STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

ORIGINAL

Certiorari to Court of Appeals
Appeal from Lexington County
Eugene C. Griffith, Jr., Circuit Court Judge

RECEIVED

FEB 26 2020

S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

GREGORY LAMONT BROOKS,

PETITIONER

APPELLATE CASE NO. 2016-002301

PETITION FOR WRIT OF CERTIORARI

SUSAN B. HACKETT
Appellate Defender

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

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did the Court of Appeals err (1) by placing the burden on Petitioner to show the conceded jury instruction error – that malice may be inferred from the use of a deadly weapon – was not harmless beyond a reasonable doubt in direct conflict with prior decisions of this Court and the United States Supreme Court, (2) by failing to consider the jury instruction as a whole when conducting the harmless error analysis, and (3) by determining the error was harmless because Petitioner was not entitled to an instruction on a lesser-included offense despite evidence in the record supporting the instruction as argued by the state at trial?

STATEMENT

When Petitioner was sixteen years old, he was shot. R. 313, ll. 14-17. One of the bullets struck his right hand, breaking the bones. R. 313, ll. 18-22. As a result, he had a difficult time grasping things with his right hand. R. 313, ll. 23-24. Unfortunately, Petitioner was right-handed, and the injury hindered his abilities. R. 313, l. 25 – R. 314, l. 1. As a result, Petitioner did not own a gun and was scared of guns. R. 314, ll. 11-18.

On February 1, 2014, Petitioner spent the day helping his girlfriend and her family move. R. 296, ll. 1-4; R. 296, ll. 20-24; R. 297, ll. 2-3; R. 297, ll. 9-23. Later that night, he and his friends, Eric Brown and Arnold Banks, met at the Cockpit Bar and Grill. R. 403, l. 18 – R. 404, l. 25; R. 417, ll. 12-14; R. 431, ll. 14-22; R. 431, ll. 23-24. Petitioner rode to the bar with Eric in a dark gray Eclipse. R. 404, ll. 10-20.

Also, at the Cockpit were Rickena Knightner, Brandon Ratliff, Andre Bunch, and Fred Moss. R. 127, ll. 12-25; R. 158, ll. 11-14; R. 357, ll. 3-7; R. 431, ll. 23-24. Andre kept a loaded a nine-millimeter Smith and Wesson semiautomatic handgun in his car, which he drove to the Cockpit. R. 129, ll. 2-5; R. 136, ll. 16-21; R. 142, ll. 11-22. After the shooting later in the night, the police found the gun along with a magazine and eight unspent rounds in the glove box of his car. R. 118, ll. 15-17; R. 119, ll. 2-6; R. 120, ll. 12-14; R. 228, ll. 14-20. The gun could hold fifteen rounds. R. 122, ll. 1-3.

Fred and Brandon arrived at the bar in Fred's car. R. 158, l. 24 – R. 159, l. 7. Brandon had a .40 caliber gun that he was known to carry in a holster. R. 146, ll. 4-20; R. 155, ll. 10-16; R. 176, ll. 8-9. In fact, Fred assumed Brandon had a .45 caliber gun in the glove compartment of Fred's car while they were at the Cockpit. R. 197, ll. 2-8. After the shooting, inside Fred's car,

the police found Brandon's holster, but no gun, on the passenger side floorboard. R. 108, ll. 22-24; R. 109, ll. 13-15; R. 197, ll. 16-19; Defendant's Exhibit #22.

Arnold and Rickena were involved in a sexual relationship. R. 311, ll. 2-14; R. 429, l. 19 – R. 430, l. 5.[1] Rickena was very intoxicated and continued to press Arnold to leave the club with her, but Arnold refused, upsetting Rickena. R. 432, ll. 7-13.

Shortly before the bar closed, there was an altercation between two people or two groups of people. R. 129, ll. 6-10; R. 407, ll. 10-14; R. 434, ll. 9-15. By all accounts, Fred was involved in the altercation inside the bar. R. 129, ll. 17-19. According to Fred, he saw a "female at the bar so [he] indulged in conversation" with her. R. 165, ll. 16-19. Within minutes of indulging in this conversation, "the whole floor" of people in the bar were looking his way. R. 165, ll. 19-23. Fred claimed a guy with long dreads approached him, saying "something slick." R. 166, ll. 3-9. Suddenly, Brandon appeared, telling Fred that it was time to go. R. 167, ll. 8-21.

Rickena claimed Petitioner and Eric were involved in the argument as well. R. 359, l. 19 – R. 360, l. 4. After she allegedly tried to convince Arnold not to get involved and he refused, she and her friend decided to leave. R. 360, ll. 18-21. Her friend went to the restroom as Rickena went outside to wait by the car. R. 360, ll. 21-25.

After security separated the men, Brandon, Fred, and their friends were escorted outside by security. R. 130, ll. 11-12; R. 148, ll. 1-6; R. 408, ll. 5-9; R. 434, ll. 15-17. Within ten or fifteen minutes, the bar announced it was closing so the patrons started to leave. R. 156, ll. 9-15; R. 408, ll. 10-12. Andre closed his tab and walked out approximately five minutes after his friends left. R. 130, ll. 13-19.

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[1] Rickena Knightner denied ever dating Arnold Brown. R. 374, ll. 20-25.

Fred and Brandon walked toward Fred's car. R. 168, ll. 4-5. Fred claimed the "same guys" from inside the bar had followed him out and were behind him. R. 168, ll. 12-13. He claimed he saw two men with dreadlocks. R. 168, ll. 13-15. Initially, Fred was talking big to the men and pretending he was armed. R. 199, l. 11 – R. 200, l. 1. However, Fred saw one of the men with dreadlocks flash a black nine-millimeter gun. R. 169, ll. 17-22; R. 199, l. 11 – R. 200, l. 1. This shut Fred up and stopped his posturing. R. 169, ll. 9-12; R. 199, l. 11 – R. 200, l. 1. Suddenly, the other man, not the one who had flashed the gun, started shooting while walking backwards with the gun. R. 170, l. 23 – R. 171, l. 4; R. 193, ll. 24-25; R. 194, ll. 16-25. Fred ducked. R. 171, ll. 5-6.

Rickena saw some of the men who had been arguing standing outside of the bar at the top of a hill. R. 362, ll. 13-23. She claimed a commotion at the top of the hill caught her attention. R. 363, ll. 1-5. She further claimed she saw Petitioner with a gun. R. 363, ll. 5-25. When she yelled out to Petitioner, he told her to get down, which she did. R. 363, l. 24 – R. 364, l. 4. According to Rickena, Petitioner got into a car that pulled up not far from her. R. 364, ll. 5-8. After the shooting, she and her friend ran up the hill to see whom had been shot. R. 365, ll. 5-15. Upon realizing they did not know the person, they returned to Rickena's car, and she called 911. R. 365, ll. 14-21.

Arnold walked out of the bar after the men who were arguing left. R. 434, l. 24 – R. 435, l. 2. When he was walking by the men to get to his car, he heard them continuing to argue. R. 435, ll. 1-2. Arnold did not see Petitioner or Eric near the men. R. 437, ll. 2-5. Within five minutes of leaving the bar, Arnold heard gunshots. R. 438, ll. 5-11. Arnold heard shots from more than one gun. R. 438, ll. 20-23. Fearful, he jumped into his truck and left the area for home. R. 438, ll. 18-19; R. 439, ll. 4-5.

While Eric was leaving the bar around closing time, he heard gunshots. R. 408, ll. 17-18. He heard more than one gun firing shots. R. 408, l. 18. He ran to his car. R. 408, l. 19. As he was driving toward the exit, Petitioner knocked on his passenger side window asking to be let in to the car. R. 409, ll. 6-8. The shots were still firing. R. 409, ll. 12-13. Eric stopped his car so that Petitioner, who was unarmed, could get inside. R. 409, ll. 14-15. He and Petitioner then went to Eric's house. R. 409, ll. 18-19.

Andre claimed that when he walked outside of the bar, he saw a group of men fussing with Fred. R. 130, ll. 23-25. Brandon was standing nearby at Fred's car. R. 131, ll. 4-13. As Andre walked to his car, he heard gunshots. R. 133, ll. 1-2. Andre jumped into his car and headed toward where Fred and Brandon had been because he was concerned for them as they had been arguing. R. 133, ll. 9-20. Andre arrived at the area within seconds. R. 134, l. 2. He saw Brandon on his back in the middle of the highway in front of the bar. R. 134, ll. 8-14; R. 175, ll. 4-6. Andre picked up Brandon, placed him in his backseat and drove to the hospital. R. 135, ll. 17-21; R. 176, ll. 5-7. Fred accompanied them. R. 135, ll. 17-21; R. 176, ll. 5-7. Brandon died as a result of exsanguination due to laceration of the heart by a gunshot wound to the chest. R. 216, ll. 3-6.

The identification of Petitioner as the shooter by Fred and Rickena depended largely on his having dreadlocks. R. 177, ll. 23-24; R. 184, ll. 2-10; R. 328, l. 18 – R. 329, l. 9; R. 330, ll. 11-15; R. 344, l. 8 – R. 345, l. 11; R. 348, ll. 20-22; R. 367, ll. 1-3; R. 370, ll. 8-20; R. 372, ll. 14-20. However, as the evidence made clear, Petitioner was far from the only person at the bar with dreadlocks. R. 147, ll. 8-14. Eric had dreadlocks a little longer than Petitioner's. R. 410, ll. 2-7. Dashun Curry also had dreadlocks, which were slightly longer than Petitioner's. R. 313, ll. 6-8; R. 410, ll. 8-12.

On April 21, 2014, months after the shooting, the police interviewed Dashun. R. 347, ll. 11-16. Without explaining how, the police eliminated Dashun as a suspect. R. 347, l. 25 – R. 348, l. 11. The police seized Dashun's cell phone, but did not explain if a search of that phone exonerated Dashun. R. 348, ll. 4-11. The police claimed Dashun did not meet the description of the shooter provided by Fred and Rickena. R. 348, ll. 12-14. There was a reward offered for anyone offering information to assist the investigation. R. 411, ll. 19-24; Defendant's Exhibit #44. A $10,000 reward was paid "for a name." R. 353, ll. 13-21; R. 479, ll. 1-11.

The police tracked down one of the people who had called 911 to report the shooting. R. 248, ll. 6-20. This person told the 911 operator and the police that her name was "Shontay Jones" and that she "was standing right by the shooter." R. 248, ll. 19-25; R. 365, l. 24 – R. 366, l. 9; R. 375, l. 24 – R. 376, l. 8. Several days after the shooting, the police met with "Ms. Jones." R. 249, ll. 1-2. "Ms. Jones" provided a description of the shooter – "short, black male that had small eyes and that had dreads." R. 249, ll. 16-18; R. 376, ll. 11-15. "Ms. Jones" did not provide the police with a name, despite the fact that at trial, she claimed she knew the shooter's name and had known him for quite some time. R. 366, ll. 17-25; R. 367, ll. 4-10; R. 370, ll. 21-25. In fact, "Ms. Jones" told the police she did not know who the shooter was. R. 378, ll. 8-12. "Ms. Jones" even agreed to meet with a sketch artist to provide a description for a composite drawing. R. 250, ll. 9-21; R. 367, ll. 11-14. Eventually, the police learned "Ms. Jones" was not whom she claimed to be. R. 249, ll. 19-23. She had lied about her identity. R. 249, ll. 22-23. In fact, "Ms. Jones" was Rickena Knightener. R. 366, ll. 6-9.

Despite Rickena's claims to the police otherwise, Rickena was very familiar with Petitioner. R. 358, ll. 4-23; R. 359, ll. 1-8.

When the police arrived at the bar, there was mass confusion and chaos as people left in cars and on foot as quickly as possible. R. 35, l. 18 – R. 36, l. 25; R. 40, l. 23 – R. 41, l. 4; R. 42, ll. 4-9. "[C]ars and people [were] everywhere." R. 55, ll. 20-24. The bar's patrons continued to run even after the police "secured the scene." R. 46, ll. 9-12; R. 56, ll. 9-15.

The police found ten .22 caliber spent shell casings along a diagonal line from the bar's front door to the blood in the roadway. R. 57, ll. 17-22; R. 71, ll. 12-16. The casings were obviously altered in some way – probably run over by cars or stepped on by people fleeing the area. R. 105, ll. 4-17. The police also found "eight patterns of blood in the roadway right outside the bar." R. 76, ll. 20-23. Additionally, the police found three projectiles in the right side of Fred's car, which was parked at the bar. R. 79, ll. 4-5; R. 88, ll. 5-11. All three were consistent with a .22 caliber. R. 89, ll. 22-23.

One of the first people interviewed by police at the bar was Josie Paxton. R. 30, ll. 19-24; R. 247, ll. 18-24. Paxton provided the police with information that established her ex-boyfriend, Antonio "Bling" Williams, as a suspect. R. 30, l. 25 – R. 31, l. 9; R. 256, l. 18 – R. 257, l. 4; R. 461, ll. 4-13; R. 468, ll. 2-3. When the police met with Paxton, the officer took photographs of text messages from Paxton's phone. R. 253, ll. 2-10; Defendant's Exhibits #29, #30, #31. The police claimed they eliminated Bling as a suspect because he did not fit the description of the shooter, which had been provided by Moss and Knightner. R. 257, ll. 5-10. According to police, Bling "was a taller black male" with long dreads, not "a black male, small stature, small eyes and dreads," which was the description the police had. R. 257, ll. 11-17; see also R. 468, ll. 18-24. The police collected Paxton's phone. R. 262, ll. 2-4.

Over the course of the investigation, the police interviewed Brittainy Dilworth, who was Brandon's girlfriend, and her friend, Shalana Weise. R. 259, l. 21 – R. 260, l. 13; R. 324, ll. 17-

20; R. 466, ll. 13-18. Brittainy told the police to investigate Petitioner, Jermiel Gartrell and two other people for whom she could only provide "street names." R. 261, ll. 3-8; R. 325, ll. 2-7. There was no indication that Brittainy or Shalana were at the Cockpit during the shooting. However, they had obtained these names from a co-worker, but refused to reveal the name of the co-worker and the police did not attempt to speak directly to the co-worker. R. 264, ll. 16-18.

On June 1, 2015, a Lexington County grand jury indicted Petitioner for possession of a weapon during a violent crime (2015-GS-32-1347) and murder (2015-GS-32-1349). R. 544-545; R. 547-548. The state, represented by Rhonda Patterson and Lester "Gill" Bell, called the case for trial before the Honorable Eugene C. Griffith and a jury on October 31 – November 3, 2016. R. 1. The jury found Petitioner guilty as charged. R. 537, ll. 12-19. Judge Griffith sentenced Petitioner to thirty-five years' imprisonment for murder and five years' imprisonment for the weapon. R. 538, ll. 13-17; R. 546; R. 549. He ordered the sentences to be served concurrently. R. 538, ll. 13-17; R. 546; R. 549.

On November 14, 2016, Petitioner served his notice of appeal. On November 20, 2019, the Court of Appeals affirmed Petitioner's convictions and sentences. App. 1-14; State v. Brooks, Op. No. 5693 (S.C. Sup. Ct. filed Nov. 20, 2019) (Shearouse Adv. Sh. No. 45 at 21). The Court correctly held the trial judge erred by instructing the jury that malice may be inferred from the use of a deadly weapon. However, the Court erred in its harmless error analysis. Throughout the Court's opinion, the burden was placed upon Petitioner 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 Petitioner, the 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 Petitioner, 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 – the 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.

Pursuant to Rule 221(a), SCACR, Petitioner filed a petition for rehearing. App. 15-24. Pursuant to a request from the Court of Appeals, the state filed a return. App. 25-29. On January 24, 2020, the Court of Appeals denied the petition. App. 30. This petition for writ of certiorari follows.

ARGUMENT

The Court of Appeals erred (1) by placing the burden on Petitioner to show the conceded jury instruction error – that malice may be inferred from the use of a deadly weapon – was not harmless beyond a reasonable doubt in direct conflict with prior decisions of this Court and the United States Supreme Court, (2) by failing to consider the jury instruction as a whole when conducting the harmless error analysis, and (3) by determining the error was harmless because Petitioner was not entitled to an instruction on a lesser-included offense despite evidence in the record supporting the instruction as argued by the state at trial.

Relevant facts

The solicitor requested the trial judge instruct the jury concerning the lesser-included offense of voluntary manslaughter. R. 475, l. 17 – R. 476, l. 18. Defense counsel agreed. R. 477, ll. 11-14. The judge indicated he would include voluntary manslaughter as a lesser included offense on the verdict form and in his instructions to the jury. R. 477, ll. 15-20.

During the solicitor's closing argument, she informed the jurors that malice could be "implied by the use of a deadly weapon." R. 495, ll. 22-23. According to the solicitor, malice could "also be implied by shooting that deadly weapon into somebody." R. 495, ll. 23-24. Defense counsel interrupted the argument and requested a bench conference. R. 495, l. 25. Thereafter, an off-the-record conference ensued. R. 496, l. 2.

At the conclusion of the solicitor's closing argument, the judge stated he had "re-read Belcher." R. 508, l. 25. According to the judge's reading of Belcher, "that inference of malice with proof or use of a weapon is not proper when self defense is presented to the jury. ... If self defense is not presented to the jury, then use of a weapon is allowable as an inference of malice." R. 508, l. 25 – R. 509, l. 6. Defense counsel argued that "if there were any mitigating circumstances

surrounding the event," then the inferred malice from the use of a deadly weapon charge was not permitted. R. 509, ll. 8-16.

Thereafter, the judge instructed the jury that malice may "rise when a deed is done by the use of a deadly weapon." R. 519, ll. 21-22. He reminded the jurors that he had "defined ... a deadly weapon [as] any article or instrument which is likely to cause death or great bodily harm." R. 519, ll. 22-25. He also stated that "a gun or a knife or a weapon such as that is an example of a deadly weapon." R. 520, ll. 2-3.

At the conclusion of his instructions, the judge asked if the lawyers had "[a]ny exceptions or additions to the instructions." R. 527, ll. 4-5. Defense counsel explained she wanted to "make sure" she "renewed [her] Belcher position." R. 527, ll. 21-24.

Discussion

The Court of Appeals correctly determined, and the state conceded, the trial judge erred by instructing the jury that malice may be inferred from the use of a deadly weapon. Nevertheless, the Court of Appeals erred when conducting its harmless error analysis. Throughout the Court's opinion, the burden was placed upon Petitioner 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 Petitioner, the 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 Petitioner, 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 – the 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.

This 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 the Court of Appeals and the state admitted – that the trial judge's inferred malice instruction to the jury at the close of Petitioner's trial was erroneous. The only question for the Court of Appeals – and now this Court – was whether the state proved beyond a reasonable doubt that the error was harmless.

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). This Court explained its ruling in Burdette was based upon the constitutional requirement that the state bears the burden of proving each element of an offense beyond a reasonable doubt. Burdette, 427 S.C. at 502, 832 S.E.2d at 582 (explaining that "[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").

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.

Contrary to the harmless analysis performed by the Court of Appeals, 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 its published opinion, the Court of Appeals placed the burden of proving the error was not harmless on Petitioner, instead of properly placing the burden of proving the error was harmless on the state. At the outset, the Court outlined Petitioner'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, the Court noted that Petitioner "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 Petitioner 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 Petitioner to argue anything at all regarding harmless error. The burden was entirely on the state. The Court of Appeals erred by repeatedly placing the burden on Petitioner 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 Petitioner, the jury instruction that malice may be inferred from the use of a deadly weapon was 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 this 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. While the Court of Appeals claimed to acknowledge this Court's "exposition of the prejudice" resulting from the erroneous jury instruction, the Court of Appeals failed to give this Court's guidance the regard it was due.

The instruction at issue occurred shortly after the trial judge told the jurors about criminal intent. After telling the jurors about reasonable doubt, the trial 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 trial judge inserted the use of a gun as one of the circumstances the jury could use to determine intent.

The trial 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 trial 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 Petitioner's argument regarding the jury instruction as a whole, the Court of Appeals 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 Petitioner'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 the assertion by the Court of Appeals 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 misapprehended this 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.

In State v. Belcher, 385 S.C. 597, 600, 685 S.E.2d 802, 803-804 (2009), this 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. The Court of Appeals held there was "no evidence of sufficient legal provocation." According to the Court, the Belcher analysis was conducted "to the extent the issue could affect a harmless error analysis," but the Court never explained if the issue affected its harmless error analysis or, if it did, how it did so.

There was evidence 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, the Court of Appeals 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. While Petitioner maintains he was entitled to the instruction based upon Brandon's conduct, the state argued the voluntary manslaughter instruction was required due to sufficient legal provocation from a third party – Fred. See State v. Wharton, 381 S.C. 209, 215, 672 S.E.2d 786, 789 (2009) (explaining that "the applicability of the doctrine of transferred intent to voluntary manslaughter cases where the defendant kills an unintended victim upon sufficient legal provocation committed by a third party remains an unsettled question in South Carolina").

There was evidence of a heated, and at times, physical argument inside the bar, which 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. Therefore, there was evidence to support the submission of voluntary manslaughter to the jury. To the extent the evidence supporting the lesser-included offense was important for the harmless error analysis, the record contradicts the Court of Appeals' conclusion.

Petitioner respectfully requests this Court grant certiorari because the published opinion from Court of Appeals runs afoul of the harmless error analysis required by the Supreme Court of the United States and this Court by placing the burden on Petitioner to show the error was not harmless beyond a reasonable doubt. See Rule 242(b)(3) & (5), SCACR. Application of the proper harmless error analysis demonstrates the trial judge's conceded error in charging the jury on the inference of malice arising from the use of a deadly weapon was not harmless beyond a reasonable doubt based upon the jury instruction as a whole and the evidence presented.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of February, 2020.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Court of Appeals
Appeal from Lexington County
Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GREGORY BROOKS,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Samuel Bailey, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Gregory Brooks, #342118, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 26th day of February, 2020.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 26th day of February, 2020.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: December 31, 2029