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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Laurens County
The Honorable Frank R. Addy, Circuit Court Judge

THE STATE, Respondent,

v.

DESHANNDON MARKELLE FRANKS, Petitioner.

Appellate Case No. 2016-002244

Opinion No: 5758

RETURN TO PETITION FOR REHEARING

This Court filed a published opinion on August 12, 2020, in which it affirmed Petitioner's two Laurens County murder convictions and sentence for murdering Sammie Darryl Leake and Nikesha James on January 31, 2014. (2014-GS-30-0499 & -0500).[1] *State v. Deshanndon Markelle Franks,* Op. No. 5758, 2020 WL 4660717 (S.C. Ct.App., Aug. 12, 2020) (Shearouse Adv. Sh. No. 31 at 65). Petitioner filed a timely petition for rehearing and this Court directed Respondent file a return to the petition in a letter filed on August 31, 2020. Respondent now makes its Return and submits that the petition for rehearing should be denied because this Court's Opinion correctly found that the jury instruction given in this case was harmless beyond a reasonable doubt. Franks' argument to the contrary confuses a burden of production with the burden of proof:

[1] He received a forty-five year sentence for each murder. He was also convicted of possession of a pistol during the commission of a violent crime (2014-GS-30-0501) and received a five year sentence for that offense.

I.

In pertinent part, the Court found that any error in the trial judge's instruction that jurors could infer malice from the use of a deadly weapon was harmless beyond a reasonable doubt "under the circumstances of this case." Specifically, the Court held that "[c]onsidering the trial court's instruction as a whole and the facts the jury heard, we find the erroneous instruction did not contribute to be verdict rendered." *See id.* at 81-83. Franks contends that this Court's harmless error analysis shifted the burden of proof to him. Respondent submits that his argument is meritless as a matter of constitutional law.

II.

In *Martin v. Ohio*, 480 U.S. 228 (1987), the United States Supreme Court rejected the defendant's claim that the trial judge's jury instruction violated due process and *In re Winship*, 397 U.S. 358, 364 (1970), by placing the burden of production on the defendant to establish she acted in self-defense, while the burden of proof remained at all times on the prosecution. *Id.* at 230-36. In the course of affirming her conviction, the Court explained that:

> As we noted in [*Patterson v. New York*, 432 U.S. 197 (1977)], the common-law rule was that affirmative defenses, including self-defense, were matters for the defendant to prove. "This was the rule when the Fifth Amendment was adopted, and it was the American rule when the Fourteenth Amendment was ratified." 432 U.S., at 202, 97 S.Ct., at 2322. Indeed, well into this century, a number of States followed the common-law rule and required a defendant to shoulder the burden of proving that he acted in self-defense. Fletcher, Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases, 77 Yale L.J. 880, 882, and n. 10 (1968). We are aware that all but two of the States, Ohio and South Carolina, have abandoned the common-law rule and require the prosecution to prove the absence of self-defense when it is properly raised by the defendant. But the question remains whether those States are in violation of the Constitution; and, as we observed in *Patterson*, that question is not answered by cataloging the practices of other States. We are no more convinced that the Ohio practice of requiring self-defense to be proved by the defendant is unconstitutional than we are that the Constitution requires the prosecution to prove the sanity of a defendant who pleads not guilty by reason of insanity. We have had the opportunity to depart from *Leland v. Oregon*, 343 U.S. 790, 72 S.Ct. 1002, 96

> L.Ed. 1302 (1952), but have refused to do so. *Rivera v. Delaware,* 429 U.S. 877, 97 S.Ct. 226, 50 L.Ed.2d 160 (1976). These cases were important to the *Patterson* decision and they, along with *Patterson,* are authority for our decision today.

Martin, 480 U.S. at 235-36. *See also Patterson*, 432 U.S. at 201-02 ("It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, ..., and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things, it is normally 'within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion,' and its decision in this regard is not subject to proscription under the Due Process Clause unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental'"). See also *Smart v. Leeke*, 873 F.2d 1558, 1565 (4th Cir. 1989) (en banc) ("Notwithstanding the widespread changes in other states, the Court in *Martin v. Ohio* found that despite the overlap of proof of murder and self-defense, it was constitutionally permissible to place the burden of proving self-defense on the defendant as long as the state bore the ultimate burden of proving all the elements of murder beyond a reasonable doubt. In light of this clear holding, and the prior precedent of this circuit, Smart's jury instructions plainly satisfied due process mandates"); *Cf. United States v. Hsu*, 364 F.3d 192, 198 (4th Cir. 2004) (To obtain an entrapment instruction, the initial burden is on the defendant to produce "more than a scintilla of evidence of entrapment") (internal quotation marks omitted).

III.

In *State v. Bellamy*, 293 S.C. 103, 104-05, 359 S.E.2d 63, 64 (1987), the South Carolina Supreme Court subsequently departed from the common law and held that the trial judge erroneously instructed jurors that the accused is required to establish the plea of self-defense by

the preponderance or the greater weight of the evidence. Although the Court acknowledged that the instruction was constitutional under *Martin*, it still violated the model instruction set forth in *State v. Davis*, 282 S.C. 45, 317 S.E.2d 452 (1984), which the Court made mandatory in *State v. Glover*, 284 S.C. 152, 326 S.E.2d 150 (1985).[2] Nevertheless, where the prosecution's evidence does not support a lesser-included charge or an affirmative defense, it is incumbent on the accused, such as Petitioner, to present evidence to support that lesser-included charge or affirmative defense. Once again, as explained by the United States Supreme Court, "While no inference of guilt can be drawn from [the defendant's] refusal to avail himself of the privilege of testifying, he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to cross-examination upon those facts." *Fitzpatrick v. United States*, 178 U.S. 304, 315 (1990). This "is a basic rule of our adversary system. *United States v. Kimball*, 15 F.3d 54, 56 (5th Cir. 1994), *cert. denied*, 513 U.S. 999 (1994).[3] Here, this Court merely observed that "the trial court

[2] Two years after *Bellamy*, the Court jettisoned *Davis* as the only proper charge on self-defense and reverted to its former precedent:

> We hold that it was error for the trial judge to charge *Davis* as an exclusive self-defense charge when Fuller's counsel repeatedly requested additional charges. We intended that the *Davis* charge cure the difficulties the trial bench encountered in charging the burden of proving self-defense. We did not, however, intend for the trial courts to eradicate the body of common law self-defense by accepting *Davis* as an exclusive charge. *See generally, State v. Sales,* 285 S.C. 115, 328 S.E.2d 619 (1985). In charging self-defense, we instruct the trial court to consider the facts and circumstances of the case at bar in order to fashion an appropriate charge.

State v. Fuller, 297 S.C. 440, 443, 377 S.E.2d 328, 330 (1989). The dissent in *Fuller* argued that this was needless because *Davis* covered the facts and circumstances at issue. *Id.* at 445, 377 S.E.2d at 331-32 (Gregory, C.J., dissenting).

[3] In *Kimball*, the Court held that the defendant had created his own unavailability by invoking his Sixth Amendment privilege against self-incrimination. Therefore, the Court held that he was not unavailable for purposes of admitting his prior testimony under Rule 804(b)(1), FRE. *Id.*

did not allow Franks to present evidence of third-party guilt at trial, and Franks did not appeal that ruling." *Franks*, Shearouse Adv. Sh. No. 31 at 82-83. Despite his contention that this was "burden-shifting," he was required to appeal that ruling if he felt that he could meet the threshold for admitting evidence of third-party guilt set forth in *State v. Gregory*, 198 S.C. 98, 104, 16 S.E.2d 532, 534-535 (1941), which was approved in *Holmes v. South Carolina*, 547 U.S. 319, 328-30 (2006). He did not do so. Nor did he present any evidence that would have rendered the challenged charge improper when given. Accordingly, *Fitzpatrick*, *Patterson*, and *Martin* make clear that the Court's harmless error analysis did not improperly shift the burden of proof to Petitioner.

IV.

Further, the trial judge's instruction that malice may be inferred from the use of a deadly weapon, where there was no evidence presented in Petitioner's trial "that would reduce, mitigate, excuse, or justify the homicide," *accord State v. Belcher*, 385 S.C. 597, 600, 685 S.E.2d 802, 803-04 (2009), *overruled*, in *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019), did not, itself, unconstitutionally shift the burden of proof to Petitioner. The Court in *Belcher* did not accept the defendant's argument that this instruction violated the state constitutional provision preventing the circuit court from commenting on the facts of the case. Instead, the Court found that the instruction was "confusing and prejudicial where evidence is presented that would reduce, mitigate, excuse or justify the homicide." *Id.* at 611, 685 S.E.2d at 809.

In *Burdette*, the Court decided that the instruction should no longer be given, regardless of the evidence presented: "We decide this issue solely under the common law; pursuant to our policy-making role under the common law, we hold, regardless of the evidence presented at trial, a trial court shall not instruct the jury that it may infer the existence of malice when the deed was done with a deadly weapon." *Id.* at 503, 832 S.E.2d at 582. The *Burdette* Court added that "whether

the deed was done with a deadly weapon or not, the State and the defendant are free to argue the existence or nonexistence of malice based on the evidence in the record." The Court further explained that "if the deed was not done with a deadly weapon, a defendant is free to argue the absence of malice based on that fact and any other facts that would naturally and logically allow a jury to conclude the State failed to prove beyond a reasonable doubt that the defendant acted without malice aforethought." *Id.* at 503, 832 S.E.2d at 582-83.

Moreover and consistent with earlier precedent, the Court in *Burdette* stated that the giving of this instruction is subject to harmless error analysis. The Court 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, 427 S.C. at 496, 832 S.E.2d 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 grds*, *Burdette*, *supra*; *Belcher*, 385 S.C. at 611, 685 S.E.2d at 809.

The Court in *Burdette* then applied this harmless error analysis. However, as it had in *Belcher*, the Court found that the error was not harmless based on the charge as a whole, including instructions on the lesser-included offenses of voluntary and involuntary manslaughter. *See Burdette*, 427 S.C. at 496-501, 832 S.E.2d at 579-82. Here, this Court correctly determined that the error was harmless beyond a reasonable doubt.

V.

South Carolina defines "murder" as "the killing of any person with malice aforethought, either express or implied." § 16-3-10; *see also State v. Johnson*, 291 S.C. 127, 352 S.E.2d 480 (1987). Thus, state law permits implied or inferred malice. *Id.* Jury charges raising a mandatory presumption rather than a permissible inference of malice constitute reversible error. *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983); *see also Francis v. Franklin*, 471 U.S. 307, 314, 317(1985) (mandatory presumptions, whether conclusive or rebuttable, violate the Constitution). "Jury instructions that explain the inevitable process of drawing reasonable inferences from the record evidence are entirely consistent with [the] constitution[ ] and, indeed, [are] highly effective tools in equipping the jury for carrying out its assigned responsibilities." *Rock v. Zimmerman*, 959 F.2d 1237, 1245 (3rd Cir. 1992), *cert. denied*, 505 U.S. 1222 (1992), *overruled on other grounds, Brecht v. Abrahamson*, 507 U.S. 619 (1993) (federal habeas court reviewing state trial court error should apply more lenient "substantial and injurious effect or influence" harmless error standard, as opposed to harmless beyond a reasonable doubt). An instruction is unconstitutional *only If* "'there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991).

The United States Supreme Court explained the difference between mandatory presumptions and permissive inferences in *Francis*:

> A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts. A permissive inference suggests to the jury a possible conclusion to be drawn if the State proves predicate facts, but does not require the jury to draw that conclusion.
>
> Mandatory presumptions must be measured against the standards of *Winship* as elucidated in [*Sandstrom v. Montana*, 442 U.S. 510 (1979)]. Such presumptions violate the Due Process Clause if they relieve the State of the burden of persuasion on an element of an offense. A permissive inference does not relieve the State of its burden of persuasion because it still requires the State to convince

> the jury that the suggested conclusion should be inferred based on the predicate facts proved. Such inferences do not necessarily implicate the concerns of *Sandstrom*.

Francis, 471 U.S. at 314-15 (citations omitted).

Respondent submits that the trial judge's jury instructions fully comported with the requirements of *Francis* and *Sandstrom*. The implied malice instruction that the trial judge gave to his jury was merely a permissive inference. *See Yates v. Evatt*, 500 U.S. 391, 402 n. 7 (1991) (a permissive inference is constitutional, so long as the inference it permits would not be irrational). In reviewing an ambiguous instruction, the inquiry is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that offends the Constitution. *Boyde v. California*, 494 U.S. 370, 380 (1990). *See also Estelle v. McGuire*, 502 U.S. 62, 72 (1991). There is no such "reasonable likelihood" in this case.

VI.

Moreover, "South Carolina follows the common law rule of murder," *State v. Norris*, 285 S.C. 86, 92, 328 S.E.2d 339, 343 (1985). At common law, the implication (or presumption) of malice arose from the defendant's use of a deadly weapon. *E.g.*, 2 *Bishop on Criminal Law*, § 680 ("Ordinarily when one without legal excuse so uses a deadly weapon that the death of a human being results therefrom, the law either conclusively or as a violent presumption of fact infers malice aforethought, and adjudges the act to be murder"); *see also Tucker v. United States*, 151 U.S. 164, 169-170 (1894) ("By the common law, neither deliberate premeditation, nor express malice or intent to kill, is required to make an unlawful homicide murder, but malice may be implied from the use of a deadly weapon or other significant facts; and any unlawful killing without malice, express or implied, is manslaughter"); *State v. Capps*, 134 N. C. 627, ___, 46 S. E. 731, 731-32 (1904) ("There is no principle in the criminal law better settled than that, where the killing with a

deadly weapon is admitted, or proved, in the sense that it is established as a fact in the case, the law implies or presumes malice, and at common law the killing, if nothing else appears, is murder"); *Com. v. Albert*, 391 Mass. 853, 859-861, 466 N.E.2d 78, 83-84 (Mass. 1984); *Hawthorne v. State*, 58 Miss. 778, ___,1881 WL 4524, *7 (Miss. 1881) ("We reject the suggestion that our statute alters the common law as to implied malice, and that murder is limited by the statute to killing with "express malice," and adhere to the view of our predecessors, that murder is the unlawful killing of a human being with malice, express or implied; and that malice is implied from any intentional killing which the law does not make justifiable or excusable; and that "malice aforethought" and "premeditated design," or "deliberate design," mean the same thing; and that "deliberate design" may be formed suddenly, and that the use of a deadly weapon to kill is evidence of deliberate design to effect death"); *Floyd v. State*, 50 Tenn. 342, ___, 1872 WL 3715, *3 (Tenn. 1871) ("The use of a deadly weapon implies malice, at common law, but does not imply that the act was done with deliberation and premeditation necessary to constitute murder in the first degree") (citation omitted).

This is "a traditional common-law inference deeply rooted in our law." *McInerney v. Berman*, 621 F.2d 20, 24 (1st Cir. 1980). Indeed, the validity of the permissive inference, in various forms, was recognized in at least twenty-four jurisdictions in the United States at the time *Belcher* was decided, though no longer permitted in South Carolina.[4] In fact, unless changed by statute or

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[4] When *Belcher* was decided, it was recognized in the Fifth, Sixth, Ninth and Tenth Circuit Courts of Appeals. *See, e.g.*, Pattern Crim. Jury Instructions. 5th Cir., §2.55-2.56 (2001); *United States v. Garcia-Meza*, 403 F.3d 364 (6th Cir. 2005); *United States v. Houser*, 130 F.3d 867 (9th Cir. 1997); *United States v. Washington*, 819 F.2d 221, 226 (9th Cir.1987); Pattern Crim. Jury Instructions, 10th Cir., § 2.52-2.53 (2006); *United States v. Yazzie*, 660 F.2d 422, 430 (10th Cir. 1981). It has likewise been recognized in Alabama [*Dickey v. State*, 901 So.2d 750 (Ala. Crim. App. 2004)]; Arizona [*State v. Jensen*, 153 Ariz. 171, 735 P.2d 781 (1987); California [*People v. Smith*, 124 P.3d 730 (Cal. 2005); *People v. Moore*, 96 Cal.App.4th 1105, 117 Cal.Rptr.2d 715 (Cal.App. 2002)]; the District of Columbia: *Belton v. United States*, 382 F.2d 150, 154-55 (D.C.

court opinion, the only jurisdictions that do not permit this inference are those that have not followed the common law inference. For instance, Kentucky has never followed the common law inference. *See Ewing v. Commonwealth*, 111 S.W. 352, 354-55 (Ky.App. 1908) ("it is manifest that at common law the killing in this case would be held to be murder upon the ground that malice was implied from the use of a deadly weapon under the circumstances shown. But the doctrine of implied malice does not obtain in Kentucky").

CONCLUSION

Based on the forgoing, Respondent submits that the Petition should be denied.

Respectfully submitted,

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Cir. 1967); 1-1 Criminal Jury Instructions for DC Form Instruction 4.17; Idaho: *State v. Jaco*, 949 P.2d 1077 (Id. 1997)]; Indiana [*Bethel v. State*, 730 N.E.2d 1242, 1246 (Ind.2000)]; Iowa [*State v. Reeves*, 670 N.W.2d 199, 207 (Iowa 2003)]; Massachusetts [*Com. v. Perez*, 825 N.E.2d 1040 (Mass. 2005); *Albert, supra*]; Michigan [*People v. Bulls*, 687 N.W.2d 159, 165 (Mich. Ct. App. 2004)]; Mississippi [*Page v. State*, 989 So.2d 887, 893 (Miss. Ct. App. 2008)]; Nebraska [*State v. Hanson*, 562 N.W.2d 840, 501 (Neb. 1997); *Kennison v. State*, 115 N.W. 289, 290 (Neb. 1908)]; New Jersey [*State v. Martini*, 619 A.2d 176 (N.J. 1993); *State v. Thomas*, 387 A.2d 1187, 1193 (N.J. 1978)]; North Carolina [*State v. Early*, 670 S.E.2d 594, 604 (N.C. Ct. App. 2009)]; Ohio [*State v. Raglin*, 699 N.E.2d 482, 492 (Ohio 1998)]; Pennsylvania [*Com. V. Natividad*, 938 A.2d 310, 326 (Pa. 2007)]; Tennessee [*State v. Shelton*, 854 S.W.2d 116, 120 (Tenn.Crim.App.1992)]; Vermont [*State v. Oakes*, 276 A.2d 18, 29-30 (Vt. 1971)]; Virginia [*Doss v. Com.*,479 S.E.2d 92, 96 (1996) (Va. 1996)]; West Virginia [*State ex rel. Corbin v. Haines*, 624 S.E.2d 752, 757-60 (W.Va. 2005)]; and Wyoming [*Guy v. State*, 184 P.3d 687, 698-99 (Wyo. 2008)].

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APPELLANT.

CERTIFICATE OF SERVICE

I, Angela Brown, am an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Return to Petition for Rehearing and Certificate of Service has been forwarded to Appellant's counsel, Robert M. Dudek, Esquire via email today, September 9, 2020 to rdudek@sccid.sc.gov.

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

This 9th day of September, 2020.

Angela Brown,
Legal Assistant to William Edgar Salter, III
Senior Assistant Attorney General

Angela Bennett

From:	Angela Bennett
Sent:	Wednesday, September 9, 2020 10:51 AM
To:	RDudek@sccid.sc.gov; 'Kellner, Haley'
Cc:	Ed Salter
Subject:	The State v. Deshanndon Franks
Attachments:	02374098.pdf
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Mr. Dudek attached is the state's Return to Petition for Rehearing in the matter of The State v. Deshanndon Markelle Franks. The Return will be electronically filed with the Court of Appeals on today's date.

Thank you,

Angela Brown
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