

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Lexington County
Hon. Eugene C. Griffith, Circuit Court Judge
Appellate Case No. 2016-002301

RECEIVED
DEC 30 2019
SC Court of Appeals

The State,

Respondent,

v.

Gregory Brooks,

Appellant.

RETURN TO PETITION FOR REHEARING

On November 20, 2019, this Court properly affirmed Appellant's convictions and sentences. State v. Brooks, Op. No. 5693(S.C. Ct. App. filed Nov. 20, 2019). This Court properly analyzed the evidence in this case in light of State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) and State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019). The Court's conclusion the error in charging that malice could be inferred from the use a deadly weapon was entirely harmless is correct.

This Court did not improperly place the burden on the Appellant to demonstrate the error was not harmless as alleged by Appellant. Instead, this Court correctly explained Appellant must demonstrate prejudice, and then the analysis once error and prejudice have been shown turns to whether the error was harmless—i.e, whether the erroneous charge did not contribute to the jury's verdict. See e.g., State v. Middleton, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014); State v. Stanko, 402 S.C. 252, 260, 741 S.E.2d 708, 712 (2013); and Belcher.

In the instant case, this Court properly considered all of the evidence presented in determining whether the inference of malice charge contributed to the verdict by the jury. To start, the Court properly found the prejudice present in *Belcher*—confusion resulting from the possible annihilation of a mitigating charge by the instruction—was not present in this case. In *Belcher*, the central issue was the confusion caused by giving the instruction when the jury was also presented with lesser included offenses such as voluntary manslaughter or a mitigating circumstance such as self-defense. The jury could have believed that the use of the deadly weapon alone was enough to render either the lesser included offense or self-defense invalid. Here, this Court properly explained that possible prejudice did not exist because the jury should never have been charged voluntary manslaughter. This Court's opinion merely eliminated one level of possible prejudice from the giving of the instruction which was not present because of the facts and circumstances of this case.

Additionally, this Court properly analyzed the facts in light of Middleton and other case law. The only conclusion a jury could reach based on the evidence actually in the record in this case was that Appellant acted with malice. The evidence clearly demonstrated: 1) Appellant and others followed the victim and Fred out of bar; 2) Appellant motioned with his gun while pacing back and forth; 3) Appellant asked one individual to "get down" while preventing her advance with his arm; and 4) then Appellant unleashed a barrage of gun fire on an individual with his hands raised in surrender and another in a car attempting to leave the scene. In light of that evidence, in particular the fact Appellant opened fire and individuals' either surrendering or attempting to flee, the only possible conclusion the jury could reach was that Appellant acted with malice. See In re Tracy B., 391 S.C. 51, 69, 704 S.E.2d 71, 80 (Ct. App. 2010) ("Malice' is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing

wrong." (quoting State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998)); id. ("It is the doing of a wrongful act intentionally and without just cause or excuse." (emphasis added) (quoting Tate v. State, 351 S.C. 418, 426, 570 S.E.2d 522, 527 (2002))); id. ("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. In the context of murder, malice does not require ill-will toward the individual injured, but rather it signifies "a general malignant recklessness of the lives and safety of others, or a condition of the mind [that] shows a heart regardless of social duty and fatally bent on mischief." (emphasis added) (citation omitted) (quoting State v. Mouzon, 231 S.C. 655, 662, 99 S.E.2d 672, 675–76 (1957))).

As this Court found: "Nevertheless, the circuit court's 'commentary' on the use of a deadly weapon in the present case could not have eclipsed the impact of Fred's powerful testimony that he raised his hands to show he was unarmed and this capitulation had no effect on Appellant." This Court correctly concluded: "beyond a reasonable doubt, the challenged inferred malice instruction did not contribute to the verdict and, thus, did not constitute reversible error."

CONCLUSION

For all of the foregoing reasons, the State requests the panel deny the petition for rehearing, and affirm Appellant's convictions and sentences.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General

BY:



William M. Blitch, Jr.
S.C. Bar No. 15608
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

December 30, 2019

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
DEC 30 2019
SC Court of Appeals

Appeal From Lexington County
Hon. Eugene C. Griffith, Circuit Court Judge
Appellate Case No. 2016-002301

The State,

Respondent,

v.

Gregory Brooks,

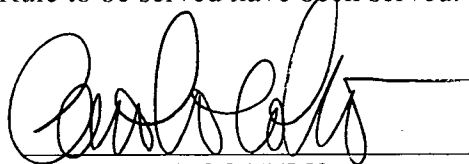
Appellant.

PROOF OF SERVICE

I, Caroline Collins, certify that I have served the within Return to Petition for Rehearing by having two copies delivered to:

Susan B. Hackett, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.
This 30th day of December, 2019.



CAROLINE COLLINS
Administrative Coordinator
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727



ALAN WILSON
ATTORNEY GENERAL

RECEIVED
DEC 30 2019
SC Court of Appeals

December 30, 2019

VIA HAND DELIVERY

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: State v. Gregory Brooks,
Appellate Case No. 2016-002301

Dear Ms. Kitchings:

Please find enclosed for filing the original and six (6) copies of the State's Return to Petition for Rehearing, with proof of service, in the above-referenced case.

Sincerely,

William M. Blitch, Jr.
Senior Assistant Deputy Attorney General
S.C. Bar No. 15608

Enclosures

cc: Susan B. Hackett, Esquire (2 copies enclosed)
Victim Advocacy Division (enclosure)