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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Charleston County
Honorable Deadra L. Jefferson, Circuit Court Judge

Opinion No. 5885 (S.C. Ct. App. filed December 22, 2021)

THE STATE,

PETITIONER,

V.

MONTRELLE LAMONT CAMPBELL,

RESPONDENT.

APPELLATE CASE NO. 2022-000349

BRIEF OF RESPONDENT

LARA M. CAUDY
Appellate Defender

DAVID ALEXANDER
Appellate Defender

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

ATTORNEYS FOR RESPONDENT

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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?

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RESPONDENT'S COUNTER ISSUES PRESENTED

I. Did the Court of Appeals properly apply this Court's holdings in State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017), and State v. Burdette, 427 S.C. 490, 832 S.E.2d 577 (2019), in concluding that the trial court erred by charging the jury that malice may be inferred by the use of a deadly weapon, and that such error was not harmless? (Petitioner's Issues I and II).

II. Did the Court of Appeals correctly hold the trial court erred by charging the jury on the hand of one is the hand of all theory of accomplice liability when there was no evidence to support the charge, specifically there was no evidence Respondent was acting with another during the shooting or that the offense was committed pursuant to a common design or plan, particularly where the state's theory of the case was that Respondent was the shooter and acted alone? (Petitioner's Issue III).

STATEMENT OF THE CASE

A Charleston County Grand Jury indicted Respondent on April 11, 2016 for murder and two counts of attempted murder. App. 557-562. His case was called to trial on January 8, 2018 before the Honorable Deadra L. Jefferson, and a jury. App. 1. Assistant Solicitors Chad Simpson and Alex Ginsberg represented the state. App. 1. Mary Ford and Michael Williams represented Respondent. App. 1. On January 12, 2018, the jury found Respondent guilty as indicted. App. 554, l. 9 – 555, l. 14. He was sentenced to life without parole for murder and thirty years concurrent for each count of attempted murder. App. 556, ll. 7-14.

After briefing and oral argument, the Court of Appeals reversed Respondent's convictions and sentence in a published opinion filed on December 22, 2021. 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. At the request of the Court of Appeals, Respondent filed a return on January 14, 2022. The Court of Appeals denied the petition for rehearing by order dated February 24, 2022. On April 18, 2022, the state filed a petition for writ of certiorari with this Court seeking review of the Court of Appeals' decision. Respondent filed a return to the petition for writ of certiorari on June 6, 2022. The state then filed a reply on June 16, 2022. By order filed September 8, 2022, this Court granted certiorari. The state filed its brief of petitioner on October 10, 2022.

This brief of respondent follows.

STATEMENT OF FACTS

On Friday, September 18, 2015, Katrina Brown hosted a party that carried over into the early morning hours. Numerous friends and family members were in and out throughout the night. App. 37, l. 3 – 40, l. 9. Katrina lived in Gadsden Green, a government housing community in Charleston. App. 106, ll. 19-25. Around 6:30 in the morning on September 19, 2015, at least fourteen bullets were fired in rapid succession into Katrina's apartment. App. 42, l. 7 – 43, l. 7; App. 75, ll. 3-19; App. 95, l. 10 – 96, l. 9; App. 131, ll. 5-7; App. 137, l. 4 – 138, l. 3. No one saw the shooter. Antwan Frost, an old friend who arrived at the apartment sometime between 5:30 and 6:00 a.m., was fatally wounded. App. 39, l. 6 – 40, l. 23; App. 193, l. 22 – 194, l. 19. Kerri Brown, Katrina's sister, suffered a graze wound to the head. App. 76, l. 23 – 77, l. 1. Tierra Brown, a cousin, was shot in the arm. App. 97, ll. 3-13.

During the early stages of the investigation, law enforcement asked Katrina if she "[knew] of anybody who would want to hurt [her]" and whether she had any "enemies in the neighborhood." App. 46, ll. 9-20. Katrina remembered an incident that occurred on Thursday night, September 17, 2015, and told the police about it. That evening, Katrina was at her apartment with her sister, Kerri. App. 27, ll. 10-22. The women were sitting in the kitchen around midnight when Respondent's sister, Kadeshia, who was an old friend, walked inside. App. 28, l. 25 – 30, l. 2. While Katrina and Kerri were talking to Kadeshia, someone knocked on the door and told Kadeshia "that her brother was outside." App. 30, ll. 1-9. Kadeshia told the person to tell her brother "she was coming." App. 30, ll. 3-11. However, Kadeshia continued talking to the women inside. App. 30, ll. 9-12.

Eventually, a man who Katrina did not know or recognize walked into the apartment without her permission and sat down. App. 30, l. 12 – 31, l. 1. He never said a word. App. 31,

l. 3. After a few minutes, Katrina asked the man, who she later learned was Respondent, to leave. App. 30, l. 9 – 31, l. 2. After Respondent eventually left, Katrina had a "verbal altercation" with Kadeshia because she was upset Kadeshia did not apologize for her brother. After this dispute, Kadeshia also left the apartment. App. 54, ll. 3-22.

Later when Katrina went outside to smoke a cigarette, she saw Kadeshia standing by a car. App. 32, l. 23 – 33, l. 2. Katrina claimed that all of a sudden Respondent "knocked" her to the ground. App. 31, ll. 16-23. He was about to "knock" her again when her sister, Kerri, came outside and "frantically" asked, "What are you doing?" App. 31, ll. 21 – 32, l. 1; App. 33, ll. 9-16. Respondent walked away. App. 31, ll. 21-25. He went to the middle of the street while Kerri helped Katrina help. App. 31, l. 16 – 32, l. 21. The women followed Respondent into the road and "had a few words." App. 32, ll. 4-6. Respondent never said anything. App. 33, ll. 17-25. He backed up and headed toward his car. Katrina thought Respondent was "about to reach for something" so the women retreated back into Katrina's apartment. App. 32, ll. 6-10. Katrina did not report this encounter to the police because "where [she is] from, it's not something that you do." App. 35, ll. 9-16. After the shooting on Saturday morning, Respondent immediately became a suspect due to this prior altercation.

Law enforcement obtained surveillance footage from five security cameras operated by the City of Charleston that were spread throughout Gadsden Green as well as from three security cameras outside Lee Lee's Hot Kitchen, a nearby restaurant. App. 169, l. 11 – 171, l. 20; App. 182, l. 1 – 187, l. 15. They also obtained footage from a private residence on Nunan Street, which had a camera that captured what occurred on the street immediately in front of the house. App. 173, l. 7 – 176, l. 5.

The footage from the private residence showed a gold Buick park on nearby Nunan Street shortly before the shooting. Two men left this vehicle and began walking toward Gadsden Green, where Katrina lived. The cameras in front of Lee Lee's Hot Kitchen as well as several of the city cameras captured the men walking. Eventually one of the men is seen running back to the car parked on Nunan Street. A third man is also seen walking toward the car carrying a rifle. App. 335, l. 20 – 350, l. 21; See State's Exhibit No. 95.

Law enforcement determined the gold Buick in the surveillance footage was registered to Tomeka President. App. 233, l. 19 – 235, l. 17. When interviewed, President claimed Respondent was at her apartment that Friday night when she went to bed but was gone when she woke up the next morning, the day of the shooting. She testified that she discovered her car was also gone when she went to leave for work shortly before 7:00 a.m. App. 237, l. 10 – 243, l. 9.

Law enforcement identified the two men originally walking from the car on Nunan Street as Trivell Richardson and Andrew "Ace" Rivers. App. 338, ll. 1-9. Richardson was the driver who was seen running back to the car after the shooting. Law enforcement interviewed Richardson. He was ultimately charged with murder and two counts of attempted murder related to this case. App. 254, ll. 10-25.

Richardson testified against Respondent at trial. He claimed he ran into Respondent, who was driving Tomeka President's car, in North Charleston during the early morning hours of Saturday, September 19, 2015. App. 262, l. 7 – 263, l. 9. Respondent asked Richardson to accompany him to the store to buy cigarettes. However, Richardson claimed that instead of stopping at a nearby store, Respondent drove downtown and stopped on Kennedy Street near Gadsden Green. R. 263, l. 10 – 267, l. 4. Richardson did not know why they were there. R. 268, ll. 8-9. According to Richardson, Respondent got out of the car and asked Richardson to park

the car on Nunan Street, which was around the corner.[1] Andrew "Ace" Rivers was there when they arrived. Richardson asked Rivers to ride with him while he moved the car and Rivers agreed. App. 268, l. 13 – 271, l. 4.

After parking the car on Nunan Street, Richardson testified he began to walk toward Gadsden Green with Rivers to find Respondent and give him the keys to the vehicle. App. 273, l. 20 – 275, l. 18. Richardson called Respondent to ask him where he should leave the keys because he was uncomfortable being in Gadsden Green and wanted to leave. App. 279, l. 25 – 281, l. 2; App. 304, ll. 1-14. While Richardson was walking with Rivers, Richardson heard gunshots and ran back to the car on Nunan Street. Rivers ran in a different direction. App. 275, l. 2 – 276, l. 7. As Richardson was attempting to start the car, he claimed Respondent opened the front passenger door and got in. Respondent was carrying an AR-15 "assault type rifle." App. 277, l. 15 – 278, l. 4. Richardson had never seen the weapon before. App. 278, ll. 5-7. He claimed the rifle was still "smoking." App. 276, l. 8 – 278, l. 20. Respondent allegedly told him to "go" and Richardson drove back to North Charleston. App. 278, l. 24 – 279, l. 9.

[1] The state claimed in its brief of petitioner that there was "video footage" of "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. Moments later the video shows *both individuals* running back, with *the man in blue still carrying the assault rifle*. These individuals were later believed to be identified by police as Campbell [Respondent] and Richardson." BOP at 5 (emphasis added). This assertion is not supported by the record. There is no surveillance footage of "a man dressed in blue" getting out of the gold Buick on Nunan Street nor is there any footage "a man dressed in blue" in possession of an assault rifle *before* the shooting. Rather, the footage from the private residence showed the gold Buick park on Nunan Street shortly before the shooting. Two men left the vehicle and began walking in the direction of Gadsden Green. Richardson was identified as the driver of the Buick while Andrew "Ace" Rivers was identified as the passenger. App. 335, l. 20 – 340, l. 22; App. 338, ll. 1-9. After the shooting, Richardson is seen on the footage running back toward Nunan Street and a third man carrying a rifle is seen walking in the same direction. App. 346, l. 9 – 350, l. 15; See State v. Campbell, 435 S.C. 528, 532, 868 S.E.2d 414, 416 (Ct. App. 2021).

Peggy Blake, who lived across the street from Katrina Brown in September 2015, testified that immediately after the shooting, she looked out her window and saw a black man wearing a "hoodie" with a "sporty rifle" in his hand. Blake allegedly saw this man get into a lime green car, which proceeded to drive away. App. 432, l. 2 – 452, l. 8. However, law enforcement was unable to find a lime green car on the surveillance footage despite "a thorough review." App. 455, ll. 12-19; App. 456, ll. 4-10; App. 457, ll. 7-11. It was also unable to find any other individuals "with an assault rifle" on the footage besides the suspect. App. 461, ll. 16-23.

STANDARD OF REVIEW

"An appellate court will not reverse the trial [court'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) (quoting State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010)) (internal quotation marks omitted). "An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law." State v. King, 422 S.C. 47, 54, 810 S.E.2d 18, 22 (2017) (citing State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012)). "In reviewing jury charges for error, this Court considers the trial court's jury charge as a whole and in light of the evidence and issues presented at trial." State v. Logan, 405 S.C. 83, 90, 747 S.E.2d 444, 448 (2013) (quoting Brandt, 393 S.C. at 549, 713 S.E.2d at 604) (internal quotation marks omitted). "A jury charge is correct if, when read as a whole, the charge adequately covers the law." Id. at 90-91, 747 S.E.2d at 448 (citing Brant, 393 S.C. at 549, 713 S.E.2d at 604) (internal quotation marks omitted). "A jury charge that is substantially correct and covers the law does not require reversal." Id. (quoting Brant, 393 S.C. at 549, 713 S.E.2d at 604); See State v. Foust, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996).

ARGUMENT

I.

The Court of Appeals properly applied this Court's holdings in *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017), and *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 577 (2019), in concluding that the trial court erred by charging the jury that malice may be inferred by the use of a deadly weapon, and that such error was not harmless.

How the Issue was Presented Below

During the charge conference, the trial court indicated that it intended to charge malice may be inferred from the use of a deadly weapon as to both murder and attempted murder since "there has been no mitigation presented or raised." App. 469, l. 21 – 470, l. 3. Defense counsel objected to this implied malice instruction pursuant to State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).[2] The trial court stated the holding in Belcher is "only applicable when there is some mitigation" such as self-defense. It concluded, "Belcher very clearly articulates that where there's no mitigation, the inference is still appropriate." App. 473, ll. 16-20. Nevertheless, defense counsel maintained her objection. App. 473, l. 21.

Specifically as to attempted murder, counsel argued the inferred malice instruction was improper because attempted murder has a different, "higher" burden than murder. She asserted, "I think having that [inferred malice] instruction basically is counter somewhat to that different burden." App. 473, l. 11 – 474, l. 1.

[2] In State v. Belcher, this Court held "where 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 use of a deadly weapon." 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009).

Despite this additional argument, the trial court overruled Respondent's objection. The court asserted, "I'm not aware of any recent cases that [have] come out that have said anything differently other than what has been articulated by the Supreme Court regarding that precedent [Belcher]. . . . *I'm not aware of . . . any case law that has come out recently or within the period of Belcher* ***and King***[3] *that has inferred malice is not appropriately instructed on an attempted murder charge*. Because ***attempted murder and murder basically are the same with the exception of the murder . . . actually being accomplished***." R. 476, l. 24 – 477, l. 20 (emphasis added). Therefore, the trial court overruled Respondent's objection. R. 477, ll. 14-20.

Jury Charge

The trial court charged the jury in part:

> The defendant is charged with murder. The State must prove beyond a reasonable doubt that the defendant killed another person with malice aforethought. Malice is hatred, ill will, or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under circumstances that 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.
>
> Malice aforethought may be expressed or inferred. These terms express and infer do not mean different kinds of malice but merely the manner in which malice may be shown to exist. That is either by direct evidence or by inference from the facts and circumstances which are proven.
>
> Expressed malice is shown when a person speaks words which express hatred or ill will for another or when the person prepared beforehand to do the act which was later accomplished. For example, lying in wait for a person or any other acts of preparation going to show that the deed was within the defendant's mind would be expressed malice. Malice may 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. A deadly weapon is any article, instrument, or substance which is likely to cause death or great bodily harm. Whether an**

[3] State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017).

instrument has been used as a deadly weapon depends on the facts and circumstances of each case.

. . .

The defendant is charged with attempted murder. In order to prove this crime the State must prove the defendant attempted to kill another person *with malice aforethought either expressed or implied*. Malice is hatred, ill will, or hostility towards another person. It is the intentional doing of [a] wrongful act [without] just cause or excuse and with an intent to inflict an injury or under circumstances that the law will infer an evil intent. Malice aforethought does not require that malice exist 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.

Malice aforethought may be expressed or inferred by as I've explained. These terms express and inferred do not mean different kinds of malice. But merely the manner in which malice may be shown to exist. That is either by direct evidence or by inference from the facts and circumstances which are proven. Express malice is shown when a person speaks words which express hatred or ill will for another, or when the person prepared beforehand to do the act which was later accomplished. For example, lying in wait for [a] person or any other acts or preparation going to show that the deed was within the defendant's mind would be expressed malice. Malice may 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. A deadly weapon is any article, instrument, or substance which [is] likely to cause death or greatly bodily harm. Whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case.**

R. 533, l. 16 – 537, l. 16 (emphasis added).

Court of Appeals Opinion

The Court of Appeals held the trial court erred by instructing the jury that malice may be inferred by the use of a deadly weapon in light of this Court's decision in State v. Burdette, 427 S.C. 490, 503, 832 S.E.2d 575, 582 (2019), where this Court held trial courts cannot instruct the jury that malice may be inferred from the use of a deadly weapon, regardless of the evidence presented. Campbell, 435 S.C. at 537, 868 S.E.2d at 419. The Court of Appeals emphasized that

although this Court decided Burdette after Respondent's trial, its holding applies to all cases that were pending on direct appeal if the issue was preserved, which it was in this case. Id.

The Court further agreed with Respondent that the trial court erred by giving an inferred malice instruction because attempted murder is a specific intent crime and requires both express malice and a specific intent to kill pursuant to this Court's ruling in State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017). Id. at 535, 868 S.E.2d at 418.

The Court of Appeals held the error was not harmless. Id. In so holding, the court cited the correct standard of review as stated by this Court in Burdette: "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." Id. at 537, 868 S.E.2d at 419 (citing Burdette, 427 S.C. at 496, 832 S.E.2d at 578); See State v. Middleton, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014)). The court then distinguished this case from State v. Brooks, 428 S.C. 618, 837 S.E.2d 236 (Ct. App. 2019), where the Court of Appeals held the trial court's error in giving an inferred malice instruction was harmless given the significant evidence of malice in that case. Id. at 537-538, 868 S.E.2d at 419. The court concluded the jury may have found malice based solely on the use of a weapon and therefore the error was not harmless. Id. at 538, 868 S.E.2d at 419.

Discussion

The Court of Appeals correctly applied this Court's holdings in State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017), and State v. Burdette, 427 S.C. 490, 832 S.E.2d 577 (2019), in concluding that the trial court erred by charging the jury that malice may be inferred by the use of a deadly weapon, and that such error was not harmless.

In State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009), having carefully scrutinized the historical antecedents of the charge, this Court held trial courts should no longer give the inferred malice from the use of a deadly weapon instruction in cases in which evidence was presented that would reduce, mitigate, excuse, or justify a homicide or an assault and battery with intent to kill. The Court recently extended the holding in Belcher in State v. Burdette, 427 S.C. 490, 503, 832 S.E.2d 575, 582 (2019), to prohibit trial courts from ever instructing juries that malice may be inferred from the use of a deadly weapon "regardless of the evidence presented at trial."

Burdette was indicted and tried for murder and possession of a weapon during the commission of a violent crime after he shot and killed Evan Tyner. Id. at 493, 832 S.E.2d at 577. Burdette maintained the shooting was an accident. Id. The trial court ultimately charged the jury on murder, voluntary manslaughter, involuntary manslaughter, and accident. Id. at 493-494, 832 S.E.2d at 577. Citing Belcher, Burdette objected to the court's proposed instruction that inferred malice could arise when a deadly weapon is used arguing the instruction was improper because there was evidence presented that could reduce, excuse, justify, or mitigate the homicide. Id. The jury acquitted Burdette of murder, but found him guilty of the lesser included offense of voluntary manslaughter. Id. at 494, 832 S.E.2d at 578.

This Court held the trial court erred in charging the jury that malice could be inferred from the use of a deadly weapon in light of Belcher since there was evidence presented at trial that tended to reduce, mitigate, or justify Burdette's killing of the decedent. Id. at 495, 832 S.E.2d at 578. This Court emphasized that "[i]t is always for the jury to determine the facts, and the inferences that are to be drawn from these facts.'" Id. at 502, 832 S.E.2d at 582 (quoting State v. Cheeks, 401 S.C. 322, 328, 737 S.E.2d 480, 484 (2013)). The Court further 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.

Burdette, which was decided while this case was pending on appeal, made clear that trial courts cannot instruct the jury that malice may be inferred by the use of a deadly weapon, regardless of the evidence presented. Accordingly, the Court of Appeals correctly held the trial court erred by charging the jury that malice could be inferred by the use of a deadly weapon over Respondent's objection.

The state complains that the Court of Appeals erred by agreeing with Respondent that the trial court erred by giving the 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 this Court's ruling in State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017). See Campbell, 435 S.C. at 535, 868 S.E.2d at 418. The state maintains this finding (that attempted murder is inconsistent with inferred malice) is in conflict with both King and "the express language of S.C. Code of Laws Ann. §16-3-29." BOP at 10-11. The state goes on to argue that the Court of Appeals' decision suggests a jury is not permitted to make inferences from the circumstantial evidence presented. BOP at 15. However, nowhere in the Court of Appeals' opinion did it state that the jury was not permitted to infer malice from the circumstances of the case in considering a defendant's guilt for attempted murder as the state asserts. The Court of Appeals merely held that the trial court's instruction that malice may be implied *by operation of law* was erroneous given this Court's ruling in King.

The offense of attempted murder is codified in S.C. Code Ann. § 16-3-29. This statute states in relevant part, "A person who, *with intent to kill*, attempts to kill another person *with*

malice aforethought, either expressed or implied, commits the offense of attempted murder." (emphasis added).

In King, which was published three months before this trial and referenced by the trial court, this Court held attempted murder requires a specific intent to kill as opposed to a general intent. The Court found our legislature "created the offense of attempted murder by purposefully adding the language 'with intent to kill' to 'malice aforethought, either expressed or implied' to require a higher level of *mens rea* for attempted murder than that of murder." Id. at 61, 810 S.E.2d at 25. The Court concluded "the additional language of 'with intent to kill' clearly elevates the required mental state above a general-intent crime." Id.

In reaching this conclusion, this Court cited favorably to Keys v. State, 104 Nev. 736, 766 P.2d 270 (1988). In Keys, the Supreme Court of Nevada held it was error for the trial court to refuse to instruct the jury that the specific intent to kill is an essential element of attempted murder. In support of its holding, the court distinguished the crimes of murder and attempted murder by analogizing express malice to a specific intent to kill. The court explained:

> Attempted murder can be committed only when the accused's acts are accompanied by *express malice,* malice in fact. One cannot *attempt* to kill another with implied malice because there "'is no such criminal offense as an attempt to achieve an unintended result.'" An attempt, by nature, is a failure to accomplish what one *intended* to do. Attempt means to try; it means an effort to bring about a desired result. Thus one cannot *attempt* to be negligent or *attempt* to have the general malignant recklessness contemplated by the legal concept, "implied malice." One cannot be guilty of attempted murder by implied malice because implied malice does not encompass the essential specific intent to kill.
>
> An attempt to kill with express malice is, on the other hand, completely consistent with the specific intent requirement of the crime of attempt. Express malice is the "deliberate intention unlawfully" to kill a human. Attempted murder, then, is the attempt to kill a person with express malice, or more completely defined: Attempted murder is the performance of an act or acts which tend, but fail, to kill a human being, when such acts are done with express malice, namely, with the deliberate intention unlawfully to kill.

King, 422 S.C. at 57, 810 S.E.2d at 23 (quoting Keys v. State, 104 Nev. 736, 740, 766 P.2d 270, 273 (1988)).

In a footnote in King, this Court stated:

> While we find it unnecessary to address King's additional sustaining ground, **we would respectfully suggest to the General Assembly to re-evaluate the language following "malice aforethought" as the inclusion of *the word "implied" in section 16-3-29 is arguably inconsistent with a specific-intent crime*.** See Keys v. State, 104 Nev. 736, 766 P.2d 270, 273 (1988) (stating, "[o]ne cannot *attempt* to kill another with implied malice because there is no such criminal offense as an attempt to achieve an unintended result.") Moreover, **if there is no evidence that one charged with attempted murder had express malice and a specific intent to kill, we believe the crime would involve a lower level of intent and, thus, would fall within the lesser degrees of the assault and battery offenses** codified in section 16-3-600. See S.C. Code Ann. § 16-3-600 (2015 & Supp. 2016) (identifying levels and degrees of assault and battery offenses).

King, 422 S.C. at 64 n.5, 810 S.E.2d at 27 n.5 (emphasis added).

The concurrence in King agreed with the majority that, after its holding, the notion of implied malice for specific intent crimes, such as attempted murder, would be problematic. Id. at 74, n.13, 810 S.E.2d at 32, n.13 (Kittredge, J., concurring). Specifically, the concurrence asserted, "For the reasons pointed out by the majority, it seems to me that **the concept of implied malice has no place in a prosecution for a specific intent crime**. The majority has wisely suggested that the General Assembly reevaluate the implied malice language in the statute in light of the Court's holding that attempted murder requires a specific intent to kill." Id. (Kittredge, J., concurring) (emphasis added).

Based on this Court's holding in King that attempted murder is a specific intent crime and that both express malice and a specific intent to kill are required for attempted murder, it is clear that the implied malice instruction given in this case over Respondent's objection was

erroneous, and the Court of Appeals correctly held so. There is nothing inconsistent between the Court of Appeals' decision in this case and this Court ruling in King.

The state further maintained that the Court of Appeals erred by concluding the error in giving the inferred malice instruction was not harmless. It claims the Court of Appeals "overlooked the considerable evidence of malice that existed within the record." BOP at 19. However, there was no evidence of express malice in this case. There was no evidence the shooting was premediated or planned in advance as the state claimed. The alleged "evidence of preparation" outlined by the state is simply not supported by the record. See BOP at 19-21.

Even if there was some evidence of express malice, the standard for determining harmless error is not merely the "existence or nonexistence" of evidence as the state suggests. See BOP at 23. The state's claim that "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 of malice" is not supported by this Court's precedent. See BOP at 23-24. Notably, the state failed to cite to any authority for this proposition and no authority supports such a bright line rule. The standard for determining harmless error when an inferred malice instruction is erroneously given is not merely the "existence or nonexistence" of any evidence of malice. The standard is whether *beyond a reasonable doubt* the erroneous instruction did not contribute to the verdict. As the Court of Appeals held, the jury in this case could have reasonably found malice partially or solely based on the use of a weapon. See Campbell, 435 S.C. at 538, 868 S.E.2d at 419. Consequently, the error cannot be said to have been harmless.

Respectfully, this Court should affirm the decision of the Court of Appeals. The Court of Appeals engaged in a straightforward application of this Court's holdings in Burdette and King

and correctly concluded that the trial court erred by instructing the jury that malice may be inferred by the use of a deadly weapon and that such error was not harmless.

II.

The Court of Appeals correctly held the trial court erred by charging the jury on the hand of one is the hand of all theory of accomplice liability since there was no evidence to support the charge, specifically there was no evidence Respondent was acting with another during the shooting or that the offense was committed pursuant to a common design or plan, particularly where the state's theory of the case was that Respondent was the shooter and acted alone.

How the Issue was Presented Below

During the charge conference, Respondent objected to the trial court charging the jury with the hand of one is the hand of all theory of accomplice liability since there was no evidence to support the charge. Defense counsel emphasized that Trivell Richardson testified "that he had no involvement in anything, didn't know of anything beforehand. At most, accessory after the fact, if that. But he [Richardson] clearly said he had no knowledge of anything. He never saw anything. He never saw Montrelle [Respondent] leave with the gun. He didn't know anything. He actually was told to park the car around the corner. He clearly wasn't instructed to stay at the car to be a getaway driver since he left and was walking on the street with the other gentleman [Andrew "Ace" Rivers], Your Honor." App. 472, ll. 13-24.

Counsel continued, "- - from the evidence [at] the crime scene, there's no suggestion that a second party was involved. There's no witness to say they saw two parties shooting or that two people were there. The only evidence is the second person, Trivell [Richardson]. And again, the State's own evidence says that he [Richardson] had no knowledge - - so he would not of been an accomplice to Mr. Campbell [Respondent] under his testimony. And so I think it would be inappropriate. It would be based merely on just speculating on, well, maybe this could've

happened. It would be inappropriate because there is no evidence [at] all of a second party, Your Honor." App. 472, l. 25 – 473, l. 10.

The trial court overruled the objection. It found the instruction was "clearly, factually supported as the case has been presented to the jury." Its ruling mostly restated the law of accomplice liability. However, the trial court also found, "While it is correct regarding the testimony of Mr. Richardson, the jury doesn't have to believe his testimony. They can believe the truth lies somewhere between. They can believe he is being dishonest and [that] he [and] Mr. Campbell [Respondent] equally participated in this crime." App. 475, l. 1 – 476, l. 23.

Jury Charge

Over Respondent's objection, the trial court charged the jury in part:

> I further instruct[], ladies and gentlemen, that if a crime is committed by two or more people who are acting together and committing a crime, the act of one is the act of all. A person who joins with another to commit an unlawful act is criminally responsible for everything done by the other person which happens as a probable or natural consequence of the act done in carrying out the common plan and purpose. For example, two people can be guilty of killing another person. When only one of the two had a gun, there is only one bullet, and only one of the two fired the shot that caused the death. If two or more people are acting together, assisting each other and committing the offense, the act of one is the act of all. Or it is sometimes said, the hand of one is the hand of all.
>
> Prior knowledge that a crime is going to be committed without more is not sufficient to make a person guilty of that crime. Mere knowledge that another person is going to commit a crime, even if the defendant is present when the crime is committed, is not sufficient to convict the defendant as a principal. Guilt as a principal is shown by actual or constructive presence at the scene as a result of prior arrangement. Therefore, a finding of a prior arrange[ment ,] plan or common scheme is necessary for a finding of guilt as a principal. The State must prove beyond a reasonable doubt by confident evidence the theory of the hand of one is the hand of all. Principle [sic] of a crime is one who either actually commits a crime or who was present aiding and abetting or assisting in committing the crime. When a person [does an] act in the presence of and with the assistance of another, the act is done by both. Where two or more people acting with the common plan or intent to present at the commission of a crime, does not matter who actually commits the crime. All are guilty. The hand of one is the hand of all.

> Present at the commission of a crime means to be sufficiently near to aid [and abet] and assist in the commission of the crime. However, mere presence at the scene of the crime is not sufficient to convict one as a principal on the theory of aiding and abetting. Intent is also a necessary element, but there must be a common design or intent to commit the crime. And the crime must've been committed pursuant thereto with the person aiding and abetting by some overt act. Intent means intending the result which actually occurs, not accidentally or involuntarily. Intent may be shown by acts and conduct of the defendant and other circumstances from which you may naturally and reasonably infer intent. The State must prove these elements beyond a reasonable doubt.

App. 539, l. 15 – 541, l. 13.

Court of Appeals Opinion

The Court of Appeals held the trial court erred by instructing the jury on the hand of one is the hand of all theory of accomplice liability because no evidence supported the charge. After discussing this Court's decision in State v. Washington, 431 S.C. 394, 848 S.E.2d 779 (2020), the court stated:

> [Peggy] Blake's testimony that she saw a man wearing a hoodie and holding a rifle leave the scene of the shooting in a lime green car is evidence that someone other than Campbell [Respondent] may have been the shooter, as Campbell was allegedly wearing a jersey and the video footage and Richardson's testimony indicate he left in President's gold Buick. Because Richardson's testimony presented evidence that Campbell was the shooter . . . the question is whether the Record contains equivocal evidence the man seen by Blake was Campbell's accomplice.
>
> Based on the evidence presented at trial, only Richardson could have been Campbell's accomplice. On the day of the shooting, Richardson rode with Campbell from North Charleston to Gadsden Green, parked the car for Campbell, and drove Campbell back to North Charleston. Like in *Wilds*[4] and *Washington*[5], the jury could have doubted Richardson's testimony that he was not involved in a common plan or scheme with Campbell to carry out the shooting. Nevertheless, neither party presented evidence that Richardson and Campbell had joined together in a common plan or scheme to carry out the shooting. Indeed,

[4] Wilds v. State, 407 S.C. 432, 756 S.E.2d 387 (Ct. App. 2014).

[5] State v. Washington, 431 S.C. 394, 848 S.E.2d 779 (2020)

> Richardson testified he did not know Campbell was going to drive to Gadsden Green or why Campbell asked him to park the car on Nunan Street.
>
> Even if Richardson's involvement was equivocal evidence he and Campbell worked together to carry out the shooting, the Record must have also contained some evidence Richardson was the shooter for the accomplice liability instruction to be proper; it did not. Again, the jury could have doubted Richardson's testimony that he was not the shooter. Still, while security footage showed Richardson walking in Gadsden Green around the time of the shooting, it also showed him walking without a rifle, wearing a white T-shirt and ball cap rather than a hoodie, and getting into the gold Buick rather than a lime green car. Consequently, Richardson does not meet the description of the man seen by Blake.
>
> Thus, neither party presented evidence that either Campbell was working with the man seen by Blake or that Richardson was the shooter. Therefore, the trial court erred by giving an accomplice liability jury instruction.

Campbell, 435 S.C. at 540-41, 868 S.E.2d at 420-21.

Discussion

The Court of Appeals correctly held the trial court erred by instructing the jury on the hand of one is the hand of all theory of accomplice liability because no evidence supported the charge. Neither party presented evidence Respondent acted with another pursuant to a common design or plan.

"Under the 'hand of one is the hand of all' theory, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." Barber v. State, 393 S.C. 232, 236-237, 712 S.E.2d 436, 439 (2011) (quoting State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010)). Under the accomplice liability theory, "a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist in the commission of that crime through some overt act." Mattison, 388 S.C. at

479-480, 697 S.E.2d at 584 (quoting State v. Langley, 334 S.C. 643, 648-649, 515 S.E.2d 98, 101 (1999)); See State v. Austin, 299 S.C. 456, 459, 385 S.E.2d 830, 832 (1989).

"In order to be guilty as an aider or abettor, the participant must be chargeable with knowledge of the principal's criminal conduct." Id. at 480, 697 S.E.2d at 584 (quoting State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 272 (1987)) (internal quotation marks omitted); See Wilson v. Wilson, 319 S.C. 370, 373, 461 S.E.2d 816, 817 (1995) ("Prior knowledge that a crime is going to be committed, without more, is not sufficient to make a person guilty of the crime."). "Mere presence at the scene is not sufficient to establish guilt as an aider or abettor." Id. (quoting Leonard, 292 S.C. at 137, 355 S.E.2d at 272). However, "presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a principle." Id. (quoting State v. Hill, 268 S.C. 390, 395-396, 234 S.E.2d 219, 221 (1977)). "Any person who is present at a homicide, aiding and abetting, is guilty of the homicide as a principal, even though another does the killing." Id. (quoting State v. Zeigler, 364 S.C. 94, 103, 610 S.E.2d 859, 864 (Ct. App. 2005)).

Because there was no evidence Respondent was acting together with the shooter at the time of the murder the trial court erred in instructing the jury on accomplice liability. The critical determination for the jury was the identity of the shooter. The physical evidence at the scene showed there was only one shooter.[6] There was no evidence that any one else was

[6] In support of its argument that the Court of Appeals erred in holding there was no evidence to support an accomplice liability charge, the state argued the fact that "[*t]wo separate cell phones* were found at the location where the shooting was committed . . . bolsters the inference that *two people were at the scene* of the crime" and the fact that "the 14 recovered shell casings were not all of the same manufacturer . . . bolsters the reasonable inference that *two guns were at the scene* of the crime." BOP at 30 (emphasis in original). The state further argued that "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." BOP at 30 (emphasis in original). Respectfully, the state's argument is illogical. First, there was

involved or that there was a common design or plan agreed upon by two parties. Even if the jury were to believe the state's theory of the case that Respondent was the shooter, there was no evidence that Respondent acted with anyone else under a common design to support the instruction on accomplice liability.

In State v. Washington, 431 S.C. 394, 848 S.E.2d 779 (2020), this Court held the trial court erred by instructing the jury on accomplice liability. After observing that the record contained evidence Washington was both the shooter and not the shooter, this Court reasoned that "[t]he question becomes whether there was equivocal evidence the shooter, if not [Washington], was an accomplice of [Washington]." Id. at 407, 848 S.E.2d at 786. Because there was no evidence that Larry Kinloch, "the only possible person who could fall into the category of [Washington's] accomplice," was the shooter, this Court concluded the accomplice liability instruction should not have been given. Id.

In support of its decision in Washington, this Court cited to Wilds v. State, 407 S.C. 432, 756 S.E.2d 387 (Ct. App. 2014). "In Wilds, evidence was presented that Wilds and two confederates were walking down a street when Wilds spotted the victim and told his confederates he was going to rob the victim. The two confederates testified Wilds stopped to talk to the victim while they kept walking. They testified Wilds pulled a gun on the victim and demanded

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no evidence the two cell phones found at the scene were even connected to this case. App. 164, ll. 5-13. Numerous individuals were in and out of Katrina's apartment that night. Gadsden Green is also a large government housing community with numerous residents and visitors. The recovered phones could have belonged to any number of people and such evidence does not support any inference that "two people were at the scene." Even if two people were at the scene, this is not evidence to support an accomplice liability instruction. Additionally, the fourteen recovered shell casings were all of the same caliber. See App. 132, l. 3 – 135, l. 17. The fact that one of the fourteen casings was of a different manufacturer than the other thirteen is simply not evidence "that two guns were fired at the scene." Even if two guns were fired, they could have been fired by the same person. This again does not support the state's argument that there was evidence of accomplice liability.

his wallet. Wilds then ordered his two confederates to beat the victim. They proceeded to do so, and Wilds shot the victim in the chest." Washington, 431 S.C. at 409, 848 S.E.2d at 787 (citing Wilds, 407 S.C. at 435-36, 756 S.E.2d at 388-89). "In holding an accomplice liability instruction was improper, the court of appeals noted there was no evidence presented that anyone other than Wilds was the shooter and that his two confederates did not join in the robbery until after Wilds pulled a gun on the victim." Id. (citing Wilds, 407 S.C. at 439-40, 756 S.E.2d at 390-91). "The court of appeals observed, 'Although the jury may have had doubts about [the two confederates'] testimony, an alternative theory of liability, such as accomplice liability, 'may not be charged merely on the theory the jury may believe some of the evidence and disbelieve other evidence.'" Id. at 409-10, 848 S.E.2d at 787 (quoting Wilds, 407 S.C. at 439, 756 S.E.2d at 390); See Barber v. State, 393 S.C. 232, 236, 712 S.E.2d 436, 438 (2011).

In State v. Dickman, 341 S.C. 293, 341 S.E.2d 268 (2000), this Court held the trial court properly instructed the jury with accomplice liability where there was some evidence Dickman and John Seals were acting pursuant to a plan to kill the decedent at the time of the murder. Id. at 296, 341 S.E.2d at 269. Seals testified that Dickman shot the decedent while the three of them where in Dickman's car and then directed Seals to drive to a remote area where they removed the body from the car and dragged it into the woods. Id. at 295, 341 S.E.2d at 268. Seals admitted he emptied the decedent's pockets and threw his wallet into the river on their way home. Id. Dickman, on the other hand, testified that Seals was the shooter. Id. The Court asserted, "The critical question is whether there is any evidence [Dickman] and Seals were acting together at the time of the killing if Seals was the shooter as [Dickman] claimed." Id. at 295-296, 341 S.E.2d at 269. The Court summarized the evidence as follows:

> [Dickman] testified Seals asked him to kill [the decedent] because [the decedent] was always behind on the rent. [Dickman] told another friend the

> murder would be on a Sunday and the murder did in fact occur on a Sunday. On the day of the murder, Seals tried to collect the rent from [the decedent] without success. When he subsequently saw [Dickman], Seals's first words to [Dickman] were "do it." [Dickman] testified, "I knew what he intended at that time." *Immediately thereafter,* Seals called [the decedent] on the telephone and arranged to pick him up for the fatal car ride.
>
> While they were driving, [Dickman] found the gun wrapped in a towel under the front seat where Seals had put it. He picked up the gun and held it up for Seals to see in the rear view mirror. [Dickman's] nerve failed him and he did not shoot. When [the decedent] briefly left the car, [Dickman] apologized for not shooting and gave Seals the gun. The two had no further communication between them before Seals allegedly shot [the decedent].

Id. at 296, 534 S.E.2d at 269 (emphasis in original).

Based on this evidence, this Court concluded there was sufficient evidence that Dickman and Seals were acting pursuant to a plan to kill the decedent at the time of the murder and, therefore, the charge on accomplice liability was proper. Id.

In Barber v. State, 393 S.C. 232, 712 S.E.2d 436 (2011), this Court held there was sufficient evidence to support the trial court's accomplice liability instruction. The state alleged Barber and three others conspired to rob a minor drug dealer. Id. at 234, 712 S.E.2d at 437. The men gathered together and discussed the plans for the robbery, procured a semi-automatic handgun, and later a rifle, and drove to the dealer's house. Id. One of the men waited in the car, while Barber and two others allegedly entered the home to rob the dealer. The men demanded money and drugs. Id. One of the suspects armed with the handgun shot and killed the dealer and shot and wounded another occupant of the home. Id. at 234, 712 S.E.2d at 438. Barber's three codefendants implicated Barber in the planning and execution of the robbery, and said he was the gunman who shot the dealer. Id. at 234-35, 712 S.E.2d at 438. However, there was also evidence that Barber's codefendant, Walker, shot the victims. Id. at 236, 712 S.E.2d at 438.

The Court found there was evidence to support the conclusion that Barber was acting with the other men during the robbery. Id. at 237, 712 S.E.2d at 439. Barber's three codefendants "all testified to substantially the same version of the planning and execution of the robbery—that Barber was involved and was the shooter." Id. Accordingly, the Court held the trial court did not err by instructing the jury on accomplice liability. Id. at 239, 712 S.C. at 440.

As seen, there was evidence in both Dickman and Barber of a prearranged plan and that the defendants were acting together with co-conspirators. Here, however, there is no evidence Respondent acted together with another to support the instruction on accomplice liability.

Respectfully, this Court should affirm the decision of the Court of Appeals. The Court of Appeals properly held the trial court erred by instructing the jury on accomplice liability as there was no evidence to support the charge.

CONCLUSION

Based on the foregoing argument, Respondent respectfully requests this Court affirm the decision of the Court of Appeals. In the alternative, Respondent requests this Court dismiss certiorari as improvidently granted.

Respectfully submitted,

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

David Alexander
Appellate Defender

ATTORNEYS FOR RESPONDENT

This 9th day of November, 2022.