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SC Court of Appeals

Petitioner argues that instructing the jury that malice may be inferred if one intentionally kills another during the commission of a felony is an improper comment on the facts. The instruction was burden-shifting in nature and violated his due process rights under federal and constitutions by presuming the malice element of murder. *Loverly v. State* 376 S.C. 499 657 S.E. 2d 76 2-11-08. Courts held even viewing the supplemental charge in conjunction with the proper instruction on felony murder in the trial courts initial charge does not rectify this patent

Constitutional error language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. *Francis*, 471 U.S. at 322, 105 S.Ct. 1965. In fact, the contradictory instructions likely only exacerbated the error by confusing the jury as to its fact-finding duties with respect to petitioner's murder charge. Petitioner argues that it is confusing and misleading the jury also the judge had no right to instruct the jury that they can infer

malice if one intentionally kills another during the commission of a felony for this is a charge on the facts contrary to the constitution in that it undertakes to intimate to and instruct the jury what facts in the case are evidence of malice. Petitioner also argues it is also error, in that after all the evidence is out, the presumption of malice from the commission of a felony fade from the case, and the jury must find malice if at all from the evidence without any aid from the court as to what weight should be attached to commission of a felony or what inference they may draw from such. State v. Morris 285 S.C. 86 (1986) #92. Court held in both instructions it was made clear that malice would not be presumed from the commission of a felony, only that it could be inferred by the jury. The charge could not reasonably have been understood by the jury as shifting the burden of proof to appellant to disprove malice or implication of malice. Petitioner argues the instructions was not made clear that malice would not be presumed from the commission of a felony, only that malice can

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be inferred by the jury. P. 32 at 4-11 Judge erred
"The court wrote in *Burdett v. State* 427 S.C. 490, 503,
832 S.E.2d 575, 582 (2019) 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]

Petitioner argues that the same should be with
the instructions of if one intentionally kills another
during the commission of a felony. The state may
argue to the jury that malice existed because
facts in evidence and other overwhelming evidence
show that petitioner intentionally killed deceased
during the commission of a felony. Petitioner
argues that there was no evidence also the defense
may argue that there was absence of malice. The
judge however should not instruct the jury malice
can be inferred because that is speaking on facts
also the charge is confusing to the jury, also
petitioner argues state failed to prove beyond a
reasonable doubt that the killing of the deceased
was accompanied by malice aforethought.

There was no facts presented at trial that petitioner killed the deceased or the deceased was intentionally killed. State v. Belcher 385 S.C 597 685 S.E 2d 802 "The Court wrote the standard implied malice charge remains valid as does the general permissive inference instruction: If facts, are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction this inference would be simply an evidentiary fact to be taken into consideration by you the jury along with other evidence in the case, and you may give it such weight as you determine it should receive," in addition, we neither restrict the state from arguing to the jury for a finding of malice from... nor restrict a defendant from arguing the absence of malice or the presence of reasonable doubt in this regard. It is axiomatic that some matters appropriate for jury argument are not proper for charging... [Petitioner argues that the judge had no right to instruct the jury that they can infer malice from the commission of a felony for this is a charge on the facts contrary

to the Constitution in that it undertakes to intimate to and instruct the jury what facts in the case are evidence of malice, it is also error, in that after all the evidence is out, the presumption of malice from the commission of a felony fade from the case, and the jury must find malice if at all from the evidence without any aid from the courts as to what weight should be attached to it if one intentionally kills another during the commission of a felony or what inference they may draw from such.] Yates v. Aiken 484 U.S. 211 108 S.Ct. 534 98 L.Ed.2d 546 US LW 4065. Court held "The due process clause of the fourteenth amendment 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." in re Winship [397 U.S. 358, 364 90 S.Ct. 1068, 1072, 25 L.Ed.2d 3168 (1970) The Bedrock, axiomatic and elementary "constitutional] principle; id. at 363 [90 S.Ct. at 1072] Prohibits the State from using evidentiary presumption in a jury charge that have the effect of relieving the

State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime. *Sandstrom v. Montana*, Supra 442 U.S. at 520-524, *Patterson v. New York*, 432 U.S. 197, *Mullaney v. Wilbur*, 421 U.S. 698-701, see also *Morisette v. United States*, 392 U.S. 240. The prohibition protects the fundamental value determination of our society, given voice in Justice Harlan's concurrence in *Winship*, that it is far worse to convict an innocent man than to let a guilty man go free! Petitioner argues that there was no overwhelming evidence that was presented to jury. Petitioner argues that the intern riding along with officer Robinson, Ms. Nichols reported seeing a man come out running from the house at the time shots were fired wearing a red shirt (p. 228 lines 5-23) Ms. Nichols was not allowed to testify at trial. Petitioner argues that Ms. Nichols was a witness with overwhelming evidence that would show that petitioner was not person that ran out the home. Petitioner also argues that officer Robinson said he saw suspect slam gun on counter but never saw anyone's face. (p. 91 lines 2-19 p. 94 13-19)

Petitioner argues that body cam footage from Officer Sandefur would show that petitioner didn't come running from home but that wasn't played during trial. (p. 120 5-18) Petitioner also argues this overwhelming evidence would have kept him from conviction along with the neighbor that called the police and said they saw three people outside of the deceased home at time of crime (p. 229 15-24) also Williams was not questioned about the involvement of other people mentioned. (p. 145 24) Petitioner argues that Williams changed statement more than once (p. 13 25) (p. 124 24) also another person was interviewed by Greenville County Sheriffs and the weapon used in the crime was owned by that person but still he wasn't at trial to testify to how the gun was received. (p. 14 1-8) Co-defendant was getting lighter sentence to testify but had the most involvement petitioner argues evidence points to Williams and is overwhelming also there was no evidence to support malice or to say petitioner killed deceased in fact the evidence

Shaw there was a third party involved
petitioner argues there was no evidence that the
jury could consider to support malice nor to say
petitioner killed the deceased or intentionally
killed deceased during the commission of a
felony. It is always for the jury to determine
the facts, and the inferences that are to be
taken or drawn from the 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

Respectfully,
s Tristian Cummings

Columbia, South Carolina

Dated: February 4, 2020

~~State of South Carolina~~

County of Richland

State of South Carolina,) ~~Respondent~~
Respondent,) Appellate Case No. 2019-000665
v.)
Tristan Cummings,) Proof of Service
Appellant)

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I certify that I have served this Appellant's Pro Se
Brief on the Honorable Jenny Abbott Kitchings, Clerk,
by depositing a copy of it in the U.S. Mail, postage prepaid,
on February 4, 2020, addressed to her office at Post
office Box 11629, Columbia, South Carolina 29211.

Tristan Cummings

Tristan Cummings 344693
Broad River C.I. / WA - 239
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Columbia, S.C. 29210

February 4, 2020

Tristan Cummings 344693

Broad River C.I. / WA-239

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Honorable Jenny Abbott Kitchings

Clerk

P.O. Box 11629

Columbia, S.C. 29211

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Re: State of South Carolina v. Tristan Cummings

Dear Ms. Kitchings,

Enclosed for your file is an original copy of my Pro Se Brief,

along with a:

1) Proof of Service

Respectfully,

St. Tristan Cummings

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4460 Broad River road
Columbia SC 29210



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