RECEIVED
Jan 19 2021
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Laurens County

Honorable Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DESHANNDON MARKELLE FRANKS,

APPELLANT

APPELLATE CASE NO. 2016-002244

APPENDIX

ROBERT M. DUDEK
Chief Appellate Defender

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

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

WILLIAM EDGAR SALTER
Senior Assistant Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201

ATTORNEYS FOR RESPONDENT

INDEX

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Deshanndon Markelle Franks, Appellant.

Appellate Case No. 2016-002244

Appeal From Laurens County
Frank R. Addy, Jr., Circuit Court Judge

Opinion No. 5758
Heard October 22, 2019 – Filed August 12, 2020

AFFIRMED

Chief Appellate Defender Robert Michael Dudek, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, and Senior Assistant Attorney General W. Edgar Salter, III, all of Columbia; and Solicitor David Matthew Stumbo, of Greenwood, for Respondent.

LOCKEMY, C.J.: On January 31, 2014, Atrayel Williams called 911 after she discovered the bodies of Nikesha James and Sammie Darryl Leake in the living room of James's mobile home. James had been shot in the chest, and Leake had been shot in the head and neck. Police later identified Deshanndon Markelle

Franks as a suspect, and he was indicted for and convicted of the murders of James and Leake.

Franks appeals his convictions and sentence of forty-five years' imprisonment for two counts of murder and possession of a weapon during the commission of a violent crime, arguing the trial court erred by (1) qualifying the State's witness as an expert and (2) instructing the jury it could infer malice from the use of a deadly weapon. We conclude the trial court did not abuse its discretion in qualifying the State's witness as an expert, and any error in the court's jury charge was harmless beyond a reasonable doubt. For these reasons, we affirm Franks's convictions.

FACTS

At the outset of his jury trial, Franks moved to suppress his Verizon Wireless cell phone records, which contained cell site location information (CSLI), arguing they were the product of a warrantless search.[1] The trial court denied Franks's motions.

Laquesha Currenton, Leake's cousin and a close friend of James's,[2] testified she last spoke to James around 11:00 p.m. or 12:00 a.m. on January 30. Williams, another of James's close friends, testified she last spoke to James around 9:00 p.m. on the 30th and could not reach her when she called around 10:30 a.m. the next morning. That afternoon, Williams and Currenton drove to James's home in Cross Hill, where they found the bodies of James and Leake, and Williams called 911.

Lavashtia Pulley testified she saw Franks and a man named Tevin Hill (Tevin) at a liquor house called "Wash" earlier on the evening of January 30. She recalled she spoke to Franks around 11:00 p.m. and he seemed "hyped" and "pumped, amped, whatever." Pulley testified she had "never seen him like that" before. She explained that while they were talking, Franks pulled out a few things from his coat, including a gun, which he said was "a Ruger." She described the gun as "black ashy kind of like." Pulley stated Franks wore a tan "overall suit," "[l]ike a hunting suit," that night. At trial, she identified a State's exhibit as the overalls she saw him wearing. Pulley stated she did not speak to Tevin or see him together

---

[1] Franks also moved to suppress a digital photograph obtained from his cell phone, a pair of brown overalls and an extended magazine found during a search of his home, and his written statement to law enforcement.

[2] Currenton noted that although others sometimes referred to Leake as James's uncle, they were not actually related.

with Franks. Pulley recalled she received a text message from Franks the next morning, but he did not mention the deaths of James or Leake.

Tamia Kinard, another friend of James's, testified she, her aunt, and her baby went to James's house around 8:00 p.m. on January 30, and Leake arrived sometime thereafter. Kinard explained her aunt left later in the evening, and Franks and Tevin came over to James's sometime afterwards. She estimated they arrived around 12:15 a.m. Kinard testified Franks had on a brown overall jumpsuit "like a hunting suit" that night and some type of red sweater over the jumpsuit. She recalled that when Franks arrived, he asked James "about something that she put on Facebook" and "asked her to come back in the bedroom to talk [to] him." Kinard stated they went into the bedroom and "had a discussion." She estimated they were in the bedroom for about ten or fifteen minutes and when they came out, "[t]hey w[ere] laughing and talking normal, like it wasn't a problem."

Around 1:00 a.m., Kinard asked Tevin to drive her home "because [Franks] was being loud" and her baby was asleep. When asked how Franks behaved that night, Kinard stated he was "hyper[, l]ike amp, you could say. He was just wild. Like he was talking loud[, h]e was jumping around like. He just wasn't acting normal." She stated that when she and Tevin left, Franks, James, and Leake were still present at James's home.

Kinard explained Tevin's route took them behind her uncle's, Milton Grant's, mobile home. Grant testified he lived about three houses down from James on John Grant Street. Grant recalled that that around 1:00 a.m., he was awakened by headlights shining through his bedroom window. He stated he could not fall back asleep, and around 3:00 a.m., he heard gunshots that sounded like they came from very close. Grant testified he jumped up and went to the window and saw someone come out of James's front door. He saw the person walk down the front steps, walk back up, turn the porch light off, close the door, and then continue walking up and down the steps before eventually disappearing. Grant stated the person "had something brown on."

Tevin testified that in January 2014, he lived at his grandmother's house on John Grant Street in Cross Hill. He stated that on the night of January 30, he met up with Franks around 8:00 p.m., and they went to "a liquor house" called "the Wash" or "Washes," where they stayed for about three hours. He remembered seeing Pulley there, and he assumed she and Franks talked because he saw them walk outside together. Tevin testified Franks was wearing brown overalls that night and identified a State's exhibit as the same overalls he saw Franks wearing. He stated that around midnight he and Franks left and went to James's, which was "where

everybody used to hangout." Tevin recalled that when they arrived, Franks was acting "kind of like loud. Kind of amp like." Tevin testified James, Leake, Kinard, and Kinard's baby were at James's when they arrived. He recalled Franks and James "went to the back of the house" to talk that night but he could not hear their discussion.

Tevin stated he drove Kinard home a short while later and Franks, James, and Leake all stayed behind. Tevin recalled he drove past Grant's home with his bright headlights on, which shined on Grant's home. He stated he arrived home around 2:00 or 3:00 a.m. after dropping Kinard off and sometime after that, Franks called and told him to come outside. Tevin explained he went outside and saw Franks walking up the road, away from James's house. Tevin stated Franks was "shaky" and "not normal" and said "stuff went bad." He testified Franks then asked him for a ride, stating he "had some females up the road like in Greenville" but once they neared Fountain Inn, Franks told Tevin to drive him to Rodrigus Scurry's house. Tevin testified they stayed at Scurry's until about 8:00 a.m. and then went back to Cross Hill. He recalled that during the car ride back, Franks said "we got to get the guns out the house or something," but Tevin did not know what he was talking about. Tevin stated he went home after dropping Franks off at his grandmother's home and a short time later, he heard police arrive at James's house. He received a call from his cousin, Deputy Rakeisha Hill, who asked him to come to the scene and bring Franks. He explained Franks "act[ed] like he didn't want to go" and then told Tevin what to tell the police. Tevin testified Franks told him to say Franks got in the car after he dropped Kinard off and then they drove to Greenville. Tevin explained he wrote this in his first statement to police, but it was a lie. He denied seeing Franks with a gun that night but stated he had seen him with a gun before that looked like the gun in the photo on Franks's phone. Tevin acknowledged he was also charged with murder and the State agreed to drop the murder charges if he cooperated in the disposition of Franks's case.

Scurry testified Franks called him around 3:00 a.m. on January 31 and said he was on his way home from Greenville but could not make it home because he had been drinking. He stated Franks called again around 4:00 a.m. when he and Tevin arrived. Scurry testified he showed them where to sleep and went back to bed. He stated Franks contacted him the next day and asked if he had talked to the police.

Officer Bryant Cheek testified he responded to the scene on January 31. He noted he encountered Tevin, who was nearby, on his way to the scene. Officer Cheek explained he recognized Tevin from coaching basketball and spoke to him briefly before proceeding to the scene. Upon arriving at the scene, Officer Cheek

interviewed bystanders who had gathered there. He stated Franks was asked to come to the scene after law enforcement learned he was at James's home the night of the shooting. Officer Cheek questioned Franks and took his statement. The trial court admitted the statement into evidence over Franks's objection. Franks stated he was at James's the night before with Kinard, Tevin, James, and Leake. Franks stated that after Tevin left to take Kinard home, he stayed and talked to James and Leake until he called Tevin. According to Franks, Tevin then picked him up "at the top of the driveway" and they drove to Greenville. Franks stated he "[c]alled a girl he was going to see" but when she did not answer, he called Scurry and spent the night at Scurry's in Fountain Inn.

Franks and Tevin turned over their phones to law enforcement, who obtained search warrants to extract the data from the phones. A digital photo of a handgun was retrieved from Franks's phone. Law enforcement also obtained Franks's cell phone records from Verizon Wireless and searched his grandmother's home, where they found a pair of brown overalls, a backpack, and an elongated magazine for a firearm. The trial court admitted this evidence over Franks's renewed objections.

A crime scene investigator with the South Carolina Law Enforcement Division (SLED) testified she observed indications that a struggle had occurred in the home, including a rug that was folded over on itself, coffee mugs and picture frames on floor, and couch cushions that were off the couch. Officers swabbed several surfaces for DNA and collected projectiles, fragments of projectiles, a drug pipe, and cartridge casings from the scene. Two of these cartridge casings were admitted into evidence, but no firearms were found. SLED analysts tested the DNA evidence collected at the scene but were unable to identify any DNA profiles other than those matching the victims' DNA. Franks's overalls were tested for gunshot residue, but none was found.

The forensic pathologist who conducted the victims' autopsies explained James suffered a gunshot to the chest, angled downward sharply, and Leake suffered gunshots to the head and neck, both angled upwards. He determined homicide to be the manner of death as to both victims because the wounds could not have been self-inflicted. The forensic pathologist recovered a projectile from James's back and discovered a deformed projectile loose in Leake's clothing as well as some fragments in the body bag.

Ira Parnell, formerly of SLED, testified as an expert in firearm and tool mark identification. Parnell examined the projectiles recovered from James's body and Leake's clothing, as well as two fired projectiles collected from the scene. He

opined all four fired bullets were fired by the same firearm and were 9 millimeter Ruger caliber bullets. Parnell testified Ruger was one of about eighty possible manufacturers that might have made a weapon that could have fired those bullets. He identified the magazine recovered from Franks's backpack as an "extended high capacity magazine which appeared to be consistent with a 9 millimeter caliber" and opined it would "very possibly" be compatible with a Ruger 9 millimeter. Parnell also concluded the handgun in the digital photo retrieved from Franks's phone appeared to be a 9 millimeter Ruger.

Sergeant Dan Kelley, of the Greenville County Sheriff's Office, testified he had twenty-seven years of law enforcement experience. He explained he reviewed phone records as part of his job. Sergeant Kelley testified that when his office received phone records, the data was in "huge voluminous amount[s]" and took "weeks [or] months to sort through." He stated his office began using a software called GeoTime to "help speed things up." Sergeant Kelley testified GeoTime worked in conjunction with another program called a "call records tool" to sort the data into an easy-to-see format. He stated he had worked with cell phone technology and records for about fifteen years, with GeoTime for three to four years, and had used GeoTime in about fifty cases. Additionally, he stated he watched several of GeoTime's seminars. The State offered Sergeant Kelley as "an expert witness in the use of GeoTime software and call records translation tools."

During voir dire, Franks questioned Sergeant Kelley about the GeoTime software. He testified it was a PC-based software but was uncertain if it was "certified" by Microsoft; however, he noted he most commonly received cell phone records in Excel format. In describing how GeoTime functioned, Sergeant Kelley explained, "It's a basic function that when you bring the data in[,] it sorts it so that you can see it." He stated GeoTime was "widely used" in the law enforcement field and was "rapidly [becoming] the industry standard." In questioning Sergeant Kelley, Franks stated, "I will assume you're very good at the use of GeoTime. But . . . are you able to testify as to the algorithms, the functioning, how it works as far as the reliability of the software?" Sergeant Kelley stated he could testify regarding the use of the software and the data it translated but not the algorithms it used. When questioned whether he had done any testing to "manually calculate and verify GeoTime data," he explained the data in phone records included latitude and longitude coordinates and he had used the wireless provider's mapping system,

"Esri's" mapping system,[3] and Google "to see where the points would line up with the data . . . and the points were accurate." Sergeant Kelley explained he performed this "cross-checking" on "just about every case," and in this case, he used Google to verify the points were the same. He stated GeoTime consolidated the information received from the phone company to show only the necessary data, which it placed into a visual format. Sergeant Kelley explained the records normally included the latitude and longitude of each call, the caller number, the calling party's number, text numbers, and phone numbers. He testified the data he relied on was billing data that contained location data as to "where the handset [wa]s at the time the call was made." Sergeant Kelley stated this "real time transmission" data was also referred to as "ping" data and it refers to the signal that goes out from a handset at the time a phone call is initiated, "hits the tower," and is received back to the handset. He stated this "ping" showed the phone company's "best estimate" of where the handset was at the time it communicated with the tower. Although he averred that the billing data was "very accurate," he acknowledged the precise accuracy of the towers and data was "for an expert from Verizon to testify to."

Franks objected, arguing the data contained in the Verizon records was unreliable. He stated, "[M]y argument is not so much with GeoTime. It is with the data [that is fed] into GeoTime." Franks argued that if no expert from Verizon testified as to the accuracy of the data, there was no way to determine its reliability.

The trial court noted the records were already in evidence and explained that its gatekeeping function in a Rule 702, SCRE, reliability analysis was to determine whether the methodology, in this case, GeoTime, was a reliable and trusted method of obtaining relevant data or information. However, the court found Franks's objection concerned "the data provided from the phone company," which was "completely separate" and the court noted Franks only objected to the admission of the underlying data on search warrant grounds and not reliability grounds. The trial court noted Franks did not contest the underlying reliability of GeoTime, and it then allowed Sergeant Kelley to testify as an expert in the use of GeoTime and other call record translation tools.

Sergeant Kelley testified that when he received Franks's call records data from Verizon, he placed the data into the call records translation tool along with the "cell

---

[3] Sergeant Kelley stated Esri was "the recognized industry leader." Esri is a company that builds geographic information system (GIS) mapping and analytics software.

tower file," which showed all of the cell towers that "were in play" when the phone was used and thus provided "geolocation" information for the cellphone. He explained that the information was merged in the call records translation tool, the phone call data was matched with the cell tower data, and entered into GeoTime. He stated GeoTime then plotted the exact points from the data onto a map in date and time order and created a visualization showing where the handset was "in relation to space and time." These visualizations were admitted into evidence without objection. Sergeant Kelley testified these showed three calls made at different times, all in different locations, and nothing in that information indicated the handset was ever in Greenville during that time. He stated that on January 31, 2014, the information placed the handset on John Grant Street in Cross Hill at 2:53:52 a.m., again in the Cross Hill area at 3:06 a.m., and in Fountain Inn at 4:04:43 a.m. On cross-examination, Sergeant Kelley acknowledged he could not state the accuracy of the pinpoint down to the foot, and it was only Verizon's best estimate of where the handset was at the time.

The State rested, and Franks renewed all prior motions and objections, which the trial court denied. The State then delivered its closing argument, and before Franks made his closing argument, the trial court held an off-the-record sidebar discussion with counsel. Thereafter, the trial court informed the parties it intended to add the "inference of malice language from the use of a deadly weapon" to its jury instruction concerning malice. The trial court reasoned that under its reading of *Belcher*,[4] the instruction "would be appropriate in this case" because no evidence was presented that tended to reduce the homicide from murder to voluntary or involuntary homicide. The court noted, "I do understand [Franks's] objection to that that he made at sidebar. Despite that objection, the [c]ourt has included that language." Franks then proceeded with his closing argument, and the trial court charged the jury. The court's instruction included the following:

> [T]he [d]efendant is charged with two counts of murder. The State must prove beyond a reasonable doubt that the [d]efendant killed another person with malice aforethought. If facts are proven beyond a reasonable doubt sufficient to raise an inference of malice and to your satisfaction, this inference would simply be an evidentiary fact to be considered by you along with the

[4] *State v. Belcher*, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009), *overruled in part by State v. Burdette*, 427 S.C. 490, 504-05, 832 S.E.2d 575, 583 (2019).

> other evidence in this case and you may give it the weight you think it should receive.
>
> I instruct you . . . that malice is defined as hatred, ill-will or hostility toward another person. It[i]s the intentional doing of a wrongful act without just cause or excuse, and with an intent to inflict injury, or under circumstances the law will infer an evil intent. Malice aforethought does not require that malice exists for any particular time before the act is committed, but malice must exist in the mind of the [d]efendant just before and at the time the act is committed. Therefore, there must be a combination of the previous evil intent and the act.
>
> I instruct you that malice aforethought may be express or inferred. These terms expressed and inferred do not mean different kinds of malice, but merely the manner by which malice may be shown to exist. That[i]s either by direct evidence or by inference from the facts and circumstances—circumstances which are proven. Expressed malice is shown when a person speaks words which express hatred or ill-will to another person, or when the person prepare [sic] beforehand to do the act that was later accomplished. For example, laying in w[ai]t for a person or any other acts in preparation going to show that the deed was within the [d]efendant's mind with the expressed malice.
>
> Malice may also be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon. . . . The following are examples of instruments . . . which may be deadly weapons[:] . . . [a] pistol, shotgun, [or] rifle.

Thereafter, Franks again noted his "objection to the malice." The trial court adhered to its earlier ruling. After about seven hours of deliberation over the course of two days, the jury found Franks guilty of both murders and the weapons charge. The trial court sentenced him to concurrent terms of forty-five years'

imprisonment for each of the murder charges and five years' imprisonment on the weapons charge. This appeal followed.

ISSUES ON APPEAL

1. Did the trial court abuse its discretion by qualifying Sergeant Kelley as an expert pursuant to Rule 702, SCRE, to testify regarding location data associated with Franks's cell phone?

2. Did the trial court err by instructing the jury "inferred malice may arise when the deed is done with a deadly weapon"?

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "This [c]ourt is bound by the trial court's factual findings unless they are clearly erroneous." *Id.*

LAW/ANALYSIS

I. Expert Witness

Franks argues the trial court abused its discretion by allowing Sergeant Kelley to testify as an expert witness because it failed to determine he was qualified in the particular area or that the testimony was reliable. Franks contends that pursuant to *State v. White*,[5] *Watson v. Ford Motor Co.*,[6] and *State v. Council*,[7] the CSLI evidence and opinion testimony was inadmissible through Sergeant Kelley because the underlying evidence was unreliable. He asserts the testimony prejudiced him

---

[5] 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009) (holding trial courts have a gatekeeping role pursuant to Rule 702, SCRE, and the court must assess the threshold foundational requirements of qualifications and reliability before admitting expert testimony).

[6] 389 S.C. 434, 446-47 699 S.E.2d 169, 175 (2010) ("[O]nly after the trial court has found that expert testimony is necessary . . . , the expert is qualified in the particular area, and the testimony is reliable, may the trial court admit the evidence and permit the jury to assign it such weight as it deems appropriate.").

[7] 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999) (setting forth four factors the trial court should consider in admitting scientific evidence under Rule 702, SCRE).

because it allowed the State to argue the records corroborated Tevin's "otherwise questionable testimony." We disagree.

"The qualification of an expert witness and the admissibility of the expert's testimony are matters within the trial court's sound discretion." *State v. Chavis*, 412 S.C. 101, 106, 771 S.E.2d 336, 338 (2015). We will not reverse the trial court's decision to admit expert testimony "absent a prejudicial abuse of discretion." *White*, 382 S.C. at 269, 676 S.E.2d at 686. "An abuse of discretion occurs when the conclusions of the circuit court are either controlled by an error of law or are based on unsupported factual conclusions." *Chavis*, 412 S.C. at 106, 771 S.E.2d at 338. "Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict." *State v. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011).

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE. As part of its gatekeeping duties pursuant to Rule 702, "the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter." *Watson*, 389 S.C. at 446, 699 S.E.2d at 175. The trial court must then "evaluate the substance of the testimony and determine whether it is reliable." *Id.* "Reliability is a central feature of Rule 702 admissibility . . . ." *White*, 382 S.C. at 270, 676 S.E.2d at 686.

> [Our supreme court has] listed several factors that the trial court should consider when determining whether scientific expert evidence is reliable:
>
> (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures.

Watson, 389 S.C. at 449-50, 699 S.E.2d at 177 (footnote omitted) (quoting *Council*, 335 S.C. at 17, 515 S.E.2d at 517); *see also id.* at 450 n.3, 699 S.E.2d at 177 n.3 (noting "[t]he test for reliability [of] expert testimony does not lend itself to a one-size-fits-all approach" but reasoning that when an expert's testimony was

based on "scientific principles and theories," the *Council* factors were "applicable and relevant to the reliability determination").

> Courts are often presented with challenges on both fronts[:]qualifications and reliability. The party offering [an] expert must establish that his witness has the necessary qualifications in terms of "knowledge, skill, experience, training or education." Rule 702, SCRE. With respect to *qualifications*, a witness may satisfy the Rule 702 threshold yet the opponent may still challenge the amount or quality of the qualifications. It is in this latter context that the trial court properly concludes that "defects in the amount and quality of education or experience go to the weight to be accorded the expert's testimony and not its admissibility." *State v. Myers*, 301 S.C. 251, 256, 391 S.E.2d 551, 554 (1990). Turning to the reliability factor, a trial court may ultimately take the same approach, *but only after making a threshold determination for purposes of admissibility*.

White, 382 S.C. at 273-74, 676 S.E.2d at 688 (emphases added).

"To be competent to testify as an expert, 'a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.'" *Gooding*, 326 S.C. at 252-53, 487 S.E.2d at 598 (quoting *O'Tuel v. Villani*, 318 S.C. 24, 28, 455 S.E.2d 698, 701 (Ct. App. 1995), *overruled on other grounds by I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000)); *see also Fields*, 376 S.C. at 555, 658 S.E.2d at 85 ("A person may be qualified as an expert based upon 'knowledge, skill, experience, training, or education.'" (quoting Rule 702, SCRE)). "The test for qualification of an expert is a relative one that is dependent on the particular witness's reference to the subject." *Maybank*, 416 S.C. at 567, 787 S.E.2d at 511 (quoting *Wilson v. Rivers*, 357 S.C. 447, 452, 593 S.E.2d 603, 605 (2004)).

We conclude the trial court did not abuse its discretion in finding Sergeant Kelley was qualified to testify as an expert in the use of GeoTime and other call records translation tools. First, the evidence shows he was qualified to testify about the applicable subject matter: GeoTime and call records translations. Sergeant Kelley testified he had fifteen years' experience working with call records and cell phone

technology, observed several seminars about GeoTime, and used GeoTime in approximately fifty cases over the course of three or four years. This testimony supports the trial court's conclusion that Sergeant Kelley had the relevant experience, training, and skill to testify concerning GeoTime and other call records translation tools. *See Fields*, 376 S.C. at 555, 658 S.E.2d at 85 ("A person may be qualified as an expert based upon 'knowledge, skill, experience, training, or education.'" (quoting Rule 702, SCRE)).

Second, we find the trial court did not abuse its discretion in finding the substance of his testimony reliable over Franks's objection to the reliability of the underlying data. Here, Franks's argument at trial and on appeal concerns the reliability not of GeoTime, but of the underlying data. However, he did not object to the data on this basis during the suppression hearing or at the time the Verizon call records were introduced into evidence. Rather, his only objection to the records was based on his argument they were unlawfully obtained without a warrant, a ruling he does not challenge on appeal. Because the underlying data—the Verizon records—had already been admitted into evidence when the State offered Sergeant Kelley as an expert, Franks waived his challenge to the reliability of the data by failing to object at the time the State introduced the data. *See State v. Simpson*, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996) ("Unless an objection is made at the time the evidence is offered and a final ruling made, the issue is not preserved for review."); *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) ("[T]o preserve for review an alleged error in admitting evidence an objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge."); *id.* ("Furthermore, a party may not argue one ground at trial and an alternate ground on appeal."). Therefore, we find Franks's objection to the reliability of the underlying data is unpreserved.

Even assuming the issue is preserved, the trial court did not abuse its discretion by finding the substance of the testimony was reliable. Sergeant Kelley explained the records normally included the latitude and longitude of each call, the caller number, the calling party's number, text numbers, and phone numbers. Although he could not testify to the precise accuracy of the location data down to the foot, he testified it was Verizon's best estimate of where the handset was at the time. Sergeant Kelley testified about his use of the GeoTime software to sort the information contained within the Verizon records, which included CSLI, and then display that information in a map format. We find the foregoing supports the trial court's finding the substance of the testimony was sufficiently reliable.

Further, as to any objection to the reliability of CSLI methodology, we find no error in the trial court's decision to admit the testimony. In reaching this conclusion, we emphasize this court recently "join[ed] the many other jurisdictions that have deemed CSLI reliable enough to pass the Rule 702 gate." *State v. Warner*, 430 S.C. 76, 89, 842 S.E.2d 361, 367 (Ct. App. 2020), *petition for cert. filed*, No. 2020-000930 (S.C. Sup. Ct. July 20, 2020). Here, Sergeant Kelley described the general science of geolocation based on CSLI. He explained that at the time a phone call is initiated, the cellular signal from the handset "hits the tower" is received back to the handset and then demonstrates the wireless provider's best estimate as to where the handset was at the time it communicated with the tower. Based on the foregoing, we find the trial court did not err by finding Sergeant Kelley's testimony concerning CSLI evidence and methodology was reliable. We therefore find the trial court did not abuse its discretion by admitting Sergeant Kelley's expert testimony.[8]

II. Jury Instruction

Franks argues the trial court erred by instructing the jury it could infer malice from the use of a deadly weapon because evidence was presented that would reduce, mitigate, excuse, or justify the homicide. He asserts the instruction could not have been harmless because the State presented no evidence of motive, the evidence as to the identity of the shooter was purely circumstantial, and the jury deliberated for two days before reaching a verdict. In addition, he contends the record contained evidence that a third party was the shooter. We agree but find the error was harmless.

The State first argues Franks failed to preserve this issue for appellate review. It next argues that pursuant to *Belcher*,[9] the instruction was not erroneous because no

---

[8] We need not reach the issue of prejudice because we have found no error. Nevertheless, we question whether Sergeant Kelley's testimony prejudiced Franks because it showed where he *was not* as opposed to where he was. In other words, it was not used to place him at the crime scene but to show he never travelled to Greenville after he left James's residence. Further, it was cumulative to Tevin's testimony that he drove Franks to Fountain Inn and not to Greenville. *See State v. Johnson*, 298 S.C. 496, 499, 381 S.E.2d 732, 733 (1989) ("The admission of improper evidence is harmless whe[n] it is merely cumulative to other evidence.").

[9] 385 S.C. at 612, 685 S.E.2d at 810 (holding "whe[n] evidence is presented that would reduce, mitigate, excuse or justify a homicide . . . caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the

evidence was presented that would "'reduce, mitigate, excuse, or justify a homicide' committed by use of a deadly weapon."

Recently, in *Burdette*, our supreme court extended *Belcher* and 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." 427 S.C. at 504-05, 832 S.E.2d at 583 (emphasis added). The court explained,

> When the trial court tells the jury it may use evidence of the use of a deadly weapon to establish the existence of malice, a critical element of the charge of murder, the trial court has directly commented upon facts in evidence, elevated those facts, and emphasized them to the jury.

Id. at 502, 832 S.E.2d at 582. Thus, the court concluded an "instruction that malice may be inferred from the use of a deadly weapon is an improper court-sponsored emphasis of a fact in evidence—that the deed was done with a deadly weapon—and it should no longer be permitted." *Id.* at 503, 832 S.E.2d at 582. The court stated this ruling was to be effective in those cases pending on direct review "so long as the issue is preserved." *Id.* at 505, 832 S.E.2d at 583.

To preserve an issue for appellate review, "[t]he issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) (quoting Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002)). "An objection made during an off-the-record conference which is not made part of the record does not preserve the question for review." *York v. Conway Ford, Inc.*, 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997). "Generally, this [c]ourt will not consider issues not raised to or ruled upon by the trial [court]." *State v. Williams*, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991). Exact phrasing of the relevant legal doctrine is not necessary to preserve an issue when "it is clear from the argument presented in the record that the motion was made on this ground." *State v. Russell*, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001).

---

use of a deadly weapon" and clarifying "[t]he permissive inference charge concerning the use of a deadly weapon remains a correct statement of the law whe[n] the only issue presented to the jury is whether the defendant has committed murder"), *overruled in part by Burdette*, 427 S.C. at 504-05, 832 S.E.2d at 583.

The *Burdette* opinion was not filed until after the parties here filed their briefs. In advance of oral argument, this court requested the parties file memoranda addressing its impact on this appeal. Franks argued that pursuant to the holding in *Burdette*, the instruction was erroneous regardless of whether there was any evidence to reduce, mitigate, excuse, or justify the homicide. The State reiterated its preservation argument and argued any error was harmless. We find Franks preserved the issue for appellate review. Franks objected during an off-the-record sidebar after which the trial court acknowledged his objection but stated it would include the inference of malice language in its charge. The trial court referenced *Belcher* and reasoned the inference of malice instruction was appropriate "because there[wa]s no evidence tending to reduce the homicide to a voluntary or an involuntary homicide." After the trial court charged the jury, Franks renewed his objection "to the malice," which the court again overruled, referencing its earlier ruling. The State acknowledged Franks objected to the inferred malice instruction "for the reasons . . . [he gave] at the unrecorded sidebar." We find Franks timely objected and the trial court ruled on the objection. Although Franks did not place his specific grounds for objection on the record, we can infer from the trial court's ruling that Franks argued that pursuant to *Belcher* an inferred malice charge was improper when evidence is presented that would tend to reduce, mitigate, justify, or excuse the homicide. This is the same argument Franks raised on appeal. Further, we acknowledge the record does not show Franks argued that the charge would be inappropriate regardless of the evidence. However, because we find Franks objected to the instruction based on *Belcher*, and *Burdette* subsequently extended *Belcher*, we find it was sufficient that Franks objected to the malice instruction and the court ruled on the objection. *See Johnson v. Roberts*, 422 S.C. 406, 412, 812 S.E.2d 207, 210 (Ct. App. 2018) ("It cannot be said that [the a]ppellant's arguments are clearly preserved. But in light of the foregoing, it also cannot be said that Johnson's arguments are clearly unpreserved. In these situations, 'whe[n] the question of issue preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation.'" (quoting *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 333, 730 S.E.2d, 282, 287 (2012) (Toal, C.J., concurring in part and dissenting in part))), *aff'd*, 427 S.C. 258, 830 S.E.2d 910 (2019). We therefore reach the merits of Franks's argument.

Pursuant to *Burdette*, we find the trial court erred by instructing the jury that it could infer malice from the use of a deadly weapon. *See Burdette*, 427 S.C. at 504-05, 832 S.E.2d at 583. Nevertheless, under the circumstances of this case, we find the error was harmless beyond a reasonable doubt.

"[E]rroneous jury instructions[] are subject to harmless error analysis." *Burdette*, 427 S.C. at 496, 832 S.E.2d at 578 (quoting *Belcher*, 385 S.C. at 611, 685 S.E.2d at 809); *see also State v. Brooks*, 428 S.C. 618, 627, 837 S.E.2d 236, 241 (Ct. App. 2019) ("Most trial errors, even those [that] violate a defendant's constitutional rights, are subject to harmless-error analysis." (alteration in original) (quoting *State v. Rivera*, 402 S.C. 225, 246, 741 S.E.2d 694, 705 (2013))). "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)). Further, to determine whether an error in giving the instruction was harmless, we must consider the jury charge as a whole. *Burdette*, 427 S.C. at 498, 832 S.E.2d at 580. "We 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." *Kerr*, 330 S.C. at 145, 498 S.E.2d at 218. "[O]ur 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.* "[W]hether or not the error was harmless is a fact-intensive inquiry." *Middleton*, 407 S.C. at 317, 755 S.E.2d at 435.

Considering 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 Kerr*, 330 S.C. at 144-45, 498 S.E.2d at 218 ("[T]o find the error harmless, we must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict."). Here, the record contains no evidence the erroneous instruction confused or misled the jury. Aside from the instruction challenged on appeal, the trial court charged the jury that malice was the "intentional doing of a wrongful act without just cause or excuse[] and with an intent to inflict an injury" and that malice could be inferred from conduct showing a total disregard for human life. The trial court did not charge any lesser-included offenses and the record contains no evidence that would tend to reduce, mitigate, excuse, or justify the homicide. Therefore, notwithstanding this was a circumstantial evidence case, no conflicting evidence concerning the shooter's intent was presented. Furthermore, the jury submitted three questions to the trial court during deliberations and none of these concerned malice. Although we are mindful that the instruction is now improper regardless of the evidence presented at trial, as Franks points out, his defense focused on discrediting the State's theory that he was the shooter and suggesting a third, unknown person may have committed the act. However, the trial court did not allow Franks to present evidence of third-party

guilt at trial, and Franks did not appeal that ruling. We acknowledge malice is an element of murder, meaning the State has the burden of proving that element beyond a reasonable doubt. Nevertheless, because the pivotal question before the jury in this case was whether Franks was the shooter and no evidence was presented tending to reduce, mitigate, excuse, or justify the homicide, the instruction was not misleading or confusing. Accordingly, we find, beyond a reasonable doubt, the erroneous instruction did not contribute to the verdict and does not require reversal.

Further, notwithstanding no evidence of an actual motive was presented and the evidence against Franks was circumstantial, there was overwhelming evidence of malice apart from the mere use of a deadly weapon. The victims were shot while they were inside of their home, the crime scene investigator testified the appearance of the room where they were found suggested a struggle had taken place, and there was no evidence either victim had been armed. Several witnesses testified concerning Franks's state of mind on the night of the shootings. Pulley, Tevin, and Kinard all testified he was "loud" and "hyped" or "amped." Kinard recalled Franks confronting James earlier that night about something James had posted on social media, although according to Kinard, the tension appeared to have resolved a short time later. According to Tevin and Kinard, Franks was the only person who stayed behind with James and Leake, and Tevin testified that when Franks found him later that night, Franks said "stuff went bad." Tevin stated Franks then asked him to drive him to Greenville, but while they were on the way, Franks asked him to go to Scurry's house in Fountain Inn instead. He recalled that during the car ride back the next morning, Franks said, "[w]e got to get the guns out the house." Tevin explained Franks told him to lie to police by telling them that after he dropped Kinard off, he picked up Franks and they drove to Greenville. Based on the foregoing, we find the evidence of malice was overwhelming such that the erroneous inference of malice instruction was harmless beyond a reasonable doubt.

CONCLUSION

Based on the foregoing, we conclude the trial court did not abuse its discretion by admitting Sergeant Kelley's expert testimony and the erroneous jury instruction was harmless beyond a reasonable doubt. Therefore, Franks's convictions are

AFFIRMED.

KONDUROS and HILL, JJ., concur.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

DESHANNDON MARKELLE FRANKS,

PETITIONER.

APPELLATE CASE NO. 2016-002244

Appeal from Laurens County

Honorable Frank R. Addy, Circuit Court Judge

Opinion No. 5758

PETITION FOR REHEARING

Pursuant to Rule 221 (a), SCACR, petitioner requests that this Court grant rehearing because it may have overlooked the fact that its harmless error analysis on the erroneous inference of malice instruction regarding the use of a deadly weapon was unconstitutionally defective because it was burden shifting to petitioner to show that a defense or a lesser-included offense was viable in this case before this Court would find the jury instruction error was not harmless.

The opinion in this case merely shifts the State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) gatekeeping function on the presence of a lesser included offense or other "mitigating

factor" being the reason *not to give the inference of malice from the use of a deadly weapon jury instruction* to a reason to find the erroneous inference of malice jury charge harmless if the defendant cannot prove such evidence of a lesser-included offense or "other mitigating factor" was present in the case.

Our Supreme Court recently held in State v. Burdette, 427 S.C. 490. 503, 832 S.E.2d 575, 582 (2019), that "[r]egardless 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." Petitioner is obviously entitled to the benefit of Burdette while this direct appeal is still pending. See, Griffith v. Kentucky, 479 U.S. 314, 328 (1987).

Yet, this Court's harmless error analysis renders the Burdette instruction error meaningless unless petitioner can demonstrate to this Court that the improper inference of malice instruction would have been improper under Belcher because there was evidence that would "reduce, mitigate, excuse or justify the homicide." This Court reasoned in this case that the error was harmless, inter alia, because "the trial court did not charge any lesser-included offenses and the record contains no evidence that would tend to reduce, mitigate, excuse or justify the homicide. Therefore, notwithstanding this was a circumstantial evidence case, no conflicting evidence of the shooter's intent was presented." State v. Franks, Op. No. 5758, 2020 WL 4660717, Shearouse's Adv. Sh. #31, at 82, 2020 (August 12, 2020).

This was burden shifting to petitioner to show why the error was not harmless. However, due process protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he is charged. In re Winship, 397 U.S. 358 (1970); Jackson v. Virginia, 443 U.S. 307 (1979). As our Supreme Court explained in Burdette, its holding was based on the constitutional requirement that the state bears the burden

of proving each element of an offense beyond a reasonable doubt. Burdette, 427 S.C. at 502, 832 S.E.2d 582 ("[W]hen the trial court tells the jury it may use evidence of the use of a deadly weapon *to establish the existence of malice*, a critical element of the charge of murder, the trial court *has directly commented upon facts* in evidence, elevated those facts, and emphasized them to the jury."). (emphasis added).

The burden shifting problems with this Court's harmless error analysis in this case, respectfully, did not end there. This Court also wrote, "Aside from the instruction challenged on appeal, the trial court charged the jury that malice was the 'intentional doing of a wrongful act without just cause or excuse...and with an intent to inflict an injury' and that malice could be inferred from conduct showing a total disregard for human life." State v. Franks, Op. No. 5758, Shearouse's Adv. Sh. #31 at 82 (Filed August 12, 2020). Petitioner is also called upon to disprove this definition of malice by pointing to certain evidence.

As petitioner has consistently argued, there was no evidence of a motive offered for the crime in this case. While petitioner understands the state does not have to prove motive, a burden cannot be placed upon petitioner to show that the homicide did involve just cause or excuse and that it was not the result of a total disregard for human life. It was unconstitutional to place such a burden upon this petitioner.

This Court also wrote that petitioner's defense focused on discrediting the state's theory that he was the shooter "and suggesting a third, unknown person may have committed the act. However, the trial court did not allow Franks to present evidence of third-party guilt at trial, and Franks did not appeal that ruling." State v. Franks, Op. No. 5758, Shearouse's Adv. Sh. #31 at 82 (Filed August 12, 2020).

Again, petitioner did not bear the burden of proving that a third party committed the murder. Under State v. Gregory, 198 S.C. 98, 104, 16 S.E.2d 532, 534 (1941), evidence of third-party guilt is limited "to such facts as are inconsistent with [the defendant's] own guilt and such facts as raise a reasonable inference or presumption as to his own innocence." While there was no evidence of a motive for petitioner to commit this murder, to put the burden upon petitioner to prove his innocence by showing a third party committed the murder was once again unconstitutional burden shifting. It also, respectfully, should not be suggested that this case would have been reversed had petitioner raised the issue of third-party guilt under the surviving onerous State v. Gregory standard. See Holmes v. South Carolina, 547 U.S. 319, 328 (2006) (approving the State v. Gregory standard and abrogating State v. Gay, 343 S.C. 543, 541 S.E.2d 541 (2001)).

Finally, even if putting the burden on petitioner to show there was evidence, which would "reduce, mitigate, excuse, or justify the homicide" was not an unconstitutional burden shifting harmless error standard, there, nonetheless, was evidence in this case, which would "reduce, mitigate, excuse, or justify the homicide," as petitioner has previously argued to the Court.

The jury in this case could have concluded that appellant was present at the murder scene with Tevin Hill but determine that appellant was not the shooter or merely present. Appellant did not have gunshot residue on the clothes he allegedly wore on the night of the shooting. R. 342, l. 18 - 345, l. 19. There was no DNA, fingerprints, or other forensic evidence linking appellant to the murder. R, 339, l. 8 – 342, l. 8.

Further, evidence that appellant had a gun, and that he allegedly told Pulley it was a nine-millimeter "Ruger" on the night of the shooting, and that a nine-millimeter Ruger was the murder

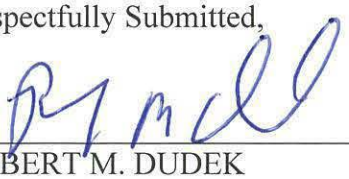
weapon was all speculation. The murder weapon was never found, and all the state's witnesses could opine was that the same gun fired the shots that killed both victims.

If appellant was present with another person who shot the victims (Tevin Hill) or knew who may have shot the victims (James Morgan Hill) but he was not the shooter, that could be evidence appellant was guilty of some other crime, but it was mitigated or reduced against a finding of his guilt for murder, even though it was not evidence of voluntary manslaughter or involuntary manslaughter, which the trial judge erroneously found conclusive. R. 296, l. 2 – 298, l. 19; R. 336, l. 13 – 338, l. 11. The trial judge's reasoning that because voluntary manslaughter and involuntary manslaughter were not lesser-included offenses to be charged in this case, that the jury instruction on implied malice from the use of a deadly weapon was therefore proper was erroneous.

The state admitted it could not point to a single reason why appellant would kill these two victims. Again, the state did not have to prove motive, but here it admitted it knew of none, did not theorize of one, and none appeared in this record. A jury instruction that malice could be implied from appellant having a deadly weapon was consequently very prejudicial in a case where no motive to kill existed, and the evidence was purely circumstantial as to whom the shooter was in this case.

Because the Court's harmless error analysis in this case was burden shifting to petitioner as to the inferred malice instruction from the use of a deadly weapon instruction, and also because there was nonetheless evidence in this record which would "reduce, mitigate, excuse, or justify the homicide" for purposes of the harmless error analysis, rehearing should be granted.

Respectfully Submitted,



ROBERT M. DUDEK
Chief Appellate Defender

This 27th day of August, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County

Honorable Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

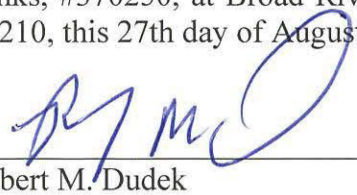
V.

DESHANNDON MARKELLE FRANKS,

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 Petition for Rehearing in the above-referenced case has been served upon William Edgar Salter, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 27th day of August, 2020; and Deshanndon Franks, #370250, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 27th day of August, 2020.



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

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

[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,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

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)].

BY: s/William Edgar Salter, III
WILLIAM EDGAR SALTER, III
S.C. Bar No. 4806

Office of the Attorney General
Post office Box 11549
Columbia, SC 29211-1549
(803) 734-6305

September 9, 2020.
Columbia, South Carolina.

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Laurens County
The Honorable Frank R. Addy, Circuit Court Judge
Appellate Case No. 2016-002244

THE STATE,

RESPONDENT,

vs.

DESHANNDON MARKELLE FRANKS,

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

The South Carolina Court of Appeals

The State, Respondent,

v.

Deshanndon Markelle Franks, Appellant.

Appellate Case No. 2016-002244

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

James E. Lockemy C.J.

J.

J.

Columbia, South Carolina

cc:
Robert Michael Dudek, Esquire
Alan McCrory Wilson, Esquire
Donald J. Zelenka, Esquire
W. Edgar Salter, III, Esquire
David Matthew Stumbo, Esquire

FILED
November 24, 2020

Melody Jane Brown, Esquire
The Honorable Frank R. Addy, Jr.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County

Honorable Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DESHANNDON MARKELLE FRANKS,

APPELLANT

APPELLATE CASE NO. 2016-002244

MEMORANDUM ON APPLICABILITY OF STATE V. BURDETTE, ___ S.C. ___, 832 S.E.2d 575 (2019)

On October 8, 2019, the Court ordered the parties to serve and file memoranda addressing the impact of the South Carolina Supreme Court's recent decision in State v. Burdette, Op. No. 27910, Shearouse's Adv. Sh. 31 at 8-19 (filed July 31, 2019), ___ S.C. ___, 832 S.E.2d 575 (2019), which held that 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. o*verruling*, among other cases, State v. Belcher, 385 S.C. 597, 600, 685 S.E.2d 802, 803-04 (2009).

First, appellant is entitled to the benefit of the Supreme Court's opinion in in State v. Burdette, Op. No. 27910, Shearouse's Adv. Sh. 31 at 8-19 (filed July 31, 2019), ___ S.C. ___,

832 S.E.2d 575 (2019), since the present case is pending on direct appeal before this Court, and not yet final. See, e.g. Griffith v. Kentucky, 479 U.S. 314, 322 (1987) *cited in* State v. Burdette, Op. No. 27910, Shearouse's Adv. Sh. 31 at 19 (filed July 31, 2019).

In this case, Defense counsel objected to the court giving a Belcher instruction that the use of a deadly weapon could be used by the jury to infer malice. After the solicitor's closing argument, and before appellant's closing, the judge stated that he was going to charge the inference of malice because he reasoned it "would be appropriate in this case because there's no evidence tending to reduce the homicide to a voluntary or involuntary homicide." R. 410, l. 22 – 411, l. 18. The judge said he understood the defense objection to the Belcher instruction. ""[I] do understand Mr. Wilkes' objection to that that he made at sidebar. Despite that objection, the Court has included that language." R. 410, ll. 13-16.

The judge instructed the jury that "inferred malice may also arise when the deed is done with a deadly weapon. A deadly weapon is defined under our law as an article, instrument, or substance which is likely to cause death or great bodily harm." R. 433, ll. 14-25.

Defense counsel again took exception the jury instruction after it was given. The judge responded, "Yes, of course. That objection, of course, is noted. Same rulings as before." R. 439, ll. 8-16. The objection to the jury instruction was well preserved.

Appellant's position now is much stronger than it was before State v. Burdette, Op. No. 27910, Shearouse's Adv. Sh. 31 at 8-19 (filed July 31, 2019), ___ S.C. ___, 832 S.E.2d 575 (2019), was decided since Burdette held that 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. The Court in Burdette also stated that the prosecution and defense remain free to argue that use or non-use of a deadly weapon showed whether or not malice existed -- in

their opinion -- but "'Do jurors need the court's permission to infer something? The answer is, of course, not.' *Belcher*, 385 S.C. at 612 n. 9, 685 S.E.2d 810 n. 9 (quoting Bruce A. Antkowiak, *The Art of Malice*, 60 RUTGERS L. Rev. 435, 476 (2008))." State v. Burdette, Op. No. 27910, Shearouse's Adv. Sh. 31 at 17-1818 (filed July 31, 2019).

Regardless, even before Burdette, in this case, appellant here correctly argued that the judge erred by reasoning that merely because voluntary and involuntary manslaughter were not lesser-included offenses in this case that the implied malice from the use of a deadly weapon instruction was proper. That is true because under Belcher, *any evidence* that would "reduce, mitigate, excuse, or justify the homicide" made the implied malice from the use of a deadly weapon instruction improper. There was such evidence in this case. See Final Brief of Appellant at 22.

Again, as appellant has stressed, the jury in this case could have concluded that appellant was present at the murder scene with Tevin Hill but determined that appellant was not the shooter. Appellant did not have gunshot residue on the clothes he allegedly wore on the night of the shooting. R. 342, l. 18 - 345, l. 19

There was no DNA, fingerprints, or other forensic evidence linking appellant to the murder. R, 339, l. 8 – 342, l. 8. Further, evidence that appellant had a gun, and that he allegedly told Pulley it was nine millimeter "Ruger" on the night of the shooting, and that a nine millimeter Ruger was the murder weapon was speculation. The murder weapon was never found, and all the state's witnesses could opine was that the same gun fired the shots that killed both victims.

If appellant was present with another person who shot the victims (Tevin Hill) or knew who may have shot the victims (James Morgan Hill) but he was not the shooter, that could be evidence appellant was guilty of some other crime with either Hill, but it mitigated or reduced

against a finding of his guilt for murder, even though it was not evidence of voluntary manslaughter or involuntary manslaughter which the judge erroneously found conclusive. R. 296, l. 2 – 298, l. 19; R. 336, l. 13 – 338, l. 11. The judge's reasoning that because voluntary manslaughter and involuntary manslaughter were not lesser-included offenses to be charged in this case, that the jury instruction on implied malice from the use of a deadly weapon was therefore proper was erroneous.

The state admitted it could not point to a single reason why appellant would kill these two victims. Appellant understands that the state did not have to prove motive, but here the state admitted it knew of none, did not theorize of one, and none appeared in this record. A jury instruction that malice could be implied from appellant having a deadly weapon was consequently very prejudicial in a case where no motive to kill existed, and the evidence was purely circumstantial as to whom the shooter was in this case.

Further, the jury did not have to accept the state's blind acceptance of the story of Tevin Hill to save himself, nor did it have to not have to focus on James Morgan Hill (the stalker) as a being the possible shooter because the judge would not allow the defense to pursue a full third-party guilt defense on James Hill being the stalker, and the shooter. R. 296, l. 2 – 298, l. 19; R. 336, l. 13 – 338, l. 11. Final Brief of Appellant at 22-23.

Any argument that there was no evidence in this case ""reduce, mitigate, excuse, or justify the homicide" is no longer relevant. As stated, appellant is entitled to the benefit of the Supreme Court's opinion in in State v. Burdette, Op. No. 27910, Shearouse's Adv. Sh. 31 at 8-19 (filed July 31, 2019), ___ S.C. ___, 832 S.E.2d 575 (2019), since this case is pending on direct appeal before this Court, and not yet final. See, e.g.. Griffith v. Kentucky, 479 U.S. 314, 322 (1987) *cited in* State v. Burdette, Op. No. 27910, Shearouse's Adv. Sh. 31 at 19 (filed July 31,

2019). Again, Burdette held that 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.* The judge gave that prohibited instruction in this case, that was prejudicial error to appellant, and he should be granted a new trial.

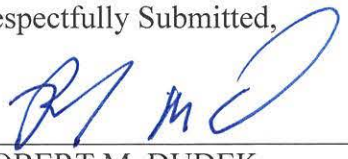
The error was not harmless. The jury also struggled over two days of deliberations to reach a verdict. The jury deliberated from 3:05 p.m until after 8:00 p.m when it went home for the evening on the first day of deliberations. The jury returned on day two and resumed deliberations at 9:04 a.m., and it did not reach a verdict until 12:49 p.m. R. 439, l. 4 – 446, l. 22. This was a hard and close case.

In State v. Heyward, 426 S.C. 630, 635, 828 S.E.2d 592, 635 (2019), the Supreme Court noted the length of the jury deliberations, and also refused to find the error cumulative to other evidence on domestic violence in rejecting the state's urging of harmless error, and concluding it constituted a "close" jury case. Further, the harmless error doctrine should be used guardedly and on a case-by-case basis. State v. Morris, 289 S.C. 294, 297, 345 S.E.2d 477, 479 (1986). Moreover, in the absence of overwhelming evidence of guilty the error should not be held harmless. State v. Singleton, 303 S.C. 313, 400 S.E.2d 487 (1991).

This was a highly unusual case that the jury struggled with during its deliberations. It was a close case. It is apparent that evidentiary instructions on how to interpret evidence are increasing disfavored by our Supreme Court, and appellant should be granted a new trial given the jury instruction error in this case. State v. Burdette, Op. No. 27910, Shearouse's Adv. Sh. 31 at 8-19 (filed July 31, 2019) See, also, State v. Cartwright, 425 S.C. 81, 819 S.E.2d 756 (2018)(attempted suicide instruction should no longer be charged); State v. Witherspoon, 418 S.C. 614, 795 S.E.2d 685 (2016) (jury instruction that the alleged victim's testimony did not

have to be corroborated was prejudicial error as announced in State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016).

Respectfully Submitted,



ROBERT M. DUDEK
Chief Appellate Defender

This 18th day of October, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County

Honorable Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DESHANNDON MARKELLE FRANKS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the memorandum on the impact of State v. Burdette, ___ S.C. ___, 832 S.E.2d 575 (2019) in the above-entitled case has been served upon William Edgar Salter, III, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Deshanndon Franks, #370250, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 18th day of October, 2019.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 18th day of October, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

Respondent,

vs.

DESHANNDON MARKELLE FRANKS,

Appellant.

Appellate Case No. 2016-002244

MEMORANDUM ON APPLICABILITY OF
***STATE v. BURDETTE*, ___ S.C. ___, 832 S.E. 575 (2019)**

On October 8, 2019, the Court ordered the parties to serve and file memoranda addressing the impact of the South Carolina Supreme Court's recent decision in *State v. Burdette*, ___ S.C. ___, 832 S.E.2d 575 (2019), on the trial judge's jury instruction (***R. p. 433, ll. 15-25***) that malice may be inferred from the use of a deadly weapon, where there was no evidence presented in Appellant's August, 2016, 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*, *Burdette*, *supra*. Assuming *arguendo* that the Court rejects the argument that this error was not preserved for appellate review, FBOR at 40-42, Respondent submits that although the instruction was erroneous in light of *Burdette*, any error was harmless beyond a reasonable doubt for the following reasons.

Appellant relied on his right not to testify or present any evidence. So, the only evidence in this case was presented by the prosecution. The State's evidence tended to prove that the double homicides were murder and there was no evidence presented "that would reduce, mitigate, excuse, or justify the homicide." *Contra Burdette*, 832 S.E.2d at 579-81; *Belcher*, *supra*. This evidence showed that Appellant and his co-defendant, Tevin Hill, went to the mobile home in which his victims, Sammie Darryl Leake and Nikesha James, lived early in the morning of January 31, 2014. ***R. pp. 93-95; 194-95; 197; 199-200; 215-16.***

Witnesses testified that Appellant was drinking and they described him as "hyper" or "amped," both on the 30th before he went to the victims' residence (***R. p. 184; 212***)[1] and while he was there in the early morning hours of the 31st. ***R. pp. 197; 199; 216***. Tamia Kinard testified that Appellant and Nikesha had a conversation at her residence "about something that she put on Facebook" and he asked her to talk to him about it "like a woman." ***R. p. 195***. He and Nikesha went back to Nikesha's bedroom and continued their conversation for "maybe 10, 15 minutes." Hill went back there while they were talking because he was ready to leave, but Appellant and Nikesha soon finished this conversation. When they emerged from her bedroom, they were laughing and talking normally. ***R. pp. 195-97***.

Co-defendant Tevin Hill also witnessed Appellant's conversation with Nikesha. He confirmed that the conversation began in the main room, and that Appellant and Nikesha went back to her bedroom and continued their discussion. Hill could not hear them, he did not know what the conversation was about, and he did not even hear the tone of their voices. ***R. pp. 216-17***. Because Hill was beginning to get tired and he was hungry, he readily agreed to give Tamia and

[1] Lavashta Pulley testified that when she saw him at Washes Club late on the night of the 30th, he also was displaying a black gun. ***R. 183; 185-90***.

her baby a ride when she asked him to take her home. ***R. pp. 217-18***. Tamia testified that Appellant was sitting down, drinking gin and soda when they left Nikesha's trailer. Sammie and Nikesha were the only other people in the residence at that point. ***R. pp. 197-99***.

There were no witnesses to the murder, except for the two victims and the person who killed them, Appellant. Investigating officers found signs of a struggle in the living room[2] where both murders occurred, but there was no evidence either victim was armed. ***R. pp. 121-37***. Moreover, Dr. James Fulcher, the forensic pathologist who performed autopsies on the victims' bodies, opined that Nikesha died as a result of a distant gunshot to the chest. The wound entered just below her right clavicle and angled "[sharply] downward." ***R. p. 153-54***. It "[p]enetrated deeply into the chest to make some very large holes in the heart which … [were] fatal. And then it … significantly damage[d] the left lung before embedding in the fat of her back on the left side." ***R. pp. 151-52***.

Dr. Fulcher opined that Sammie Leake died from two gunshots to the head. Each wound penetrated into his brain and caused significant damage to his brain. Either would have been almost instantly fatal. Again, the manner of death was homicide and Dr. Fulcher found no evidence that these wounds were close range or contact wounds, such as stippling. ***R. pp. 154-58***.

Overruling its earlier decision in *Belcher*, the Court in *Burdette* held that "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," *Burdette*, 832 S.E.2d at 583. *See also id.* at 582, and the Court extended this new rule to all cases "which are pending on direct review or

---

[2] SLED Agent Mindy Worley testified, "The rug was folded over on itself, coffee mugs [were] in the floor, [a] picture frame [was] knocked on the floor. There was blood, especially around [Mr. Leake], on the floor." Also, "two of the couch cushions were off the couch. One [cushion] was on top of a third one, and the other was propped in front of the couch." ***R. p. 124***.

are not yet final, so long as the issue is preserved." *Id.* at 583. As argued in the Final Brief of respondent, Respondent submits that Appellant's objection at an unrecorded sidebar (***R. p. 410, l. 11***) failed to preserve the issue on appeal.

Moreover and consistent with earlier precedent, the Court in *Burdette* stated that the giving of this instruction is subject to harmless error analysis. *Id.* 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* 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, at 578-79. The Court then applied this harmless error analysis but simply found, as it had in *Belcher*, 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. *Burdette*, 832 S.E.2d at 579-82.

Applying the above harmless error standard to the charge given in this case, however, Respondent submits that any error must be viewed as harmless beyond any reasonable doubt. First, *Belcher* abandoned strict adherence to the common law inference of malice from use of a deadly weapon based on the Court's conclusion that this inference was "confusing and prejudicial where evidence is presented that would reduce, mitigate, excuse or justify the homicide." *Belcher*, 385

S.C. at 611, 685 S.E.2d at 809. It was the presence of such evidence that led the Court to hold the jury instructions in *Belcher* and *Burdette* were not harmless beyond a reasonable doubt. *See Burdette*, 832 S.E.2d at 579-82; *Belcher*, 385 S.C. at 604, 609-12, 685 S.E.2d at 806, 808-10. Appellant's case, however, does not present a concern of possible jury confusion because there was no evidence that the killing was in self-defense or that Appellant could be guilty of any lesser-included offense of murder. Accordingly, any error in giving the instruction was harmless beyond a reasonable doubt.

A second reason the instruction was harmless beyond any reasonable doubt is that the trial judge gave two alternative definitions of "malice" that support a conclusion that the killing was malicious. Specifically, he instructed jurors that:

> I instruct you, ladies and gentlemen, that malice is defined as hatred, ill-will or hostility toward another person. It's **the intentional doing of a wrongful act without just cause or excuse, and with an intent to inflict an injury, or under circumstances the law will infer an evil intent**. Malice aforethought does not require that malice exists for any particular time before the act is committed, but malice must exist in the mind of the Defendant just before and at the time the act is committed. Therefore, there must be a combination of the previous evil intent and the act.
>
> I instruct you that malice aforethought may be expressed or inferred. These terms expressed and inferred do not mean different kinds of malice, but merely the manner by which malice may be shown to exist. That's either by direct evidence or by inference from the facts and … circumstances which are proven. Expressed malice is shown when a person speaks words which express hated or ill-will to another person, or when the person prepare[s] beforehand to do the act that was later accomplished. For example, laying in weight for a person or any other acts in preparation going to show that the deed was within the Defendant's mind with the expressed malice.
>
> **Malice may also be inferred from conduct showing a total disregard for human life**.

R. p. 432, l. 16 – p. 433, l. 15 (emphasis added).

Thus, the trial judge's charge on malice permitted the jury to infer or imply malice based on the above facts under two different scenarios, separate and apart from the inference of malice from use of a deadly weapon that is now at issue. Specifically, jurors could infer malice if they found that the victims' deaths were caused by "the intentional doing of a wrongful act without just cause or excuse, and with an intent to inflict an injury, or under circumstances the law will infer an evil intent." Likewise, jurors could infer malice if they found that the deaths were caused by "conduct showing a total disregard for human life."

Each of these definitions is supported by South Carolina case law. *See, e.g., Margolis v. Telech*, 239 S.C. 232, 238, 122 S.E.2d 417, 419-20 (1961) ("Malice is the deliberate, intentional doing of a wrongful act without just cause or excuse"); *id.* at 238, 122 S.E.2d at 420 ("Malice 'is implied where it shows a disregard of the consequences of the injurious act, without reference to any special injury which he may inflict on another', and 'in doing some illegal act for one's own gratification or purposes, without regard to the rights of others or the injury he may inflict on another'"); *State v. Murphy*, 86 S.C. 268, 68 S.E. 570, 570 (1910) ("'Malice is a term of art, implying wickedness, and excluding a just cause or excuse. It is implied from an unlawful act, willfully done, until the contrary be proved.' It has also been defined to be the willful or intentional doing of a wrongful act, without just cause or excuse"); *McBride v. Sch. Dist. of Greenville Cty.*, 389 S.C. 546, 565, 698 S.E.2d 845, 855 (Ct. App. 2010) ("malice is 'the deliberate intentional doing of a wrongful act without just cause or excuse'") (quoting *Eaves v. Broad River Elec. Coop., Inc.*, 277 S.C. 475, 479, 289 S.E.2d 414, 416 (1982) (internal quotation omitted)); *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 437, 629 S.E.2d 642, 649 (2006) (malice may be implied where the evidence reveals a disregard of the consequences of an injurious act, without reference to any special injury that may be inflicted on another person"); *State v. Young*, 238 S.C. 115, 124-25, 119

S.E.2d 504, 509 (1961), overruled on other grds, *State v. Torrence*, 305 S.C. 45, 60-69, 406 S.E.2d 315, 323-28 (1991) (Toal, J., (concurring in result) (abolishing in favorem vitae review). *See also, e.g., State v. Cottrell*, 421 S.C. 622, 644, 809 S.E.2d 423, 435 (2017) (finding trial judge properly instructed jurors that malice could be inferred from conduct showing a total disregard for human life), *reh'g denied* (Feb. 16, 2018), *cert. denied* (Oct. 1, 2018), *cert. denied*, 139 S.Ct. 174 (2018); *State v. Oates*, 421 S.C. 1, 20, 803 S.E.2d 911, 921 (Ct. App. 2017) ("Malice can be inferred from conduct [that] is *so reckless and wanton as to indicate a depravity of mind and general disregard for human life*") (emphasis in original), *reh'g denied* (Sept. 1, 2017), *cert. denied* (Mar. 7, 2018); *State v. Mouzon*, 231 S.C. 655, 662, 99 S.E.2d 672, 675 (1957); *In re Tracy B.*, 391 S.C. 51, 69, 704 S.E.2d 71, 80 (Ct. App. 2010). Each definition likewise fits the facts of this case.

Clearly, shooting a victim twice in the head or through the heart "without just cause or excuse" is malicious. Also, both of these actions reflect "conduct showing a total disregard for human life." Further, despite the unrecorded sidebar during which defense counsel objected to the inference being charged, (***R. p. 410, l. 11***), the defense did not contest whether the killing was malicious. Rather, the defense focused on whether the State had adequately established that Appellant was the shooter. Indeed, counsel's closing argument focused exclusively on the State's failure to prove identity and did not once mention the term "malice." ***R. p. 412, l. 8 – 422, l. 16***.[3] Accordingly, any error in charging the jury that malice could be inferred from the use of a deadly weapon was harmless beyond a reasonable doubt.

Respectfully submitted,

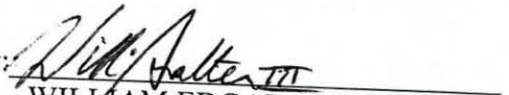
ALAN WILSON

[3] Although this was a circumstantial evidence case, the State's proof of identity was overwhelming. *See* FBOR pp. 8-20.

Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General
S.C. Bar # 4806
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit
Post Office Box 516
Suite 203 Park Plaza
600 Monument Street
Greenwood, SC 29648
(864) 942-8802

By: 
WILLIAM EDGAR SALTER, III
ATTORNEYS FOR RESPONDENT

October 15, 2019.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Laurens County
The Honorable Frank R. Addy, Circuit Court Judge
Appellate Case No. 2016-002244

THE STATE,

Respondent,

vs.

DESHANNDON MARKELLE FRANKS,

Appellant.

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, counsel for Respondent, certify that I have served two (2) copies of the within Memorandum on Applicability of *State v. Burdette*, ___ S.C. ___, 832 S.E.2d 575 (2019), on counsel for the Appellant by depositing same in the United States mail, first class, postage prepaid, and addressed as follows:

Robert M. Dudek, Esq.
SCCID/Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

This 15th day of October, 2019.

WILLIAM EDGAR SALTER, III
S.C. Bar # 4806
Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211