clear that the State has to prove malice by proof beyond a reasonable doubt. I understand your objection. You actually got a private note to me that was printed, so.

MR. BURR: Thank you.

(R. p. 408, line 1 – p. 409, line 22.) Although Petitioner did object to the instruction on inferred malice from the use of a deadly weapon, he did not argue the erroneous instruction would heighten the risk of a compromise verdict, nor did he object to the instructions on voluntary

manslaughter or involuntary manslaughter in light of the erroneous instruction. Later, the jury asked for clarification of the elements of voluntary and involuntary manslaughter, as well as murder. (R. p. 466, line 22 – p. 467, line 4.) The court re-read its instructions on the three charges to the jury. (R. pp. 468-472.) Petitioner did not renew his objection following the re-charge to the jury. (R. p. 472.)

STANDARD OF REVIEW

An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court committed an abuse of 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 is not supported by the evidence. *Id.* “To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous **and prejudicial** to the defendant.” *Id.* at 262, 607 S.E.2d at 95 (emphasis added).

ARGUMENT

The Court of Appeals properly found Petitioner suffered no prejudice from the trial court's erroneous instruction that malice may be inferred from the use of a deadly weapon in light of the jury's rejection of the verdict of murder in favor of voluntary manslaughter.

In light of the evidence supporting the instructions for voluntary and involuntary manslaughter, Petitioner correctly asserts the trial judge should not have given the implied malice instruction to the jury, an argument previously conceded by the State and accepted by the Court of Appeals. (App. p. 4, n. 2.) Petitioner cannot, however, show how the judge's error contributed to the jury's verdict of voluntary manslaughter. When considering whether an error with respect to a jury instruction was harmless, the court 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, reh'g denied (Apr. 2, 2014), cert. denied, 135 S. Ct. 196, 190 L.

Ed. 2d 152 (U.S.S.C. 2014) (quoting *State v. Kerr*, 330 S.C. 132, 144–45, 498 S.E.2d 212, 218 (Ct. App. 1998). Voluntary manslaughter involves an intentional act on the part of the perpetrator but lacks the element of malice. *State v. Blassingame*, 271 S.C. 44, 46, 244 S.E.2d 528, 529 (1978). Because the instruction pertained to the finding of malice, and the jury rejected the charge of murder, the instruction did not contribute to the verdict and the judge’s error was harmless beyond a reasonable doubt. Indeed, the Court of Appeals resolved this issue precisely on this basis.¹ Petitioner’s specific argument the instruction heightened the risk of a compromise verdict was not raised to the trial court, was not addressed in the Court of Appeals in its opinion, and is not preserved for this Court’s review.

The Instruction on the Charges

There was certainly no dispute Burdette shot and killed Evan Tyner. There was, however, conflicting evidence as to whether Burdette believed the men had trespassed onto his parents’ property, whether he aimed his gun at Tyner and pulled the trigger, whether he aimed the gun in Tyner’s direction and fired, unintentionally killing him, or whether the gun discharged because of a defect, accidentally killing Tyner. Accordingly, the judge instructed the jury on murder, voluntary manslaughter, and involuntary manslaughter. (R. p. 453.) As part of the murder instruction, the court told the jury the State must prove “beyond a reasonable doubt that the defendant killed another person with malice aforethought.” (R. p. 453, lines 6-8.) The court went on to define malice aforethought, and instructed it may be express or inferred:

Express malice is shown when a person speaks words which express hatred or ill will for another, or when the person prepared beforehand to do the act which was later accomplished. For example, lying in wait for a person or any other acts of preparation going to show that the deed was within the defendant's mind could be express and would be express malice. Malice may be inferred from conduct

¹ “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.” (App. p. 5.)

showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon.

(R. p. 454, lines 1 - 10.) The court also instructed on “deadly weapon” and what might constitute such a weapon. (R. p. 454, lines 11-21.)

Following the judge’s instruction on murder, the instructions clearly shifted to discuss the lesser offenses of voluntary manslaughter and involuntary manslaughter. (R. p. 455.) The court defined voluntary manslaughter and instructed the jury on the sudden heat of passion and sufficient legal provocation, as well as the cooling off period. The court then instructed on involuntary manslaughter, and informed the jury that the State must prove the defendant unintentionally killed the victim without malice while engaged in a lawful activity with a reckless disregard for others. (R. p. 457.)

Following the charges for murder, voluntary manslaughter, and involuntary manslaughter, the court instructed the jury on the defense of accident. (R. p. 459.) The court told the jury it was the State’s burden to prove beyond a reasonable doubt the crime was not an accident. (R. p. 459, lines 18-23.) The court then went on to explain the verdict form, explaining the form would have “four choices.” (R. p. 260, lines 5-9.) The court said the jury could find Burdette guilty on one of the three charges, or they could find “not guilty” where indicated on the form. (R. p. 460, lines 18-19.)

The trial court’s instructions offered a clear delineation from one charge to the next, with each charge containing its own elements and further instruction on the elements where appropriate. When read in its entirety, the instruction on inferred malice was clearly given as a modifier of the murder charge alone.

The Instruction Was Harmless Beyond a Reasonable Doubt

Respondent would agree with Petitioner the trial judge erred in giving the inferred malice instruction because the record contained evidence mitigating or reducing the charge of murder. *See State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009) (holding the “use of a deadly weapon” implied malice instruction has no place in a murder prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing). However, in *Chapman v. California*, the Supreme Court held error of even constitutional magnitude may be deemed harmless if, “considering the entire record on appeal, the reviewing court finds beyond a reasonable doubt that the error did not contribute to the verdict.” 386 U.S. 18 (1967); *see also Taylor v. State*, 312 S.C. 179, 181, 439 S.E.2d 820, 821 (1993).

In the instant case, there is no more striking example of harmless error than the jury clearly rejecting the erroneous charge. Respondent submits any error that could have resulted from the giving of that instruction was entirely harmless and did not impact the verdict in Petitioner’s case. The trial judge’s instruction the jury could infer malice from the use of a deadly weapon had no impact on the ultimate outcome of Petitioner’s case because the verdict returned by the jury rejected that charge.

In reading the jury instruction in its entirety, it is clear the instruction on the inference of malice was applicable to the charge of murder, not voluntary manslaughter. The parallel wording of the charges makes the distinctions all the more significant. In the murder charge, the problematic instruction describes malice as “hatred, ill will, or hostility toward another person,” and says, “[i]nferred malice may also arise when the deed is done with a deadly weapon.” (R. pp. 468, lines 3-4, 469, lines 5-6.) Contrast this instruction with that of voluntary manslaughter’s charge: “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.” (R. p. 470, lines 11-14.) “Heat of passion” had just been described as affecting “a person’s self-control and temporarily disturb[ing] a person’s reason.” (R. p. 469, lines 23-25.)

The instruction makes it clear that malice (i.e., hatred, ill will) is the required emotion for murder, but then “disturbed” and lacking “self-control” are the appropriate mental states for voluntary manslaughter. Given the distinct segregation of the elements of each charge within the instruction, with the trial court moving from murder, then clearly to voluntary manslaughter, then clearly to involuntary manslaughter, the jury was not misled, as Petitioner argues, into confusing malice as a required element to convict Burdette of voluntary manslaughter. The charge just does not read that way.

Moreover, despite the fact the jury was instructed it could infer malice from the use of a deadly weapon, its verdict reflected it was not misled to believe it could not find the existence of justification, excuse, or mitigation in a situation where a deadly weapon was used, which was precisely the type of jury misunderstanding the Supreme Court’s rule in *Belcher* sought to avoid. *See Belcher*, 385 S.C. at 610, 685 S.E.2d at 808-809 (“[I]nferring malice from the use of a deadly weapon is indeed only a ‘half-truth.’ The absence of justification, excuse or mitigation cannot be inferred from the use of a deadly weapon standing alone. Other facts and evidence (or the absence of other facts and evidence) are required for the fulfillment of these component parts.”). Critically, even though the evidence presented showed Evan’s death resulted from the use of a deadly weapon, the jury demonstrated it found Petitioner’s actions did not involve malice and were mitigated under the circumstances by convicting him of the lesser-included offenses of voluntary manslaughter. *See Nation v. State*, 556 S.E.2d 196, 200-201 (Ga. Ct. App. 2001) (finding any error that resulted from the giving of an erroneous jury charge was harmless

and did not contribute to the verdict where the jury's verdict demonstrated it was not impacted by the erroneous charge).

The record is replete with evidence supporting the jury's conclusion the shooting was no accident:

- 1) Burdette and Evan were fighting in the hours before the shooting over Burdette's drug use. (R. p. 79, lines 1-5.)
- 2) The men engaged in a physical confrontation before Evan and his friend forced Burdette to leave. (R. p. 80, lines 1-11.)
- 3) Despite the fighting between the men, Burdette was obligated to hand over Tiffany's debit card to the men for them to purchase cigarettes. (R. p. 81, line 16 – p. 83, line 4.)
- 4) The jury knew Burdette was angry at the men because when the car broke down and Burdette passed the men on the road, Burdette waived, laughed, and made rude gestures at the men. (R. p. 84, line 24 – p. 85, line 3.)
- 5) After everyone arrived at the parsonage, Burdette and Evan began arguing again. (R. p. 87, lines 14-17.)
- 6) Appellant told Evan he "had something for [them]," went inside the house for about ten minutes, and returned with a shotgun. (R. pp. 86 – 91.)
- 7) Appellant's anger was so troubling to one of the men that he told Evan they needed to leave. (R. p. 88, lines 1-5.)
- 8) Appellant **first** shot under the car where the men were sitting. (R. p. 91, lines 5-10, p. 92, lines 13-19.)

- 9) After the men began running away, Appellant then **changed his position** to move to the direction Evan was running. (R. pp. 91-93.)
- 10) Burdette fired a **second shot**, striking Evan and killing him. (R. p.91, line 23- p. 92, line 5.)
- 11) Burdette provided a two page statement in which he claimed he shot the victim while throwing the shotgun at him. (R. p. 20, line 3 – p. 22, line 5.)
- 12) Burdette gave another statement in which he admitted pulling the trigger on the shotgun, but claimed he thought it was not loaded. (R. p. 28, line 11 – p. 29, line 7.)
- 13) In a third statement, Burdette claimed he purposely fired into the air, but he accidentally hit Evan. (R. p. 36, lines 21-25.)
- 14) All of these statements seemed to conflict with what he told his parents, that he was “goin to jail for layin the law down,” a suggestion his act was an intentional effort to retaliate against Evan after their argument. (R. p. 94, lines 15-23.)

Petitioner’s argues the evidence supported the defense of accident,² but the record reflects otherwise. The jury could not reasonably believe Burdette accidentally fired the gun when he shot the gun twice, and the second time he aimed in Evan’s direction. Further, in at least one of his statements, Burdette admitted he purposefully pulled the trigger. Even if the jury believed the bullet that killed Evan ricocheted off the ground, striking him in the head, the evidence overwhelmingly supported a charge of voluntary manslaughter or involuntary manslaughter. Petitioner’s argument the jury was “convinced to reject involuntary manslaughter as a verdict

² Brief of Petitioner, p. 12.

because of the use of a deadly weapon and its accompanying inference of malice”³ is entirely speculative and not preserved for this Court’s review. *See, for example, State v. Hornsby*, 326 S.C. 121, 130, 484 S.E.2d 869, 874 (1997) (comparing the guilty but mentally ill verdict to an instruction on other lesser included offenses, and finding the compromised verdict argument too speculative for the Court to consider).

Further, Petitioner’s argument that the permissive inference of malice carries over into the instruction for voluntary manslaughter simply because the court does not instruct voluntary manslaughter is a killing *without malice*, suggests *all* instructions on malice carry over into a voluntary manslaughter charge. To take Petitioner’s argument to its logical conclusion, all instructions on murder and voluntary manslaughter would be improper unless the court expressly excluded malice from each portion of its voluntary manslaughter instruction.

Given the evidence before the jury, Petitioner cannot show the inference of malice jury instruction confused the jury in Petitioner’s case or mislead them to believe the use of a deadly weapon alone mandated a finding of malice. *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 jury instructions on malice was harmless where the jury convicted the defendants of lesser-included offenses of the offense of ABWIK and, thus, did not find the defendants acted with malice). Petitioner argues on appeal the jury was confused by the instruction, which heightened the risk of a compromise verdict, as if the evidence only supported the defense’s theory of accident or involuntary manslaughter.⁴ However, the jury’s finding was well supported by the testimony of the witnesses who saw the

³ Brief of Petitioner, p. 18.

⁴ Respondent notes again that Petitioner did not object to the instruction on voluntary manslaughter or involuntary manslaughter. Petitioner’s concern about the risk of a compromise verdict should have been addressed to the trial court.

shooting, as well as Burdettes's own changing statements. The verdict was an entirely proper reflection of the evidence presented at trial. Petitioner's convictions should be affirmed.

CONCLUSION

Based on the foregoing, the State requests this Court deny the Petition for Writ of Certiorari to the Court of Appeals. For the reasons discussed above, the Court of Appeals was correct in finding Petitioner suffered no prejudice from the trial court's erroneous jury instruction.

Respectfully submitted,

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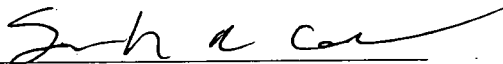
PROOF OF SERVICE

I, Susannah Cole, counsel for the Respondent, certify that I have served the within Brief of Respondent on Petitioner by depositing copies of the same via inter-agency mail, addressed to his attorney of record:

Susan B. Hackett
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 3rd day of May, 2018.



Susannah R. Cole,
Assistant Attorney General