STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Edward W. Miller, Circuit Court Judge

THE STATE,

Respondent,

v.

NYQUAN TYKIE BROWN,

Appellant

Appellate Case No. 2019-001548.

INITIAL BRIEF OF RESPONDENT

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RESPONDENT'S COUNTERSTATEMENT OF THE ISSUE ON APPEAL

I. At Appellant's trial for murder, armed robbery, and possession of a weapon during the commission of a violent crime, did the trial court err when it instructed the jury that malice could be inferred if one kills another during the commission of a felony, where there was no evidence to reduce or excuse the murder, and where the complete charge formed a permissive inference and did not comment on any particular fact in evidence?

STATEMENT OF THE CASE

In October 2017, the Greenville County Grand Jury indicted Appellant Nyquan Tykie Brown for the December 8, 2016 murder and armed robbery of Fred Anderson, and for the possession of a weapon during the commission of a violent crime. (R. pp. *Indictments).

On September 3, 2019, Appellant proceeded to a jury trial before the Honorable Edward W. Miller. Thomas Quinn, Esquire, represented Appellant and Assistant Thirteenth Circuit Solicitor Mark Moyer prosecuted the case. (Tr. p. 1). Two days later, a jury convicted Appellant as indicted. (Tr. p. 390, lines 3-12).

Judge Miller sentenced Appellant to 45 years for the murder of Fred Anderson, a concurrent 30 years for the armed robbery, and a concurrent five years for possession of a weapon during the commission of a violent crime. (Tr. p. 394, lines 12-17). This appeal follows with notice timely served September 9, 2019. (R. p. *Notice of Appeal).

STATEMENT OF FACTS

Around 10:00 P.M. in early December 2016, two men wearing ski masks entered an unlocked apartment in Greenville County. (Tr. p. 88, line 23 – p. 92, line 12). The masked men interrupted Fred Anderson and another resident Whitney Parham. Anderson, Parham, and Parham's niece had been watching a movie on Anderson's cell phone. (Tr. p. 90, lines 4-14). Anderson had been staying with Parham and her sister for the past few weeks. (Tr. p. 107, lines 4-13). Locals knew Anderson sold marijuana. (Tr. p. 107, lines 17-22).

Parham asked the intruders if they were serious, and the masked men "started asking where things were" and looking for "weed and money." (Tr. p. 95, lines 13-25). One of the men had a gun. (Tr. p. 94, lines 8-14). Anderson handed the masked men a mason jar that he kept concealed in the back of a chair. It had some marijuana in it. (Tr. p. 96, line 8 – p 97, line 7). Anderson also handed the men $30 cash from his pocket and told them it was all he had. (Tr. p. 97, lines 12-22). The men granted Parham permission to take her young niece upstairs. (Tr. p. 98, lines 1-8).

Returning to the living room, Parham stopped about five steps short in the stairwell. (Tr. p. 98, lines 13-22). She heard the men repeatedly ask, "Where is the wallet?" (Tr. p. 99, line 5). Anderson and Parham both said they did not know, he did not carry it. (Tr. p. 99, lines 6-8). Parham heard, but could not see, a "commotion" and "tussling or something." (Tr. p. 99, lines 9-15). Anderson "said he was not going to fight them because his homebody was going to shoot him." (Tr. p. 99, lines 9-11). Parham watched the person with the gun stand by the door and point the gun in Anderson's direction. (Tr. p. 99, line 16 – p. 100, line 8). "His hands started to shake." (Tr. p. 100, line 11). Parham "knew something bad was about to happen" so she backed upstairs. That is when she heard gunshots. (Tr. p. 100, lines 14-23).

Anderson fell near the doorway and the base of the stairs. (Tr. p. 102, lines 22-25). He sustained two fatal gunshot wounds to the chest and a third to the left upper arm, as well as some superficial abrasions. (Tr. p. 125, lines 2-17). Hearing the commotion downstairs, Parham's sister looked out an upstairs window and saw two people fleeing the apartment. She called 911. (Tr. p. 111, lines 1-11). When officers arrived, Parham could only describe one intruder as shorter than the other, potentially shorter than 5'5". She could also tell the men were black because she could see some skin around their eyes. (Tr. p. 92, lines 8-25; Tr. p. 94, lines 5-25). She remembered the gun that she saw was a revolver. (Tr. p. 104, line 7).

Nobody ever found Anderson's cell phone after the shooting. (Tr. p. 104, line 22 – p. 105, line 4; Tr. p. 112, lines 17-19; Tr. p. 240, lines 1-4). Consistent with Parham's description of a revolver, officers found no shell casings on scene. (Tr. p. 75, lines 8-24). They also found a wallet on the victim's person that contained $100 cash. (Tr. p. 74, lines 11-24).

From the outset, officers began looking at the apartment complex's surveillance video footage. They noticed that two suspects ran from the scene down to another apartment building. (Tr. p. 61, lines 21-23). Officers went to that apartment to perform a knock-and-talk. (Tr. p. 56, lines 2-12). As the officers approached that apartment, one officer looked through the window blinds and saw two occupants "running towards the back" in apparent attempt "to conceal themselves." (Tr. p. 62, lines 4-8). Two women responded immediately to the knock-and-talk, but officers had to call for the two men inside to come speak with them. (Tr. p. 57, lines 3-6). The men denied anyone ran inside the apartment after the shooting and officers did not press them further. (Tr. p. 237, lines 5-16). Officers obtained a consent to search from the occupants which returned nothing of evidentiary value. (Tr. p. 63, lines 1-22; Tr. p. 235, lines 17-23).

With over 40 surveillance cameras situated around the apartment complex, officers honed in on additional video footage. (Tr. p. 164, lines 19-24; Tr. p. 263, line 12 – p. 271, line 17). Studying multiple camera angles, they observed footage from the approximate time of the incident showing "some sort of commotion at the apartment door," then "what appeared to be several muzzle flashes right in front of that door," and then "two suspects running away from" the incident towards another apartment building. (Tr. p. 166, lines 8-16). Those two persons stopped off at another apartment, going inside "for several minutes" and then emerging and disappearing out of view as they exited the complex on foot. (Tr. p. 166, lines 16-25).

The video resolution did not reveal either suspect's face. (Tr. p. 244, lines 8-14). Upon closer examination, investigators observed footage of a car pulling into the apartment complex at 9:27 P.M. (Tr. p. 242, lines 16-20). The car drove down to the front of the building where the knock-and-talk occurred. (Tr. p. 241, lines 14-20). The car's passenger got out and met with a male in that apartment "for a minute or two." (Tr. p. 241, lines 20-24). The video showed the car's passenger and the male from that apartment exit the apartment and walk up the street a little. At that point, the investigator could identify the man from the apartment as Johnathan Suber-Purry, one of the men he spoke with during the knock-and-talk. (Tr. p. 241, line 25 – p. 242, line 4). The video showed Suber-Purry pointing up the street toward the apartment where the shooting occurred. (Tr. p. 242, lines 4-9). After Suber-Purry pointed in that direction, the passenger got back in the car and drove off and Suber-Purry went back into the apartment. (Tr. p. 242, lines 10-13).

Officers arrested and interviewed Suber-Purry. (Tr. p. 247, lines 9-21). In a second interview, Suber-Purry stated that his brother "called his homebody 'Nine' to come and do this robbery." (Tr. p. 255, lines 9-18). He said his brother wanted Anderson "knocked off his high

horse" from "selling a little weed and getting a little money." (Tr. p. 190, line 6 – p. 191, line 5). Suber-Purry pointed out Anderson's apartment to "Nine," whom he described as the shorter of the two suspects. (Tr. p. 190, lines 17-19; Tr. p. 194, lines 9-23). Suber-Purry also described where "Nine" lived and offered his Facebook account up for the investigator to review. (Tr. p. 255, lines 18-22).

From Facebook, the investigator identified Appellant. (Tr. p. 255, lines 22-23; Tr. p. 256, lines 21-24). According to Suber-Purry, Appellant was "the person he met with 30 minutes before the robbery" and was "the same person that ran into his apartment right after the robbery." (Tr. p. 255, line 23 – p. 256, line 1).

Law enforcement subsequently executed an arrest warrant upon Appellant, seized his cell phone, and obtained warrants to extract data from Appellant's and Suber-Purry's phones. (Tr. p. 248, line 24 – p. 249, line 22). Records showed that Appellant called Suber-Purry a handful of times between 9:25 P.M. and approximately 10:00 P.M. (Tr. p. 305, line 13 – p. 306, line 11). At corresponding times, the surveillance video showed Appellant walking about the apartment complex while talking on a cell phone. (Tr. p. 264, lines 10-14; Tr. p. 267, lines 19-22). Another call corresponded with Appellant's car arriving at the apartment complex. (Tr. p. 242, lines 16-20; Tr. p. 306, lines 3-5).

Later, officers executed a search warrant on an address tied to Appellant. (Tr. p. 252, line 24 – p. 253, line 2). Appellant's mother identified his bedroom to the officers and they found a black ski mask. (Tr. p. 174, lines 23-25). Just as Suber-Purry had described, the apartment was a three to five minute walk and "a straight shot" from the apartment complex where the shooting occurred. (Tr. p. 194, line 24 – p. 195, line 11; Tr. p. 253, lines 9-19).

STANDARD OF REVIEW

"An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) (internal citations omitted). "In reviewing jury charges for error, this Court must consider the circuit court's jury charge as a whole in light of the evidence and issues presented at trial." *State v. Simmons*, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009).

"An erroneous instruction alone is insufficient to warrant this Court's reversal." *State v. Burdette*, 427 S.C. 490, 496, 832 S.E.2d 575, 578 (2019). "Errors, including erroneous jury instructions, are subject to harmless error analysis." *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009).

ARGUMENT

With no evidence in the record to reduce or excuse the shooting, the trial court did not err in instructing the jury with the permissive inference that it could infer malice if it found that one killed another during the commission of a felony, as the instruction did not comment on any particular fact in evidence, and as any error proves harmless beyond a reasonable doubt when viewed alongside the remainder of the record.

Appellant stood trial for and was convicted of murder, armed robbery, and possession of a weapon during the commission of a violent crime. (R. pp. *Indictments and Sentencing Sheets). On the final day of trial, Appellant objected "generally" to any jury charge which "indicates that malice can be inferred." (Tr. p. 322, lines 8-12). Appellant more specifically posited that the instruction that malice may be inferred "[i]f one kills another during the commission of a felony" erroneously "reduc[es] the burden on the State. [By], essentially, saying

that they don't really have to prove malice because you can infer it, you can find it from something else." (Tr. p. 322, lines 8-20). Appellant also argued that "the language [']during the commission of a felony[']" is implicitly a statement on the facts" because it suggests "there has been possibly a commission of a felony." (Tr. p. 322, line 21 – p. 323, line 2).

The trial court ruled it would give the charge as it reflected the "current state of the law." (Tr. p. 323, line 22 – p. 324, line 2). The court included the challenged instruction after it had already charged the jury on the law of armed robbery, possession of a weapon during the commission of a violent crime, and murder. (Tr. p. 377, line 14 – p. 380, line 11). The court instructed:

> . . . malice aforethought may be expressed or inferred. These terms expressed and inferred do not mean different kinds of malice but merely the manner in which malice may be shown to exist. That is either by direct evidence or by inference from the facts and circumstances which are proved. . . .
>
> Malice may also be inferred from conduct showing a total disregard for human life. Malice can be inferred if one kills another during the commission of a felony. Now, [if] the 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 considered by you, along with all the other evidence in the case. And you give it the weight that you decide it should receive.

(Tr. p. 380, line 12 – p. 381, line 5).

A. <u>This implied malice instruction addressed the correct and current state of the law.</u>

South Carolina defines murder as "the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10. "The trial court is required to charge only the current and correct law of South Carolina." *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010). "The law to be charged must be determined from the evidence presented at trial." *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "A request to charge a

correct statement of the law on an issue raised by the indictment and the evidence presented at trial should not be refused." *State v. Austin*, 299 S.C. 456, 458, 385 S.E.2d 830, 831 (1989).

Appellant stood trial in September 2019. (Tr. p. 322, line 1). Both then and now, a jury instruction that "malice can be inferred if one kills another during the commission of a felony" appropriately accompanies the jury charge on murder in cases where a defendant faces charges for a murder occurring during the commission of an enumerated felony such as armed robbery, and where self-defense is not an issue of fact. *State v. Smith*, 430 S.C. 226, 845 S.E.2d 495 (2020); *see Lowry v. State*, 376 S.C. 499, 506 n.4, 657 S.E.2d 760, 764 n.4 (2008) (finding this instruction a "proper charge on implied malice") (citing *State v. Norris*, 285 S.C. 86, 92, 328 S.E.2d 339, 343 (1985), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) *and State v. Belcher*, 385 S.C. at 607 n.4, 685 S.E.2d at 807 n.4.

Since Appellant's trial, the South Carolina Supreme Court has decided *State v. Smith*, therein holding "trial courts may no longer give an implied malice charge when there has been evidence presented that the defendant acted in self-defense." 430 S.C. at 230, 845 S.E.2d at 496. *Smith* addressed an instruction that malice may be implied "if one attempts to kill another during the commission of a felony," but did so in the context of a charge for attempted murder. *Id.* at 232, 845 S.E.2d at 498. This decision is distinguishable from the Court's earlier decision in *State v. Burdette*, which addressed the propriety of a different implied malice instruction, that "malice may be inferred from the use of a deadly weapon," and held this instruction erroneous "regardless of the evidence presented at trial." *State v. Burdette*, 427 S.C. 490, 503, 832 S.E.2d 575, 582 (2019). Neither *Smith* nor *Burdette* constitute a blanket prohibition of the instruction that "malice can be inferred if one kills another during the commission of a felony" in cases where a defendant is charged with murder and armed robbery.

Appellant's case also diverges factually from that of *Smith* and *Burdette* such that the specific prohibitions in those cases should not be employed here. Unlike *Smith*, where "two groups began posturing and exchanging insults" prior to gunfire, 430 S.C. at 230, 845 S.E.2d at 497, and *Burdette*, where the shooter "claimed accident," 427 S.C. at 493, 832 S.E.2d at 577, Appellant and one cohort instigated the events resulting in the victim's death. They entered the victim's residence unannounced and concealing their faces with masks. (Tr. p. 91, line23 – p. 92, line 12). They arrived at the behest of a man a few apartment buildings down, who wanted the victim "[k]nocked off his high horse," and who had his brother point the intruders in the direction of the victim's apartment. (Tr. p. 190, line 5 – p. 191, line 5; Tr. p. 195, lines 23-24; Tr. p. 203, lines 17-25).

Indicating a robbery was underway, Appellant and his cohort said, "y'all know what this is," asked the unassuming residents "to get up," and began asking for cash and the victim's stash of marijuana. (Tr. p. 95, line 4 – p. 97, line 22). The victim complied with the initial demands for money and drugs. (Tr. p. 97, lines 1-22). But Appellant wanted more, despite the victim and the female resident telling the intruders the victim had no wallet. (Tr. p. 99, lines 5-9). The female residents heard the victim tell the intruders "he was not going to fight them because his homeboy was going to shoot him." (Tr. p. 97, line 7 – p. 99, line 11; Tr. p. 110, lines 3-5). The female resident heard tussling. (Tr. p. 99, lines 9-15). This is when the female resident honed in on the intruder standing by the door. She saw him lift his arm with a gun in his shaking hands. (Tr. p. 99, line 16 – p. 11). "He just stood there watching with the gun pointed" toward the victim. (Tr. p. 100, lines 3-8). Then he fired. (Tr. p. 100, line 21 – p. 101, line 7).

Appellant presents no mitigating case for self-defense or accident in this hand of one, hand of all, armed robbery and murder. *See State v. Condrey*, 349 S.C. 184, 194, 562 S.E.2d 320,

324 (Ct. App. 2002) ("one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose"). Not only did the victim comply with the masked men's demands, but he was not armed and was heard announcing his intent to withdraw. (Tr. p. 97, line 1 – p. 99, line 11; Tr. p. 110, lines 3-5). The shooter thus faced no threat of return fire, and did not justifiably meet the victim's intent to withdraw with deadly force. *See State v. Dickey*, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011) (one "is justified in using deadly force in self-defense when . . . a reasonab[ly] prudent man of ordinary firmness and courage would have entertained the same belief").

Since he chose to engage in the armed robbery, Appellant also cannot be found without fault in bringing about the difficulty, nor can it be said he had no other probable means of avoiding the danger. *See id.* (discussing elements of self-defense). Instead, one perpetrator drew out the robbery after the victim handed over some goods, and the other perpetrator stood, stared, and then fired at the victim. (Tr. p. 100, lines 3-23). The facts make no case for an accidental shooting or a shooting in the defense of another. *See Douglas v. State*, 332 S.C. 67, 73, 504 S.E.2d 307, 310 (1998) (defense of others applies to one "who assaults [another] if that [other person] would likewise have the right to take the life of the assailant in self-defense"); *State v. Owens*, 427 S.C. 325, 831 S.E.2d 126 (Ct. App. 2019) ("The defense of accident (sometimes called misadventure) protects a defendant who, while acting lawfully and with due care, unintentionally causes harm to another. The defense has three elements: (1) the harm was unintentional, (2) the defendant was acting lawfully, and (3) due care was used in the handling of the weapon.").

With no evidence that the shooter acted in some justifiable manner, and no other

evidence which might mitigate the shooting occurring in the throes of this armed robbery, the trial court's instruction that malice can be inferred if one kills another during the commission of a felony continues to reflect a proper instruction on the law applicable to the jury's deliberations. *See State v. Wilds*, 355 S.C. 269, 276-77, 584 S.E.2d 138, 142 (Ct. App. 2003) (implied malice arises when circumstances demonstrate that a reasonably prudent man would have known there was a strong likelihood death would follow his actions).

B. <u>This implied malice instruction did not alter the State's burden of proof.</u>

A court may not issue jury instructions containing conclusive evidentiary presumptions. *Sandstrom v. Montana*, 442 U.S. 510, 523, 909 S.Ct. 2450, 2459 (1979). Conclusive presumptions violate the Due Process Clause of the Fourteenth Amendment by having the effect of relieving the State of its burden of proof as to every essential element of a crime. *Francis v. Franklin*, 471 U.S. 307, 313, 105 S. Ct. 1965, 1970 (1985), *modified by Boyde v. California*, 494 U.S. 370, 110 S. Ct. 1190 (1990). However, jury instructions which raise only a permissive inference do not suffer the same constitutional infirmity. *Id.* at 314, 105 S.Ct. at 1971.

"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." *Francis v. Franklin*, 471 U.S. at 314, 105 S. Ct. at 1971. "Jury instructions that explain the inevitable process of drawing reasonable inferences from the record evidence are entirely consistent with [*Sandstrom*] and, indeed, highly effective tools in equipping the jury for carrying out its assigned responsibilities." *Rock v. Zimmerman*, 959 F.2d 1237, 1245 (3d Cir. 1992) (citing *Yates v. Evatt*, 500 U.S. 391, 402 n.7, 111 S.Ct. 1884, 1892 n.7 (1991) (a

permissive inference is constitutional, so long as the inference it permits would not be irrational)). Therefore, when instructing the jury, "the judge should make clear to the jury that it is free to accept or reject the permissive inferences depending on its view of the evidence." *State v. Wilds*, 355 S.C. at 277, 584 S.E.2d at 142. "A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." *Francis v. Franklin*, 471 U.S. at 314-15, 105 S.Ct. at 1971.

This malice charge instructs the jury to consider any inference of malice only if raised to its satisfaction, and then only alongside the remainder of the evidence. (Tr. p. 380, line 12 – p. 381, line 5). After instructing the jury on the law pertaining to each of Appellant's three charges, the court charged that malice, an element of murder, may be "inferred from conduct showing a total disregard for human life" and that it "can be inferred if one kills another during the commission of a felony." (Tr. p. 380, lines 21-24). The court next instructed that 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 considered by you, along with all the other evidence in the case. And you give it the weight that you decide it should receive." (Tr. p. 380, line 24 – p. 381, line 5). The jury charge concluded at that point. (Tr. p. 381, lines 6-10). The charge therefore appropriately "make[s] it clear to the jury that it is free to accept or reject these permissive inferences depending on its view of the evidence." *State v. Peterson*, 287 S.C. at 247, 335 S.E.2d at 802; *accord Francis v. Franklin*, 471 U.S. at 314, 105 S.Ct. at 1971; *Sandstrom v. Montana*, 442 U.S. at 523, 909 S.Ct. at 2459. Accordingly, Appellant's assertion of *Sandstrom* error is not compatible with the malice instruction in this case.

C. <u>This implied malice instruction did not comment on the facts.</u>

In crafting a jury instruction, "judges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. art. V, § 21. As to the facts, the jury must deliberate separately on each indictment, *United States v. Lane*, 474 U.S. 438, 450, 106 S.Ct. 725, 732 (1986), and the State must prove each element of a crime beyond a reasonable doubt. *In Re Winship*, 397 U.S. 358, 361, 90 S.Ct. 1068, 1071 (1970).

The charge at issue permissibly constructed a manner in which members of the jury could deliberate upon the entirety of the facts in evidence and separately decide whether the State's presentation satisfied the elements of armed robbery, of possession of a weapon during the commission of a violent crimes, and of murder, each beyond a reasonable doubt. For the permissive inference instruction to even apply to its deliberations, the jury had to make a predicate finding that an armed robbery in fact occurred, an offense which the court defined only as a violent crime and not as a felony. (Tr. p. 377, line 14 – p. 378, line 25; Tr. p. 379, lines 10-20).

The instruction that "malice can be inferred if one kills another during the commission of a felony" does not comment on any particular fact presented at trial. It does not draw attention to any one piece of evidence. In this way, the instruction at issue again diverges from the pair of cases admonishing courts for instructing that "malice may be inferred from the use of a deadly weapon." *State v. Burdette*, 427 S.C. at 503, 832 S.E.2d at 582 ("jury instruction that malice may be inferred from the use of a deadly weapon is an improper court-sponsored emphasis of a fact in evidence"); *see State v. Belcher*, 385 S.C. 597, 602, 685 S.E.2d 802, 804 (2009). To charge a jury that malice may be inferred from the use of a deadly weapon more directly relates to the evidence that they have heard at trial—likely that the killing occurred by gunfire—than a jury

instruction that broadly references the entirety of the indictments before the jury's consideration.

Appellant's argument to the contrary is unavailing. In *Belcher*, the precursor to *Burdette*, our state Supreme Court declined to accept the defendant's argument that the instruction that malice may be inferred from the use of a deadly weapon violated the state constitutional prohibiting trial courts from commenting on the facts of the case. *State v. Belcher*, 385 S.C. at 602, 685 S.E.2d at 804. The *Belcher* court instead found the instruction "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. *Burdette* likewise decided the issue "solely under the common law" rather than as a violation of S.C. Const. art. V, § 21. 427 S.C. at 503, 832 S.E.2d at 582. Here, the instruction remains rooted in the common law rule of murder followed in South Carolina. *See State v. Norris*, 285 S.C. at 92, 328 S.E.2d at 343.

D. <u>Any error in the instruction is harmless given guilt conclusively established beyond a reasonable doubt.</u>

As noted in *Burdette*:

> "Errors, including erroneous jury instructions, are subject to harmless error analysis." *State v. 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, 144-5, 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). This is "a fact-intensive inquiry." *Id.* The Court "must review the facts the jury heard and weigh those facts against the erroneous jury charge to determine what effect, if any, it had on the verdict."

427 S.C. at 496, 832 S.E.2d at 578-79.

Beyond a reasonable doubt, the implied malice instruction did not contribute to the verdict obtained. The State presented ample evidence from which the jury could infer malice existed at the time of the shooting absent the commission of an armed robbery. "Murder is the killing of a person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10. "Malice is a legal term implying wickedness and excluding a just cause or excuse. The term malice indicates a formed purpose and design to do a wrongful act under the circumstances that exclude any legal right to do it." *State v. Fennell*, 340 S.C. 266, 275 n.2, 531 S.E.2d 512, 517 n.2 (2000). "It is something which springs from wickedness, from depravity, from a heart devoid of social duty and fatally bent on mischief." *Arnold v. State*, 309 S.C. 157, 163, 420 S.E.2d 834, 837 (1992). Appellant's jury was to decide whether malice, as an element of murder, existed at Appellant's pulling of the trigger. *Id.* Malice must exist at the time of the act producing the resulting death, and it need not exist for any appreciable length of time before that act's commission. *State v. Harvey,* 220 S.C. 506, 514-15, 68 S.E.2d 409, 412-13 (1951), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991).

As previously discussed, none of the evidence adduced at trial served to reduce, mitigate, excuse, or justify the shooting. *See State v. Smith*, 430 S.C. at 232-33, 845 S.E.2d at 498; *State v. Belcher*, 385 S.C. at 612, 685 S.E.2d at 810. Rather, the evidence established that the shooter raised his weapon, paused, and fired at the victim despite the victim's audible withdrawal. (Tr. p. 99, line 9 – p. 100, line 23). The female residents heard the victim announce "he was not going to fight them because his homeboy was going to shoot him." (Tr. p. 99, lines 6-11; Tr. p. 110, lines 3-5). The shooter also fired multiple times, (Tr. p. 101, lines 6-7), with the victim sustaining three separate gunshot wounds. (Tr. p. 121, lines 2-3). Then the perpetrators fled from the victim's apartment, (Tr. p. 111, lines 1-2), indicating consciousness of guilt. *See State v.*

Orozco, 392 S.C. 212, 220, 708 S.E.2d 227, 231 (noting evidence of "unexplained" flight "is admissible as indicating consciousness of guilt, for it is not to be supposed that one who is innocent and conscious of that fact would flee"), *overruled on other grounds by State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016). Since the perpetrators were masked, (Tr. p. 92, lines 8-12), the larger question before the jury's consideration was identity, not the wicked intent that accompanied the shots fired. *Compare State v. Smith*, 430 S.C. at 232-33, 845 S.E.2d at 498 (jury deliberating attempted murder charge "was faced with the choice of either believing Smith's story and finding he acted in self-defense or believing Smith had a self-admitted intent to kill that was *not* legally justified . . .").

Moreover, the State permissibly argued at closing that the facts and circumstances of the case warranted a finding that the shooting occurred with malice aforethought. (Tr. p. 349, lines 1-14). The *Burdette* Court expressly approved that "the State and the defendant are free to argue the existence or nonexistence of malice based on the evidence in the record," including any "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; *State v. Belcher*, 385 S.C. at 612 n.9, 685 S.E.2d at 810 n.9 ("we neither restrict the State from arguing to the jury for a finding of malice from the use of a deadly weapon, nor restrict a defendant from arguing the absence of malice or the presence of reasonable doubt in this regard").

By arguing to the jury that killing "somebody while committing the type of felony where death is a possible or foreseeable outcome, it's homicide[,] [i]t's murder," the State argued a correct statement of law in conjunction with the facts at hand. "Implied malice is when circumstances demonstrate a 'wanton or reckless disregard for human life' or 'a reasonably

prudent man would have known that according to common experience there was a plain and strong likelihood that death would follow the contemplated act.'" *State v. Wilds*, 355 S.C. at 276-77, 584 S.E.2d at 142 (quoting 40 C.J.S. *Homicide* § 34 (1991)). The State then went on to argue that malice could be inferred from the cadence of the gunshots depicted as muzzle flashes in the surveillance video at trial: there were four flashes with a pause of "about two seconds" between the third and the fourth. (Tr. p. 350, line 13 – p. 351, line 3). The State concluded: "If that's not malice – another term for malice is just meanness. And if that's not malice, then what is?" (Tr. p. 351, lines 17-20).

Where there is evidence of malice aside from the murder occurring during the commission of an armed robbery, the court should not find prejudice in the inclusion of the implied malice instruction. *Compare Gibson v. State*, 416 S.C. 260, 266, 786 S.E.2d 121, 124 (2016) (granting post-conviction relief where counsel failed to object to instruction that malice may be inferred from the use of a deadly weapon, and where "there was little evidence of malice aside from the use of a gun"). Given the totality of the jury instruction, of the evidence, and of the State's closing argument, any error in charging the jury that "malice can be inferred if one kills another during the commission of a felony" was harmless beyond a reasonable doubt, as it did not contribute to the verdict in this case.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully submits that this Court should affirm Appellant's convictions and sentence for murder, armed robbery, and for possession of a weapon during the commission of a violent crime.

Respectfully submitted,

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December 9, 2020
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Edward W. Miller, Circuit Court Judge

Appellate Case No. 2019-001548

THE STATE, Respondent,

vs.

NYQUAN TYKIE BROWN,

Appellant.

CERTIFICATE OF SERVICE

I, Brandy Rankin, as an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Initial Brief of Respondent and Designation of Matter, and Certificate of Service have been forwarded to Appellant's counsel, Lara M. Caudy, Esq., via email today, December 9, 2020 to lcaudy@sccid.sc.gov and to Ms. Caudy's assistant, Lindsey Matthews, lmatthews@sccid.sc.gov.

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

This 9th day of December, 2020.

Brandy Rankin

Brandy Rankin
Legal Assistant to Caroline Scrantom
Assistant Attorney General

Angela Bennett

From: Brandy Rankin
Sent: Wednesday, December 9, 2020 3:42 PM
To: 'lcaudy@sccid.sc.gov'; 'lmatthews@sccid.sc.gov'
Cc: Caroline Scrantom; Melody Brown; Trisha Allen
Subject: Brown, Nyquan Tykie, Appellant Case No. 2019-001548
Attachments: Brown, Nyquan Tykie, Appellate Case No. 2019-001548, Initial Brief of Respondent and Designation of Matter, 12-9-20 (02445124xD2C78).pdf

Dear Ms. Caudy,

Please find attached the Respondent's Initial Brief and Designation of Matter. These documents will be filed today with the South Carolina Court of Appeals along with a copy of this email. Thank you!

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