ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

GREGORY BROOKS,

APPELLANT

APPELLATE CASE NO. 2016-002301

Appeal from Lexington County

Eugene C. Griffith, Circuit Court Judge

Opinion No. 5693

PETITION FOR REHEARING

On November 20, 2019, this Court affirmed Appellant's convictions and sentences. State v. Brooks, Op. No. 5693 (S.C. Sup. Ct. filed Nov. 20, 2019) (Shearouse Adv. Sh. No. 45 at 21). Pursuant to Rule 221(a), SCACR, Appellant respectfully requests this Court rehear the matter due to numerous points overlooked and/or misapprehended by this Court.

This Court correctly held the trial judge erred by instructing the jury that malice may be inferred from the use of a deadly weapon. However, this Court erred in its harmless error analysis. Throughout this Court's opinion, the burden was placed upon Appellant to show the error was not harmless. However, controlling case law from the United States Supreme Court

requires the burden be placed upon the state to show an error was not harmless beyond a reasonable doubt. By misplacing the burden on Appellant, this Court examined the facts in the light most favorable to the state with no consideration of how those facts, when properly examined in the light most favorable to Appellant, affected the jury's verdict. Further, when analyzing whether there was any evidence to support the lesser-included offense of voluntary manslaughter – an analysis that was unnecessary in light of recent case law – this Court completely ignored that it was the prosecutor who requested the trial judge provide the jury with the voluntary manslaughter instruction based upon the evidence presented and an unsettled question of law in South Carolina.

The Fifth, Sixth, and Fourteenth Amendments require that the state must prove each element of a crime beyond a reasonable doubt. See State v. Brown, 360 S.C. 581, 595, 602 S.E.2d 392, 400 (2004) ("[T]he United States Supreme Court recently has re-emphasized the constitutional protections of surpassing importance contained in the Fourteenth Amendment's due process clause ant the Sixth Amendment right to a jury trial, which indisputably entitle a defendant to a jury determination that he is guilty of every element of the crime which he is charged, beyond a reasonable doubt") (internal quotations omitted); see also In re Winship, 397 U.S. 358 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); Jackson v. Virginia, 443 U.S. 307, 314 (1979) ("A meaningful opportunity to defend, if not the right to trial itself, presumes as well that a total want of evidence to support a charge will conclude the case in favor of the accused."). When a jury charge creates a mandatory presumption and impermissibly shifts the burden of proof to the

defendant, the Due Process Clause of the Fourteenth Amendment is violated. Sandstrom v. Montana, 442 U.S. 510, 524 (1979); Mullaney v. Wilbur, 421 U.S. 684, 703-704 (1975).

The South Carolina Supreme Court recently held "[a] jury instruction that malice may be inferred from the use of a deadly weapon is an improper court-sponsored emphasis of a fact in evidence – that the deed was done with a deadly weapon – and it should no longer be permitted." State v. Burdette, 427 S.C. 490, 503, 832 S.E.2d 575, 582 (2019). Therefore, it is undisputed – as this Court and the state admitted – that the trial judge's inferred malice instruction to the jury at the close of Appellant's trial was erroneous. The only question for this Court was whether the state proved beyond a reasonable doubt that the error was harmless.

According to the United States Supreme Court "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." Chapman v. California, 386 U.S. 18, 22 (1967). In order for constitutional error to be deemed harmless, it must be determined beyond a reasonable doubt the error did not contribute to the verdict. Id. at 24. In Arizona v. Fulminante, 499 U.S. 279, 303 (1991), a plurality of the Court explained what types of errors may be deemed harmless – "'trial error' – error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." Fulminante, 499 U.S. at 307-308.

Misplaced burden of proof

Contrary to this Court's analysis, the burden is on the *state* to prove the error was harmless beyond a reasonable doubt. See Chapman, 386 U.S. at 24. "Certainly error,

constitutional error, in illegally admitting highly prejudicial evidence or comments, *casts on someone other than the person prejudiced by it* a burden to show that it was harmless." Id. (emphasis added). "It is for that reason that the original common-law harmless-error rule put the burden on the *beneficiary of the error* either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment." Id. (emphasis added); see also id. at 26 ("Under these circumstances, it is completely impossible for us to say that the state has demonstrated, beyond a reasonable doubt, that the prosecutor's comments and the trial judge's instruction did not contribute to petitioners' convictions").

Throughout the opinion, this Court placed the burden of proving the error was not harmless on Appellant, instead of properly placing the burden on the state. At the outset, this Court outlined Appellant's argument that the error could not be considered harmless and promised to address the argument. The state's argument regarding harmless error was never even mentioned despite the fact that the state had the burden. Most strikingly, this Court noted that Appellant "argue[d] that the erroneous instruction was given shortly after the circuit court instructed the jury to examine the surrounding circumstances to determine criminal intent and that the circumstances involved the use of a gun," and then criticized Appellant for "not explain[ing] why the state could not prove malice through the other circumstances of the case." According to the United States Supreme Court, it was the state's burden to prove the error was harmless beyond a reasonable doubt. In other words, the presumption is the error was not harmless and the state must prove the error was harmless beyond a reasonable doubt. Therefore, there was no obligation upon Appellant to argue anything at all regarding harmless error. The burden was entirely on the state. This Court erred by repeatedly placing the burden on Appellant to show why the error was not harmless.

When the burden is properly placed upon the state, and the evidence is viewed in the light most favorable to Appellant, the jury instruction that malice may be inferred from the use of a deadly weapon was not harmless beyond a reasonable doubt.

Not harmless beyond a reasonable doubt

"'Harmless beyond a reasonable doubt' means the reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt." State v. Mizzell, 349 S.C. 326, 334, 563 S.E.2d 315, 319 (2002). A reviewing court "must review the facts the jury heard and weigh those facts against the erroneous jury charge to determine what effect, if any, it had on the verdict." State v. Kerr, 330 S.C. 132, 145, 498 S.E.2d 212, 218 (Ct. App. 1998). "When considering whether an incorrect jury instruction constitutes harmless error, [the reviewing court is] required to review the trial court's charge to the jury in its entirety." Burdette, 427 S.C. at 498, 832 S.E.2d at 580.

Here, the judge instructed the jury that malice may be inferred from the use of a deadly weapon. According to the Supreme Court, "[w]hen the trial court tells the jury it may use evidence of the use of a deadly weapon to establish the existence of malice, a critical element of the charge of murder, the trial court has directly commented upon facts in evidence, elevated those facts, and emphasized them to the jury." Burdette, 427 S.C. at 502, 832 S.E.2d at 582. "Even telling the jury that it is to give evidence of the use of a deadly weapon only the weight the jury determines it should be given does not remove the taint of the trial court's injection of its commentary upon that evidence." Id. at 502-503, 832 S.E.2d 582. This Court's opinion claimed to acknowledge the Court's "exposition of the prejudice" resulting from the erroneous jury instruction; however, this Court failed to give the Supreme Court's guidance the regard it was due.

The instruction occurred shortly after the judge told the jurors about criminal intent. After telling the jurors about reasonable doubt, the judge instructed the jury on criminal intent. R. 517, l. 19 – R. 518, l. 15. He explained that intent could not be proven to a mathematical certainty. R. 517, ll. 23-24. He told the jurors to look at the "circumstances surrounding the situation" to determine criminal intent. R. 517, ll. 21-23. In fact, he said that "[c]riminal intent is always a matter that must be determined by the jury from the circumstances surrounding the situation." R. 517, ll. 21-23. Thus, the judge inserted the use of a gun as one of the circumstances the jury could use to determine intent.

The judge told the jury that "[c]riminal intent is a state of mind that operates jointly with an act or omission in the commission of a crime" and that it "is a mental state of conscious wrongdoing." R. 518, ll. 6-9. He explained the jury would have to "determine what the defendant intended to do based upon the circumstances shown to have existed." R. 518, ll. 9-11. Those circumstances necessarily included the use of a gun.

Thereafter, the judge instructed the jury on the offense of murder. He immediately told the jurors that murder required a showing of malice. R. 518, ll. 16-20. Similar to language used to define criminal intent, the judge told the jury that malice "is the intentional doing of a wrongful act without just cause or excuse with an intent to inflict an injury or under circumstances that the law will infer as an evil intent." R. 518, ll. 21-24. This segued nicely into his instruction on when the law permits an inference of malice. The judge explained that the law permitted malice to be inferred when the "deed is done by use of a deadly weapon." R. 519, ll. 20-22. Thus, the placement of the inferred malice instruction not only diluted the state's burden as to malice, but also diluted the state's burden concerning criminal intent. The jury heard repeatedly about the requirement that it use the circumstances, which undisputedly involved the use of a gun, to reach conclusions as to

intent and malice. In light of the record evidence demonstrating sudden heat of passion and sufficient legal provocation, the jury conceivably based its verdict for murder on the evidence of the use of a gun. It is impossible to say "the court-sponsored emphasis" on the fact that a deadly weapon was used and that such use satisfied the element of malice did not contribute to the jury's verdict.

Refusing to analyze Appellant's argument regarding the jury instruction as a whole, this Court weighed the evidence presented and erroneously examined it in the light most favorable to the state. Of import, the state relied upon the inference of malice from a deadly weapon to prove this element in its closing argument R. 495, ll. 12-24. The prosecutor informed the jury of the elements of murder – the killing of a person with malice aforethought expressed or implied. R. 495, ll. 12-24. Then, the state argued that the killing of another person was satisfied because of Ratliff's death. R. 495, ll. 15-16. Thereafter, the state argued that it had satisfied the element of malice because malice "can be implied by the use of a deadly weapon. It can also be implied by shooting that deadly weapon into somebody." R. 495, ll. 22-24. The state's reliance upon the inference of malice from the use of a deadly weapon and its promise to the jury that the judge would instruct them that they could infer malice from Appellant's use of a deadly weapon demonstrated how important the erroneous jury instruction was to the state's ability to prove every element of the case. In fact, the use of a deadly weapon was the *only* argument made by the state that it had satisfied the element of malice.

Contrary to this Court's assertion that the jury's questions suggested the jury was not focused on, or affected by, the erroneous inferred malice instruction, the jury's questions demonstrated the jury had accepted the erroneous jury instruction at face value and applied it to the case – that malice could be inferred from the use of a deadly weapon. The suggestion that because

the jury did not ask about the inferred malice instruction means that the jury was not affected by the erroneous instruction misapprehends the Supreme Court's explanation that the erroneous instruction places such an emphasis on the use of a weapon that it elevates the evidence to a place of prominence in the minds of the jurors.

Entitlement to lesser-included instruction

In State v. Belcher, 385 S.C. 597, 600, 685 S.E.2d 802, 803-804 (2009), the South Carolina Supreme Court overruled prior law and held "that a jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide." At trial, defense counsel argued that because the state requested the jury be instructed as to voluntary manslaughter, then the court must not instruct the jury on the inference of malice from the use of a deadly weapon based upon Belcher. This Court held there was "no evidence of sufficient legal provocation." According to this Court, the Belcher analysis was conducted "to the extent the issue could affect a harmless error analysis," but this Court never explained if the issue affected its harmless error analysis or, if it did, how it did so.

There was no question that evidence was presented in this case that reduced the crime from murder to a lesser crime – voluntary manslaughter. In fact, it was the state requesting such a charge. However, this Court refused to acknowledge in its opinion that the state made the request for the lesser-included instruction and even argued to the judge that the law in South Carolina was unsettled regarding the applicability of transferred intent in the context of voluntary manslaughter. R. 475, l. 17 – R. 476, l. 18. There was evidence of a heated, and at times, physical argument inside the bar. The argument continued outside. Although Fred claimed that he only pretended to be armed, the

police found a holster missing its gun in Fred's car, and it was undisputed that Brandon carried a gun in his holster. It was also undisputed that Brandon's friend, Andre, was armed with a gun.

Appellant respectfully requests this Court rehear this matter in light of the significant points overlooked and/or misapprehended in arriving at the opinion affirming Appellant's convictions and sentences. First, and foremost, Appellant request this Court place the burden of proving the error was harmless beyond a reasonable doubt on the state, not Appellant. Using the proper burden of proof, this Court will determine the error was not harmless. Finally, Appellant respectfully requests this Court omit its unnecessary analysis of Belcher in light of Burdette, or, at a minimum, Appellant requests this Court acknowledge the prosecutor requested the jury instruction on the lesser-included offense of voluntary manslaughter and any argument on appeal that the evidence did not support the instruction was barred from review.

Respectfully Submitted,

Susan B. Hackett

SUSAN B. HACKETT
Appellate Defender

This 5th day of December, 2019.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Samuel Marion Bailey, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Gregory Brooks, #342118, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 5th day of December, 2019.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 5th day of December, 2019.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: September 30, 2029