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Jun 19 2020
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Cherokee County
Honorable R. Keith Kelly, Circuit Court Judge

THE STATE,

Respondent,

v.

RAJSHUN BERNARD FOSTER,

Appellant.

Appellate Case No. 2019-001571

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APPELLANT'S STATEMENT OF THE ISSUE ON APPEAL

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

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

II. Whether Judge Kelly committed reversible error in charging the permissive inference of malice from a deadly weapon where the charge was appropriate under the law and facts at the time the case was tried because there was no evidence reducing or mitigating the offense and the decision in State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), is not applicable to this case because the issue was not preserved below and even if it had been, the instruction was harmless because it could not have reasonably affected the jury's verdict given the other jury instructions and the evidence of malice in this case?

STATEMENT OF THE CASE

On June 22, 2014, Appellant Rajshun Foster ("Foster") and a co-defendant, Franklin-Pierre Dover ("Dover"), murdered Timothy Blair in Cherokee County. After a police investigation, Foster and Dover were both arrested for the murder. Foster was subsequently indicted by the Cherokee County Grand Jury for Blair's murder (Ind. # 2014-GS-11-878) as was Dover. Foster and Dover proceeded to a joint trial before the Honorable R. Keith Kelly, Circuit Court Judge, and a jury on July 15-17, 2019. Foster was represented by Tracy Racine, Esquire. Dover was represented by Michael Morin, Esquire. At the conclusion of the trial, both men were found guilty of Blair's murder. Judge Kelly sentenced Foster to thirty-five (35) years in prison. Dover was sentenced to life. (Tr. 1, 14, 471, 477). Foster directly appeals his conviction and sentence raising one (1) issue. (IBOA, p. 2).[1] This is the Brief of Respondent.

[1] Currently pending before this Court is another appeal raising a very similar issue to that raised by Foster. State v. DeShanndon Markelle Franks, Appellate Case No. 2016-002244. At the time of the filing of this brief, Appellant Foster's co-defendant Dover had not filed an Initial Brief of Appellant.

RESPONDENT'S STATEMENT OF FACTS

Timothy Blair ("Victim"), known by the nickname "Slick," was murdered on June 22, 2014 in the Connecticut Village Apartments in Gaffney, S.C. Four (4) men were involved in Victim's murder: Appellant Rajshun Foster (hereinafter "Foster) who was also known as "Shawn Fawlk"; Franklin Dover (hereinafter "Dover"), also known as "Gwap"; Terrance Studyvance (hereinafter "Studyvance"), also known as "T"; and Antron Bonner (hereinafter "Bonner"), also known as "Red." The two (2) main perpetrators in the murder were Appellant Foster and his co-defendant at trial Dover. Neither man lived in Connecticut Village Apartments. At Foster and Dover's joint trial, Bonner testified for the State. Numerous other eyewitnesses also testified for the State. Neither Foster nor Dover testified, or offered any witnesses at trial. They did not argue self-defense, accident, defense of others, stand your ground, or any other defense such as insanity. They did not argue or present any evidence the crime was voluntary manslaughter or involuntary manslaughter. The only issue at trial was whether Foster and Dover committed the murder of Victim, i.e. whether either or both of them were perpetrators of the murder. (Tr. pp. 1-14; 41-74; 76-77; 93-166; 176-194; 197-267; 269-293; 295-296; 305-471; 473-477).

The testimony at trial proved that Appellant Foster and co-defendant Dover had been looking for Victim for several days prior to Victim's death. Foster and Dover believed Victim had stolen something that belonged to them. It is unclear whether it was drugs or money. Several witnesses testified Foster and Dover were actively looking for Victim in the days leading up to Victim's murder and had threatened Victim. Foster and Dover had told the witnesses to tell Victim they were looking for him. (Tr. pp. 93-113; 116-124; 128-133; 308-313).

Then on the afternoon of June 22, 2014, Foster and Dover both drove to Connecticut Village Apartments in separate vehicles. Once they arrived there, they confronted Victim. Eyewitnesses testified Foster was the instigator of the confrontation "getting up in" Victim's chest or face. Victim refused to fight Foster and kept backing away from him. Then two (2) different eyewitnesses heard Dover state out loud to Victim that: "he would get him [Victim] one way or the other." Victim walked away from the confrontation with the two (2) men with his head down. One (1) eyewitness saw Dover armed with a rifle, standing in the doorway of his vehicle, when he made the verbal threat that he would get Victim one way or the other. (Tr. pp. 177-193; 146-166; 198-207; 207-218; 263-267; 277-293; 308-313).

Foster and Dover both then left the apartment complex in their two (2) respective vehicles. They drove to a nearby mobile home park where Dover lived with his girlfriend. The two (2) men then had a discussion with Studyvance (aka "T") in front of one of the mobile homes. Terrance Bonner (aka "Red") walked up and saw the three (3) men conversing. Bonner asked if anyone knew where they could get some marijuana, and Foster said yes, to come with them to Connecticut Village Apartments. The four (4) men; Foster, Bonner, Studyvance, and Dover got in Foster's girlfriend's car headed for Connecticut Village Apartments. Before getting in the car, Dover got his rifle and at least one (1) surgical type glove out of his own car, and got in the back of Foster's girlfriend's car where Bonner was seated in the back seat. Studyvance was also armed with a pistol, seated in the front passenger seat, as the four (4) men traveled to Connecticut Village Apartments with Foster driving. (Tr. pp. 308-400; 93-103; 58-74; 146-166; 277-293; 308-313; 314-363).

The four (4) men arrived at Connecticut Village Apartments shortly before 5:00 p.m., on June 22nd, while it was broad daylight. First, the men drove into Connecticut Village Apartments

briefly and then turned around and left the apartment complex parking lot. Foster, still driving his girlfriend's car, then drove up a nearby paved road and dropped Dover and Studyvance (aka "T") off at a wooded path that led down to the back of Connecticut Village Apartments and directly to the back door of Victim's girlfriend's apartment. When he got out of the car, Dover was carrying his loaded rifle and had with him a mask and surgical gloves. Studyvance was still armed with his pistol. Dover then snuck on foot to a location near the Victim's girlfriend's apartment. Studyvance followed Dover. Once at the back of the apartment complex near Victim's girlfriend's apartment, Dover laid in wait for Victim. (Tr. pp. 93-125; 58-74; 128-145; 146-166; 177-193; 207-218; 218-244; 245-263; 263-67; 277-293; 314-363; 363-383).

While Dover waited, Foster and Bonner drove back into the Connecticut Village Apartments immediately after dropping off Dover and Studyvance at the head of the wooded trail. Foster was still driving his girlfriend's car and Bonner was now seated in the front passenger seat. Once they drove back into the apartment complex, Foster parked his girlfriend's car near a garbage dumpster. Foster got out of the car and confronted Victim again, who was walking through the apartment complex on foot. Several witnesses testified to seeing Foster and Victim have another verbal altercation there. Again, Foster was the instigator of the verbal altercation. However, there was no physical contact between Foster and Victim. Victim again walked away. Foster got back in his girlfriend's car and Foster and Bonner were still parked in Foster's girlfriend's car next to a garbage dumpster and seated in the front seat where they could see Victim. They did not leave. Victim then began walking to his girlfriend's apartment. (Tr. pp. 58-74; 128-145; 146-166; 177-193; 198-207; 207-218; 219-244; 263-267; 277-293; 308-313; 314-363; 385-400).

While walking to his girlfriend's apartment, Victim stopped at another female friend's apartment and told her he was afraid for his life. He told her he had been in an argument with Foster and Dover and was scared. She told Victim to go to his girlfriend's apartment, get his clothes and personal things, return to her apartment, and she would help him get safely out of the apartment complex. Victim left her apartment to get his things as she suggested. (Tr. pp. 128-145; 207-218; 219-244; 245-263; 263-267; 277-293; 314-363).

Phone records introduced at trial proved between the time Foster and Bonner pulled into the apartment complex parking lot and parked next to the dumpster and when Victim was killed, there were three (3) phone calls between Foster and Dover on their cell phones, i.e. Foster and Dover were communicating as Foster and Bonner sat in the car watching Victim as Dover laid in wait for Victim somewhere near the back of the apartment complex. (Tr. pp. 58-74; 146-166; 219-244; 245-263; 263-267; 277-293; 314-363; 385-400).

While walking to his girlfriend's apartment to get his things, Victim rounded a building's corner. When he did, Dover shot Victim once through the lungs with the rifle killing Victim. Victim was unarmed. Dover was wearing a mask and gloves when he shot victim in the chest with the rifle he was carrying. An eyewitness saw Dover, wearing a mask and surgical type gloves carrying a rifle just moments before the fatal shot was fired, lurking around the side of one of the apartment buildings. Police later found a fired 7.62 shell casing near victim's body at the crime scene. After killing the victim, Dover and Studyvance then fled back up the path through the woods where they had been dropped off earlier by Foster. An eyewitness saw two (2) men flee from the area of the shooting up the wooded path immediately after the fatal shot was fired. (Tr. 93-125; 128-145; 146-66; 177-193; 198-207; 207-218; 219-244; 245-263; 263-267; 270-76; 277-293; 308-313; 314-363; 363-383).

According to co-defendant Bonner, after Victim was shot, Foster received a telephone call from Dover. Foster and Bonner then left the apartment complex in Foster's girlfriend's car with Foster still driving. Foster drove back to the same location he had dropped Dover and Studyvance out at earlier and picked up Dover and Studyvance. Both Dover and Studyvance hurriedly jumped in the same back door of the car. As soon as he got in the car, Dover stated to Foster, "get me out of here fast, get me out of here fast." Foster asked Dover where she shot Victim, and Dover stated: "in the chest area." Foster then drove the four (4) men to the residence of Dover's girlfriend where Dover and Studyvance got out of Foster's girlfriend's car and entered Dover's girlfriend's residence. (Tr. pp. 58-74; 93-125; 128-145; 219-244; 245-263; 270-276; 277-293; 308-313; 314-363; 363-383; 385-400).

A witness, Dover's former girlfriend, testified Dover then changed clothes in her house and put the clothes he removed in a shoe box. He had never done this before. Dover later instructed her to call a friend of his to come and pick up the box with the clothes in it, which she did. The friend came and picked up the shoe box full of clothing. Then the former girlfriend and Dover left her residence in Dover's car and drove immediately to Westgate Mall in Spartanburg arriving right at closing time, but soon enough for both to enter and be seen inside the mall, i.e. Dover was trying to set up an alibi for himself for Victim's murder. (Tr. pp. 363-383).

The State also proved at trial that Dover's cell phone pinged in the area of Connecticut Village Apartments at the time of the murder. (Tr. 58-74; 385-400). Cell tower information also showed Dover's phone pinged in the area of his girlfriend's mobile home before the four (4) men left for Connecticut Village Apartments to commit the crime, and the phone pinged along the path away from the crime scene and back to his girlfriend's home shortly after the crime, when Dover removed the clothes he had been wearing during the murder. (Tr. 58-74; 385-400; 363-

383). Cell tower information also showed Dover's phone pinged along I-85 after leaving his girlfriend's mobile home and arriving at Westgate Mall in Spartanburg shortly before 6:00 p.m. (Tr. pp. 58-74; 385-400; 363-383).

The State relied on accomplice liability [i.e. "the hand of one is the hand of all"] to prove Foster's guilt because he drove Dover to the scene, knew what Dover was going to do, was complicit and aided and abetted in the murder, and then picked up Dover after the murder, and effected the group's getaway or escape. (Tr. pp. 58-73; 93-166; 176-194; 197-267; 269-292; 308-400; 410-428; 451-469). The only issue at trial was whether either Foster or Dover or both committed Victim's murder. (Tr. pp. 58-73, 93-166, 176-194; 197-267; 269-292; 308-400; 451-469). There was no evidence reducing the crime to voluntary manslaughter or involuntary manslaughter. (Tr. pp. 58-73; 93-166; 176-194; 197-267; 269-292; 308-400; 404-410; 451-469). There was no jury instruction on voluntary or involuntary manslaughter. (Tr. pp. 451-469). Neither Foster nor Dover offered a defense such as accident, self-defense, defense of others, stand your ground, or insanity. (Tr. pp. 404-410). There was no jury instruction on any such defense (Tr. pp. 451-469), because none was offered and there was no evidence supporting such a charge. (Tr. pp. 58-72; 93-166; 176-194; 197-267; 269-292; 308-400). There was no objection by either Foster or Dover to Judge Kelly not charging voluntary or involuntary manslaughter or not charging any recognized defense because there was no evidence supporting such an instruction. (Tr. pp. 400-477; 58-73; 93-166; 176-194; 197-267; 269-292; 308-400).

Appellate Issue

Did Judge Kelly commit reversible error in instructing the jury it could infer malice from the use of a deadly weapon and is the holding in State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), applicable to Foster's case and if so was the instruction harmless beyond a reasonable doubt?

What occurred below

At the charge conference, the State requested Judge Kelly instruct the jury on the permissive inference of malice from the use of a deadly weapon given the evidence in the case.[2] In this case, there was no evidence mitigating or reducing the crime from murder to any lesser included offense such as voluntary manslaughter or involuntary manslaughter and there was no evidence of or a defense offered such as accident, self-defense, or insanity. (See BOA, p. 10, ll. 1-5). In the present case, Appellant Foster and his co-defendant either committed the murder or they were innocent. This case was tried before the South Carolina Supreme Court issued its Opinion in State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019). Because the charge was appropriate at the time of trial pursuant to the Supreme Court's previous opinions in State v. Belcher, 385 S.C. 597, 685 S.E.2d 892 (2009) and State v. Stanko, 402 S.C. 252, 741 S.E.2d 708 (2013), there was no objection from Appellant Foster or his co-defendant Dover to the instruction on the permissive inference of malice from a deadly weapon. (Tr. pp. 400-477)(See also IBOA, p. 10, lines 1-5).[3] Thereafter, Judge Kelly gave the following jury instruction on the permissive inference of malice from the use of a deadly weapon:

> 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

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[2] On information and belief, the charge conference was conducted in chambers. It is not contained in the trial transcript.

[3] Foster concedes in his brief that there was no objection below to the charge of the permissive inference of malice from a deadly weapon because it was appropriate at the time of trial based on the evidence in this case and the law at the time. (IBOA, p. 10, ll. 1-5).

> if you conclude that 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. The law says if one kills another with a deadly weapon, the implication of malice may arise. If the facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, the inference would be simply an evidentiary fact to be taken into consideration by you, along with all other evidence, and give it such weight as you determine it should receive.

(Tr. 460-61). There was no objection to this charge after Judge Kelly gave his jury instructions either. (Tr. pp. 466-469). There was no post-verdict motion for a new trial or to set aside the verdict based on Judge Kelly's instruction on the permissive inference of malice from a deadly weapon. (Tr. pp. 470-477).

ARGUMENT

> **Judge Kelly did not commit reversible error in charging the permissive inference of malice from a deadly weapon where the charge was appropriate under the law and facts at the time the case was tried because there was no evidence reducing or mitigating the offense and the decision in State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), is not applicable to Foster's case because the issue was not preserved below; and, even if it had been, the instruction was harmless because it could not have reasonably affected the jury's verdict given the other jury instructions on malice and the evidence in this case.**

In State v. Burdette, 427 S.C. 490, 502-03, 832 S.E.2d 575, 582-83 (2019), a case decided after this case was tried, and after the challenged instruction was given, the South Carolina Supreme Court held that it was now error to instruct the jury on the permissive inference of malice from a deadly weapon, even where there is no evidence mitigating or reducing the crime from murder to manslaughter and where there is no defense to the crime. The Court held its' change in the law would be applicable to any case pending on direct review **where the issue was preserved for appeal.** Burdette, 427 S.C. at 504-505, 832 S.E.2d at 585, *overruling in part* Belcher, *supra* & Stanko, *supra*.

Lack of Preservation

Foster concedes, as he must, that this issue is not preserved for appeal. (IBOA, p. 10, ll. 1-5). It was not preserved for appeal with an objection below. (IBOA, p. 10, ll. 1-5). And, there was no objection to Judge Kelly instructing the jury on the permissive inference of malice because at the time the instruction was given, the instruction was entirely appropriate. (Tr. pp. 400-477)(See also IBOA, p. 10, ll. 1-5)("Trial counsel could not have known that the court [the South Carolina Supreme 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."). As a result, this appeal must be dismissed as the Burdette Court held its' holding in Burdette would only be applicable to those cases pending on direct review, "if the issue was preserved" by an objection below. Id. at **504-505**, 832 S.E.2d at **583**. Here, there was no objection to the jury instruction, so the issue is not preserved and must be denied and dismissed with prejudice. (Tr. 400-477). Burdette at **504-505**, 832 S.E.2d at **583**; State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)(rejecting plain error and requiring issue preservation in future appeals).

Instead, Foster argues that pursuant to the United States Supreme Court's holding in Griffith v. Kentucky, 479 U.S. 314 (1987), he should receive the benefit of the holding in Burdette, even though the issue was not preserved below. He argues, Griffith held anytime there is a new rule of criminal law that represents a clear break with the past, it is to be applied retroactively to all cases pending on direct review, whether preserved or not. Foster is wrong.

There is an explicit limitation of Griffith's holding. It only applies to new **federal constitutional** rules. Trice v. Secretary, Florida Department of Corrections, 766 Fed. Appx. 840

(11th Cir. 2019). It does not extend to state Supreme Court decisions on state substantive criminal law, even if they represent a clear break with that state's past decisions. Trice v. Secretary, Florida Department of Corrections, 766 Fed. Appx. at 846-849 (Petitioner was not entitled to retroactive application of Florida Supreme Court's change in its substantive criminal law as Griffith only applied to changes in federal constitutional law). Where there is a change in a state's substantive criminal law by that state's Supreme Court, the state's Supreme Court's decision controls whether it is retroactive or not and to which cases it is retroactively applied. Id. at 848-849. Because the South Carolina Supreme Court changed its' state substantive criminal law in Burdette, not federal constitutional law, its' Opinion controls to which cases its' holding applies retroactively, and it specifically held it applied to any cases pending on direct review where the issue was preserved below by an objection. Burdette, *See also* Trice, 766 Fed. Appx. at 848-849 (Because Florida's Supreme Court only changed its state's substantive criminal law in Weiand v. State, 732 So.2d 1044 (Fla 1999), and not federal constitutional law, the Florida Supreme Court's decision that Weiand would only be applicable to cases pending on direct appeal where the issue was preserved below with an objection was controlling, not Griffith v. Kentucky). As a result, there is no merit to Foster's argument in his brief that Griffith requires Burdette be applied to his case.

Further, Griffith involved whether the United States Supreme Court would apply its' holding in Batson v. Kentucky[4] retroactively to cases pending on direct review. Griffith itself dealt with two (2) cases pending on direct review, one (1) from state court and one (1) from federal court, where the issue was preserved below by an objection by trial counsel in each case. Griffith, 479 U.S. 314. In both cases, the state and the federal case, trial counsel had raised

[4] 476 U.S. 79 (1986).

challenges immediately after jury selection to the prosecutor's use of peremptory challenges against African-American jurors and argued the exercise of those strikes violated each respective defendant's federal constitutional rights, i.e. the issue was preserved for appellate review. *See* Griffith, 479 U.S. 314. The United States Supreme Court decided to apply its holding in Batson retroactively to cases pending on direct review, but it did not decide to apply Batson to cases on direct review where the issue was not even raised at trial. To have applied Batson as Foster argues, would have produced an absurd result. This would have resulted in numerous lower appellate court's having to comb the record for any case pending on direct review at the time of Batson, to attempt to determine if a prosecutor improperly used peremptory challenges even where there was no challenge to the use of peremptory challenges at trial. That cannot be what the Supreme Court intended. Thomas v. Moore, 866 F.2d 803, 805 (5th Cir. 1989) (Griffith v. Kentucky applies to cases on direct review where there was an objection at trial to the prosecutor's use of peremptory challenges, not to cases like this defendant's where there was no objection at trial and the issue was not preserved for appellate review) State v. Luttrell, 764 P.2d 554 (Ore. 1988)(recognizing in Griffith the defendant preserved the issue by raising an objection at trial, however, Luttrell did not; therefore, Griffith did not apply).

Here, in the present case, there was no objection below to the trial court's instruction on the permissive inference of malice. This is conceded in Foster's brief. (IBOA, p. 10, ll. 1-5). Our appellate courts have rejected plain error as far back as State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). As a result, this appellate ground has no merit and must be denied.

The was no error at the time and the instruction was harmless

It goes without saying, Judge Kelly did not err at the time, in instructing the jury on the permissive inference of malice from a deadly weapon, because at the time of trial this was an

appropriate charge on the law. Belcher, 385 S.C. 597, 685 S.E.2d 892, *overruled by* Burdette; Stanko, 402 S.C. 252, 741 S.E.2d 708, *overruled by* Burdette. Foster concedes this in his brief, as he must. (IBOA, p. 10, ln. 5)("The jury instruction as issued on that day was appropriate."). However, *post-hac* the instruction is now considered error if the case was pending on direct review at the time Burdette was decided and the issue is preserved below. Burdette, **504-505, 832 S.E.2d at 583**; State v. Brooks, 428 S.C. 613, 627-33, 837 S.E.2d 236, 241-44 (Ct. App. 2019)(recognizing the instruction is now error where the case was pending on direct review at time Burdette was decided and the issue is preserved below). Even if Foster could show this issue was preserved, which he cannot, Burdette's application to those cases pending on direct review and preserved would provide him no relief.

Consistent with earlier precedent, the Court in Burdette stated that the giving of this instruction is subject to harmless error analysis. Id. at 578-79. *See also* State v. Stanko, 402 S.C. 252, 265, 741 S.E.2d 708, 714–15 (2013) (finding instruction that malice could be inferred from use of deadly weapon was improper but concluding error was harmless), *overruled on other grounds*, Burdette, *supra*; Belcher, 385 S.C. at 611, 685 S.E.2d at 809, *overruled on other grounds*, Burdette, *supra*. The Court in Burdette explained that:

> 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, at 578-79.

Applying the above harmless error standard to the charge given in this case, any error must be viewed as harmless beyond any reasonable doubt. First, Belcher abandoned strict adherence to the common law inference of malice from use of a deadly weapon based on the Court's conclusion that this inference was "confusing and prejudicial where evidence is presented that would reduce, mitigate, excuse or justify the homicide." Belcher, 385 S.C. at 611, 685 S.E.2d at 809. It was the presence of such evidence that led the Court to hold the jury instructions in Belcher and Burdette were not harmless beyond a reasonable doubt. *See* Burdette, 832 S.E.2d at 579-82; Belcher, 385 S.C. at 604, 609-12, 685 S.E.2d at 806, 808-10.

Foster's case, however, does not present a concern of possible jury confusion because there was no evidence that the killing was in self-defense or that Foster could be guilty of any lesser-included offense of murder. There was no jury instruction on voluntary manslaughter, involuntary manslaughter, or any recognized defense such as self-defense, accident, defense of others, or insanity. Accordingly, any error in giving the instruction was harmless beyond a reasonable doubt.

A second reason the instruction was harmless beyond any reasonable doubt is that the trial judge gave two (2) alternative definitions of "malice" that support a conclusion that the killing was malicious. Specifically, he instructed jurors that:

> Now, each of these defendants is charged with murder. And in order to prove this crime, the State must prove each defendant killed another person with malice afore-thought, either expressed or implied.
>
> Malice has been defined as hatred, ill will, hostility to another. It is the intentional doing of a wrongful act without justification or excuse and with an intent to kill that the law will infer an evil intent.
>
> Malice aforethought does not require that malice exists for any particular time before the act is committed, but malice must exists in the mind of the defendant before and at the time the act was committed. Therefore, there must be a combination of previous evil intent and the act itself.

> Malice aforethought may be expressed or inferred. These terms expressed and inferred do not mean different kinds of malice, but merely the means and manner in which malice may be shown to exists. It is either by direct evidence or by inference from the facts and circumstances.
>
> Express malice is shown when a person speaks words which express hatred or ill will for another, or when the person prepared beforehand to do the act which was later accomplished. For example, lying in wait for a person.
>
> Malice is wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong. It is the doing of a wrongful act intentionally without just cause or excuse.
>
> Intent means intending the result which actually occurred and not accidentally or involuntarily.
>
> Intent may be shown by acts and conduct of each defendant and other circumstances from which you may naturally and reasonably infer intent.
>
> Evidence of the character of the act, the character of the instrument used, the manner in which was used, the purpose to be accomplished and resulting wounds or injuries, may be considered in determining intent.

(Tr. p. 459, ln. 13 – p. 460, ln. 23). Each of these definitions is supported by South Carolina case law. *See, e.g.*, Margolis v. Telech, 239 S.C. 232, 238, 122 S.E.2d 417, 419-20 (1961) ("Malice is the deliberate, intentional doing of a wrongful act without just cause or excuse"); Id. at 238, 122 S.E.2d at 420 ("Malice 'is implied where it shows a disregard of the consequences of the injurious act, without reference to any special injury which he may inflict on another', and 'in doing some illegal act for one's own gratification or purposes, without regard to the rights of others or the injury he may inflict on another'"); State v. Murphy, 86 S.C. 268, 68 S.E. 570, 570 (1910) ("'Malice is a term of art, implying wickedness, and excluding a just cause or excuse. It is implied from an unlawful act, willfully done, until the contrary be proved.' It has also been defined to be the willful or intentional doing of a wrongful act, without just cause or excuse"); McBride v. Sch. Dist. of Greenville Cty., 389 S.C. 546, 565, 698 S.E.2d 845, 855 (Ct. App.

2010) ("malice is 'the deliberate intentional doing of a wrongful act without just cause or excuse'") (quoting Eaves v. Broad River Elec. Coop., Inc., 277 S.C. 475, 479, 289 S.E.2d 414, 416 (1982) (internal quotation omitted)); Law v. S.C. Dep't of Corr., 368 S.C. 424, 437, 629 S.E.2d 642, 649 (2006) (malice may be implied where the evidence reveals a disregard of the consequences of an injurious act, without reference to any special injury that may be inflicted on another person"); State v. Young, 238 S.C. 115, 124-25, 119 S.E.2d 504, 509 (1961), *overruled on other grds*, State v. Torrence, 305 S.C. 45, 60-69, 406 S.E.2d 315, 323-28 (1991) (Toal, J., (concurring in result) (abolishing in favorem vitae review). *See also, e.g.*, State v. Cottrell, 421 S.C. 622, 644, 809 S.E.2d 423, 435 (2017) (finding trial judge properly instructed jurors that malice could be inferred from conduct showing a total disregard for human life); State v. Oates, 421 S.C. 1, 20, 803 S.E.2d 911, 921 (Ct. App. 2017)("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*") (emphasis in original); State v. Mouzon, 231 S.C. 655, 662, 99 S.E.2d 672, 675 (1957); In re Tracy B., 391 S.C. 51, 69, 704 S.E.2d 71, 80 (Ct. App. 2010). Each definition instructed to the jury above likewise fits the facts of this case. There was both express malice and inferred malice in this case. There were threats made to the victim and there was "lying in wait" for the victim. There was a clear intent to kill or injure the victim.

Finally, the charge was harmless under the facts of this case. Unlike Burdette, *supra*, there was no evidence in the present case reducing the crime from murder to voluntary manslaughter or involuntary manslaughter. In Burdette, the South Carolina Supreme Court found, and the State conceded, there was evidence reducing the crime from murder to voluntary or involuntary manslaughter. The permissive inference charge should not have been given by the trial judge. In fact, in Burdette, the trial court instructed the jury on both voluntary and

involuntary manslaughter. Id. The Supreme Court found in Burdette that the instruction there was not harmless because the trial court failed to instruct the jury that voluntary manslaughter was an intentional killing **without malice**, so it was impossible to tell if the jury relied on the permissive inference or not when it convicted the defendant of the lesser offense of voluntary manslaughter. Id.

Here, that did not occur. There was no instruction on any lesser included offense (Tr. 451-469). Foster concedes in his brief that there was nothing mitigating or reducing the offense. (IBOA, p. 10, ll. 1-5). In the present case, Foster and his co-defendant Dover either committed murder or they were innocent.

And, the evidence of malice was overwhelming. Therefore, the permissive inference of malice from a deadly weapon instruction was harmless. Stanko, 402 S.C. 252, 264-65, 741 S.E.2d 708, 714-15 (erroneous instruction of permissive inference of malice arising from the use of a deadly weapon was harmless where there was overwhelming evidence of malice and given the entire jury instruction including definition of malice); State v. Brooks, 428 S.C. 613, 627-33, 837 S.E.2d 236, 241-44 (Ct. App. 2019)(permissive inference of malice instruction was harmless beyond a reasonable doubt after considering jury instruction as a whole and other evidence of malice independent of the use of a deadly weapon)(citing Stanko, *supra*).

The overwhelming evidence of malice

Foster and Dover searched for Victim for several days before finding him. They believed the victim had stolen something from them. They had told more than one (1) witness to tell Victim they were looking for him. Witnesses described this communication as "not a friendly visit." (Tr. pp. 93-113; 116-124; 128-133; 308-313).

Then on the day of Victim's murder, Foster and Dover drove in separate vehicles to Connecticut Village Apartments where victim lived with his girlfriend. Once there, both men got out of their respective vehicles and confronted Victim in the parking lot of the apartment complex. Witnesses testified Foster was the instigator of the confrontation "getting up" in Victim's face or chest yelling at him. Victim backed away and refused to fight Foster. Dover was seen standing in the doorway of his car holding a rifle. Two (2) witnesses heard Dover yell at the victim that he would "get him one way or the other." Victim walked away from both defendants. Foster and Dover then got back in their respective vehicles and left the apartment complex. (Tr. pp. 177-193; 146-166; 198-207; 207-218; 263-267; 277-293; 308-313).

Foster and Dover drove to Dover's girlfriend's residence where they met up with and began talking to Studyvance. Bonner then walked up. The men agreed to go to Connecticut Village Apartments together in Foster's girlfriend's car. Foster drove; Studyvance was in the front passenger seat carrying a handgun; Bonner got in the back seat; and, Dover got in the back of seat after retrieving his rifle from his own car and carried it with him. (Tr. pp. 308-400; 93-103; 58-74; 146-166; 277-293; 308-313; 314-363).

Foster drove the group of men to Connecticut Village Apartments, where victim lived, again looking for the victim. Upon arriving at Connecticut Village Apartments, Foster first circled through the apartment complex and then left the complex. Foster drove up a paved road outside the apartment complex and dropped Dover and Studyvance off at a wooded trail that led down the back of the apartment complex. When Dover got out of Foster's car he was armed with his loaded rifle. Studyvance was still carrying his pistol. The wooded trail led directly to the back door of Victim's girlfriend's residence in the apartment complex. According to an

eyewitness, Dover was also wearing a mask and gloves. (Tr. pp. 93-125; 58-74; 128-145; 146-166; 177-193; 207-218; 218-244; 245-263; 263-67; 277-293; 314-363; 363-383).

After dropping off Dover and Studyvance, Foster then drove to back to Connecticut Village Apartments with Bonner still in the car with him. Bonner was now in the front passenger seat. Once there, Foster pulled in next to a garbage dumpster and got out of his car and confronted Victim again. The victim walked away from the confrontation. Foster got back in the driver's side of the car and according to eyewitnesses, Foster and Bonner sat in the car watching Victim walk away. During this time period, at least two (2) phone calls were made between Foster and Dover on their cell phones. (Tr. pp. 58-74; 128-145; 146-166; 177-193; 198-207; 207-218; 219-244; 245-263; 263-267; 277-293; 308-313; 314-363; 385-400).

Meanwhile, after being dropped off, Dover and Studyvance had walked down the wooded trail and snuck through the wooded area to a location near the victim's girlfriend's apartment. As Victim walked away from Foster and Bonner, Victim rounded the corner of an apartment building, where Dover confronted him wearing a mask and gloves. Dover pointed his loaded rifle at Victim and shot him in the chest with 7.62 large caliber ammunition, killing him. Dover then fled the scene with the rifle and still wearing the mask and gloves. Studyvance also fled with Dover. An eyewitness in the apartment complex saw two (2) men fleeing up the wooded trail immediately after the shooting. Dover then called Foster using his cell phone. Foster received a phone call on his cell phone, and was also told by an acquaintance in the apartment complex who walked up to his car, that Victim had been shot and killed. Foster and Bonner then drove out of the apartment complex, with Foster driving, and picked up Dover and Studyvance at the same location Foster had dropped them off before the murder. Dover, still carrying the rifle, stated "get me out of here, get me out of here." Foster asked Dover where he

shot Victim and Dover stated "in the chest area." Foster then drove all of the men back to another residence, Dover's girlfriend's residence, where they decided to split up and did. (Tr. 58-74; 93-125; 128-145; 146-66; 177-193; 198-207; 207-218; 219-244; 245-263; 263-267; 270-76; 277-293; 308-313; 314-363; 363-383; 385-400).

Dover and Studyvance got out of the car, and Dover changed out of the clothes he was wearing during the murder rolling them up and putting them in a shoe box. Dover also told his girlfriend to call a friend of Dover's to come pick up the clothes and get rid of them. She did as Dover directed. Dover's friend came and picked up the clothes and got rid of them. Dover and his girlfriend then attempted to create a false alibi for Dover for the murder by driving to Spartanburg and being seen at Westgate Mall. Dover also called a friend at Connecticut Village Apartments and told her to tell another individual there not to mention his name to police; "Keep my name out of his mouth." (Tr. pp. 314-363; 363-383; 242-244).

There was overwhelming evidence of malice. There was evidence of a premeditated plot to kill or wound the victim. There were threats communicated to the victim heard by witnesses. Foster dropped the shooter off before and picked up the shooter after the murder. The shooter laid in wait for the victim wearing a mask and gloves. (Tr. 58-74; 93-125; 128-145; 146-66; 177-193; 198-207; 207-218; 219-244; 245-263; 263-267; 270-76; 277-293; 308-313; 314-363; 363-383; 385-400). There was no evidence reducing or mitigating the offense, and no defense was offered such as self-defense, accident, or insanity. (Tr. pp. 58-73; 93-166; 176-194; 197-267; 269-292; 308-400; 404-410; 451-469). The challenged instruction could not have impacted the jury's verdict. Stanko, 402 S.C. at 264-65, 741 S.E.2d at 714-15; Brooks, 428 S.C. 613, 627-33, 837 S.E.2d 236, 241-44.

CONCLUSION

For the above stated reasons, Foster's conviction and sentence for the murder of Timothy Blair must be affirmed.

Respectfully submitted,

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June 19, 2020

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Cherokee County
Honorable R. Keith Kelly, Circuit Court Judge

THE STATE,

Respondent,

v.

RAJSHUN BERNARD FOSTER,

Appellant.

Appellate Case No. 2019-001571

CERTIFICATE OF SERVICE

I, Donna D'Alessio, am an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Initial Brief of Respondent, Designation of Matter, and Certificate of Service has been forwarded to Appellant's counsel, Tommy A. Thomas, Esq., via email today, June 19, 2020 to thomaslaw@me.com, and by depositing one copy of the same in the United States mail, postage prepaid, and addressed to his attorney of record: Tommy A. Thomas, Esq., P.O. Box 88, Irmo, South Carolina 29063.

I further certify that all parties required by Rule to be served have been served.

This 19th day of June, 2020.

Donna D'Alessio

Donna D'Alessio,
Legal Assistant to J. Anthony Mabry
Senior Assistant Attorney General

Donna D'Alessio

From: Donna D'Alessio
Sent: Friday, June 19, 2020 2:37 PM
To: thomaslaw@me.com
Subject: Foster, Rajshun B. - Appellate Case No. 2019-001571 - Initial Brief of Respondent, Designation of Matter and Cert. of Service
Attachments: Foster, Rajshun B. - Appellate Case No. 2019-001571 - Initial Brief of Respondent 6-19-2020 (02306050xD2C78).pdf

Dear Mr. Thomas:

Attached is a scanned copy of the Initial Brief of Respondent, Designation of Matter, and Certificate of Service regarding the above matter. A paper copy is being mailed to you this afternoon. The Initial Brief and supporting documents are being submitted to the South Carolina Court of Appeals through e-filing, along with a copy of this email.

Hope you are well, and thank you.

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