STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Beaufort County

Honorable Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN IRA DUNCAN III,

APPELLANT

APPELLATE CASE NO 2019-001919

INITIAL BRIEF OF APPELLANT

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err in admitting State's Exhibit #37, a video containing two separate interviews with a witness, as extrinsic evidence of three purported prior inconsistent statements pursuant to Rule 613(b) when the State failed to lay the proper foundation for one of the statements and the witness did not deny or not recall making another of the statements?

2. When State's Exhibit #37, the video containing two separate interviews with a witness, was published to the jury at trial, did the trial judge err in allowing the State to edit the Exhibit to include a purported subtitle transcript of the interviews prepared by an employee of the prosecutor's office, as the State argued that the added subtitle transcript portion was only for demonstrative purposes and would not be admitted in evidence and sent back to the jury?

3. In this murder case where there was evidence presented that Appellant acted in self-defense, did the trial judge err in instructing the jury that, "The law says that if one intentionally kills another with a deadly weapon, the implication of malice may arise."?

STATEMENT OF THE CASE

On July 20, 2015, the State filed a juvenile petition against Appellant, John Ira Duncan, alleging that he committed murder and possessed a firearm during the commission of a violent crime, 2015-JU-07-190, 191. On October 28, 2016, a waiver hearing was held in the Beaufort County Family Court before the Honorable Peter L. Fuge. Jared S. Newman represented the juvenile. Jean McCormick represented the State. In an order filed November 16, 2016, Judge Fuge transferred both charges to the Court of General Sessions. (R. p. **, Transfer Order). In June of 2017, the Beaufort County Grand Jury indicted the juvenile for murder and possession of a weapon during the commission of a violent crime, indictments #2016-GS-07-2133, 2134. (R. p. **). On January 14, 2019, the weapons charge was dismissed because that charge cannot be waived from Family Court. (R. p. **, Nolle Prosequi). On May 6, 2019, the juvenile proceeded to jury trial before the Honorable Brooks Goldsmith. Jeffrey Scott Stephens and Benjamin John Tripp represented the juvenile. Solicitor Isaac McDuffie Stone, III, and Sean Paul Thornton prosecuted the case. The jury returned a verdict of guilty and sentencing was deferred until November 6, 2019. After hearing testimony from witnesses, Judge Goldsmith sentenced the juvenile to thirty-seven (37) years in prison. A timely notice of intent to appeal was served on November 14, 2019. This appeal follows.

STANDARDS OF REVIEW

1. Admission of prior inconsistent statement:

In criminal cases, the appellate court only reviews errors of law and is bound by the trial court's factual findings unless the findings are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Rulings on the admission of evidence are within the trial court's discretion and will not be reversed absent an abuse of discretion. State v. Stokes, 381 S.C. 390, 398, 673 S.E.2d 434, 438 (2009).

Our courts have consistently held that a trial court's decision to admit evidence of a witness's prior inconsistent statement will not be reversed absent a manifest abuse of discretion. State v. Lynn, 277 S.C. 222, 225, 284 S.E.2d 786, 788 (1981); State v. Sierra, 337 S.C. 368, 373, 523 S.E.2d 187, 189 (Ct. App. 1999) (finding appellant must show both abuse of discretion and resulting prejudice).

2. Admission of demonstrative evidence:

We believe the standard for merely showing or exhibiting demonstrative evidence, however, would not be higher than the standard for actually admitting demonstrative evidence. The trial court has broad discretion in the admission or rejection of evidence and will not be overturned unless it abuses that discretion. See Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000), *aff'g as modified* 332 S.C. 433, 504 S.E.2d 605 (Ct.App.1998) (trial court has broad discretion in whether to admit a computer animation as demonstrative evidence); Holmes v. Black River Elec. Coop., 274 S.C. 252, 262 S.E.2d 875 (1980) (pictures of plaintiff's amputated arm were demonstrative evidence that aided the jury in evaluating the injury suffered and, as such, were admissible within the discretion of the trial court); State v. Barrs, 257 S.C. 193, 199,

184 S.E.2d 708, 711 (1971) (no error in admitting copper wire coils of the same type as those allegedly stolen by the defendant because the coils were "simply demonstrative evidence, useful in the examination of witnesses"). Davis v. Traylor, 340 S.C. 150, 530 S.E.2d 385, 388 (Ct. App. 2000).

3. Jury instruction:

"In criminal cases, the appellate court sits to review errors of law only." State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "An appellate court will not reverse the trial judge's decision regarding jury charges absent an abuse of discretion." State v. Santiago, 370 S.C. 153, 159, 634 S.E.2d 23, 26 (Ct.App.2006). Generally, the trial court is required to charge only the current and correct law of South Carolina. Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). A charge to the jury is correct if it contains the correct definition of the law when read as a whole. Id. at 665, 594 S.E.2d at 472-73.

STATEMENT OF FACTS

The jury found Appellant guilty in the fatal shooting of Dominique Williams. At the time of the shooting, Sunday, July 19, 2015, John Duncan, the Appellant, was fifteen years old. John attended Hilton Head High School where he played football and ran track. (Tr. p. 530, line 10 – p. 531, lines 1-8). On the Friday night before the shooting Dominique Williams, Jestin Morrow, a classmate who played football with John, and Trey Days met John in his neighborhood in Winterhaven on the south end of Hilton Head. (Tr. p. 249, line 15 – p. 250, lines 1-7). According to Jestin, he went to get his BB gun back from John but Dominque and Trey planned to take John's marijuana. (Tr. p. 267, lines 2-14). Jestin testified that John gave Dominique the marijuana and then Dominique drove away without paying for it. (Tr. p. 269, line 16 -p. 270, lines 1-13). Jestin testified that it was about three grams or about sixty dollars ($60.00) worth of marijuana. (Tr. p. 270, line lines 14-19).

The next day, Saturday, July 18, 2015, John went to his friend, Dontarious Seay's house. (Tr. p. 539, lines 1-24). The apartment complex where Dontarious lived was next door to where John lived. (Tr. p. 273, lines 1-9). John testified that Jestin called him on Saturday and suggested that John and Dominique fight it out. (Tr. p. 540, lines 13-25). Jestin, Dominque, Devon Williams and Drew Bouldin showed up at the apartment complex where John and Domique had a fist fight. (Tr. p. 541, lines 1-10). Jestin videotaped the fight and the video was introduced in evidence as State's Exhibit #33. (Tr. p. 274, lines 1-23). After the fight the whole group went upstairs to Dontarious' apartment where Dominque continued to brag about taking John's marijuana. (Tr. p. 542, lines 14-23). John testified that he stayed to himself and did not pay any attention. (Tr. p. 542, line 23 – p. 543, lines 1-7). Jestin testified, however, that John threatened Dominique if he did not return his "stuff." (Tr. p. 278, lines 2-13). After the others

left Dontarious' apartment, John left to go to his grandmother's house in Hardeeville. (Tr. p. 545, lines 1-11).

The next day, Sunday, July 19, 2015, John and Dontarious went to the beach where they saw Jestin and Dominique and Devon Williams. (Tr. pp. 552-554). John confronted Jestin about "hanging with the person [Dominique] that just robbed me." (Tr. p. 553, lines 21-24). John testified, "As I was talking to Jestin about how he was supposed to be my homeboy but he was hanging with somebody that just robbed me, Dom said what that supposed to mean, like, you already know what's up. As I looked, I seen him coming towards me and reaching for something." (Tr. p. 554, lines 17-21). John then testified, "the first – my first reaction, I was afraid for my life. So the gun I had on me, I shot once in the direction and ran away." (Tr. p. 554, lines 23-25). Dominque Williams died as a result of a single gunshot to wound to the head. (Tr. p. 204, lines 8-13)

ARGUMENTS

1. **The trial judge erred in admitting State's Exhibit #37, a video containing two separate interviews with a witness, as extrinsic evidence of three purported prior inconsistent statements pursuant to Rule 613(b) when the State failed to lay the proper foundation for one of the statements and the witness did not deny or not recall making another of the statements.**

Dontarious Seay was called as a witness by the State. (Tr. pp. 363-389). Dontarious testified that he did not remember telling the investigators that he heard John say something right after the shooting. (Tr. p. 369, line 24 – p. 370, lines 1-3). Dontarious also testified that he did not remember telling the investigators that John Duncan "did what he said he was going to do." (Tr. p. 371, lines 1-23; p. 372, line 22 – p. 373, lines 1-4). Dontarious, however, agreed that he told officers that John said that he was going to take matters into his own hands and that he would not get robbed again. (Tr. p. 372, lines 3-21). After the shooting investigators interviewed Dontarious twice, once in the early morning on July 20, 2015, and once on July 22, 2015. (Tr. p. 518, line 14 – p. 519, lines 1-24). Dontarious is wearing a blue jumpsuit in the July 20th interview and a white shirt in the July 22nd interview. The interviews appear in reverse chronological order in the video introduced as State's Exhibit #37.

One of the investigators who interviewed Dontarious, Investigator Reynells, was not called as a witness by the State in their case in chief but was called by the Defense. (Tr. pp. 478-521). During a break in the trial the State announced the intention of introducing the video of the interviews with Donatious, with an added subtitle transcript[1], as a prior inconsistent statement pursuant to Rule 613(b). (Tr. p. 492, line 12 – p. 493 – 504). Defense counsel objected to the admission of the videos arguing that he did not recall the questions asked and did not remember if the State established a proper foundation for the admission of

[1] The addition of the subtitle transcript is challenged in issue two below.

extrinsic evidence of a prior inconsistent statement pursuant to Rule 613(b). (Tr. p. 493, lines 7-11; p. 494, line 21 – p. 495, lines 1-15). The State argued:

> If I may, Your Honor, my notes are very good because I specifically asked this because I knew, in fact, he wouldn't answer the question. I asked did this take place at the Beaufort County sheriff's office, the Hilton Head substation, and then I rephrased that to say the Hilton head station. Did it occur on July the 20th and July the 22nd, the first one at 7:21 a.m. and the second time or sometime around there and the second one at 2:21 p.m. I then asked were you talking to Investigator Reynells and Investigator Lavant, and then I specifically asked do you remember him saying – you telling the officer that Duncan's – you heard Duncan say something after the shot, Duncan shot Dom, had the gun in a purple bag, wasn't going to be robbed, he had been robbed before, but he wasn't going to be robbed again and he was going to take matters into his own hands.
>
> And then the last statement was that Dom – that you told the investigator Dom [sic] did what he said he was going to do. Number one, he could not remember the first one or the last one. He – in fact, the next to the last one where he wasn't robbed again, he said I don't remember telling him that, but I remember talking to Dom somewhat about that. So he was kind of vague with that. And then on cross-examination is when the defense counsel crossed him on the fact that – oh, but I was under – I was under duress. He was – he was scaring me and all that too.

(Tr. p. 495, line 16 – p. 496, lines 1-15). The State then cited to State v. Blalock, 357 S.C. 74, 591 S.E.2d 632 (Ct. App. 2003), and State v. Moses, 390 S.C. 502, 522, 702 S.E.2d 395, 406 (Ct. App. 2010).

The judge ruled that the videos, with the added subtitle transcript, were admissible. (Tr. p. 504, lines 10-16). The State moved to admit the videos of the interviews with Dontarious during the cross-examination of Investigator Reynells. (Tr. p. 516, lines 15-17). Appellant renewed the objection. (Tr. p. 516, lines 18-20). The trial judge overruled the objection and the videos were admitted as State's Exhibit #37 and played for the jury. (Tr. p. 517, lines 4-5; p. 518, line 25 – p. 519, lines 1-4). The trial judge erred in admitting State's Exhibit #37.

Rule 613(b) provides:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible. However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

The State sought to introduce the video of the interviews with Dontarious, State's Exhibit #37, as extrinsic evidence of three prior inconsistent statements: 1.) a statement that Dontarious did not remember telling the investigators that he heard John say something right after the shooting. (Tr. p. 369, line 24 – p. 370, lines 1-3); 2.) a statement that Dontarious did not remember telling the investigators that John Duncan "did what he said he was going to do." (Tr. p. 371, lines 1-23; p. 372, line 22 – p. 373, lines 1-4); and 3.) a statement that John said that he was going to take matters into his own hands and that he would not get robbed again. (Tr. p. 372, lines 3-21). The State should not have been allowed to introduce State's Exhibit #37 with regard to the first and third statements.

As to the first statement, the State failed to lay the proper foundation for admission of the video pursuant to Rule 613(b) when Dontarious testified that he did not remember telling the investigators that he heard John say something right after the shooting. The following took place during the questioning of Dontarious:

> Q: Did you hear him say – did you hear John Duncan say anything to Dominique before he shot him?
>
> A: No, sir.
>
> Q: Did you hear him say anything afterwards?
>
> A: No, sir.

Q: Do you recall telling officers that you heard him say something afterwards?

A: Not at all.

(Tr. p. 369, line 21 – p. 370, lines 1-3). The State failed to advise the witness of the time and place the statement was made. Also, the general reference to officers does not satisfy the requirement that the witness be advised to whom the statement was made. The portion of the video of the interview when Dontarious tells the investigators he heard John say something after the shooting should not have been admitted because the State failed to lay the proper foundation pursuant to Rule 613(b).

As to the third statement, the following took place during the questioning of Dontarious:

> Q: Do you recall telling the officer that John Duncan told you he had been robbed before, but he wasn't going to be robbed again, he would take matters into his own hands?
>
> A: Can you repeat your question?
>
> Q: Do you recall telling the officers that John Duncan had been robbed before and he told you he wasn't going to be robbed again, he was going to take matters into his own hands?
>
> A: I remember having a conversation with John about this and I remember him saying it wasn't going to happen again.
>
> Q: But that's – that's after the first robbery?
>
> A: Correct.
>
> Q: After another robbery, he says it's not going to happen again?
>
> A: (No verbal response).
>
> Q: Do you remember telling the officers - -
>
> THE COURT RPORTER: I'm sorry. He didn't answer.
>
> Q: -- that?

A: Correct.

Q: Okay. I'm sorry. I interrupted. Correct. And that he was going to take matters into his own hands, that he would not get robbed again; is that correct?

A: Correct.

(Tr. p. 371, line 24 – p. 372, lines 1-21).

Dontarious did not deny telling the officers that John said he was not going to get robbed again and was going to take matters into his own hands. The portion of the video where Dontarious discusses the prior robbery, John not wanting to get robbed again and taking things into his own hands should not have been admitted pursuant to Rule 613(b). The portion of the video dealing with the first and third statements comes from the interview conducted on July 22, 2015, where Dontarious is wearing a white shirt. This interview appears first on State's Exhibit #37. The entire July 22nd interview should have been removed from State's Exhibit #37.

As to the second statement that Dontarious did not remember telling the investigators that John Duncan "did what he said he was going to do," this was the only prior statement that should have been admitted pursuant to Rule 613(b). Dontarious made this statement during the July 20, 2015, interview that appears after the July 22nd interview discussed above and contained in State's Exhibit #37. At trial the State advised the witness of the time, place and specifically to whom the statement was made and the witness did not recall making the statement. (Tr. p. 371, lines 1-23). This is the only portion that should have been admitted in evidence pursuant to Rule 613(b). The trial judge abused his discretion by including the July 22nd interview in State's Exhibit #37. The error is not harmless especially as it was introduced during the presentation of Appellant's self-defense claim.

The present case is easily distinguished from State v. Blalock, 357 S.C. 74, 591 S.E.2d 632 (Ct. App. 2003), one of the cases cited by the State. The issue in Blalock was whether the

witness made a clear and unequivocal admission that her prior statement to a detective was inconsistent with her trial testimony. The Court of Appeals found that the witness did not make a clear and unequivocal admission that her prior statement to a detective was inconsistent with her trial testimony. As a result, the admission of her statement to the detective was proper as extrinsic evidence pursuant to Rule 613(b). The issues in the present case involve the State's failure to lay a proper foundation for the first statement about whether John said something after the shooting and the fact that Dontarious admitted telling the officer that John did not want to get robbed again and was taking things into his own hands as to the third statement. Neither of these statements should have been admitted pursuant to Rule 613(b).

The present case is also easily distinguished from State v. Moses, 390 S.C. 502, 523, 702 S.E.2d 395, 406 (Ct. App. 2010), the other case cited by the State. In Moses extrinsic evidence of a prior inconsistent statement was properly admitted because the witness stated she could not remember making the prior statement and the witness was advised by the State of the substance of the statement she made, the time and place it was allegedly made, the person to whom it was made, and she was given the opportunity to explain or deny the statement. In the present case the State failed to lay the proper foundation as to the first statement and there was no inconsistent statement as to the third statement. The error in including the July 22nd interview in State's Exhibit #37 requires reversal.

2. **When State's Exhibit #37, the video containing two separate interviews with a witness, was published to the jury at trial, the trial judge erred in allowing the State to edit the Exhibit to include a purported subtitle transcript of the interviews prepared by an employee of the prosecutor's office, as the State argued that the added subtitle transcript portion was only for demonstrative purposes and would not be admitted in evidence and sent back to the jury.**

When the State advised the Judge about moving to admit State's Exhibit #37, discussed above in issue one, the State also sought to add to the video a subtitle transcript of the interviews. (Tr. p. 492, line 12 – p. 493, lines 1-2). The Solicitor told the judge:

> The only thing I'm going to go into with Investigator Reynells are the statements by the witnesses, which he's crossed – which he's examined him on as far as being inconsistent.
>
> Yesterday, I – Dontarious Seay testified and he testified to some of the – remembering some of the statements, some of which he did not remember. All of those were given to Seth Reynells and I think we've discussed this with the defense that we have Seth – excuse me – Dontarious Seay's interview that we plan on playing.
>
> The only difference is we have a transcription. What I've done in the past on that is the evidence itself is the disk without the transcription, but the transcription – excuse me – our demonstrative part of that. There may be an objection as to the transcript of that and if you'd like to address that now, but that – that's fine.

(Tr. p. 492, line 12 – p. 493, lines 1-2). The Solicitor later explained to the judge, "This is –this is a video of the segments of those interviews that I specifically asked the investigator about, which the – which Mr. Seay said he did not recall or he qualified in some way. And then the transcript at the bottom is something my office provided as an assistance. It is not part of the evidence, but it will obviously play to the jury." (Tr. p. 517, lines 16-22).

Appellant objected to admission of the videos with the added subtitle transcript. (Tr. p. 493, lines 3-16; p. 497, line 2 – p. 498, 500, 501, 502, lines 1-21; p. 504, lines 4-9; p. 505, lines 16-17). Appellant argued that the State improperly altered the videotapes of the interview by

adding subtitles and the addition was not simply demonstrative evidence. (Tr. p. 497, line 5 – p. 498, lines 1-2). Appellant also argued, "I think it's highly prejudicial, Your Honor, for the jury to get evidence that's being written down by a person I don't even know who that is." (Tr. p. 499, lines1-3). The Solicitor stated that the identity of the transcriptionist was irrelevant. (Tr. p. 499, lines 15-16; p. 503, line 16). The Solicitor explained that the subtitle transcript was prepared "in house" by an employee of the prosecutor's office, Derek Nelson. (Tr. p. 499, lines 4-13; p. 503, lines 1-15). The Solicitor argued, "This is nothing more than a demonstrative aid to assist the jury in seeing what is being heard." (Tr. p. 503, lines 24-25). Appellant again argued that the added subtitle transcript was not demonstrative evidence stating:

> I understand what I believe is the State's argument that this is not actual evidence but demonstrative evidence, but I believe that's intellectually dishonest. No offense, but the terminology, because the jury will take this as the words of the defendant – or excuse me, the words of that witness. If they don't, there wouldn't be any point in playing it.
>
> So I think the jury has to decide what they hear and if they're hard of hearing or if the recording is not good enough, I think that's just the risk you take with any evidence, Your Honor. That we don't go through and transcribe to put our opinions on every piece of purported evidence.
>
> Again, the defense maintains – and I apologize if I'm a little overly emotional about this issue, but this is – I believe it's highly prejudicial, whether or not it's been done in other cases. We would maintain our objection to it here.

(Tr. p. 502, lines 4-21). Additionally, Appellant specifically noted Rule 1002, SCRE. (Tr. p. 504, lines 4-9).

The judge overruled the objection stating, "All right. I've used transcripts in trial where transcripts of a recording were used, were admitted, and I'm looking to see if I can find my notes on the charge. I'm going to admit it. I'll be glad to give you – give you a limiting instruction, if you wish for me to, to tell the jury about it. I will be glad to consider giving you a jury charge on it also, if you wish for me to do so." (Tr. p. 504, lines 10-16).

The State moved to admit the video recordings of the interviews with Dontarious, with the added subtitle transcript, during the cross-examination of Investigator Reynells. (Tr. p. 516, lines 15-17). Appellant renewed the objection. (Tr. p. 516, lines 18-20). The trial judge overruled the objection and the video recordings with the added subtitle transcript was played for the jury. (Tr. p. 517, lines 4-5; p. 518, line 25 – p. 519, lines 1-4). Although State's Exhibit #37 was played for the jury with the added subtitle transcript, the State's Exhibit #37 that was admitted in evidence did not contain the subtitle transcript. A copy of the video with the added subtitle transcript was not admitted as a Court's Exhibit. The judge gave a limiting instruction. (Tr. p. 517, lines 23 – p. 518, lines 1-6). The limiting instruction, however, did not cure the error. The trial judge erred in allowing the State to play for the jury State's Exhibit #37 with the added subtitle transcript.

The State altered the original videos by adding the subtitle transcript. By altering the original, the State violated the best evidence rule found in Rule 1002, SCRE. Additionally, the alteration placed undue emphasis on the evidence. See State v. Gulledge, 277 S.C. 368, 372, 287 S.E.2d 488, 490 (1982). The subtitle transcript was not demonstrative evidence. The State should not be allowed to circumvent the rules of evidence by simply labeling evidence as demonstrative. The subtitle transcript was not admissible as evidence and should not have been played for the jury. The trial judge abused his discretion in allowing the State to play the Exhibit for the jury with the added subtitle transcript.

Rule 1002, SCRE, provides that, "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." Pursuant to the rule, the original unaltered recording were required. The objection in this case, except as discussed above in issue one with regard to the

recording of the July 22nd interview, was not to the original recordings of the two interviews. Instead, the objection was to the State's adding subtitles not included in the originals. The subtitles should not have been allowed.

The present case is distinguished from State v. Winkler, 388 S.C. 574, 585, 698 S.E.2d 596, 602 (2010), where the South Carolina Supreme Court found no abuse of discretion by allowing the jury to review a 911 call transcript while the 911 tape was replayed in the courtroom. First, the 911 original tape in Winkler was not altered, as the original recordings were in the present case. Second, in Winkler there was no objection to the introduction of the 911 transcript at trial and no objection to the transcript being read while the 911 tape played. See id. at n. 4. In the present case Appellant objected to the addition of the subtitle transcript to the original recordings.

The added subtitles were not demonstrative evidence as argued by the State. The toy gun used during the direct examination of Investigator Reynells was demonstrative evidence. (Tr. pp. 480-482). In Davis v. Traylor, 340 S.C. 150, 530 S.E.2d 385, 388 (Ct. App. 2000), the South Carolina Court of Appeals, addressing the standard for allowing the use of demonstrative evidence wrote:

> We have found no South Carolina case in which the trial court refused to admit an object into evidence but allowed the use of the object for demonstrative purposes during trial. We believe the standard for merely showing or exhibiting demonstrative evidence, however, would not be higher than the standard for actually admitting demonstrative evidence. The trial court has broad discretion in the admission or rejection of evidence and will not be overturned unless it abuses that discretion. See Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000), *aff'g as modified* 332 S.C. 433, 504 S.E.2d 605 (Ct.App.1998) (trial court has broad discretion in whether to admit a computer animation as demonstrative evidence); Holmes v. Black River Elec. Coop., 274 S.C. 252, 262 S.E.2d 875 (1980) (pictures of plaintiff's amputated arm were demonstrative evidence that aided the jury in evaluating the injury suffered and, as such, were admissible within the discretion of the trial court); State v. Barrs, 257 S.C. 193, 199, 184 S.E.2d 708, 711 (1971) (no error in admitting

copper wire coils of the same type as those allegedly stolen by the defendant because the coils were "simply demonstrative evidence, useful in the examination of witnesses").

The video recordings with subtitles added by the prosecution do not constitute demonstrative evidence. If, however, the recordings with subtitles could be considered demonstrative evidence, this evidence still does not meet the standard of admissibility pursuant to Rule 1002, SCRE. The trial judge abused his discretion in allowing the State to play State's Exhibit #37 with the added subtitle transcript for the jury. The error was not harmless.

3. **In this murder case where there was evidence presented that Appellant acted in self-defense, the trial judge erred in instructing the jury that, "The law says that if one intentionally kills another with a deadly weapon, the implication of malice may arise."**

During the charge conference the trial judge asked, "Let me – I really want to ask a question of both sides about this. Does *State v. Belcher* take out the inferred malice done with a deadly weapon?" (Tr. p. 601, lines 8-10). Both the State and the Defense seemed to agree that the inference of malice from the use of a deadly weapon should not be charged. (Tr. p. 6-1, line 11 – p. 602, lines 1-8). The judge then asked:

> In lieu of that section dealing with inferred malice, we still have malice. *Gibson v. State* I think says that the following might be appropriate, and y'all tell me. The law says that if one intentionally kills another with a deadly weapon, the implication of malice – the implication of malice may arise. If facts are proven beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, the inference would simply be an evidentiary factor to be taken into consideration by you, the jury, along with other evidence. You may give it the way [sic] you determine it should receive. Y'all tell me.

(Tr. p. 602, lines 9-21). Defense counsel responded, "Your Honor, I believe that seems to be the same as what was ruled out in *Belcher*, which is to say that if these certain facts happened,

then you may infer malice. It seems to be saying the same thing. (Tr. p. 602, lines 22-25). The State argued, "I think they are distinguishable because of the talk about the intentional nature of the killing, and I think *Gibson* actually distinguishes itself. My recollection is *Gibson* is after *Belcher*." (Tr. p. 603, lines 4-7). The trial judge agreed and the State continued, "And distinguishes itself from it and I believe that *Gibson* is still good law. So we – the State has no problem with putting that language in there." (Tr. p. 603, lines 8-11). The judge then stated, "We all think *Gibson* – I don't have the cite but it's *Gibson v. State*, May the 11th, 2016, a South Carolina case. That's – that's all I have on it, but look at that and see. We'll talk about it in the morning. We'll see if the State's recollection is the same as mine." (Tr. p. 603, lines 12-16). The State agreed that a self-defense charge was proper. (Tr. p. 623, lines 19-21).

The next morning the judge charged the jury with the law. (Tr. pp. 684-694). The judge instructed the jury, "Malice may be inferred from conduct showing a total disregard for human life. The law says that if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts are proven beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would simply be an evidentiary fact to be taken into consideration by you, the jury. Along with the other evidence in the case, you give it the weight you determine it should receive." (Tr. p. 691, lines 2-11). The trial judge erred.

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, because 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.

The malice charge from 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), the case relied upon by the trial judge, 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. 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 trial judge's reliance on Gibson, however, was misplaced because Belcher was the law at the time of Appellant's trial and Appellant presented evidence that he acted in self-defense. The trial judge

in the present case erred in instructing the jury that malice could be inferred from the use of a deadly weapon.[2]

In Burdette, decided in July of 2019, three months after Appellant's trial but before the November 2019, sentencing hearing, the South Carolina Supreme Court held:

> 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)).

427 S.C. at 504–05, 832 S.E.2d at 583. The Burdette case expanded the ruling in Belcher to prohibit the inference of malice from the use of a deadly weapon instruction in all cases, instead of just cases 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, and Burdette, the trial judge erred by instructing the jury that "if one intentionally kills another with a deadly weapon, the implication of malice may arise." The error is not harmless.

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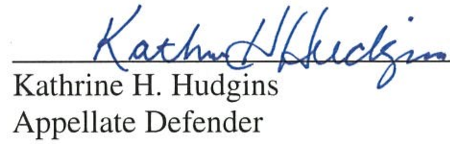
[2] The co-defendant who was tried with Gibson was granted post-conviction relief on the ground that trial counsel was ineffective in failing to object to the erroneous jury charge on the inference of malice from the use of a deadly weapon. Gibson v. State, 416 S.C. at 266, 786 S.E.2d at 124, n. 1.

CONCLUSION

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



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of September, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
Sep 10 2020
SC Court of Appeals

Appeal from Beaufort County

Honorable Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

RESPONDENT,

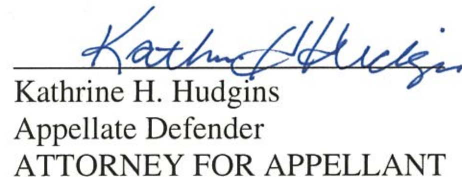
V.

JOHN IRA DUNCAN III,

APPELLANT

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and a copy of the Initial Brief of Appellant and Designation of Matter have been served on John Ira Duncan, #382670, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 10th day of September, 2020.



Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT