STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

WILLIAM C. (BILLY) SELLERS,

APPELLANT

APPELLATE CASE NO. 2018-001667

Appeal from Edgefield County

Honorable Eugene C. Griffith, Circuit Court Judge

Opinion No. 2021-UP-254

PETITION FOR REHEARING

Appellant seeks rehearing pursuant to Rule 221 (a), SCACR because this Court may have overlooked the fact that given the thirty year passage of time since State v. Bell, 305 S.C. 11, 406 S.E.2d 165 (1991) and material changes in the law that it should not be "[c]onstrained to hold this [malice instruction] remains good law that circuit judges may include as part of a malice instruction." State v. William C. (Billy) Sellers, 2021-UP-254 (filed July 7, 2021). This Court noted that the jury instruction that malice "[i]s the intentional doing of a wrongful act without just cause or excuse . . ." had been held by the Supreme Court to not be an unconstitutional burden shifting instruction in State v. Bell, 305 S.C. 11, 19, 406 S.E.2d 165, 170 (1991).

However, Bell is an outdated thirty-year-old death penalty opinion, decided long before, as this Court correctly determined, the "[t]rend by our Supreme Court (aptly noted by Sellers) to revisit dubious and outworn jury instructions, see Pantovich v. State, 427 S.C. 555, 832 S.E.2d 596 (2019) . . ." State v. William C. (Billy) Sellers, 2021-UP-254 (filed July 7, 2021).

This Court also wrote, "We understand Sellers' argument that a reasonable jury could apply the phrase equating malice with 'intentional doing of a wrongful act without just cause or excuse' in problematic ways. We are not sure what the challenged phrase adds to a malice charge and can see the wisdom in not charging it. We are also not sure how a wrongful act can be said to be done with malice if all that is proven is that the act was done with intent (all crimes require some level of intent except strict liability ones, see, e.g., (State v. Ferguson, 302 S.C. 269, 271-72, 395 S.E.2d 182, 183 (1990)). Nor are we sure how an intentional act that is justified or excusable by law could be a crime." State v. William C. (Billy) Sellers, 2021-UP-254 (filed July 7, 2021).

Yet, despite this excellent analysis of the multiple problems with this jury instruction, this Court reasoned it was bound by the precedent of Bell. However, this Court should reverse because it recognizes the current jurisprudence of the Supreme Court disfavoring such confusing, unnecessary jury instructions that did not exist thirty years ago when Bell was issued. This instruction that malice "is the intentional doing of a wrongful act without just cause or excuse" should be adjudicated to be burden shifting, and therefore unconstitutional.

If this Court is unwilling to so hold after granting rehearing, this jury instruction was also extremely confusing, and, consequently, very prejudicial. It is reversible error to give jury instructions which are calculated to confuse or mislead the jury. This is so because the purpose of jury instructions is to enlighten the jury as to what the law is, in order that the jury may arrive

at a just, fair, and proper verdict. See State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987); State v. Hewitt, 205 S.C. 207, 31 S.E.2d 257, 259 (1944).

Given the modern jurisprudence of the Supreme Court as to jury instructions, as this Court aptly recognized in its opinion in this case, rehearing should be granted as to this confusing, burden shifting, and prejudicial malice charge issue. See Pantovich v. State, 427 S.C. 555, 832 S.E.2d 596 (2019); State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019); State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009); State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987); State v. Hewitt, 205 S.C. 207, 31 S.E.2d 257, 259 (1944).

2. **Accomplice liability instruction**

This Court should also reconsider its holding that the trial judge did not abuse his discretion by instructing the jury on accomplice liability. The vague testimony of jailhouse snitches about "[a]n *unidentified* coconspirator named Gee or *another unknown person*" allegedly robbing and murdering the victim by beating him to death should be insufficient as a matter of law to justify the jury instruction on accomplice liability.

Appellant submits accomplice liability must be based on the defendant acting with another real, identifiable person to commit the crime, and the evidence must be "equivocal" as to whether the defendant or his accomplice dealt the fatal blow that resulted in the victim's death. See State v. Washington, 431 S.C. 394, 407, 848 S.E.2d 779, 786 (2020). In Washington, the Supreme Court noted: "For an accomplice liability instruction to be warranted, the evidence must be equivocal on some integral fact and the jury [must have] been presented with evidence upon which it could rely to find the existence or nonexistence of that fact. Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011)."

The Court in Washington also wrote: "In this case, there was evidence Petitioner was the shooter. There was also evidence petitioner was not the shooter. The question becomes whether there was equivocal evidence the shooter, if not Petitioner, was an accomplice of Petitioner. Based on the evidence presented in this case, Kinloch is the only possible person who could fall into the category of Petitioner's accomplice. Therefore, if the record contains no evidence Kinloch was the shooter, then the accomplice liability instruction should not have been given." Id. 431 S.C. at 407, 848 S.E.2d at 786.

The Court in Washington determined there was not any probative evidence that Kinloch was the shooter, and therefore Washington could not be his accomplice. The trial court therefore erred in charging accomplice liability. There was no doubt that Kinloch was a real person.

To allow the state to obtain an accomplice liability instruction, the "hand of one, is the hand of all" charge here, based upon the claims and supposition of jailhouse snitches places a criminal defendant's due process right to a fair trial in great jeopardy. The accomplice liability instruction here allowed the jury to guess that some unknown person (allegedly real) other than Appellant Billy Sellers may have committed the murder while still holding Billy Sellers criminally liable for that murder.

To be able to obtain an instruction on accomplice liability, an evidentiary predicate should be required to show that the shooter is in reality a real person and not just "a theoretical person" or "an unknown person." See State v. Washington, 431 S.C. 394, 407, 848 S.E.2d 779, 786 (2020). No such evidentiary predicate was established in this case. Rehearing should be granted on this issue also.

3. **A sentencing sheet is not probative of whether a promise was made to a snitch**

Finally, this Court should also grant rehearing because the state introducing inmate Griffin's form sentencing sheet to allegedly prove he "pled straight up, *without any sentencing negotiations or recommendation from the State*" was misleading on its face to the lay people on the jury. See State v. William C. (Billy) Sellers, 2021-UP-254 (filed July 7, 2021) (emphasis added). It is common knowledge among judges and criminal defense attorneys on both sides that inmates -- jailhouse snitches -- have great incentive to mislead by claiming the defendant on trial implicated himself or herself in the crime to obtain sentencing consideration or other favors for themselves.

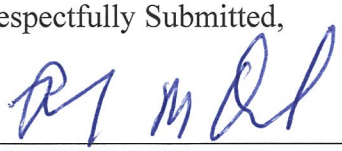
State v. McEachern, 399 S.C. 125, 137, 731 S.E.2d 604, 610 (Ct. App. 2012), does hold that "[w]hen a party introduces evidence about a particular matter, the other party is entitled to introduce evidence *in explanation or rebuttal thereof*, even if the latter evidence would have been incompetent or irrelevant had it been offered initially." A sentencing sheet, as here, simply does not rebut or explain evidence that the snitch got a lesser sentence or some other consideration. This consideration can range from a lesser sentence to movement to another facility to having dental work done to canteen privileges. See State v. Quattlebaum, 338 S.C. 441, 451, 527 S.E.2d 105, 110 (2000); State v. Jones, 343 S.C. 562, 570-71, 541 S.E.2d 813, 816-18 (2001).

Additionally, the sentencing sheet was *not relevant* to rebut the claim or evidence that Griffin was receiving consideration for his "cooperation" because such deals are often made off the record and behind the scenes. The sentencing sheet therefore was simply not *relevant* in rebuttal or explanation. This Court insinuated that it might have held otherwise if a Rule 403,

SCRE objection had been interposed – but relevance was a proper objection as explained above.

Rehearing therefore should be granted on this issue as well.

Respectfully Submitted,



ROBERT M. DUDEK
Chief Appellate Defender

This 22nd day of July, 2021.

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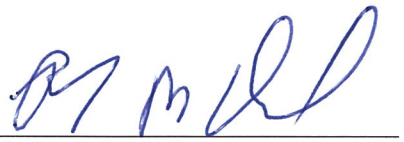
CERTIFICATE OF SERVICE

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 Caroline Scrantom, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 22nd day of July, 2021.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT