

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Michael G. Nettles, Circuit Court Judge

THE STATE,

V.

TRISTIAN CUMMINGS,

ORIGINAL

RECEIVED
DEC 20 2019
SC Court of Appeals
RESPONDENT,

APPELLANT

APPELLATE CASE NO. 2019-000665

ANDERS BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTSi

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL 1

STATEMENT OF THE CASE 2

STANDARD OF REVIEW 3

ARGUMENT..... 4

CONCLUSION..... 9

PETITION TO BE RELIEVED AS COUNSEL..... 10

TABLE OF AUTHORITIES

Cases

<u>Clark v. Cantrell</u> , 339 S.C. 369, 529 S.E.2d 528 (2000)	3
<u>Lowry v. State</u> , 376 S.C. 499, 657 S.E.2d 760 (2008)	5
<u>State v. Baccus</u> , 367 S.C. 41, 625 S.E.2d 216 (2006).....	3
<u>State v. Burdette</u> , 427 S.C. 490, 832 S.E.2d 575 (2019)	6, 7
<u>State v. Cheeks</u> , 401 S.C. 322, 737 S.E.2d 480 (2013)	6, 7
<u>State v. Grant</u> , 275 S.C. 404, 272 S.E.2d 169 (1980)	7
<u>State v. Stukes</u> , 416 S.C. 493, 787 S.E.2d 480 (2016)	6

Statutes

S.C. Code §16-3-657	6
---------------------------	---

Constitutional Provisions

S.C. Const. art. V, § 21	6
--------------------------------	---

STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in instructing the jury that if one intentionally kills another during the commission of a felony, the inference of malice may arise because the instruction is an improper comment on the facts?

STATEMENT OF THE CASE

In June of 2017,¹ the Greenville County Grand Jury indicted Appellant, Tristian Cummings, for conspiracy, murder, possession of a weapon during the commission of a violent crime, attempted armed robbery and burglary first degree, indictments # 2016-GS-23-8773, 8778, 8779, 8780 and 8772. On April 8, 2019, Appellant proceeded to jury trial before the Honorable Michael G. Nettles. Rodney Richey represented Appellant. William McMaster and Andrew Culbreath prosecuted the case. The jury found Appellant guilty on all counts. Judge Nettles sentenced Appellant to thirty-five (35) years for murder, thirty-five (35) years concurrent for burglary first degree, twenty (20) years concurrent for attempted armed robbery, five (5) years concurrent for the weapon charge and five (5) years concurrent for conspiracy. A timely notice of intent to appeal was served on April 15, 2019. This appeal follows.

¹ The indictments appear to have originally been from the June 2016 term but 2016 is crossed out and 2017 is handwritten in. The date listed below the name of the witness is March 6, 2016. The date the indictment was stamped filed with the clerk's office is October 3, 2016.

STANDARD OF REVIEW

“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.

ARGUMENT

The trial judge erred in instructing the jury that if one intentionally kills another during the commission of a felony, the inference of malice may arise because the instruction is an improper comment on the facts.

The jury found Appellant guilty of the burglary, robbery and murder of Jeryl White in his home on Burgess Avenue in the early morning hours of March 6, 2016. White's girlfriend, April Green, was at the home at the time and called 911. (R. p. 61, lines 4-25). Green admitted that White sold drugs and was known to have drugs and money. (R. p. 74, lines 2-9). A co-defendant, Simeon Williams, testified at trial. According to Williams, earlier in the evening of March 5, 2016, he saw Appellant at Fleetwood. (R. p. 143, lines 2-22). Williams testified that he, Appellant, who he knew as Dula, Quan and Shaw rode back to Williams' house in a friend's car. (R. p. 145, line 14- p. 146, lines 1-5). Williams admitted that once they were back at his house, he decided to rob White, who he knew as Cincinnati. (R. pp. 148-149). White lived nearby and Williams admitted that he had purchased drugs from White in the past. (R. p. 148, lines 1-19). According to Williams, Appellant had a gun and agreed to the robbery. (R. p. 149, lines 10-19). Williams was not questioned about Quan and Shaw or their possible involvement in the robbery.

Officer Harold Robinson with the Greenville County Sheriff's Office was on patrol on March 6, 2016, when two calls came out about a disturbance on Burgess Avenue. (R. pp. 82-83). Officer Robinson was close by and arrived at White's house within twenty seconds. (R. p. 83, lines 5-22). When Officer Robinson arrived at White's house he saw a black male with a red striped shirt going through the cabinets and drawers in the kitchen. (R. p. 88, line 20 – p. 89, lines 1-17). This individual was arrested and identified as the co-defendant, Williams. (R. p. 90, lines 1-10).

Officer Robinson testified that when Williams saw him, he mumbled something and then another black male, dressed in all black, ran through the kitchen, slammed a gun down on the counter and ran out the front door. (R. p. 91, lines 2-19; p. 94, lines 13-19). Officer Kenneth Sandefur, also of the Greenville County Sheriff's Office, arrived at White's house right after Officer Robinson. (R. p. 107, line 1 – p. 108, lines 1-14). Officer Sandefur testified that he saw Appellant run out the front door. (R. p. 110, line 11 – p. 111, lines 1-13). Officer Sandefur chased Appellant and he was apprehended by another officer, Deputy Rodriguez. (R. p. 114, line 1 – p. 115, 116, lines 1-23).

Investigator Michael Fortner with the Greenville County Sheriff's Office confirmed that an intern riding with Officer Robinson, Ms. Nichols, reported seeing a man come out of the house at the time shots were fired wearing a red shirt. (R. p. 228, lines 5-23). Ms. Nichols did not testify a trial. Investigator Fortner also confirmed that a neighbor from across the street called 911 and reported seeing people outside wearing orange shirts. (R. p. 229, lines 15-24).

At the end of the trial the judge instructed the jury, "Ladies and gentlemen of the jury, if one intentionally kills another during the commission of a felony, the inference of malice may arise. If facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would simply be an evidentiary fact to be taken into consideration by you along with all other evidence in the case. You may give it the weight you think it deserves."² (R. p. 326, lines 4-11). The trial judge erred.

While the charge in the present case did not improperly create a mandatory presumption of malice that shifted the burden of proof as in Lowry v. State, 376 S.C. 499, 657 S.E.2d 760 (2008), instructing the jury that malice may be inferred if one intentionally kills another during

² The charge is almost identical to the charge the Court noted was proper in State v. Norris, 285 S.C. 86, 328 S.E.2d 339 (1985). Norris, however, was overruled by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). Belcher was recently overruled by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019).

the commission of a felony is an improper charge on the facts. The South Carolina Supreme Court recently held in State v. Burdette, 427 S.C. 490, 503, 832 S.E.2d 575, 582 (2019), that, “. . . regardless of evidence presented at trial, a trial court shall not instruct the jury that it may infer malice when the deed was done with a deadly weapon.” In Burdette the Court wrote:

When 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. 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. Such an instruction is no different than an instruction that the jury may use evidence of flight as evidence of guilt. 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.

427 S.C.at 502–03, 832 S.E.2d at 582. Telling the jury that malice can be inferred if one intentionally kills another during the commission of a felony is an improper comment on the facts in the same way that telling the jury that malice can be inferred from the use of a deadly weapon is an improper comment on the facts.

S.C. Const. art. V, § 21 provides that “Judges shall not charge juries in respect to matters of fact, but shall declare the law.” In State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016), the South Carolina Supreme Court found that charging the jury, pursuant to S.C. Code §16-3-657, that a victim’s testimony need not be corroborated was an impermissible charge on the facts. In State v. Cheeks, 401 S.C. 322, 737 S.E.2d 480 (2013), the Court found that in a drug trafficking case the trial court must not charge the jury that actual knowledge of the presence of a drug is strong evidence of a defendant's intent to control its disposition or use. The charges in both Stukes and in Cheeks, while proper for a judge to consider when deciding the sufficiency of the evidence, were not proper as instructions to the jury. The Court in Burdette noted, that, “. . .

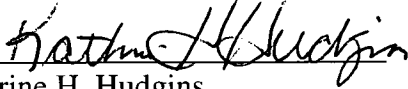
when ruling on a defendant's motion for directed verdict on the ground the State failed to prove the element of malice, a trial court may take into account the fact that the deed was done with a deadly weapon." 427 S.C. at 503-04, 832 S.E.2d at 583. While a trial judge may take into consideration the fact that one intentionally killed another during the commission of a felony as an inference of malice when ruling on a directed verdict motion, the inference should not be charged to the jury.

Additionally, with regard to arguments by counsel to the jury rather than instructions to the jury by the judge, the Court in Burdette, wrote, "Of course, whether the deed was done with a deadly weapon or not, the State and the defendant are free to argue the existence or nonexistence of malice based on the evidence in the record." 427 S.C. at 503, 832 S.E.2d at 582. (See also State v. Grant, 275 S.C. 404, 272 S.E.2d 169 (1980) (While a charge on flight is improper, argument by counsel as to the inference of flight may be appropriate.). The same is true with regard to malice based on an intentional killing during the commission of a felony. The State may argue to the jury that malice existed because one intentionally killed another during the commission of a felony. The defense may argue that there was an absence of malice because the killing did not take place during the commission of a felony. The judge, however, should not instruct the jury that malice can be inferred if one intentionally kills another during the commission of a felony. As noted by the Court in Cheeks, 401 S.C. at 328, 737 S.E.2d at 484, "Simply because certain facts may be considered by the jury as evidence of guilt in a given case where the circumstances warrant, it does not follow that future juries should be charged that these facts are probative of guilt. It is always for the jury to determine the facts, and the inferences that are to be drawn from these facts." The trial judge erred in instructing the jury that

malice can be inferred if one intentionally kills another during the commission of a felony because it is an improper comment on the facts. The error is not harmless.

CONCLUSION

Based on the above argument, this Court should reverse the murder conviction and remand for a new trial.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of December, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Michael G. Nettles, Circuit Court Judge

RECEIVED

DEC 20 2019

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

TRISTIAN CUMMINGS,

APPELLANT

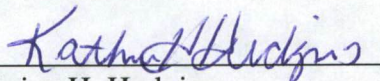
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Tristian Xavier Cummings states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Michael G. Nettles, which was held on April 8 - 9, 2019, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, She asks the Court to relieve her as counsel for Tristian Xavier Cummings.

Respectfully Submitted,



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

This 20th day of December, 2019.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Honorable Michael G. Nettles, Circuit Court Judge

RECEIVED
DEC 20 2019
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

TRISTIAN CUMMINGS,

APPELLANT

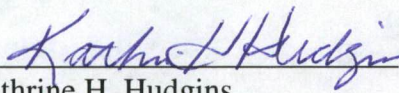
DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictments and sentencing sheets;
- (2) Full trial transcript.

I certify that this designation contains no matter which is irrelevant to this appeal.

December 20, 2019


Kathrine H. Hudgins
Appellate Defender

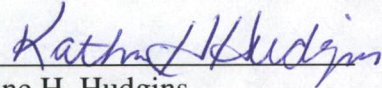
South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

December 20, 2019.



Kathrine H. Hudgins
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

RECEIVED

DEC 20 2019

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
DEC 20 2019
SC Court of Appeals

Appeal from Greenville County

Honorable Michael G. Nettles, Circuit Court Judge

THE STATE,

RESPONDENT,

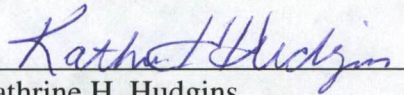
V.

TRISTIAN CUMMINGS,

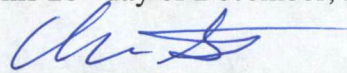
APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders 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 Anders Brief of Appellant and Designation of Matter have been served on Tristian Xavier Cummings, 344693, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 20th day of December, 2019.


Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of December, 2019.

 (L.S)

Notary Public for South Carolina

My Commission Expires: September 30, 2029