

STATE OF SOUTH CAROLINA

In the Court of Appeals

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

**RECEIVED**

**Jul 08 2020**

**SC Court of Appeals**

Case No.: 2019-001571

State of South Carolina,

Respondent,

vs.

Rajshun Bernard Foster,

Appellant.

REPLY TO INITIAL BRIEF OF RESPONDENT

TOMMY A. THOMAS  
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ATTORNEY FOR APPELLANT

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### **RESPONDENT'S ARGUMENT**

No reversible error was committed by the trial court's jury charge because State v. Burdette, 427 S.C. 490, 832 S.E.2d 585 (2019) is not applicable as the issue was preserved below, a fact that was considered in the opinion. 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 of malice and the evidence in this case.

### **APPELLANT'S RESPONSE**

The issues regarding implied malice that Burdette overruled could not have been preserved at trial because they represented a diametrical change from the case law at the time. Further, though there may be evidence of malice on the part of the other players in the crime, there was no evidence of malice on the part of Appellant.

## ARGUMENT

**The issues regarding implied malice that Burdette overruled could not have been preserved at trial because they represented a diametrical change from the case law at the time. Further, though there may be evidence of malice on the part of the other players in the crime, there was no evidence of malice on the part of Appellant.**

Respondent argues that, in order for Appellant to prevail in this appeal, he must have objected to the jury instruction at trial. However, had he done so, his argument would have been improper and against precedent, with absolutely no basis for it to be made. It is well-settled law, generally mentioned during post-conviction relief actions, that lawyers cannot anticipate every possible event, outcome, or change in the law. See Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993), Chalk v. State, 313 S.C. 25, 437 S.E.2d 19 (1993), overruled on other grounds by Brightman v. State, 336 S.C. 348 520 S.E.2d 614 (1999).

Appellant argues that this was the precise reason that the court in State v. Burdette, 427 S.C. 490, 505, 832 S.E.2d 585, 583 (2019) cited to Griffith v. Kentucky, 479 U.S. 314, 328, 107 S. Ct. 708 and pulled the quote “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.’” To counter this argument, Respondent cites an unpublished federal case from the 11<sup>th</sup> circuit: Trice v. Secretary, Florida Department of Corrections, 766 Fed. Appx. 840 (11<sup>th</sup> Cir. 2019). It is clear in the Burdette opinion that Griffith was cited for this one holding, not the convoluted explanation provided by Respondent that includes how law would be applied in this case if it were a Batson challenge. IBOR, p.12; 4-11.

Respondent argues that Appellant could not be found guilty of any lesser-included offense of murder. In this matter, he was found guilty of murder based on accomplice liability or hand of one is the hand of all. However, there is no evidence that Appellant had a gun, knew a crime was about to occur, or had any involvement with the planning of the crime. Respondent recites the

definitions of malice given at trial, as well as other approved definitions of malice given in South Carolina courts. It argues that any error is harmless.

Appellant, though being tried under an accomplice liability theory, did not have to meet the same fate as his co-defendant who was found guilty of murder. It is true that there were no mitigating factors provided, nor was there an instruction on any lesser included offense. However, Respondent's assertion that "Foster and his co-defendant Dover either committed murder or they were innocent" is incorrect insofar that it assumes both must meet the same fate.

The factual evidence against Dover is much higher than that against Appellant. The jury could have found Dover guilty of murder but found that Appellant was not sufficiently related to or informed of the crime to be bound by accomplice liability. While evidence may have been overwhelming against Dover, it was not against Appellant. No evidence was presented at trial to show that Appellant knew Dover was intending to commit a crime or knew Dover was armed. The reading of a Belcher<sup>1</sup> instruction could have caused the jury to carry over the idea that, because Dover was armed while in Appellant's car, Appellant had malicious intent. Simply because the idea of malice was tied up with the presence of a deadly weapon in the jury's instructions, Appellant may have suffered because of it. This cannot be deemed harmless error.

Similarly, Respondent's argument that there was a premeditated plot to kill or wound the victim is preposterous. Even in Respondent's account of the facts, Appellant is only involved in verbal altercations with the victim. All acts of violence were conducted by Dover. Any implications made against Dover carried over to Appellant, including the shooting and suspicious activity afterward. Though Appellant was tried under hand of one hand of all, he is still a separate individual and was not found guilty of murder solely because Dover was. Instead, the malice that

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<sup>1</sup> State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

was introduced and implied against Dover was foisted onto Appellant. Allowing the Belcher instruction exacerbated this harm to a level that cannot be deemed harmless error.

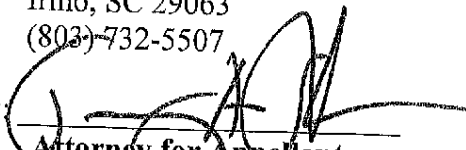
**CONCLUSION**

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

Respectfully submitted,

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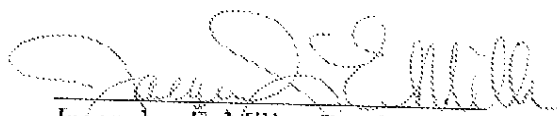
vs.

Rajshun Bernard Foster, .....Appellant.

CERTIFICATE OF SERVICE

I, Jacquelyn E. Miller, Paralegal to Tommy A. Thomas, Attorney for the Appellant  
hereby certify that emailed, a copy of a Reply to Respondent's Initial Brief to:

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July 8, 2020

**Jackie Miller**

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**Subject:** Rajshun Foster 2019-001571  
**Attachments:** Foster.reply.pdf

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**SC Court of Appeals**

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July 8, 2020  
VIA FAX

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RE: State v. Rajshun B. Foster  
Appellate Case No.: 2019-001571

Dear Sir or Madam:

Attached please find for filing a Reply to Respondent's Initial Brief along with a Certificate of Service.

Please feel free to contact me should you have any questions.

Yours truly,

Tommy A. Thomas,  
Attorney at Law

TAT/jem  
cc: Melody Jane Brown, Esq. via email