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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County

The Honorable Deadra L. Jefferson, Circuit Court Judge

THE STATE,

PETITIONER,

v.

MONTRELLE LAMONT CAMPBELL,

RESPONDENT.

Appellate Case No. 2022-000349

BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

ISSUES PRESENTED

I. Did the Court of Appeals err in its analysis of malice for attempted murder under *State v. King* and S.C. Code of Laws § 16-3-29, and in its disregard for the copious amount of direct and circumstantial evidence supporting a finding of malice?

II. In considering *State v. Burdette*, did the Court of Appeals err by misapplying the standard for harmless error and resting its decision to reverse on the assumption that the jury could have ignored the other evidence of malice in the record?

III. Did the Court of Appeals fail to properly apply the "any evidence" standard to the accomplice liability instruction given at trial when the evidence demonstrated that a second gunman was seen fleeing the scene, two cell phones were found at the scene, two brands of ammunition were found at the scene, no ballistics evidence was offered demonstrating all ammunition was fired by the same gun, and the video evidence of Campbell and co-defendant Richardson is not of sufficient quality to confirm their respective identities with absolute certainty?

STATEMENT OF THE CASE

Montrelle Campbell[1] (hereinafter "Campbell") was indicted on April 11, 2016, by a Charleston County Grand Jury for murder and two counts of attempted murder. Campbell proceeded to trial on January 8, 2018, before the Honorable Deadra L. Jefferson, and a jury. (App., p. 1). The State was represented at trial by Assistant Solicitors Chad Simpson and Alex Ginsberg. (App., p. 1). Attorneys Mary Ford and Michael Williams represented Campbell. (App., p. 1). At the conclusion of his trial on January 12, 2018, the jury found Campbell guilty as indicted. (App., p. 554, line 9 through p. 555, line 14). Campbell was sentenced to life without parole for murder and to concurrent thirty year sentences for each count of attempted murder. (App., p. 556, lines 7-14).

Campbell filed a timely notice of appeal on January 23, 2018. He sought reversal of his conviction on the grounds that a *Belcher* charge for implied malice was improper for an attempted murder charge under *State v. King* and that there was no evidence in the record to warrant the trial court giving a hand of one is the hand of all jury charge. The parties completed briefing on August 16, 2019, and conducted oral argument on September 15, 2021. The Court of Appeals reversed Campbell's conviction by its Opinion filed December 22, 2021. (App., p. 625); *State v. Campbell*, 435 S.C. 528, 868 S.E.2d 414 (Ct. App. 2021). The State filed a Petition for Rehearing on January 6, 2022. (App., p. 636). The Court of Appeals then requested Campbell file a Return to the Petition for Rehearing on January 7, 2022. (App., p. 647). Campbell filed his Return on January 14, 2022, and the Court of Appeals later denied the Petition for Rehearing on February 24, 2022. (App., p. 649; p. 656).

[1] Campbell is often referred to by witnesses during trial by his nickname "Troll".

On April 18, 2022, Petitioner filed its Petition for Writ of Certiorari with this Court. Respondent filed his Return to the Petition on June 6, 2022. The State then filed its Reply on June 16, 2022. This Court granted certiorari on September 8, 2022, and this Brief of Petitioner now follows.

STATEMENT OF FACTS

Campbell visited the Norman Street home of Katrina Brown on the night of September 17, 2015. Katrina's home is located in an area known as Gadsden Green, in downtown Charleston, South Carolina. Campbell's sister, Kadeshia, along with other visitors, were at Katrina's home that night. Katrina testified that around midnight there was a knock at her door. Kadeshia was told to answer, but never made it to the door. Moments later a man introduced to Katrina as "Troll" had entered the home. Katrina did not know "Troll" and did not know that "Troll" was Kadeshia's brother, Campbell. Since Katrina was not familiar with Campbell, she asked him repeatedly to leave. (App., p. 23, line 7; p. 29, line 12 through p. 31, line 11). Campbell did not explain who he was to Katrina. Though he did not immediately leave when asked, he did eventually leave Katrina's home. (App., p. 30, lines 5-6; p. 31, lines 5-11).

Soon after, Katrina stepped outside to smoke a cigarette and was attacked by Campbell. Campbell struck Katrina on the head and appeared ready to continue the attack, but he was interrupted by other partygoers who came out to intervene. Their presence caused Campbell to back away. They followed and a verbal confrontation began to take place in the street. However, according to both Katrina and her sister, Kerri, it appeared as though Campbell was going to pull something out of his car so Katrina urged everyone back inside. Campbell then left the scene with his sister Kadeshia. (App., p. 31, line 16 through p. 32, line 10; p. 33-34; p. 70, line 17 through p.

71, line 9). Katrina identified Campbell in the courtroom as the assailant from that evening. (App., p. 34, line 1-9).

Katrina learned the following day (Friday) that people in town were already gossiping about Campbell hitting her that night. (App., p. 36, lines 15-24). Friday evening Katrina hosted friends and family at her home again for a get together that ran into Saturday morning when Victim Antwan Frost arrived around 6:00am. (App., p. 37-38). Katrina was not aware of any social media postings that would have made the gathering public knowledge. (App., p. 50, lines 16-21).

Less than 36 hours after assaulting Katrina – sometime after 4am on September 19, 2015 – Campbell took the keys to his girlfriend's car without her permission, and convinced his friend, co-defendant Trivelle Richardson (hereinafter "Richardson"), to join him in the vehicle. Richardson testified that Campbell told him they were going to get cigarettes, but that Campbell passed the store and continued into downtown. (App., p. 260-265; p. 230).

Video surveillance captured the car as it parked on Nunan Street, near Katrina's home on Norman Street. (App., p. 23-24; p. 465; p. 207). Tomeka President, Campbell's girlfriend, testified that the gold Buick Century in the surveillance video was hers and confirmed the license plate for her car. (App., p. 232, line 19 through p. 233, line 15; p. 235-236). She testified that Campbell had stayed over on the night preceding the shooting, but that he was gone when she awoke that morning. (App., p. 237, lines 3-14; p. 241, lines 4-10). She further testified that she was forced to call a taxi and was late to work due to the surprising absence of her car that morning. (App., p. 232, line 19 through p. 233, line 15; p. 237, line 15 through p. 239, line 7; p. 240, line 4-24). Ms. President testified that as the cab was picking her up, she saw her car parked in a different space than where she had left it, and the keys were in the driver seat. (App., p. 242, line 2 through p. 243,

line 9). Following her interview with police, she provided them with Campbell's phone number. (App., p. 244, line 18 through p. 245, line 12).

The video footage also shows two African-American individuals pulling up to Nunan Street. One of these individuals, a man dressed in blue, was shown shortly after in possession of an assault rifle, the other was shown parking the car and for a time appeared to be waiting and smoking a cigarette. (App., p. 207, lines 4-25). Moments later the video shows both individuals running back, with the man in blue still carrying the assault rifle. (App., p. 346, lines 11-14). These individuals were later believed to be identified by police as Campbell and Richardson.[2] (App., p. 348-349).

Co-defendant Richardson testified on behalf of the State and explained the events of that morning. Richardson testified that on the night of September 18, 2015, he went to a party for a friend who had been killed and then went to a strip club. He testified that he left the strip club at about 4:00am, and was then dropped off by a friend. (App., p. 260, line 1 through p. 262, line 14). He then walked toward his house located in Austin Lakes. Richardson testified that Austin Lakes was near Austin Avenue, where Ms. President lived. (App., p. 261, line 18; p. 230, line 1-10).

Before getting home he was approached by Campbell, with whom he was friends. (App., p. 263, lines 1-9). His conversation with Campbell suggested they would go get cigarettes from the store, but Richardson testified that they ultimately never went to the store. He testified that Campbell took him to a car for the trip and testified that he recognized the car as Ms. President's Buick. (App., p. 262, line 15 through p. 264, line 17). Richardson testified that Campbell drove past the Kangaroo gas station where he anticipated they would stop for cigarettes, and instead drove downtown. Richardson testified that he asked Campbell where they were going; Campbell

[2] The video is not of sufficient quality to positively identify these individuals.

told him to "chill", and told him that "it'll be all right." (App., p. 264, line 18 through p. 265, line 3).

Richardson testified that Campbell drove to the corner of Kennedy Street and President Street in downtown. (App., p. 266, line 18 through p. 268, line 25). He testified that once he and Campbell arrived they were met by a third individual named Andrew Rivers (aka Ace), whom Richardson knew from growing up. Richardson testified that he told Ace to get in the car and ride with him. (App., p. 269, line 1 through p. 271, line 2). Richardson then explained that Campbell exited the vehicle and instructed him to park the car on Nunan Street.

Richardson did not see where exactly Campbell went, but agreed that Campbell walked back toward "Green", also called Gadsden Green, which was a government housing community in the area. (App., p. 271, line 5-10; p. 88, lines 15-17; 98-99; p. 106, line 24-25). He testified that there was a restaurant "something Kitchen" where he parked, and Richardson testified that he was the individual wearing a white shirt depicted in the video flicking a cigarette butt out of the driver's side of the Buick. (App., p. 271, line 21 through p. 272, line 24; p. 284). Richardson then testified that he and Ace got out of the car and walked toward the Gadsden Green projects. (App., p. 273, line 20 through p. 274, line 11). He testified that he tried to call Campbell and ask where to leave the keys, as he was leaving the car. (App., p. 279, line 20 through p. 281, line 2).

Soon after his attempted phone call, Richardson heard multiple gunshots. He testified that Ace ran away and he ran back to the car. (App., p. 273, line 20 through p. 276, line 5). He tried to start the car using the spare key on the keychain, but it would not start. By the time he switched to the other car key Campbell had returned and gotten into the vehicle. Richardson testified that Campbell was in possession of an AR-15 rifle that was still smoking. (App., p. 277, line 18 through p. 278, line 15). Richardson testified that Appellant instructed him to drive away and back to the

Austin Lakes apartments. (App., p. 278, line 24 through p. 279, line 9). He testified that he voluntarily went to the police when he learned they wanted to speak with him about the shooting. (App., p. 281, line 16 through p. 282, line 1). At first he claimed to police that he was not at the scene so as to avoid legal consequences, but Richardson ultimately identified himself in the various photos the police presented to him and provided various explanations for his presence. Richardson also provided his cell phone number to police. (App., p. 282, lines 2-23; p. 288, lines 5-25; p. 297-303).

With police having both Campbell's and Richardson's cell phone records, the State presented evidence that there were two calls between Campbell's and Richardson's phones just minutes prior to the murder. One was at 6:13:22am and the other at 6:15:22am. Likewise, there was a record of numerous calls in the days before and after the crime. (App., p. 390-394).

Katrina Brown testified as to the how the shooting took place. She testified that at approximately 6:30am, she was in her home with numerous guests, including her sister Kerri Brown, her cousin, Tierra Brown, and her longtime friend Antwan Frost. They were enjoying their get-together when a hail of bullets was fired into her crowded apartment. (App., p. 41-42; p. 39, p. 73). Kerri and Tierra were both injured, with Kerri being struck by a bullet that grazed her head and Tierra being struck by a bullet to her arm. (App., p. 76-78; p. 95). Mr. Frost was struck in the heart and died at the scene. (App., p. 194).

The state put forth evidence at trial that demonstrated the following: 14 total rounds of high-caliber rifle ammunition were fired into the apartment from the rear porch area. (App., p. 122, line 20 through p. 123, line 9; p. 133, line 13 through p. 134, line 4). These 14 rounds were not all the same brand of ammunition. (App., p. 134-135; p. 137). No gun was ever recovered and no ballistic evidence was presented to the jury that would demonstrate all of the ammunition was fired

from the same gun. Police also recovered two cellphones from the location where the guns were fired (as indicated by the location of the spent shell casings). (App., p. 157-158).

After the State's case-in-chief, the defense called witness Peggy Blake to testify. Ms. Blake lived on Bogard Street near the scene of the crime. (App., p. 432). She testified to hearing the nearby gunfire and saw a separate "hooded individual", carrying a "sporty rifle", leaving from the area where the shooting had just taken place. She testified that this individual left the area in a lime green car. (App., p. 433-434).

STANDARD OF REVIEW

"An appellate court will not reverse the trial judge's decision regarding jury charges absent an abuse of discretion." *State v. Brandt*, 393 S.C. 526, 550, 713 S.E.2d 591, 603 (2011). A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied. *State v. Wharton*, 381 S.C. 209, 213, 672 S.E.2d 786, 788 (2009). "[T]he trial court is required to charge only the current and correct law of South Carolina." *Brandt*, 713 S.E.2d at 603. "In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." *Id.* "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." *Id.* "A jury charge which is substantially correct and covers the law does not require reversal." *Id.*, (citing *State v. Foust*, 325 S.C. 12, 479 S.E.2d 50 (1996)). 'The law to be charged must be determined from the evidence presented at trial.' *Brandt*, at 549, 713 S.E.2d at 603 (2011) (citing *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "If there is any evidence to support a charge, the trial court should grant the request." *Id.* (citing *State v. Williams*, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct. App. 2005)). "Errors, including erroneous jury instructions, are

subject to harmless error analysis." S*tate v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009).

ARGUMENT

The Court of Appeals' opinion repeatedly erred in its application of malice and accomplice liability. Those errors can be clearly attributable to the consistent oversight of crucial facts set forth in the record. However, those errors primarily arise as a result of the Court of Appeals' miscomprehensions of the law concerning direct and circumstantial evidence, and how those types of evidence establish the singular term of art we refer to as "malice". To wit, as all juries are told, different types of malice do not exist, only different types of evidence demonstrating malice, and the law makes absolutely no distinction between the weight or value to be given to each. The Court of Appeals' departure from these rules of law requires correction by this Court, both for this case and for future jurisprudence.

Simply put, *a mass shooting* – wherein numerous rounds of ammunition are intentionally fired upon numerous unsuspecting people – should, categorically, satisfy the element of malice, regardless of whether the charge concerns murder or attempted murder. Nevertheless, the Court of Appeals has disagreed, in reliance upon its many errors of law and fact. Likewise, a case where there is distinct evidence of two different individuals, with two different rifles, seen leaving the same exact mass-shooting scene (committed by rifle fire), at the same exact time (mere seconds after the shooting), in two different cars, should not fall short of warranting an accomplice liability charge. But, the Court of Appeals' ruling has created that quandary as well. The errors of the Court of Appeals warrant reversal, and they are as follows:

I. The Court of Appeals committed reversible error in its analysis of malice for attempted murder under *State v. King* and S.C. Code Ann. § 16-3-29, and in its disregard for the copious amount of direct and circumstantial evidence supporting a finding of malice.

The Court of Appeals' opinion sets forth a conglomeration of errors, involving both law and fact, which concern the interplay of attempted murder, specific intent, and malice. This case no doubt involves an area of law that has come into recent confusion in our State, but the Court of Appeals' opinion is not merely one that insufficiently addresses a confusing topic – it is one that reaches egregiously improper legal and factual conclusions. The Court of Appeals' errors include finding: a) that the trial court's error extends not *just* to the charge of inferred malice from use of a deadly weapon, retroactively improper under *Burdette*, but that jury instructions regarding the right to infer malice from the facts and evidence presented cannot accompany the charge of attempted murder; b) that the State acquiesced to such a legal paradigm and relied solely upon evidence of "express malice"; and c) that there is insufficient record evidence demonstrating malice other than Campbell's use of a deadly weapon. This Court's holding in *State v. King* does not provide the Court of Appeals the requisite precedent to rule as it did, and the plain reading of the codified definition of attempted murder explicitly permits both express and implied malice. More generally, the terms "express malice" and "implied malice", are at the heart of the confusion that arises in this area of law. Reversal of the Court of Appeals' opinion is warranted for both factual and legal error, and to establish consistency to an issue that has led to multiple contradictory rulings in the Court of Appeals.

The first error by the Court of Appeals was expanding its opinion beyond *Burdette* and ruling that an attempted murder charge is comprehensively inconsistent with inferred malice due to the specific intent nature of the crime. The Court of Appeals' improper holding can be found

from the outset of its legal analysis, wherein it stated: "Campbell argues the trial court erred by giving an inferred malice jury instruction because attempted murder is a specific intent crime and requires both express malice and a specific intent to kill pursuant to our supreme court's ruling in *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017). We agree." [3] *State v. Campbell*, 435 S.C. 528, 535, 868 S.E.2d 414, 418 (Ct. App. 2021), reh'g denied (Feb. 24, 2022). This holding is in error and it ultimately resulted in a cascade of subsequent errors regarding the statutory authority for attempted murder, the reach and application of *State v. King*, the maxims of law concerning malice and circumstantial evidence, and the accurate assessment of facts and evidence supporting malice.

First, the express language of S.C. Code of Laws Ann. § 16-3-29, dictating that attempted murder is explicitly satisfied by "malice aforethought, either express or implied", is in direct conflict with this holding. Though the Court of Appeals recites the codified language of attempted murder, it offers no analysis as to how the language of that statute can be interpreted to exclude implied malice. Nor does the court explain how the trial court's reliance upon and charge of that statutory language can constitute legal error. The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction. *State v. Sweat*, 379 S.C. 367, 375, 665 S.E.2d 645, 650 (Ct. App. 2008), aff'd as modified, 386 S.C. 339, 688 S.E.2d 569 (2010) (citing *Durham v. United Cos. Fin. Corp.*, 331 S.C. 600, 604, 503 S.E.2d 465, 468 (1998)). The plain language of the statute cannot be contravened. *State v. Leopard*, 349 S.C. 467, 473, 563 S.E.2d 342, 345 (Ct. App. 2002) (citing *Scholtec v. Estate of Reeves,* 327 S.C. 551, 560, 490 S.E.2d 603, 607 (Ct. App. 1997)). This Court has even cited with approval that "'[a]s a general rule where

[3] This ruling is also demonstrated at the outset of the opinion, where the court's intent to reverse follows from the summary of Campbell's argument that the specific intent nature of the attempted murder renders in error the trial court's charge on implied malice from use of a deadly weapon – as opposed to simply being in error by application of *Burdette* to a pending and preserved appeal. *Id.* at 416.

the law governing a case is expressed in a statute, the court in its charge not only may, *but should*, use the language of the statute, and may, indeed, be guilty of error if it employs language which constitutes a departure in an essential respect from the statute.'" *Field v. Gregory*, 230 S.C. 39, 47–48, 94 S.E.2d 15, 20 (1956) (citing 53 Am. Jur. Trial, para. 542, at page 433) (emphasis added); (See 75A Am. Jur. 2d Trial § 908).

The trial court adhered to the rules of statutory construction, the Court of Appeals did not, and the opinion offers no explanation for its departure from the clear statutory definition of attempted murder. The Court of Appeals' reversal is in error and the opinion fails to provide any independent discussion in support of its holding. It instead simply relies upon *State v. King* to do the heavy lifting for the entire opinion. The problem is that *State v. King* does not support the Court of Appeals' decision.

State v. King establishes that attempted murder is a specific intent crime and that a charge to the contrary constituted reversible error; *it goes no further*. The Court of Appeals' reliance upon *King* is misplaced, as the ruling does not extend so far as to *rule* on the question of inferred malice. Though the issue may have been anticipated by footnote, this Court's decision did not reach this issue for discussion, did not make an accompanied ruling on the issue, and in fact, explicitly stated that "*we decline to address King's additional sustaining ground*" for having affirmed the decision of the Court of Appeals on other grounds. *State v. King*, 422 S.C. 47, 64, 810 S.E.2d 18, 27 (2017), reh'g denied (Mar. 9, 2018) (Footnote 5 recognizing Appellant raised an additional sustaining argument, but declining to reach the argument having already affirmed the decision of the Court of Appeals).

The Court of Appeals has rested its decision on mere dictum, and this Court has ruled that obiter dictum does not carry precedential value. *Herndon v. Wright*, 257 S.C. 98, 102, 184 S.E.2d

444, 445 (1971). Justice Few made this point all the more clear in his concurrence in *Gordon v. Lancaster:*

> [B]ecause the Court's expansive statement was not necessary to the decision of the case, the statement is dictum. See *Nash v. Tindall Corp.*, 375 S.C. 36, 40-41, 650 S.E.2d 81, 83 (Ct. App. 2007) (explaining "dictum 'is a statement on a matter not necessarily involved in the case, ... is not binding as authority ..., [and] is not the court's decision.' " (quoting 21 C.J.S. Courts § 227 (2006)). Dictum is not the law.

Gordon v. Lancaster, 425 S.C. 386, 395, 823 S.E.2d 173, 177 (2018). Footnote 5 in *State v. King* is precisely this "expansive statement not necessary for resolution of the case" described above – the various disclamations in the case itself prove such. It therefore cannot serve as the foundation for the Court of Appeals *finding error* on the part of the trial court. *State v. Phillips*, 416 S.C. 184, 194, 785 S.E.2d 448, 453 (2016) (citing S.C. Const. art. V, § 9) (Noting that it is incumbent upon the court of appeals to properly apply the precedent of the Supreme Court.). Appropriately, the trial court referenced *King* during its charge conference when confirming the specific intent nature of attempted murder and assured that it would instruct the jury accordingly. The trial court also noted that he was not aware of any precedent to support Campbell's position at trial. The trial court was again correct. In the absence of an actual ruling on the question of law, there is no precedent, *King* or otherwise, that would render inferred malice improper in an attempted murder case.[4] The Court of Appeals' holding is without controlling authority of any kind and the holding is therefore in error.

While the Court of Appeals erred in its reversal of the trial court, due to the total absence of precedent to support its decision and the directly contradictive statutory mandate, the underlying issue is now squarely before this Court: can attempted murder be proven via implied malice?

[4] Notwithstanding the application of *Burdette* as a charge upon the facts.

Contrary to the dicta in *King*, the answer to this question is yes and there is no concern for inconsistency within § 16-3-29. Implied malice need mean nothing more than the jury reaching *factual* inferences from the evidence presented to them. See *State v. Taylor*, 434 S.C. 365, 862 S.E.2d 924 (Ct. App. 2021), reh'g denied (Sept. 28, 2021). Implied malice does not mean a presumption or inference of malice *reached as a matter of law*, as such instruction has been long since deemed unconstitutional. See *Sandstrom v. Montana*, 442 U.S. 510, 524, 99 S. Ct. 2450, 2459, 61 L. Ed. 2d 39 (1979), holding modified by *Boyde v. California*, 494 U.S. 370, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990); *Yates v. Aiken*, 484 U.S. 211, 214, 108 S. Ct. 534, 536, 98 L. Ed. 2d 546 (1988). It is simply malice demonstrated by way of circumstantial evidence.

Unfortunately, this understanding has gone unheeded and the terms "express malice" and "implied malice" have grown increasingly misconstrued. This is not surprising, given that our own S.C. Jurisprudence openly admits that despite "the numerous judicial attempts to define malice illustrate, malice aforethought remains very difficult to define clearly." 23 S.C. Jur. Homicide § 16. That misunderstanding stems from interpretations that these terms either 1) presuppose a differing valuation of the types of evidence available to a jury at trial, or 2) suggest different types of malice.[5] Either option represents a break from long established law in South Carolina. See *State*

[5] The confusion expressed by our courts is nowhere better demonstrated than in *State v. Wilds*, 355 S.C. 269, 276–77, 584 S.E.2d 138, 142 (Ct. App. 2003). Therein, the Court of Appeals cited with approval to *State v. Milam* and quoted the longstanding maxim that "[m]alice may be either express or implied. 'The words 'express or implied' add nothing to the meaning of the word 'malice.' They do not imply different kinds of malice, but merely the manner in which the only kind known to the law may be shown to exist—that is, either by positive evidence or by inference.' *State v. Milam*, 88 S.C. 127, 130, 70 S.E. 447, 449 (1911)." Yet, in the very next sentence the opinion contradicts the very premise just cited by stating that "[e]xpress malice is when there is a deliberate intention to unlawfully take the life of another. 40 C.J.S. Homicide § 34 (1991). Implied malice is when circumstances demonstrate a "wanton or reckless disregard for human life" or "a reasonably prudent man would have known that according to common experience there was a plain and strong likelihood that death would follow the contemplated act." *Id.* at § 35. Careful review of CJS § 34 and § 35 do not bear the words "express malice" or "implied malice".

v. Grippon, 327 S.C. 79, 84, 489 S.E.2d 462, 464 (1997), holding modified by *State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004) (establishing the current and accepted jury instruction that "[t]he law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence."); *State v. Logan*, 405 S.C. 83, 97, 747 S.E.2d 444, 451 (2013)(supporting *Grippon* and reiterating the fact that circumstantial evidence has the same probative weight and value as direct evidence); *State v. Milam*, 88 S.C. 127, 70 S.E. 447, 449 (1911). (Noting that "[a]ppellant also complains of error in the language above quoted in omitting the words "aforethought, either express or implied" after the word "malice." ***The words 'express or implied' add nothing to the meaning of the word 'malice.'*** They do not imply different kinds of malice, but merely the manner in which the only kind known to the law may be shown to exists—that is, either by positive evidence or by inference.").

Regarding the first misconception, nowhere has this Court ever suggested that a jury is not permitted to make inferences as it sees fit from the circumstantial evidence presented in a case. Not all evidence of malice will be "direct evidence of malice" such that the defendant explicitly announces his evil intentions/hatred/ill-will/hostility (i.e. malice) ahead of time. Thus, any legal holding that demands a "certain type of evidence" cannot stand. The Court of Appeals conclusion that only "express malice" can satisfy a specific intent standard is in conflict with *Grippon* and *Logan* and the fundamental mechanism of permitting a jury to reach reasonable inferences from circumstantial evidence.

The second misinterpretation – that express and implied malice exist as different types of malice – is fundamentally in error and it is an error that is at the very foundation of the referenced

language from *Keys v. State*.[6] *Id.*, 104 Nev. 736, 740, 766 P.2d 270, 272 (1988) (Holding that "[t]he *mens rea* requirement denoted by the term express malice is different from that of implied malice. Express malice, called malice in fact, is the deliberate intention to kill; implied malice, called malice in law, does not relate to a deliberate, intentional killing but is rather a *mens rea* inferred in law from the 'circumstances' of the killing. NRS 200.020.").

Through the many different definitions given to malice, it has repeatedly been defined as an "ill will" "hatred" or "wicked heart". It has also been defined to arise from a reckless disregard for human life. *State v. Harvey*, 220 S.C. 506, 514, 68 S.E.2d 409, 412 (1951), overruled on different grounds by *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (quoting *State v. Doig*, 31 S.C.L. 179, 182 (S.C. App. L. 1845) ("'In law, malice is a term of art, importing wickedness and excluding a just cause or excuse.'"). An intentional action born of such mindsets can be said to be a malicious act, or "an unlawful and intentional act, with malice aforethought". Problems arise when these definitions, and accompanying legal analysis, try to equate "malice" to "intent" as if they were the same element of the crime. They are not.

The confusion is understandable, as juries and reviewing courts must often discern malice from the same actions they discern intent. But that does not mean the law must conflate the two.[7]

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[6] The error originates from the fact that the Nevada legislature has codified separate types of malice. Nev. Rev. Stat. Ann. § 200.020 (West).

[7] Practically speaking, the actor's intent can never be fully discerned strictly by confirming the presence of malice. By way of example, a defendant can harbor an ill-will and hatred for his intended victim, along with unlawful and intentional act, *but only harbor an intent to maim or injury.* Whether the intent is to break someone's leg, or crash their car, or some other harmful violence, the presence of malice would still be satisfied. In the context of a murder charge, we need not look any further. If the malice is present, and the unlawful act is present, all that is left is for death to result. Since murder exists as a general intent crime, a reckless disregard for human life is all that need exist. For attempted murder, the evaluation would have to proceed one step further for the separate element of specific intent. Obviously, a baseball bat to the knee would likely not suffice in the eyes of the jury, nor would a punch to the gut. However, were a defendant to silently walk up to an individual pull a gun and attempt to shoot them in the head, the jury would

A jury is perfectly capable of evaluating the actions of a defendant, and as the fact-finder, determine whether the defendant bore an ill-will or reckless disregard for human life at the time of his action. They can then judge those same actions to determine whether the defendant bore a specific intent to kill. Practically speaking, the actor's intent cannot be discerned from the presence of malice. By way of example, a defendant can harbor an ill-will and hatred for his intended victim, but only harbor an intent to maim or injury. Whether the intent is to break someone's leg, or shoot someone in the head, the presence of malice would still be satisfied. What constitutes murder is when the actions taken from that ill-will result in death – even if that was not the intent at the time. For attempted murder, that same ill-will must be present, but the actions in question must demonstrate an intent to kill. That may not always be a simple task for the jury, but often, it will be. And, it most certainly is in the case at hand.

This Court was right to conclude that a defendant "cannot attempt an unintended result", but the sentiment is incomplete. A defendant can also attempt an intended result, and simply fail to succeed. The jury should decide which sentiment the facts of the case support. A reckless disregard for human life satisfies the existence of malice, but it would not satisfy specific intent to kill – nor should it. It is the actions of the defendant which will dictate the jury's ability to discern intent. Such is a question of fact that must be left to the jury, and actions such as mass-shootings, bombings of public places, unprovoked and unmitigated attacks with deadly weapons (even when uninstructed), or the wrapping and abandoning of a baby in trash bag (See *State v. Taylor, Supra*), will likely all be uncomplicated evaluations for the jury to make.

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have little trouble concluding that a specific intent to kill was present. While these are simple examples, they demonstrate that a jury can and should separate their evaluation of the facts to determine the presence of malice, and the actor's intent. But it is inescapable that our statute expressly provides for proof of malice by either express or implied means.

While the Court of Appeals may have bungled its decision in the case at hand, it soundly demonstrated the legal reasoning necessary for this issue in its prior holding in *State v. Taylor*:

> The question in this case is whether "inferred malice"—the concept that a jury may deduce malice from a defendant's actions—is inconsistent with the specific intent to kill required for attempted murder. We hold it is not. After all, actions can speak louder than words.
>
> . . .
>
> Sometimes the jury is left with nothing to consider except the defendant's actions.
>
> . . .
>
> When our supreme court spoke of implied malice in *King*, it was speaking of malice implied by operation of law, not of the jury's ability to infer malice based on its view of certain facts.

State v. Taylor, 434 S.C. 365, 370, 862 S.E.2d 924, 927 (Ct. App. 2021), cert. denied (October 7, 2022). An individual can harbor a specific intent to kill without professing that intent or with evidence demonstrating overt preparation and planning. The jury's ability to infer malice from the circumstances of the case is critical and proper. The conclusion reached in *Taylor* is the correct interpretation of "implied malice", it is perfectly consistent with § 16-3-29, and an equivalent analysis should be the bedrock holding of this Court in this matter.[8]

Notwithstanding the intricacy of the legal paradigms discussed above, the facts of this case present an adequate demonstration of Campbell's intent to kill. In closing, even defense counsel

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[8] In addition to the case at hand, prior cases from the Court of Appeals demonstrate a drastic inconsistency on this matter. See *State v. Shands*, 424 S.C. 106, 131, 817 S.E.2d 524, 537 (Ct. App. 2018) (finding that "[i]n light of our supreme court's discussion in *King*, we find the State needed to prove Shands acted with express malice and the specific intent to kill in order to be found guilty of attempted murder."); *State v. Taylor*, 434 S.C. 365, 370, 862 S.E.2d 924, 927 (Ct. App. 2021), cert. denied (October 7, 2022) (finding that Supreme Court's reference to implied malice in *King* addressed only implied malice as a matter of law, not the jury's right to infer malice from the facts of a case, and therefore found no conflict with the element of specific intent); *State v. Williams*, 427 S.C. 148, 157, 829 S.E.2d 702, 707 n. 8 (2019).

acknowledged that the culprit's actions were sufficient when he referenced that perhaps the "target" was not Katrina, but some other visitor – and therefore the shooting was the action of some other individual. (App., p. 499). That is tantamount to a concession that this was an attempted murder; he simply challenges the issue of identity. While such should not be legally required, there is without question "direct evidence" of an intent to kill in this record that requires no need for inference, and such is more than enough to support the jury's finding of malice and specific intent, without reliance upon the implied malice from the use of a deadly weapon charge. However, and without sufficient explanation, that evidence was discounted.

The Court of Appeals overlooked the considerable evidence of malice that existed within the record, due at least in part to its erroneous analysis of how malice may be demonstrated. The Court of Appeals considered the State's evidence of malice to be limited to "evidence that Campbell had recently hit Katrina [i.e grudge and motive], Campbell drove across town in his girlfriend's car [i.e. preparation], and fourteen rounds were fired from the rifle into Katrina's crowded apartment [i.e. a wicked heart and a specific intent to kill]." *Campbell*, 868 S.E.2d at 419. While this is incidentally a concession by the court that evidence of malice exists (*infra*), the Court of Appeals misses the mark by being dismissive of numerous other instances of malice within the record.

The Court of Appeals held that "Campbell's previous altercation with Katrina and Campbell driving across town is not a total disregard for human life like the defendant in *Brooks* displayed." *Id.* at 419. The court's conclusion here is perplexing, as is its reliance on *Brooks*. Such evidence is clearly relevant to the criminal episode, and demonstrates the existence of ill-will/hatred and a specific intent to commit a future shooting. Also the "total disregard for human life" definition of malice is one of the ways in which a jury might *infer* malice from the facts and

evidence for the charge of *murder*. It therefore has nothing to do with specific intent and the court's supposed need for "express malice" (i.e. direct evidence of malice). What the Court of Appeals' seems to overlook is that a jury could easily infer Campbell demonstrated ill-will with an intent to do harm by these actions. In fact, historically, evidence of prior grudges, lying in wait, lying in ambush, and preparation for the crime have all been identified as evidence of malice *that does not require inference by the jury*. See *State v. Smith*, 430 S.C. 226, 233, 845 S.E.2d 495, 498 (2020); *State v. Judge*, 208 S.C. 497, 506, 38 S.E.2d 715, 720 (1946); *State v. Strickland*, 147 S.C. 514, 145 S.E. 404, 405 (1928), overruled on other grounds by *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009); *State v. Alford*, 264 S.C. 26, 32, 212 S.E.2d 252, 254 (1975), overruled on other grounds by *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009) (citing 40 C.J.S. Homicide s 209). Suggesting that Appellant's prior physical attack upon Katrina and his driving across town do not satisfy a "total disregard for human life" standard is to completely misconstrue the purpose of malice evidence. The evidence shows motive, ill-will, and premeditation of Campbell's intent to kill.

Next, there is a distinction to be made between "inferring malice from the use of deadly weapon" and the "manner in which that deadly weapon was used." Someone committing a shooting in such a way that it could realistically and deliberately result in the deaths of numerous unsuspecting men, women, and children is a demonstration of malice in its most obvious and evil form. There is no explanation for such actions and it demonstrates that the manner in which a shooting takes place can serve as evidence of malice beyond the simple use of a deadly weapon that this Court no longer wishes to see expressly charged. All of which is to say, notwithstanding the *Burdette* issue in this case, *the nature of the act itself is inherently malicious*. Notably, the Court of Appeals omitted the firing of the gun 14 times from its analysis of malice.

While the Court of Appeals' summary of the State's position included the inherent nature of the shooting, it excluded the 14 gunshots from its own position on "express malice". Having listed only the prior attack and drive across town as two instances of express malice, the Court of Appeals omitted the additional evidence of preparation for the crime. Campbell[9] 1) took someone else's car without permission *during the early morning hours* so as to commit the crime without being seen, 2) acquired the services of a friend[10] to park his getaway car *away from the scene*, 3) arranged it so that his friend would serve as a getaway driver, 4) walked on foot in the early morning hours to Katrina's apartment while carrying with him an assault rifle, 5) committed the crime in a "lying in wait/lying in ambush" manner, such that the victims were unaware of his presence and intentions, 6) ran from the scene without concern for the well-being of the apartment's occupants – constituting positive evidence of his deliberate intention to take life, and 7) ran back to the getaway vehicle and had his friend drive away from the scene. Each of these actions is a separate and distinct portion of the Campbell's planning and preparation for the shooting, and they each constitute evidence of malice *and* demonstrate Campbell's specific intent to kill. Moreover, as evidence of preparation for the crime itself, these actions do not *require* inference to demonstrate ill-will. They are direct evidence that Campbell formulated in his mind the desire to 1) go to the scene of a prior dispute, 2) shoot 14 rounds into a crowded apartment so as to kill the individuals residing in that location, and 3) evade responsibility for the crime. Inexplicably, however, none of these facts were considered by the Court of Appeals.

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[9] Presumably, Campbell *is at least one of the gunmen* who committed this shooting. (*Infra*).

[10] The State's theory of the case is that this friend is Trivell Richardson, but Petitioner argues the video does not provide absolute proof as to which culprit is which, leaving Richardson the possibility of switching his role in the crime with that of Campbell's, and making an accomplice liability charge necessary. (*Infra*).

The Court of Appeals did not abide by the express statutory language set forth in § 16-3-29, it then stretched this Court's opinion in *King* well beyond its legal holding and ruled that an attempted murder charge can only be supported by evidence of "express malice" – a misconstrued term demonstrating the court's acceptance of two different kinds of malice. To compound these legal errors, the Court of Appeals then disregarded substantial evidence of malice in reaching its decision to reverse.

II. In considering *State v. Burdette*, the Court of Appeals erred by misapplying the standard for harmless error and resting its decision to reverse on the assumption that the jury could have ignored the other evidence of malice in the record.

In addition to the Court of Appeals' errors of law and fact concerning *King* and § 16-3-29, the Court of Appeals also failed to properly apply the standard for harmless error, conceded that evidence of malice was present within the record, and based its decision to reverse on the assumption that the jury could have ignored the "non-*Burdette*" evidence of malice within the record. Certiorari should be granted to correct this error of law.

The Court of Appeals asserted the following recitation of law for harmless error review of a jury instruction:

> 'An erroneous instruction alone is insufficient to warrant this [c]ourt's reversal.' *Id.* at 496, 832 S.E.2d at 578. '[E]rroneous jury instructions are subject to a harmless error analysis.' *State v. Smith*, 430 S.C. 226, 233, 845 S.E.2d 495, 498 (2020). '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.' *Burdette*, 427 S.C. at 496, 832 S.E.2d at 578 (quoting *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014)). '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.* at 496, 832 S.E.2d at 578-79 (quoting *State v. Kerr*, 330 S.C. 132, 145, 498 S.E.2d 212, 218 (Ct. App. 1998)).

Campbell, 868 S.E.2d at 419. This is not an inaccurate statement of law. However, the Court of Appeals cannot inappropriately apply that law. Such error exists in the fact that the Court of Appeals expressly conceded the presence of direct evidence of malice in the record, but erroneously construed the harmless error paradigm to support the contention that a jury instruction is not harmless if the jury "could have" relied upon that erroneous instruction.

The Court of Appeals' errors of fact are demonstrated within the following excerpts from its opinion:

i. "In the present case, the evidence of express malice is significantly less than the amount in *Brooks.*"[11]

ii. "The jury could have reasonably found malice partially based on the use of a weapon."

iii. "Indeed, the jury may have found malice based solely on the use of a weapon."

Id. at 419. In the first and second statements (i & ii), the Court of Appeals explicitly concedes that there is evidence within the record to support the element of malice, other than the use of a deadly weapon. The first statement even goes so far as to concede that there is evidence of malice in the record that does not require inference by the jury. (See *Supra*). The element of malice is not one that must be satisfied "by degree". There is no "substantial evidence of malice" threshold that must be met; the satisfaction of the element is judged strictly by its existence or nonexistence in the evidence presented. Thus, a charge on inferred malice from the use of a deadly weapon cannot be said to have contributed to the verdict when the record has been shown to include other evidence

[11] Respondent would also dispute the conclusion that *Brooks* carries more evidence of malice, given the lying in ambush style shooting that killed one and endangered numerous other individuals. It is strictly a matter of the victims' good fortune that Campbell is not facing multiple counts of murder for his actions.

of malice. This is especially so when there is, as conceded by the Court of Appeals, *evidence of express*[12] malice within the record. See *State v. Smith*, 430 S.C. 226, 233, 845 S.E.2d 495, 498 (2020) (parenthetically summarizing the holding in *Wilds* that "malice need be implied only if there is no positive evidence of express malice."). This concession is inconsistent with reversal.

The second circumstance of error from these statements (ii & iii) is that the Court of Appeals has clearly misapplied the law governing harmless error analysis. The Court of Appeals concludes that if the jury could have considered the erroneous charge in question, either partially or entirely, then it cannot reach the conclusion that the charge was harmless. Such an evaluation would render only an absolutely irrelevant jury charge as "harmless" in the eyes of the law, and harmless error is not the strict equivalent of irrelevant error.

In addressing whether an erroneous charge is harmless the analysis cannot be as simple as asking: "could the jury have relied upon it?" *The answer to this question will always be yes.* The proper framing of the issue is: "did the jury rely upon it?" Under this framing, the question is answered if, in total exclusion of the disputed charge, the verdict is supported by the remaining record beyond a reasonable doubt. This sentiment is clearly apparent in numerous holdings by this Court, but is omitted from the Court of Appeals' review, in favor of asking the lesser standard of what the jury "could" have done. See *State v. Jefferies*, 316 S.C. 13, 22, 446 S.E.2d 427, 432 (1994) ("[w]e must review the facts the jury actually heard and weigh those facts against the erroneous jury charge to determine what effect, if any, it had on the verdict."); *Arnold v. State*, 309 S.C. 157, 166, 420 S.E.2d 834, 839 (1992) ("The first step in determining whether these instructions contributed to the jury's verdict is to determine what evidence the jury considered on the issue of [malice], independently of the presumptions themselves."); *State v. Middleton*, 407

[12] I.e. direct evidence of malice that does not require inference by the jury.

S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (citing *State v. Jeffries*, and noting that "whether or not the error was harmless is a fact-intensive inquiry" that requires the court weigh the facts heard by the jury against the erroneous charge).

The Court of Appeals did not ask whether the evidence of malice, independent of the use of a deadly weapon charge, is present within the record such that the jury need not rely upon the erroneous charge to satisfy the elements of the crime. The failure by the Court of Appeals to address harmless error in this way coupled with its outright concession that direct evidence of malice existed within the record is tantamount to the Court of Appeals concluding that the jury could have just ignored the considerable evidence of malice within record in reaching its verdict. The Court of Appeals' conclusion that the jury "may have found malice based solely on the use of a weapon" is to presume that the jury disregarded its instruction by the court as to the definition of malice and disregarded the numerous facts establishing malice set forth in evidence presented. The Court of Appeals' conclusion is inconsistent with the well-settled presumption that the jury will obey the instructions of the court. *Parker v. Randolph*, 442 U.S. 62, 73, 99 S. Ct. 2132, 2139, 60 L. Ed. 2d 713 (1979), abrogated on other grounds by *Cruz v. New York*, 481 U.S. 186, 107 S. Ct. 1714, 95 L. Ed. 2d 162 (1987) ("A crucial assumption underlying that system [of trial by jury] is that juries will follow the instructions given them by the trial judge."); See also *Aldrich v. S. Ry. Co.*, 95 S.C. 427, 79 S.E. 316, 320 (1913); *Coogler v. Thompson*, 286 S.C. 168, 169, 332 S.E.2d 215, 216 (Ct. App. 1985).

III. **The Court of Appeals failed to properly apply the any evidence standard to the accomplice liability instruction given at trial when the evidence demonstrated that a second gunman was seen fleeing the scene, two cell phones were found at the scene, two brands of ammunition were found at the scene, no ballistics evidence was offered demonstrating all ammunition was fired by the same gun, and the video evidence of Campbell and co-defendant Richardson is not of sufficient quality to confirm their respective identities with absolute certainty.**

While the evidence presented at trial demonstrated beyond a reasonable doubt that Campbell was, at minimum, a participant in the shooting that resulted in Victim Frost's death, and Victims Kerri and Tierra's injuries, there are no eyewitnesses or forensic proof identifying the individual who actually pulled the trigger. For that matter, the record also fails to confirm that only one trigger was pulled that morning. That limitation to the record, combined with the numerous instances of circumstantial evidence, demonstrated the need for the accomplice liability charge given by the trial court, and the court exercised proper discretion in instructing the jury that the hand of one is the hand of all. The Court of Appeals failed to properly apply the "any evidence" standard in this matter and it further failed to give deference to the discretion of the trial court's ruling, instead choosing to follow a strained interpretation of the record. The Court of Appeals' legal and factual errors as to accomplice liability warrant reversal.

In determining whether a trial court erred in charging the jury on the law of accomplice liability, "[a]n appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010). "The law to be charged must be determined from the evidence presented at trial." *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "If there is *any evidence* to warrant a jury instruction, a trial court *must*, upon request, give the instruction." *State v. Smith*, 391 S.C. 408, 412, 706 S.E.2d 12, 14 (2011) (emphasis added). The case at hand provides two separate routes toward satisfying the any evidence standard for an accomplice liability charges. The first being

that two separate gunmen were seen fleeing the scene immediately after the shooting, and the forensic evidence could reasonably support a "two shooters" inference by the jury. The second is that the video evidence is insufficient to identify with certainty which of the two individuals was carrying the rifle toward and from the scene of the shooting. Admittedly, if Richardson's self-serving explanation is to be believed, the record does not contain *overt* evidence of an agreed upon plan between two participants in the crime. However, such is not necessary. "To establish sufficiently the existence of the conspiracy, proof of an express agreement is not necessary, and direct evidence is not essential, but the conspiracy may be sufficiently shown by circumstantial evidence and the conduct of the parties. The circumstantial evidence and the conduct of the parties may consist of concert of action." *State v. Fleming*, 243 S.C. 265, 274, 133 S.E.2d 800, 805 (1963) (citing *15 C.J.S. Conspiracy § 93a); State v. Condrey,* 349 S.C. 184, 192, 562 S.E.2d 320, 323–24 (Ct. App. 2002); *State v. Gibson*, 390 S.C. 347, 354, 701 S.E.2d 766, 770 (Ct. App. 2010). "Concert of action" is present in two individuals who drove together into downtown Charleston ultimately assuming the duties of "shooter" and "driver" in this crime. "Concert of action" is present in the fact that two men carrying rifles left the scene of a rifle shooting at the same time. There is no other explanation for this other than concerted actions. And, even if there were another explanation, a "two-shooters theory" is a more than reasonable inference for the jury to conclude, especially given evidence presented at trial. In its opinion, the Court of Appeals summarized Campbell's position: "Campbell first objected to the accomplice liability jury instruction, arguing no evidence implicated a second party." *Campbell*, 868 S.E.2d at 417. The Court of Appeals then agreed that "Campbell argues neither party presented evidence he acted with another pursuant to a common design or plan." *Id.* at 420. The Court of Appeals based its decision to reverse on a review of *State v. Washington*, finding that 1) though evidence of an accomplice relationship

existed, there was no evidence that Richardson actually committed the shooting, and 2) though there was evidence of a second party who could have committed the shooting, there was no evidence supporting an accomplice relationship between he and Campbell. The Court of Appeals erred in both regards.

The Court of Appeals concluded that Richardson was the driver and that Campbell was the shooter, but the only distinguishing proof as to which culprit performed the role of shooter, is the testimony of Richardson himself. The jury is not required to believe Richardson's testimony at trial. Richardson's testimony was obviously beneficial to the State, but as Respondent's cross-examination and closing argument suggested, he has reason to try and limit his own culpability. The record cannot irrefutably demonstrate that Richardson was "the driver" suspect, and that Campbell was the "rifle carrier" caught on camera. The Court of Appeals dismissed the possibility that if the jury were not convinced beyond a reasonable doubt as to which culprit on video was carrying the rifle toward the scene of the crime (and ultimately using that rifle), they need not differentiate, so long as they were certain that both men were aware of and perpetuating the crime together. The record is "equivocal" as to this point, which is what is required under *Barber v. State*, and Richardson's various statements to police demonstrate prior dishonesty on the question of his identity. *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 439 (2011) (holding that in order to warrant an accomplice liability charge, 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.").

Such, *by itself*, satisfies the minuscule "any evidence standard" that would warrant the charge from the court. However, the Court of Appeals' errors did not end there.

In addition to the accomplice relationship between Campbell and Richardson that lacks a clearer surveillance video to distinguish the two, the record also contains Ms. Blake's eyewitness testimony. She testified to seeing an unidentified hooded individual leaving the scene of the shooting while carrying a "sporty rifle" and fleeing in a lime green car. Despite the "any evidence" and "abuse of discretion" standards it must overcome to find reversible error by the trial court, the Court of Appeals concluded that there was no equivocal evidence that Campbell was working in concert with the man seen by Ms. Blake. Without explicitly stating so, the Court of Appeals appears to infer that "direct" evidence of an accomplice relationship is required to warrant an accomplice liability charge. It is not; circumstantial evidence will suffice, and there is considerable circumstantial evidence that the shooter did not act alone in this murder. See *State v. Fleming*, 243 S.C. 265, 274, 133 S.E.2d 800, 805 (1963). Here, the remarkable fact that two different individuals were seen fleeing the same crime while carrying rifles, *at the precise moment following a massive shooting committed by rifle fire*, is undeniable circumstantial evidence that these two individuals could have been working together. To suggest the jury could not infer such a scenario by believing both the video evidence *and* the testimony of Ms. Blake, is to disregard the maxim that "it is always for the jury to determine the facts, and the inferences that are to be drawn from th[o]se facts." *State v. Burdette*, 427 S.C. 490, 502, 832 S.E.2d 575, 582 (2019)(quoting *State v. Cheeks*, 401 S.C. 322, 328, 737 S.E.2d 480, 484 (2013)). Such an inference does not require the jury to "disbelieve" any evidence presented to them during trial, as this inference could be reached by believing *all* the evidence presented at trial. It is the jury's prerogative to establish the credibility of witnesses, and since the testimony of Ms. Blake is not incompatible with the video surveillance and testimony of Richardson, they would have had every right to reach this conclusion. If the jury had interpreted the evidence in this manner, the lack of an accomplice liability charge in this case would have left

the jury with no instruction on how to articulate guilt if they believed Campbell was involved, but had help from the culprit seen by Ms. Blake.[13]

Moreover, that particular inference – *that there were two shooters at the scene* – is corroborated by other evidence that the Court of Appeals omitted from its analysis entirely. *Two separate cell phones* were found at the location where the shooting was committed. (App., p. 157-158). This bolsters the inference that *two people were at the scene* of the crime. Additionally, the 14 recovered shell casings were not all of the same manufacturer; this bolsters the reasonable inference that *two guns were at the scene* of the crime. (App., p. 134-135). Lastly, the evidence in the record *does not* inform the jury that these 14 rounds were all fired from the same firearm, permitting the *reasonable inference that two guns were fired* at the scene of the crime.[14]

Admittedly, there is no *direct evidence* showing an agreement between the two witnessed gunmen seen fleeing the scene, but such is not required. Circumstantial evidence can be used to establish an accomplice theory. The jury was tasked with determining whether Campbell was guilty, *not that he was solely guilty*. If the trial court were to follow the Court of Appeals' opinion and not give an accomplice liability instruction, it would force the jury into a factual finding that either Campbell committed the crime, or the unidentified man in a hoodie committed the crime, *but not both*. The jury cannot know that with absolute certainty because the record simple cannot support that conclusion, and the lack of an accomplice liability charge would leave the jury ill

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[13] Defense counsel focuses upon the credibility and substance of Ms. Blake's testimony for a large portion of its closing argument. The defense certainly wanted the jury to believe there was a second individual armed with a rifle that night (as the video evidence is irrefutable proof of a first), and that this unidentified man is the shooter – not the man caught on camera with an AR-15. (App., p. 500-502; p. 514; p. 515; p. 517-518).

[14] If the jury were to believe the testimony of Mr. Richardson and Ms. Blake, the Court of Appeals' decision could only be supported by the explanation that two separate shooters wanted to commit the same crime independently, but by sheer coincidence, happened to arrive at the same time to do so. Such a coincidence, though not impossible, is certainly implausible.

equipped to fully determine the facts of the crime. In consideration of *Barber*, this Court need only change the name of the defendant in its conclusive holding in order for the statement to be equally applicable to the case at hand:

> Therefore, the testimony is equivocal as to whether or not [Campbell] was the only person armed with the type of gun the forensic experts say fired all the shots that night. The circuit court judge did not err in instructing the jury on "the hand of one, the hand of all" theory of accomplice liability.

Id., at 440.

The Court of Appeals is confined to an "any evidence" standard, and the jury had all of the pieces to the puzzle they would need to reasonably conclude that there were two shooters or two participates perpetrating the crime that morning. To ignore the circumstantial evidence of this case is clear reversible error.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the opinion of the Court of Appeals should be reversed, and that the judgments, convictions, and sentences of the trial court be affirmed.

(Signature block on following page)

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