STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Sumter County

Honorable Thomas L. Hughston, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SINCERE JA RAY DINKINS,

APPELLANT

APPELLATE CASE NO 2019-001763

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to grant a new trial after instructing the jury that "the law says one who intentionally kills another with a deadly weapon, the implication of malice may arise if facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction"?

STATEMENT OF THE CASE

In April of 2018, the Sumter County Grand Jury indicted, in a six count indictment, Appellant, Sincere Dinkins, and a co-defendant, Larenzo Ty Andre Hagood, for murder, criminal conspiracy, attempted armed robbery, two counts of kidnapping and possession of a weapon during the commission of a violent crime, indictment #2018-GS-43-0381. On July 15, 2019, Appellant proceeded to jury trial before the Honorable Thomas Hughston. Timothy W. Murphy and Philip Little represented Appellant at trial. Ernest A. "Chip" Finney, III prosecuted the case. The jury returned verdicts of guilty on each count. At the time of the incident Appellant was only seventeen years of age. Pursuant to Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), Appellant presented additional witnesses relevant to sentencing. (R. pp. 431-494). Sentencing was deferred so that both sides could submit sentencing memorandum. (R. p. 504, 509). On August 5, 2019, Appellant filed a motion for a new trial based on State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019). (R. p. 542).

On August 16, 2019, Judge Hughston heard the motion for new trial. Judge Hughston deferred ruling until he received a copy of the transcript of his jury instruction. On October 11, 2019, the parties again appeared before Judge Hughston. The judge denied the motion for a new trial and sentenced Appellant to an aggregate term of thirty (30) year in prison. A timely notice of intent to appeal was served on October 16, 2019. This appeal follows.

STANDARD OF REVIEW

In reviewing an alleged error in jury instructions, an appellate court will not reverse the circuit court's decision absent an abuse of discretion. See Cole v. Raut, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008) (applying an abuse of discretion standard of review to an alleged error in jury instructions). In reviewing jury charges for error, the appellate court must consider the circuit court's jury charge as a whole in light of the evidence and issues presented at trial. Welch v. Epstein, 342 S.C. 279, 311, 536 S.E.2d 408, 425 (Ct.App.2000). If the charges are reasonably free from error, isolated portions that might be misleading do not constitute reversible error. Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999).

ARGUMENT

The trial judge erred in refusing to grant a new trial after instructing the jury that "the law says one who intentionally kills another with a deadly weapon, the implication of malice may arise if facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction."

On November 24, 2017, two men, both armed, entered the Sav-Mart Convenience where Mr. Patel worked. The men demanded that two customers who were inside the store at the time go to the floor. Then, one of the men fatally shot Mr. Patel and both men fled. Investigator Irene Culick with the Sumter Police Department testified that Crime Stoppers tips indicated that Appellant and Larenzo Hagood were involved in the shooting. (R. p. 344, lines 20-23). When Hagood was arrested he gave a statement implicating himself and Appellant in the attempted armed robbery but claiming that Appellant was the shooter. (R. p. 159, line 3 – p. 160, lines 1-25). Hagood testified at Appellant's trial. (R. pp. 118-175). Hagood pled guilty to voluntary manslaughter, attempted armed robbery, two counts of kidnapping and possession of a weapon during the commission of a violent crime prior to Appellant's trial but at the time of trial he had not yet been sentenced. (R. p. 161, line 12 – p. 162, 163, lines 1-16).

During the jury instruction on malice the judge told the jury, "Inferred malice may also arise when the deed is done with a deadly weapon." (R. p. 416, line 25 – p. 417, line 1). Counsel for Appellant objected and the judge sent the jury out of the courtroom. (R. p. 417, lines 2-8). The State argued that the instruction was proper because, unlike in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), overruled by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), in the present case Appellant did not assert that he acted in self-defense. (R. p. 418, line 20 – p. 419, lines 1-5). The judge then asked defense counsel what specific charge language he

was requesting. (R. p. 420, lines 8-10). Counsel for Appellant answered citing to Gibson[1] and then telling the judge, "The law says if one intentionally kills another with a deadly weapon the implication of malice may arise[2]. If facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, the inference would simply be an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in a case and you may give it such weight as you determine it should receive." (R. p. 420, lines 14-22). The judge agreed to the charge. (R. p. 420, lines 23-25). Counsel for Appellant then noted, "And that's what, no specific reference to a weapon." (R. p. 421, lines 5-6).

The judge instructed the jury:

> Now, the law says one who intentionally kills another with a deadly weapon, the implication of malice may arise if facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction. This inference would be simply an evidentiary fact to be taken into consideration by you along with all the other evidence in the case in deciding, and in deciding whether malice had been proven and in giving such weight as you determine that it should receive.

(R. p. 423, line 16 – p. 424, line 1). The charge still referenced a deadly weapon and the implication of malice.

The jury returned verdicts of guilty. Appellant was only seventeen years of at the time of the incident and, pursuant to Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014), counsel for Appellant presented additional witnesses relevant to sentencing. (R. pp. 431-494). Sentencing was deferred so that both sides could submit sentencing memorandum. (R. p. 504, 509). On

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[1] Gibson v. State, 416 S.C. 260, 786 S.E.2d 121 (2016), overruled by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019).

[2] This inference of malice from the use of a deadly weapon language was approved in State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), but held improper in Belcher if evidence was presented that would have reduced, mitigated, excused or justified the homicide.

August 5, 2019, Appellant filed a motion for a new trial based on State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019). (R. p. 542). On August 16, 2019, Judge Hughston heard the motion for new trial. At the hearing counsel for Appellant argued, “Your Honor, basically as the Court recalls, there was an instruction given. At the time we objected and asked you to give what at the time seemed to be the correct law which is the Belcher instruction. You gave that instruction. And then here we are a few days after the end of the trial the Supreme Court overrules Belcher and the last paragraph of the Supreme Court opinion indicates that their ruling is applicable to all cases ---” (R. p. 546, lines 12-21). The judge said, “They have not become final.” (R. p. 546, line 22). Defense counsel continued, “They did not get final which means the issue then preserved. Obviously, we objected at the time. We have filed this motion in order to preserve this issue. Obviously, the Court, you, or if you rule against us, will have to determine whether or not there was prejudicial error, but we believe very strongly that the Belcher – now given this opinion that the Belcher instruction was given at the time of the trial was error and, therefore, is the basis for new trial at this time. Thank you, Your Honor.” (R. p. 546, line 23 – p. 547, lines 1-8).

The State responded, “And my uneasiness today is that when there was an agreement as to what we wanted you to say, and you said it, there was no objection on the record; and therefore, the charge you gave, there’s no objection on the record to say now that they have a right to appeal from.” (R. p. 548, lines 2-7). The judge deferred ruling on the motion for new trial until he received a copy of the transcript of his jury instruction. (R. p. 548, line 13 – p. 549, lines 1-23). On October 11, 2019, the judge denied the motion for a new trial and sentenced Appellant to an aggregate term of thirty (30) years in prison. (R. pp. 552-559; R. p. 560; R. p.

561). The trial judge erred in refusing to grant a new trial based on the erroneous jury instruction.

In denying the motion for new trial the judge said, "This case is not yet final. However, in my opinion the issue is not preserved. The instruction that I gave the jury on this issue was correct at that time, and the instruction was agreed to by the State and the defendant through his attorneys. Therefore, the issue is not preserved. I deny the motion for a new trial." (R. p. 557, lines 2-8; R. p. 561). The judge went on to conduct a harmless error analysis stating, "Now, therefore, in these unusual circumstances, a harmless error analysis is also appropriate. I believe the, I believe the jury instructions as a whole to be without error. It was not an inferred malice charge that convicted the defendant, the uncontradicted facts did. The inferred malice charge did not contribute an iota, in my opinion, to this conviction." (R. p. 557, lines 2-8; R. p. 561).

In State v. Belcher, 385 S.C. 597, 600, 685 S.E.2d 802, 803–04 (2009), overruled by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), the South Carolina Supreme Court wrote:

> It has long been the practice for trial courts in South Carolina, as sanctioned by this Court, to charge juries in any murder prosecution that the jury may infer malice from the use of a deadly weapon. We granted Belcher's petition to argue against this precedent. Having carefully scrutinized the historical antecedents to this permissive inference, we hold today 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.

Pursuant to Belcher, the law at the time of Appellant's trial, if evidence was presented that would have reduced, mitigated, excused or justified the homicide, the judge erred in giving an instruction that referenced a deadly weapon and the implication of malice. Trial counsel cited to Gibson v. State, 416 S.C. 260, 786 S.E.2d 121 (2016), overruled by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019). In Gibson the South Carolina Supreme Court found that trial

counsel was ineffective for failing to object to the trial judge's failure to include the permissive inference language approved in State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). In footnote #9 of the Belcher opinion the Court noted, "The standard implied malice charge remains valid, as does the general permissive inference instruction: 'If facts, are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.'" 385 S.C. at 612, 685 S.E.2d at 810. The general permissive inference instruction missing in the Gibson case was properly included in the instruction in the present case. The judge, however, erred in referencing a deadly weapon with the implication of malice in the instruction. Defense counsel asked that the instruction have no specific reference to a weapon.[3] (R. p. 421, lines 5-6).

In State v. Burdette, 427 S.C. 490, 504–05, 832 S.E.2d 575, 583 (2019) (n. #3 omitted), decided after Appellant was found guilty but before he was sentenced, the South Carolina Supreme Court wrote:

> We further overrule our precedent to the extent it permits a jury instruction that malice may be inferred from the defendant's use of a deadly weapon. Regardless of the evidence presented at trial, trial courts shall not instruct a jury that the element of malice may be inferred when the deed is done with a deadly weapon. Our ruling today 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"). However, today's ruling will not apply to convictions challenged on post-conviction relief. See Belcher, 385 S.C. at 613, 685 S.E.2d at 810 (citing Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)).

[3] Trial counsel did not object after the judge gave the instruction that included the reference to a deadly weapon and the implication of malice. If this Court finds the issue is not preserved for review, then the failure to object may need to be raised in post-conviction relief.

The holding in Burdette should apply to the present case. The trial judge erred in refusing to grant a new a new trial based on the erroneous jury instruction. The issue is properly preserved and not harmless. The instruction in the present case should have omitted "Now, the law says one who intentionally kills another with a deadly weapon," and simply instructed that, "[T]he implication of malice may arise if facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction. This inference would be simply an evidentiary fact to be taken into consideration by you along with all the other evidence in the case in deciding, and in deciding whether malice had been proven and in giving such weight as you determine that it should receive." The error requires reversal.

CONCLUSION

Based on the above argument, this Court should reverse Appellant's conviction and sentence for murder and remand for a new trial.

s/ Kathrine H. Hudgins

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 25h day of June, 2020.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Sincere Ja Ray Dinkins states:

1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. She has reviewed the record of appellant's trial before Judge Thomas L. Hughston, which was held on July 15 - 19, 2019, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, She asks the Court to relieve her as counsel for Sincere Ja Ray Dinkins.

Respectfully Submitted,

s/ Kathrine H. Hudgins

Kathrine H. Hudgins
Appellate Defender

This 25th day of June, 2020.

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True-billed indictment and sentencing sheets;
(2) July 15-18, 2019, Trial transcript pages 1-494;
(3) August 16, 2019, Trial transcript pages 1-9;
(4) October 11, 2019, Trial transcript pages 1-8;
(5) Sentencing Memo filed by Defense;
(6) Sentencing Memo filed by State;
(7) Motion for new trial;
(8) Order denying motion for new trial;
(9) Sentencing order.

I certify that this designation contains no matter which is irrelevant to this appeal.

June 25, 2020

s/ Kathrine H. Hudgins

Kathrine H. Hudgins
Appellate Defender

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

June 25, 2020.

s/ Kathrine H. Hudgins

Kathrine H. Hudgins
Appellate Defender

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