STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Hampton County
Honorable Perry M. Buckner, Circuit Court Judge
Appellate Case Tracking No. 2018-002201

The State, Respondent,

vs.

Daniel Lee Fludd, Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. While the charge given by the trial court that malice may be inferred from the use of a deadly weapon was not proper, any error was entirely harmless. Most significantly, the issue is blatantly not preserved and this Court should not entertain Appellant's request for plain error review which has been explicitly abandoned in South Carolina.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

ARGUMENT

I. While the charge given by the trial court that malice may be inferred from the use of a deadly weapon was not proper, any error was entirely harmless. Most significantly, the issue is blatantly not preserved and this Court should not entertain Appellant's request for plain error review which has been explicitly abandoned in South Carolina.

Appellant contends the trial court erred in charging the jury that malice may be inferred from the use of a deadly weapon in violation 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). While it was error to give the charge, the issue is blatantly not preserved for review on appeal and this Court should apply long-standing preservation requirements in this case. Further, the error is entirely harmless in this case and is distinguishable from the Supreme Court's recent opinion in Burdette.

Preservation

Initially, the issue raised is not preserved and was explicitly waived by Appellant's trial counsel. This Court should not entertain Appellant's request for plain error review, should not indulge the red herrings he sets forth in his brief, and, instead, should reiterate the preservation requirements that form a central tenet of appellate practice. The State is not asking this Court to "punt" anything; instead, the State asks this Court to apply the appropriate case law require Appellant to proceed through the means of review remaining at his disposal.

The South Carolina Supreme Court recently rearticulated the requirements for issue preservation:

> "There are four basic requirements to preserving issues at trial for appellate review." S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301–02, 641 S.E.2d 903, 907 (2007) (quoting Jean Hoefer Toal et al., Appellate Practice in South Carolina 57 (2d ed. 2002)). "The issue must have been (1) raised to and ruled upon by the trial court, (2) **raised by the appellant**, (3) raised in a

> timely manner, and (4) raised to the trial court with sufficient specificity." Id.

State v. Simmons, 423 S.C. 552, 561, 816 S.E.2d 566, 571 (2018) (emphasis added). The South Carolina Supreme Court explained issue preservation:

> An appellate court may not, of course, reverse for any reason appearing in the record. The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421–22, 526 S.E.2d 716, 724 (2000).

Initially, Appellant seems to maintain because the State objected to the giving of the charge it cannot now claim issue preservation prevents its review. One of the primary requirements of issue preservation is that the party raising the issue on appeal must have been the party that raised the issue at trial. The Courts of this State have long required the Appellant to have raised the issue or joined in the issue when raised by another. See State v. Carriker, 269 S.C. 553, 555, 238 S.E.2d 678, 678 (1977) ("[T]he appellant may not utilize the objection of another defendant to gain review."); see also, State v. Nichols, 325 S.C. 111, 123, 481 S.E.2d 118, 124 (1997) (finding issues raised by an appellant were not preserved for appellate review because the appellant failed to object during trial or join in his co-defendant's objections). The State's objection did not preserve anything for Appellant. See e.g., Davis v. State, 245 Ga. App. 402, 407, 538 S.E.2d 67, 71 (2000)("Davis did not join in the state's request or object to the failure to give the charge. Therefore, he has not preserved this issue for appeal.").

Significantly, Appellant specifically waived any objection to the charge at trial, trying to hold his ace up his sleeve and then waiting to play it on appeal. After the State raised the issue

and the trial court reiterated his belief the charge was correct, the trial court asked: "Any exceptions or additions to the charge from the defendant?" Appellant's response: "No, Your Honor." As a result, he specifically waived the issue for review on appeal and should not now be able to complain when he prevented the trial court from having the benefit of his objection and the ability to change his ruling. See State v. Sledge, 428 S.C. 40, 57, 832 S.E.2d 633, 642 (Ct. App. 2019) (finding when appellant stated "no objection" any issue is waived for review on appeal); see also, State v. Dicapua, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct. App. 2007) (holding the defendant's statement that he had no objection to a videotape coming into evidence "amounted to a waiver of any issue" the defendant had with the videotape); Burke v. AnMed Health, 393 S.C. 48, 55, 710 S.E.2d 84, 88 (Ct. App. 2011) ("When a party states to the trial court that it has no objection to the introduction of evidence, even though the party previously made a motion to exclude the evidence, the issue raised in the previous motion is not preserved for appellate review.").

Appellant knew the issue regarding the charge existed because the State mentioned it. Instead of joining with the State in the objection, he led the trial court to believe there was nothing wrong with the trial court's decision to give the charge. "A defendant may not reserve vices in his trial of which he has notice, taking his chances of a favorable verdict, and, in the case of disappointment, use the error to obtain relief." State v. Thomas, 248 S.C. 573, 580, 151 S.E.2d 855, 859 (1966), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); see also, State v. Logan, 279 S.C. 345, 348, 306 S.E.2d 622, 624 (1983) ("Appellant can neither take advantage of an error he contributed to at trial nor preserve a vice and, upon learning of the outcome of trial, raise it on appeal."). As the Supreme Court stated many years ago: "The general principle that a party cannot take his chances of a successful issue, reserving vices in the

trial, of which he has notice, for use in case of disappointment, is universally recognized and obviously just." State v. Simon, 126 S.C. 437, 120 S.E. 230, 231 (1923). The Court continued: "the motion was not made in this case, and no ground exists for imputing reversible error to the trial court as to a matter upon which no ruling was sought or made." State v. Simon, 126 S.C. 437, 120 S.E. 230, 232 (1923). Appellant clearly sat on this vice, reserving it for appeal instead of providing the trial court with a united front with the solicitor explaining the error in giving the Belcher charge and allowing the court the opportunity to correct its mistake.

Appellant makes a feeble argument that any objection would have been futile. Quite the opposite is likely to be correct. The State objected and the trial judge provided a basis for his reasoning. He then sought any objections from Appellant's counsel. Had Appellant objected, the trial court would have found a united front seeking to alter his charge. Instead, Appellant indicated his complete acceptance of the charge given by the trial court, signaling the trial court made the correct decision and there was no need to possibly alter the instructions. Nothing in the statements of the trial court indicated any ire would befall Appellant or his counsel for joining in the State's objection. C.f., State v. Pace, 316 S.C. 71, 74, 447 S.E.2d 186, 187 (1994) (finding "[a]s to counsel's failure to raise an objection, the tone and tenor of the trial judge's remarks concerning her gender and conduct were such that any objection would have been futile."). Any objection in this case would clearly have not been futile and, instead, would have served to not mislead the trial court into thinking Appellant approved of the charge as given.

Finally, Appellant argues judicial economy and not delaying the inevitable are proper bases for ignoring issue preservation rules and considering the issue on direct appeal instead of allowing it to proceed through the proper channel of post-conviction relief. If delay was Appellant and his appellate counsel's primary concern, they could have forgone the brief filed in

the instant case and proceeded directly to post-conviction relief. Judicial economy is certainly not served by bringing an arguably frivolous appeal on a blatantly not preserved issue. The Notice of Appeal in the instant case was filed in December 2018. It will likely be nearing two years by the time the issue is considered and ruled on by the Court—two years which could have been spent preparing and going forward with a post-conviction relief case where the issue is properly addressed.[1]

The South Carolina Supreme Court has explained the importance of our preservation rules:

> Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. The requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.

I'On, 338 S.C. at 422, 526 S.E.2d at 724.

This Court should not indulge Appellant's request to abandon long-standing issue preservation requirements, especially in light of the fact he specifically waived any objection. Our preservation rules serve foundational interests in allowing the court best suited to consider and correct errors to do so at the best possible time. See e.g., State v. Torrence, 305 S.C. 45, 66, 406 S.E.2d 315, 327 (1991) (eliminating *in favorem vitae* review in death penalty cases and holding: "A contemporaneous objection requirement enables trial judges to make reasoned decisions by appropriately developing issues by way of argument, both for or against any

[1] It is also significant to note that while Appellant attempts to blame the State for forcing delay, punting the case into PCR, not acting with judicial economy, and expending unnecessary time and money, Appellant has chosen a path which has greatly delayed proper consideration of his issue, filed a merits brief on a conceded unpreserved issue, and has required both parties and this Court to expend time and resources to address an issue which should have been brought initially in a PCR action.

particular legal proposition. This, in turn, allows potential errors to be prevented or cured."). This Court should continue to reject the plain error doctrine. See State v. Sheppard, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011) ("This Court, however, has routinely held the plain error rule does not apply in South Carolina state courts."); Jackson v. Speed, 326 S.C. 289, 306, 486 S.E.2d 750, 759 (1997) ("This Court has consistently refused to apply the plain error rule.")(citing State v. Vanderbilt, 287 S.C. 597, 340 S.E.2d 543 (1986); Young v. Smith, 168 S.C. 362, 167 S.E. 669 (1933)); State v. Beekman, 405 S.C. 225, 238, 746 S.E.2d 483, 490 (Ct. App. 2013) (finding "our appellate courts do not apply the plain error rule."); State v. Passmore, 363 S.C. 568, 583, 611 S.E.2d 273, 281 (Ct. App. 2005) (refusing to apply the "plain error" rule and requiring counsel to properly preserve issues for review on appeal). In particular, Torrence eliminated *in favorem vitae* review precisely to end the type of sandbagging taking place in this case. This Court should continue to "remind the bar that our appellate courts have 'consistently refused to apply the plain error rule' and 'it is the responsibility of counsel to preserve issues for appellate review.'" State v. Rivers, 411 S.C. 551, 555, 769 S.E.2d 263, 266 (Ct. App. 2015) (citations omitted).

Harmless Error

Appellant maintains the error in giving the implied malice charge was not harmless and that the question is "easily answered" by Burdette. However, the charge given in Burdette was different than the charge in this case such that the jury in the present case would not have had the same confusion present in Burdette which prevented it from being harmless error. As a result, even if this Court ignores precedent and does not apply error preservation rules, this Court should conclude any error in giving the implied malice charge was entirely harmless.

The Supreme Court explained the standard for a determination of whether the giving of an erroneous charge is harmless error:

> An erroneous instruction alone is insufficient to warrant this Court's reversal. "Errors, including erroneous jury instructions, are subject to harmless error analysis." Belcher, 385 S.C. at 611, 685 S.E.2d at 809. "When considering whether an error with respect to a jury instruction was harmless, we 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 (2014) (quoting State v. Kerr, 330 S.C. 132, 144-45, 498 S.E.2d 212, 218 (Ct. App. 1998)). "In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered." Id. (quoting Kerr, 330 S.C. at 145, 498 S.E.2d at 218).

State v. Burdette, 427 S.C. 490, 496, 832 S.E.2d 575, 578–79 (2019).

In Burdette, the trial court charged the jury on the law of murder, including the improper charge on implied malice. The court then charged the jury on the law of voluntary manslaughter, but said nothing about a requirement of malice or no malice during its charge. Finally, the court charged the jury on the law of involuntary manslaughter and specifically indicated it was a killing without malice. In effect the trial court charged the jury that murder required malice, involuntary manslaughter required no malice, and said nothing about voluntary which meant "the jury was left with the incorrect impression that malice is an element of voluntary manslaughter, which allowed the jury to use the improperly charged inference of malice from the use of a deadly weapon to find Burdette guilty of voluntary manslaughter." Id. at 501, 832 S.E.2d at 581.

In the instant case, the trial court did not charge the jury regarding involuntary manslaughter. The jury received a charge for murder which required a finding of malice and included the charge on implied malice. The jury then was charged on voluntary manslaughter, with no mention of a requirement of malice. The jury did not receive a charge on involuntary

manslaughter being a killing without malice, and so there was no basis for confusion on whether malice was or was not required for voluntary manslaughter as there was in Burdette. The Supreme Court in Burdette explained: "The charge **as a whole** necessarily resulted in confusion that contributed to the verdict that Burdette was guilty of voluntary manslaughter." Id. (emphasis added). Because the jury was not charged on involuntary manslaughter using the language that it was a killing "without malice" there was no basis for the confusion in the instant jury that resulted from the charge in Burdette.

Accordingly, this Court should find the error to be entirely harmless even if it completely overlooks the very clear preservation bar.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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January 31, 2020

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Hampton County
Honorable Perry M. Buckner, Circuit Court Judge
Appellate Case Tracking No. 2018-002201

The State, Respondent,

vs.

Daniel Lee Fludd, Appellant.

PROOF OF SERVICE

I, Caroline Collins, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by having delivered copies addressed to:

David Alexander, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
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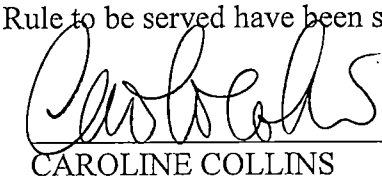
I further certify that all parties required by Rule to be served have been served.
This 31st day of January, 2020.



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RE: State v. Daniel Fludd
Appellate Case Tracking No. 2018-002201

Dear Mr. Alexander:

I am enclosing copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case. If you have any questions, please do not hesitate to contact me.

Sincerely,

William M. Blitch, Jr.
Senior Assistant Deputy Attorney General
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Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services