STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Robert J. Bonds, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOSEPH DECORIYUS BURTON,

APPELLANT.

APPELLATE CASE NO. 2021-000619

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred by instructing the jury that malice may be shown from conduct showing a total disregard for human life because the instruction amounted to a comment on the facts where the state elicited testimony from appellant that his behavior showed total disregard for human life, the state highlighted that testimony during closing, and evidence was presented that appellant acted in defense of others?

STATEMENT OF THE CASE

On January 17, 2019, a Beaufort County grand jury indicted appellant for possession of a weapon during the commission of a violent crime. R. *. On February 14, 2019, a Beaufort County grand jury indicted appellant for murder. R. *. Appellant's case was called to trial on June 1, 2021, before the Honorable Robert J. Bonds and a jury. Tr. 1. Scott Lee represented appellant and Mary Jones, assistant solicitor, represented the state. Tr. 1.

On June 3, 2021, the jury found appellant guilty as indicted. Tr. 660. Judge Bond sentenced appellant to concurrent terms of forty years' imprisonment for murder and two years' imprisonment for possession of a weapon during the commission of a violent crime. Tr. 677-78.

This appeal follows.

STANDARD OF REVIEW

In reviewing an alleged error in jury instructions, an appellate court will not reverse the circuit court's decision absent an abuse of discretion. *See Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008) (applying an abuse of discretion standard of review to an alleged error in jury instructions). In reviewing jury charges for error, the appellate court must consider the circuit court's jury charge as a whole in light of the evidence and issues presented at trial. *Welch v. Epstein*, 342 S.C. 279, 311, 536 S.E.2d 408, 425 (Ct. App. 2000). If the charges are reasonably free from error, isolated portions that might be misleading do not constitute reversible error. *Keaton ex rel. Foster v. Greenville Hosp. Sys.*, 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999).

ARGUMENT

The trial court erred by instructing the jury that malice may be shown from conduct showing a total disregard for human life because the instruction amounted to a comment on the facts where the state elicited testimony from appellant that his behavior showed total disregard for human life, the state highlighted that testimony during closing, and evidence was presented that appellant acted in defense of others.

Relevant facts

Early in the morning of August 4, 2018, appellant and his friends stopped at a gas station after having been out drinking. Tr. 290, l. 20-291, l. 18; 292, ll. 2-17. The gas station had multiple surveillance cameras which captured the following incident. Inside the gas station an altercation broke out between appellant's group and another group of individuals that included Christopher Fells. Shortly after, the altercation continued outside, and the surveillance video shows appellant turn and fire a gun. State's exhibit 15, surveillance video.[1] Ultimately, Fells was hit by the bullets and died several months later. Tr. 481, ll. 15-16.

At trial, the state alleged that a man who was part of Fells' group had harassed appellant's girlfriend earlier in the evening and then again inside the gas station. The state claimed that the girlfriend incited appellant's anger and that is why he ultimately shot Fells. Tr. 203-05.

Appellant testified at trial that he, a group of close friends, and some family had been out celebrating on the morning of the incident. Tr. 527-28. He contended that he did not know Fells and they had no disagreement that night, in fact they had a friendly exchange inside the gas station. Tr. 531, l. 13-532, l. 7; 543, ll. 3-16. Appellant testified that he had bad vision and until he was incarcerated did not wear glasses. Tr. 541, ll. 4-14.

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1 This exhibit is on file with the Court.

Appellant did not deny having been at the gas station or being the person who fired the gun that ultimately killed Fells. 542, l. 20-543, l. 2. Appellant testified that while he was in the gas station one of the individuals with the other group, Christian Paez, appeared to have a weapon. Tr. 532, l. 13-536, l. 21. Appellant said that when he exited the gas station, he walked hurriedly to his car in order to get out of the situation quickly. Tr. 537, l. 14-539, l. 5. Once out of the store he heard footsteps and yelling behind him and realized that one of his friends had been hurt. Tr. 539, ll. 6-20. Appellant was scared and believed he heard a "gun click," and as a result he fired the gun to protect himself and the people in his group. Tr. 540, ll. 12-24; 542-43.

During the charge conference, defense counsel made an objection to the court's instruction on murder. Counsel argued that the last sentence, "[m]alice may be shown from conduct showing a total disregard for human life," amounted to a comment on the facts and the jury "could necessarily place undue emphasis" on it. Tr. 504, l. 20-505, l. 6; 506, ll. 11-17. The court overruled defense counsel's objection and decided to keep the language in the charge. Tr. 508, ll. 8-10.

During the state's cross examination of appellant, the following exchange occurred:

Q: And on this night, you didn't have glasses?

A: No.

Q: But you still felt the need to protect yourself and protect your family and your friends?

A: Yes, ma'am.

Q: And you would do that at all cost?

A: Yes, ma'am.

Q: Even though you can't see what you're doing?

A: Yes.

Q: Wouldn't you agree that blindly shooting into a crowd is a total disregard for human life?

A: Yes, I'd agree with that.

Tr. 563, ll. 11-22. Then during closing the prosecutor highlighted this portion of appellant's testimony stating, "he also agreed that it was total disregard to fire blindly into a crowd of people." Tr. 622, ll. 4-6. After closing arguments, the court gave the jury instructions and included that language in the charge for murder. Tr. 640, ll. 8-9

Discussion

The trial court's erroneous instruction that "malice may be shown from conduct showing a total disregard for human life," undoubtedly contributed to the verdict in this case where appellant presented evidence that he acted in defense of others.

"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. *State v. Burdette*, 427 S.C. 490, 498, 832 S.E.2d 575, 580 (2019). "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.

The court's erroneous charge was an improper expression of its view of the weight of

certain evidence. *See State v. Cheeks*, 401 S.C. 322, 328, 737 S.E.2d 480, 484 (2013) (Noting "[s]imply because certain facts may be considered by [the jury] as evidence of guilt in a given case where the circumstances warrant, it does not follow that the jury should be charged that these facts are probative of guilt. It is always for the jury to determine the facts, and the inferences that are to be drawn from those facts"). The court's instruction regarding malice in combination with the state's highlighting the language during appellant's testimony and closing left the jury with the impression that because the appellant agreed with the state's rather confusing question during cross-examination, that used the exact language from the objectionable charge, that appellant admitted to malice. That, in addition to appellant's having already admitted to being the shooter, sealed his fate.

Malice is an element of murder, and the state had the burden of proving it beyond a reasonable doubt. Here, there was no doubt appellant was at the gas station and was the individual who shot Fells. This case did not turn on who committed the act but on the circumstances in which the incident occurred. Appellant's testimony revealed what the surveillance video could not, the context in which the incident occurred. There was no evidence of malice in this case, other than the state's unsupported claim that appellant shot Fells because a man in Fells' group had stood too close to his girlfriend in the gas station. Appellant testified that he had did not know Fells or have any ill will towards him. It is apparent in the surveillance video that appellant had no malice towards Fells where you see the two of them speaking in a friendly manner while inside the gas station. The erroneous charge contributed to the verdict and appellant's convictions should be reversed.

CONCLUSION

By reason of the foregoing argument, appellant requests this Court reverse his conviction and remand his case for a new trial.

Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of April, 2022.

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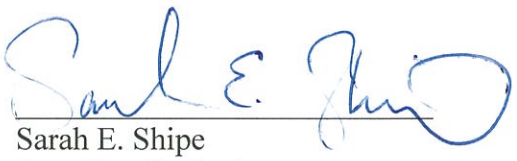
CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 6th day of April, 2022.



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