STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHEROKEE COUNTY
Court of General Sessions
The Honorable R. Keith Kelly

RECEIVED
MAR 27 2020
SC Court of Appeals

Case No.: 2019-001571

State of South Carolina,

Respondent,

vs.

Rajshun Bernard Foster,

Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The circuit court erred, as a matter of law, in instructing the jury it could infer malice from the use of a deadly weapon.

STATEMENT OF THE CASE

Mr. Foster ("Appellant") was indicted for murder (Indictment 2014-0878, which became case number 2014-GS-11-00878) (Tr. p.14) Appellant and a co-defendant, Franklin Pierre Dover, proceeded to trial before a jury and the Honorable R. Keith Kelly July 15-17, 2019. Appellant was represented by Tracy Racine, Esquire. Both men were found guilty of murder, with Appellant sentenced to 35 years' imprisonment. (Tr. p. 471; 477) Appellant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court.

Appellant filed a timely Notice of Appeal on July 26, 2019 with the Cherokee County Clerk of Court. She had served opposing trial counsel the day prior (July 25, 2019). Unfortunately, the notice of appeal was not properly filed with this court. Undersigned counsel filed a motion to file belated appeal on September 11, 2019 that was unopposed by the State. The request was granted by this court on September 25, 2019. This initial brief follows.

STATEMENT OF FACTS

On June 22, 2014, Timothy Blair ("Victim"), also known as "Slick," was shot and killed in the Connecticut Village Apartments in Gaffney, Cherokee County, South Carolina. The State alleged that four individuals were involved in the crime – Appellant, Rajshun Foster, also known as "Fawlk;" Franklin Dover, also known as "Gwap;" Terence Studyvance, also known as "T;" and Antron Bronner, also known as "Red." Tr. p.157, line 20 – p.158, line 1; p.178, line 13-p.179, line 16. Allegedly, Appellant, while driving his girlfriend's car, dropped off Dover and Studyvance at a wooded path that led to the apartment complex. Tr. p.159, line 12 – p.160, line 8; p.323, lines 13-25. There, Dover laid in wait for Victim. Tr. p. 223, lines 2-13. While Dover waited, Appellant went into the complex and began socializing with friends. Several witnesses testified to seeing Appellant and Victim have a verbal altercation, then Victim walked to his ex-girlfriend's apartment where he was shot once through the lungs. Tr. p.225, line 9- p.226, line 15; p.275, line 23 – p.276, line 6.

The State relied on an accomplice liability or "hand of one, hand of all" theory to charge Appellant with murder. Because, it alleged, Appellant drove Dover to the scene, knew Dover was armed, and picked him up after, he is complicit in this murder. However, there were no eyewitnesses to the shooting, no DNA evidence, no fingerprints, no confessions, and no one who could affirmatively state that any of these men caused Victim's death.

STANDARD OF REVIEW

"In criminal cases, the Appellate Court sits to review errors of law only. We are bound by the trial court's factual findings unless they are clearly erroneous. This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases." State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (citations omitted).

Review is limited to determining whether any evidence supports the trial court's finding. State v. Banda, 371 S.C. 245, 251, 639 S.E.2d 36, 39 (2006). Upon such review, an appellate court may reverse only when the trial court's decision is clear error. State v. Pichardo, 367 S.C. 84, 95, 623 S.E. 2d 840, 846 (Ct. App. 2005). Under the "clear error" standard, the appellate court will not reverse a trial court's finding of fact simply because it may have decided the case differently. Id. at 96, 623 S.E.2d at 846. [T]his deference does not bar this Court from conducting its own review of the record to determine whether the trial judge's decision is supported by the evidence." State v. Tindall, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010).

"Errors, including erroneous jury instructions, are subject to harmless error analysis." State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). "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.

ARGUMENT

The circuit court erred, as a matter of law, in instructing the jury it could infer malice from the use of a deadly weapon.

The trial court erred, as a matter of law, in issuing the following jury instruction:

> The use of a deadly weapon gives rise to a permissive inference of malice. You twelve may draw an inference of malice from proof of the use of a deadly weapon if you conclude such an inference is proper after considering all the facts and circumstances in evidence. You are free to accept or reject the permissive inferences, depending on your view of the evidence.

Transcript, p.460-61.

The question of whether trial judges can instruct juries on the inference of malice when a deadly weapon is used (also known as the permissive inference charge) has a detailed past in South Carolina. This history is detailed in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) – the first case to establish a bright line rule that there could be any limit to a trial court's instruction on the matter. The Belcher court concluded, after detailed discussion of the history of the instruction, that they were "unable to harmonize the earlier writings of this Court with our modern jurisprudence." Id., 385 S.C. at 609, 685 S.E.2d at 808. However, it held, there are scenarios in which it may be appropriate for a jury to infer malice based on the involvement of a deadly weapon. These are "where evidence is presented that would reduce, mitigate, excuse or justify the killing (or the alleged assault and battery with intent to kill)." Id., 385 S.C. at 610, 685 S.E.2d at 809. Regardless, this decision created a new, overarching rule regarding the specific jury instruction.

This past summer, however, the Supreme Court again took up the implied malice jury instruction and, again, created a bright line rule. The analysis began with the consideration that "[they] have held in other settings that it is improper to give examples of conduct the jury may consider when determining whether the State has proven an element of a crime or when

determining whether certain other facts have been proven or disproven." State v. Burdette, 427 S.C. 490, 502, 832 S.E.2d 575, 582 (2019) This, they reasoned, is a direct comment from the trial court on the facts in evidence, and "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.

The Court further elaborated that this does not prevent the attorneys from arguing whether the jury should or should not infer malice based on the facts, but commentary from the trial court on the topic was inappropriate. Id. 427 S.C. at 503, 832 S.E.2d at 582-83. It even referred back to its holding in Belcher, stating, "It is axiomatic that some matters appropriate for jury argument are not proper for charging. 'Do jurors need the court's permission to infer something? The answer is, of course not.'" Belcher, 385 S.C. at 612 n.9, 685 S.E.2d at 810 n.9 (quoting Bruce A. Antkowiak, *The Art of Malice*, 60 RUTGERS L. REV. 435, 476 (2008))." Id.

Importantly in the case at bar, though, is the conclusion to Burdette, which holds that the ruling is effective in this case and in those cases which are pending on direct review or are not yet final, so long as the issue is preserved. See Griffith v. Kentucky, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987) (holding "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review or not yet final"). Id. This opinion was filed July 31, 2019 – approximately two weeks after the trial in this matter ended. However, the initial notice of appeal was filed July 26, 2019, with notice being provided to Respondent the day prior. Though the notice was not properly filed with this court, Respondent and the County were on notice of an intent to appeal within the time required to file. Any doubt as to the same should be resolved in favor of Appellant. Therefore, for purposes of applying the new case law, this matter was pending on direct review when the Burdette opinion was issued.

Specifically, regarding issue preservation, this matter is an example of a "clear break" discussed in Griffith, supra. Trial counsel could not have known that the court would rule on this issue mere days after trial. At the time of trial, they were following the jurisprudence laid out in Belcher which allowed implied malice, so long as there was no evidence of mitigating circumstances presented. The jury instruction as issued on that day was appropriate. However, as contemplated in Griffith, "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." Griffith, 479 U.S. at 322, 107 S. Ct. at 713. Specifically, it quoted Justice Harlan, who stated,

> "If we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all. . . . In truth, the Court's assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation." Mackey v. United States, 401 U.S., at 679 (opinion concurring in judgment).

Griffith, 479 U.S. at 323, 107 S. Ct. at 713 (citing Mackey v. United States, 401 U.S. 667, 91 S. Ct. 1160 (1971). For this reason, because Appellant's litigation is still pending, the principle issued in Burdette must apply. The issuance of this permissive inference instruction that was constitutional under Belcher is now unconstitutional under Burdette and, therefore, Appellant's conviction must be overturned.

CONCLUSION

For the above stated reasons, Appellant respectfully requests that this Court reverse his conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, secretary to Tommy A. Thomas, Attorney for the Appellant hereby certify that pursuant to an Order of the Supreme Court dated March 20, 2020 regarding Operation of the Appellate Courts During the Coronavirus Emergency, I email a copy of the Initial Brief of Appellant and Designation of Matter to Melody J. Brown, Esq., at the Office of the Attorney General, at mbrown@scag.gov

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March 27, 2020

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