

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Lexington County
Hon. Eugene C. Griffith, Jr., Circuit Court Judge
Appellate Case Tracking No. 2020-000330

RECEIVED

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S.C. SUPREME COURT

The State,

Respondent,

v.

Gregory Lamont Brooks,

Petitioner.

Opinion No. 5693 (S.C. Ct. App. filed November 20, 2019)

**RETURN TO PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS**

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STATEMENT OF QUESTION PRESENTED

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STATEMENT OF THE CASE

Procedural History

Petitioner was indicted by the Lexington County Grand Jury on charges of possession of a weapon during a violent crime and murder. (Supp ROA. p. 1, ll. 5-9). He proceeded to trial before the Honorable Eugene C. Griffith, October 31st – November 3rd, 2016. (R. p. 1). At the conclusion of the trial, the jury found Petitioner guilty of both possession of a weapon and murder. (R. p. 537, ll. 12-21). Following the conviction, Judge Griffith sentenced Petitioner to a concurrent five (5) years for the possession of a weapon charge and thirty-five (35) years for murder. (R. p. 538, ll. 13-17). Petitioner filed a timely Notice of Appeal.

After briefing and oral argument, the Court of Appeals issued its opinion on November 20, 2019, affirming Petitioner's convictions and sentences. See State v. Brooks, 428 S.C. 618, 837 S.E.2d 236 (Ct. App. 2019). Petitioner served a Petition for Rehearing on December 5, 2019. (App.15-24). After a Return by the State, the Petition was denied by the Court of Appeals on January 24, 2020. (App. 25-30). Petitioner served his Petition for Writ of Certiorari on February 26, 2020. This Return follows.

Factual Background

During the early morning of February 2, 2014, Brandon Ratliff, along with his good friends Andre Bunch and Fred Moss, were having a guy's night out around the Richland and Lexington County areas. (R. p. 126, l. 20 – p. 127, l. 22; p. 157, l. 23 – p. 158, l. 12). The three had initially started their night in the Vista area of Columbia, but decided to make one last stop at the Cockpit Bar and Grill in Lexington. (R. p. 127, l. 23 – p. 128, l. 21; p. 158, ll. 11-14). Earlier that night, Eric Brown, Arnold Banks, and

Petitioner had also arrived at the Cockpit.¹ (R. p. 403, l. 18 - p. 404, l. 25; p. 417, ll. 12-14; p. 431, ll. 14-24). Shortly after Andre, Fred and Brandon arrived, Fred Moss began talking with a girl at the bar. Little did he know, this woman was an acquaintance of Petitioner and his group, and the fact that Moss was speaking with her angered them. (R. p. 129, l. 6 – p. 130, l. 10; p. 160, ll. 15-18; p. 165, l. 16 – p. 166, l. 6; p. 359, l. 19 – p. 360, l. 17; p. 434, l. 9 – p. 435, l. 2).

After being aggressively confronted by Petitioner and his friends, Brandon, Andre, and Fred decided to leave the Cockpit Bar and Grill. (R. p. 131, l. 14 – p. 132, l. 24; p. 167, l. 8 – p. 168, l. 5). However, as Brandon, Fred, and Andre left the bar and proceeded to their car, Petitioner and his friends followed. (R. p. 130, l. 11 – p. 131, l. 3; p. 167, l. 16 – p. 168, l. 15; p. 434, l. 11 – p. 435, l. 7). The altercation between the two parties escalated in the parking lot. (Tr. p. 273, l. 14 – p. 274, l. 17; p. 168, ll. 9-16; p. 362, l. 13 – p. 363, l. 2). At this point, Andre, who had driven separate from Brandon and Fred, parted from the group and went directly to his car that was parked a short distance away. (R. p. 128, l. 18 – p. 129, l. 5; p. 132, l. 18 – p. 133, l. 2). It is not contradicted that Brandon and Fred attempted to leave in Fred's nearby car. (R. p. 168, l. 16 – p. 169, l. 4). Brandon had the keys to Fred's car and was able to unlock the driver's side door. Fred, however, was unable to open the locked passenger door and was stuck outside. (R. p. 168, l. 8 – p. 169, l. 4).

Fred believed that he was about to be assaulted by Petitioner and his group. (R. p. 169, ll. 10-16). In a moment of fear, he adjusted his belt in an attempt to trick the group into thinking he was armed. (R. p. 199, l. 15 – p. 200, l. 1). Fred testified from where

¹ Petitioner is referred to by the street name "Dink" throughout the trial transcript.

Petitioner and his acquaintance were standing, they did not see his attempt. (R. p. 199, ll. 19-25). He did not, in fact, have a firearm. (R. p. 170, ll. 17-22). However, when Fred turned away from the car toward Petitioner and his friend, he discovered that they did bring and were brandishing firearms. (R. p. 169, ll. 10-22; p. 199, l. 19 – p. 200, l. 1). The uncontroverted testimony indicates Fred immediately raised his hands in a passive manner to indicate that he was unarmed. (R. p. 170, 19-22; p. 199, l. 15 – p. 200, l. 1). Petitioner and his friend continued to threaten Fred as he stood outside the car. (R. p. 169, l. 9 – p. 170, l. 22; p. 199, l. 19 – p. 200, l. 1).

Rickena Knightner walked out of the club, saw Petitioner with the gun. (R. 363). She stated: “no, Dink, No Dink.” Petitioner responded by putting his arm back and telling Rickena to get down. (R.363-364). Rickena ducked down and pressed against a vehicle. (R.364).

Despite Fred’s passivity and Rickena’s plea for Petitioner to stop, Petitioner unleashed a hail of gun fire at the car. (R. p. 170, l. 24 – p. 171, l. 6; p. 363, ll. 4-11). Fred was able to take cover and avoid being shot. (Tr. p. 313, ll. 5-6; tr. p. 314, ll. 13-15). Brandon, however, was hit in the torso by a bullet. Brandon got out of the car and stumbled a short distance into the road where he collapsed. Petitioner and his group quickly fled the scene. (R. p. 173, l. 22 – p. 174, l. 19; p. 175, ll. 8-16). Fred quickly found his wounded friend and began crying for help. (R. p. 175, l. 20 – p. 176, l. 3). Andre, who had heard the gun fire a short distance away, drove his car toward the sound to find his friends. (R. p. 132, l. 25 – p. 133, l. 12). He found Brandon collapsed on the road with Fred by his side. (R. p. 133, l. 12 – p. 135, l. 2). Andre and Fred loaded Brandon into Andre’s car and sped to Lexington Medical. (R. p. 135, ll. 19-21; p. 176, ll.

5-7). However, Petitioner's bullet had nicked Brandon's heart and he quickly bled out during the drive. (R. p. 137, ll. 12-20; p. 215, ll. 11-19).

Throughout the investigation, several witnesses were able to identify Petitioner as the person who fired into the car, killing Brandon Ratliffe. Fred Moss was able to pick out Petitioner from a photo line-up. (R. p. 181, l. 14 – p. 185, l. 5; p. 327, l. 6 – p. 329, l. 9). In addition, Rickena, who knew Petitioner and his friends testified that she witnessed Petitioner firing into the car. (R. p. 358, l. 22 – p. 359, l. 10; p. 363, ll. 4-11; p. 368, l. 10 – p. 370, l. 9). She called 911 shortly after the shooting. (R. p. 365, ll. 7-23). She originally gave them a false name because she was scared and did not want to be further involved. (R. p. 365, l. 24 – p. 366, l. 90). However, she eventually met with investigators and provided her true name. (R. p. 248, l. 9 – p. 250, l. 21; p. 376, l. 24 – p. 377, l. 16). Law Enforcement also received anonymous phone calls implicating Petitioner as the shooter. (R. p. 340, ll. 17-19).

At trial, Andre Bunch testified that he owned a handgun and that he had provided it to investigators when they arrived to the hospital after Brandon's death. (R. p. 129, ll. 2-5; p. 136, ll. 16-21; p. 142, ll. 1-22; p. 118, ll. 15-17; p. 119, ll. 2-6; p. 120, ll. 12-14; p. 228, ll. 14-20). Fred Moss also testified that Brandon owned a handgun which he had placed in Fred's car for safekeeping prior to their night out. (R. p. 197, ll. 2-8). A Crime scene investigator performed a Gunshot Residue Test (GSR) on Andre, Fred, and Brandon's body soon after their arrival at the hospital. The results came back negative for all three men. (R. p. 223, l. 22 – p. 226, l. 25; p. 227, ll. 10-23; p. 243, ll. 9-16).

STANDARD OF REVIEW

“An appellate court will not reverse the trial judge’s decision regarding a jury charge absent an abuse of discretion.” State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)). ““In reviewing jury charges for error, [the Court] must consider the court’s jury charge as a whole in light of the evidence and issues presented at trial.”” State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (quoting State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2013)).

ARGUMENT

I. The Court of Appeals properly applied the correct standard in its determination, after reviewing the jury instructions in their entirety, that the error in charging that malice may be inferred from the use of a deadly weapon was entirely harmless because the Court of Appeals correctly concluded there was no evidence to support the giving of the lesser-included charge of voluntary manslaughter.

The Court of Appeals correctly found Petitioner was not entitled to the voluntary manslaughter charge based on the facts of the case and, as a result, considering the charge as a whole the charge that malice may be inferred from the use of a deadly weapon was entirely harmless.² Additionally, the Court of Appeals did not place the burden on Petitioner to prove any error was not harmless.

Initially, the Court of Appeals did not improperly place the burden on the Petitioner to demonstrate the error was not harmless as alleged by Petitioner. Instead, this Court correctly explained Petitioner must demonstrate prejudice. The Court explained that a determination once error is found must then turn 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 State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). The Court of Appeals conducted the proper analysis as instructed by this Court.

² At the time of the trial, State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), had not been issued so the charge would have been entirely proper under State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), if there was no mitigation in the form of a lesser included charge for voluntary manslaughter. However, post Burdette, the charge has been determined to be improper at all times.

In determining whether the charge was harmless, the Court of Appeals considered whether the improper jury charge contributed to the verdict by the jury. This Court explained the standard for a determination of whether the giving of an erroneous charge is still harmless error in Burdette:

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).

Burdette, 427 S.C. at 496, 832 S.E.2d at 578-79.

The Court of Appeals began by considering the prejudice found in Belcher—confusion resulting from the possible annihilation of a mitigating charge by the instruction—and determining that was not present in this case. In Belcher, the central issue was the confusion caused by giving the instruction when the jury was properly presented with lesser included offenses such as voluntary manslaughter or a mitigating circumstance such as self-defense. This Court found the jury could have believed the use of the deadly weapon alone was enough to render either the lesser included offense or self-defense invalid, thus contributing to a verdict of guilty for murder. Here, the Court of Appeals properly explained the possible prejudice found in Belcher did not exist because the jury should never have been charged voluntary manslaughter.

“A trial judge is required to charge a jury on a lesser included offense if there is evidence from which it could be inferred that a defendant committed the lesser offense rather than the greater.” State v. Drafts, 288 S.C. 30, 32, 340 S.E.2d 784, 785 (1986). “In determining whether the evidence requires a charge of voluntary manslaughter, the trial court views the facts in a light most favorable to the defendant.” State v. Hernandez, 386 S.C. 655, 660, 690 S.E.2d 582, 585 (Ct. App. 2010) (citing State v. Byrd, 323 S.C. 319, 321, 474 S.E.2d 430, 431 (1996)). However, “[a]n instruction should not be given unless justified by the evidence.” State v. Moultrie, 273 S.C. 532, 534, 257 S.E.2d 730, 731 (1979).

“To receive a voluntary manslaughter charge, there must be evidence of sufficient legal provocation and sudden heat of passion.” State v. Niles, 412 S.C. 515, 522, 772 S.E.2d 877, 880 (2015) (citing State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000)). “Sufficient legal provocation must include more than “mere words” or a display of a willingness to fight without an overt, threatening act.” Id. (quoting State v. Rogers, 320 S.C. 520, 525, 466 S.E.2d 360, 362-63 (1996)). “Neither the exercise of a legal right nor a victim's attempts to resist or defend himself from crime constitute sufficient legal provocation.” Id. (citing State v. Ivey, 325 S.C. 137, 142, 481 S.E.2d 125, 127 (1997); State v. Shuler, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001)).

In order to be entitled to an instruction on the lesser included offense of voluntary manslaughter, there must be some evidence of the required elements. This Court has held:

We have consistently held that both heat of passion and sufficient legal provocation must be present at the time of the killing. [State v. Wharton, 381 S.C. 209, 215, 672 S.E.2d 786, 788 (2009)]. A defendant is not entitled to a

voluntary manslaughter charge merely because he was in a heat of passion. See id. (holding the State's request for a voluntary manslaughter charge was not warranted where there was no evidence of sufficient legal provocation, although the defendant may have been acting under heat of passion). Conversely, a defendant is not entitled to voluntary manslaughter merely because he was legally provoked. See State v. Pittman, 373 S.C. 527, 576, 647 S.E.2d 144, 170 (2007) (holding although sufficient legal provocation arguably existed, there was no evidence the defendant was in a heat of passion). Moreover, there must be evidence that the heat of passion was caused by sufficient legal provocation.

State v. Starnes, 388 S.C. 590, 596–97, 698 S.E.2d 604, 608 (2010). In the instant case, the only evidence in the record indicates both elements of voluntary manslaughter were lacking and the trial court should not have charged the jury with the lesser included offense.

In considering heat of passion, this Court has stated:

The sudden heat of passion need not dethrone reason entirely or shut out knowledge and volition, but it must be such as would naturally disturb the sway of reason and render the mind of an ordinary person **incapable of cool reflection** and produce what may be called an uncontrollable impulse to do violence.

State v. Sams, 410 S.C. 303, 309, 764 S.E.2d 511, 514 (2014) (emphasis added). However, even when a person's passion is "sufficiently aroused by a legally adequate provocation, if at the time of the killing those passions had cooled or a sufficiently reasonable time had elapsed so that the passions of the ordinary reasonable person would have cooled, the killing would be murder and not manslaughter." State v. Knoten, 347 S.C. 296, 303, 555 S.E.2d 391, 395 (2001). Whether an accused cooled off prior to a violent act must be determined by a review of all the circumstances surrounding the event and the people involved. State v. Norris, 253 S.C. 31, 35, 168 S.E.2d 564, 566 (1969).

In the instant case, even if the confrontation in the bar and Fred's subsequent actions of pulling up his belt were sufficient to put Petitioner in a heat of passion initially, the uncontroverted evidence shows those passions had cooled such that he was able to exercise cool reflection. Prior to shooting at Fred and Brandon, Petitioner stopped Rickena and specifically told her to get down. His uncontrollable urge to do violence had clearly ceased as he was able to rationally decide to warn Rickena and prevent her from being an unintended victim.

Further, any provocation was insufficient to warrant a charge of voluntary manslaughter. The only direct confrontation occurred inside the bar. After the confrontation between Fred and Petitioner, both Fred and Brandon sought to leave the bar and the scene. Brandon entered the vehicle and Fred was forced to remain outside. While Fred adjusted his belt in an attempt to make Petitioner believe he may have a weapon, his subsequent act of raising his hands in surrender clearly removed him from the hostile act and indicated he posed no clear threat to Petitioner sufficient to constitute legal provocation.

Accordingly, in considering the evidence in the light most favorable to the defendant, the Court of Appeals properly concluded voluntary manslaughter was improperly charged. The Court of Appeals correctly found the prejudice existing in Belcher did not exist in this case because the jury should never have been charged voluntary manslaughter. The 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.

Further, there was no prejudice or possible confusion similar to that found in Burdette. 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. (R.518-520). Even considering the improper charge for voluntary manslaughter, the jury was charged on voluntary manslaughter with no mention of a requirement of malice. (R.520-522). 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. This 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.

Finally, the Court of Appeals 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 Petitioner acted with malice. The evidence clearly demonstrated: 1) Petitioner and others followed Brandon and Fred out of bar; 2) Petitioner motioned with his gun while pacing back and forth; 3) Petitioner told Rickena to “get down” while preventing her advance with his arm in order to prevent her from becoming an unintended victim; and 4) then Petitioner unleashed a barrage of gun fire on an individual with his hands raised in surrender and another in a car attempting to flee the scene. In light of that uncontroverted evidence, in particular the fact Petitioner opened fire at individuals either surrendering or attempting to flee, the only possible conclusion the jury could reach was that Petitioner 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.” (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.” (citation omitted) (quoting State v. Mouzon, 231 S.C. 655, 662, 99 S.E.2d 672, 675–76 (1957))).

As the Court of Appeal correctly articulated: “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 Petitioner.” The 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.” This Court should find voluntary manslaughter was incorrectly charged by the trial court and while the charge on inferring malice from a deadly weapon was incorrectly given based on Burdette, the charge was entirely harmless as it did not contribute to the verdict reached by the jury. Therefore, this Court should deny the Petition for Writ of Certiorari.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

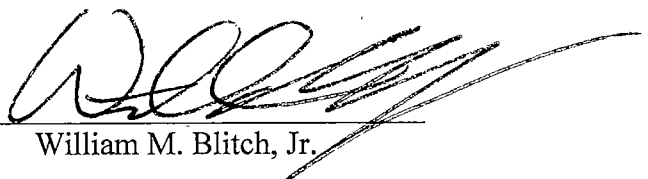
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PROOF OF SERVICE

I, Caroline Collins, certify that I have served the within Return to Petition For Writ of Certiorari to the Court of Appeals by depositing copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 27th day of March, 2020.



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