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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable Daniel Coble, Circuit Court Judge

KEYLAN J. DURHAM,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001507

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the PCR court erred where it found Petitioner was not prejudiced despite counsel's deficient performance, where counsel failed to object to the trial court's instruction that the jury could infer malice from the use of deadly weapon, since the jury could have improperly concluded Petitioner was guilty of attempted murder solely because he struck Officer Brown with a car, a deadly weapon?

STATEMENT

During the March 2016 term, a Richland County Grand Jury indicted Petitioner, Keylan Durham, for two counts of attempted murder, two counts of kidnapping, two counts of attempted armed robbery, carjacking, first-degree assault and battery, and possession of a weapon during the commission of a violent crime. Petitioner was also charged with an additional count of attempted murder. App. 871 – 888; App. 16, ll. 7-10. Petitioner was tried before the Honorable Clifton Newman and a jury, from April 11 – 14, 2016. Petitioner was represented by Tracy Pinnock, Rhodes Bailey, and Rebecca Williams. Luck Campbell, John Steadman, and J.J. Shellenburg prosecuted the case. App. 1.

Petitioner was wanted for the August 4, 2014, carjacking of Marck Drastich and Lashonda Edwards. Police had arrest warrants for Petitioner for carjacking, two counts of attempted armed robbery, two counts of kidnapping, possession of a weapon during the commission of a violent crime, and one count of first-degree assault and battery (against Drastich). App. 288, l. 24 – 289, l. 14; App. 871 – 876; App. 881 – 888. These convictions are not affected by the ineffective assistance of counsel allegation briefed in this petition.

On August 6, 2014, a group of law enforcement officers went to Petitioner's girlfriend's home at Brook Pines Apartments to try to apprehend him. App. 288, l. 24 – 291, l. 15; App. 256, l. 16 – 257, l. 20. A number of officers from different law enforcement entities were present. Several police officers witnessed what happened next. So did two disinterested witnesses, Dereka Brown and Marcus Harvey, residents of the complex who were out on their balcony nearby. In sum, Petitioner's car parked. The police tried to block him in. Petitioner briefly got out and then reentered his car. Petitioner reversed the car at an angle to try to get away, and the bumper hit Officer Marcus Brown's arm and leg; the mirror hit his arm. Officer Brown began

shooting. Petitioner's car continued to reverse at high speed before hitting a tree, coming back down off the tree, and continuing in reverse until hitting a telephone pole. Petitioner crawled into the back seat. Petitioner and the passenger were removed from the car. App. 297, ll. 1-12; App. 292, l. 2 – 295, l. 6.

Officer Keith Thrower said he was almost hit by Petitioners car after it "launched off" of the tree but before it hit the telephone pole. App. 327, l. 3 – 329, l. 8. Officer Justin Britt also said Petitioners' car came at him twice, both before and after it "bounce[d] off the tree." Thrower and Britt both fired shots at the car. Neither man was struck by Petitioner's car. App. 450, l. 17 – 453, l. 25; App. App. 327, ll. 7-15. Officer Brown had injuries to his hand, shoulder, and arm from being hit by the car. App. 296, ll. 5-19.

Officer Marcus Brown testified his partner parked their car behind Petitioner "catercornered" to try to block him in. App. 292, ll. 2-11. "As I got out of the vehicle, I said police. As I was getting out of the car to run toward the vehicle, then I stopped when I saw those lights. I said police. As he looked in the mirror, put it in gear, gun the motor and came back at me, then I tried to jump out of the way." App. 297, ll. 1-5.

> Q And you mentioned you tried to jump out of the way as best you could, but what part of the car struck you?
>
> A The actual—the rear bumper actually hit my right leg and spun me around to my back was up against the—the car I was in. And then the side of the vehicle as he was trying to angle his car out to, I guess, avoid our vehicle, The front bumper and mirror hit my left arm.
>
> Q And if you had not gotten out of the way would that car have hit you straight on?
>
> A Oh, yes, it would have definitely ran straight over me.

App. 297, ll. 6-16.

Dereka Brown was a disinterested witness out on her balcony. Dereka Brown testified as follows.

> Q Tell me what you saw.
>
> A Well, when they pulled in and first they pull in, I guess, they was trying to set him up. He was – once he pulled in and he parked, they told him to get out the vehicle. He got out, but he got back in.
>
> . . .
>
> A He got in—I mean, he got out and he got back in, And he backed out and they just spin back.
>
> Q And did you see the officer get out of his vehicle?
>
> A He got out of his vehicle and stood up beside the vehicle when they backed up. The person stood in front of him and they got back in.
>
> . . .
>
> Q **When you saw the vehicle back up was the officer standing in the way of the vehicle**?
>
> A **He was on the side**.
>
> Q And then what did he do after that?
>
> A **He backed up out of control**, he shot.
>
> Q And what do you mean out of control, how was that person driving?
>
> A He was wild, they just backed up.
>
> Q And did you see it hit the tree?
>
> A Yeah.
>
> Q Then what happened once it hit the tree?
>
> A He hit the tree. He spin out again, hit the brown vehicle. Then he hit the light pole. After that, they open—the other officers came toward the car and open the door and someone fell out.

App. 503, l. 12 – 505, l. 24 (emphasis added).

Marcus Harvey, the second disinterested witness, was on the balcony with Dereka Brown. According to Marcus Harvey, "The police told him to get out put his hands up. He threw the car in reverse and almost hit the police, that's when the police fired his rounds. He hit the tree. And while he was still firing rounds, he hit the pole. And then after that he pulled the dude out of the backseat. App. 508, l. 16 – 509, l. 19. Harvey said the driver was "a little reckless." App. 510, ll. 8-11.

Investigator John Moore, who interrogated Petitioner, was asked whether he questioned Petitioner about "why he was trying to get away," and Moore stated: "I think he was just paranoid and he's trying to get away from the police at that point." App. 572, ll. 13-15; App. 574, ll. 1-3.

In closing arguments, defense counsel argued Petitioner did not have the requisite intent for attempted murder. "He pulled out to run, not kill somebody. That is one step away from murder, putting a car in reverse to run away is not one step away from murder. It's not trying to kill somebody. His intent was to run away and that's what y'all's question is . . . his thinking was he was going to run." App. 728, l. 8 – 729, l. 4. The Court instructed the jury that, "Malice may also be inferred when the deed is done with a deadly weapon." App. 744, ll. 13-14. Defense counsel did not object. App. 755, ll. 17-20.

As to the August 6, 2014, incident, Petitioner was convicted of one count of attempted murder (against Officer Marcus Brown). This count is the subject of the ineffective assistance of counsel claim in this petition. It was on this charge that Petitioner was ultimately sentenced to the most time (twenty-four years). Petitioner was found *not* guilty of a second count of attempted murder (against Officer Keith Thrower), and on the third count of attempted murder, he was convicted of the lesser-included offense of first-degree assault and battery (against Officer Justin

Britt). As to the August 4, 2014, incident, Petitioner was found guilty of two counts of kidnapping, two counts of attempted armed robbery, carjacking, first-degree assault and battery (as to Marck Drastich) and possession of a weapon during the commission of a violent crime. App. 757, ll. 3-21. He was, respectively, sentenced to serve concurrent terms of imprisonment of twenty-four years, ten years, twenty-two years, twenty-two years, twenty years, twenty years, twenty years, ten years, and five years. App. 782, l. 11 – 785, l. 11; App. 889 – 896. During sentencing, it came out that at the time of the crimes, Petitioner was using a "mixture" of "street drugs." He was given "anti-hallucination drugs" by medical staff at the jail. App. 779, l. 16 – 782, l. 3.

On February 26, 2019, after exhausting his remedies on direct appeal, Petitioner filed an application for post-conviction relief (PCR). App. 788 – 796. He then filed an amended application. App. 797 – 798. On July 15, 2019, the State made its return. App. 799 – 807. A hearing was held on the matter before the Honorable Daniel Coble on May 9, 2023. Michael Lifsey represented Petitioner. D. Russell Barlow, III, represented the State. App. 808.

During her testimony at the PCR hearing, trial counsel agreed that the defense's theory of the case was that "the police provoked some of this[.]"App. 842, l. 21 – 843, l. 8. "You know, they responded to the scene with twenty-plus different law enforcement, jumped in front of a moving car, and then claimed that their lives had been threatened when they were the ones that jumped in front of the moving car." App. 843, ll. 3-7. Trial counsel testified that she was aware of *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), *overruled by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019), which held that the jury should not be instructed it could infer malice form the use of a deadly weapon when there were circumstances that could reduce, excuse, justify, or mitigate the offense. As seen, this case was tried in 2016, but the trial court

erroneously instructed the jury it could infer malice from a deadly weapon. Counsel said she "missed" the objection. "I just missed it." App. 843, l. 9 – 845, l. 1; App. 838, ll. 3-13. In summation, PCR counsel argued trial counsel provided ineffective assistance of counsel when she failed to object to the erroneous jury instruction. App. 844, l. 21 – 845, l. 1.

On September 12, 2023, the PCR court issued an order of dismissal. App. 847. The order of dismissal stated that the PCR court found trial counsel's testimony at the hearing to be credible. App. 857. The order addressed the allegation that counsel was "ineffective of failing to object to the trial court's jury instruction that it could infer malice from the use of a deadly weapon." App. 863. The order stated that the PCR court found counsel's performance *was* deficient, since counsel "did not articulate a valid strategy in not objecting to the jury charge. Thus, this Court finds Trial Counsel was deficient for not objecting to the jury charge." App. 865. "This Court finds that Trial Counsel erred in failing to argue that the lower court should not have given the inference of malice instruction regarding a deadly weapon when evidence was presented that could reduce, excuse, justify or mitigate the homicide." App. 864.

However, the order stated that, "this Court cannot find that Applicant suffered any prejudice from the erroneous jury charge . . . Applicant was charged with three counts of attempted murder, and the jury only found Applicant guilty of one count of attempted murder." App. 865. "Importantly, the jury convicted Applicant of the lesser included assault and battery—1st on one of the attempted murder charges and acquitted Applicant on the other attempted murder charge." App. 865. "This Court highlights the jury's conviction of the lesser included assault and battery—1st because malice is not an element of this charge. This Court finds there is <u>not</u> a reasonable likelihood that the jury applied the improper instruction in a way that violates the constitution." App. 865 (emphasis in original).

The order also cited to Officer Brown's testimony that the driver looked in the mirror before putting the car in gear and "coming straight back for me." App. 866. The order continued, "Moreover, the implied malice from the use of a deadly weapon was not the only implied malice evidence presented at the trial." App. 866. "[M]alice, in this case, was not proven solely or necessarily from the use of a deadly weapon—because a vehicle is not necessarily a deadly weapon—rather, malice is implied from the Applicant's actions when he made the decision to put the vehicle in reverse and gun it in the direction of Brown." App. 867.

This petition for writ of certiorari follows.

ARGUMENT

The PCR court erred where it found Petitioner was not prejudiced despite counsel's deficient performance, where counsel failed to object to the trial court's instruction that the jury could infer malice from the use of deadly weapon, since the jury could have improperly concluded Petitioner was guilty of attempted murder solely because he struck Officer Brown with a car, a deadly weapon.

It was long the practice for trial courts "to charge juries in any murder prosecution that the jury may infer malice from the use of a deadly weapon." *State v. Belcher*, 385 S.C. 597, 600, 685 S.E.2d 802, 803 (2009), *overruled by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019). However, in 2009, this Court held that "a jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide." *Belcher*, 385 S.C. at 600, 685 S.E.2d at 803–04. This was because "malice includes the absence of justification, excuse and mitigation." *Id.* at 609, 685 S.E.2d at 808 (citation omitted). "The absence of justification, excuse or mitigation cannot be inferred from the use of a deadly weapon standing alone." *Id.*

"[W]e hold that the "use of a deadly weapon" implied malice instruction has no place in a murder (or assault and battery with intent to kill) prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing (or the alleged assault and battery with intent to kill)." *Id.* at 610, 685 S.E.2d at 809 (2009) (footnote omitted). "[W]e are firmly convinced that instructing a jury that 'malice may be inferred by the use of a deadly weapon' is confusing and prejudicial where evidence is presented that would reduce, mitigate, excuse or justify the homicide." *Id.* at 611, 685 S.E.2d at 809.

Subsequent to *Belcher*, through the passage of the Omnibus Crime Reduction and Sentencing Reform Act of 2010, the General Assembly repealed the offense of assault and battery with intent to kill (ABWIK), and created the new offense of attempted murder. *State v. King*, 422 S.C. 47, 63, 810 S.E.2d 18, 26 (2017). S.C. Code Ann. § 16-3-29 (2010) provides that, "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." *Belcher* therefore applied to the offense of attempted murder.[1]

"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). "It is error to give instructions which may confuse or mislead the jury." *State v. Rothell*, 301 S.C. 168, 169–70, 391 S.E.2d 228, 229 (1990). "Instructions that do not fit the facts of the case may serve only to confuse the jury." *State v. Blurton*, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002).

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The United States Supreme Court has established a two-pronged test to evaluate allegations of ineffective assistance of counsel. A petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and the deficient performance prejudiced the petitioner. *Id.* at 687. "To show prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability the result of the trial would have been different." *Patrick v. State*, 349 S.C. 203, 207, 562 S.E.2d 609, 611 (2002). "A reasonable

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1 Three years after Petitioner's trial, this Court held that "regardless of the evidence presented at trial, a trial court shall no longer instruct a jury that malice may be inferred from the use of a deadly weapon." *State v. Burdette*, 427 S.C. 490, 493, 832 S.E.2d 575, 577 (2019). "A jury instruction that malice may be inferred from the use of a deadly weapon is an improper court-sponsored emphasis of a fact in evidence—that the deed was done with a deadly weapon—and it should no longer be permitted." *Id.* at 503, 832 S.E.2d 582.

probability is a probability sufficient to undermine confidence in the outcome of the trial." *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). In determining whether an applicant has proven prejudice, the strength of the State's case is one significant factor to be considered, along with the specific impact of counsel's error and other relevant considerations. *Smalls v. State*, 422 S.C. 174, 190, 810 S.E.2d 836, 844 (2018).

"In determining whether a defendant was prejudiced by improper jury instructions, the court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the improper instruction in way that violates the Constitution." *Battle v. State*, 382 S.C. 197, 203, 675 S.E.2d 736, 739 (2009). *See Hill v. State*, 350 S.C. 465, 472–73, 567 S.E.2d 847, 851 (2002) (Hill's guilt of ABIK was so conclusively proven at trial that there is no reasonable probability that the trial judge's faulty ABHAN instruction would have affected the result); *Bailey v. State*, 392 S.C. 422, 437, 709 S.E.2d 671, 679 (2011) (Bailey was prejudiced by trial counsel's failure to object to erroneous jury instructions as this deficiency undermined confidence in the outcome of his trial).

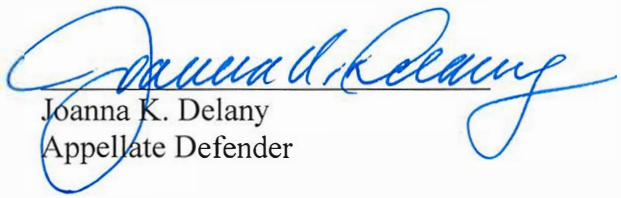
Petitioner was tried in 2016 and there was evidence that would reduce, mitigate, excuse or justify the conduct that comprised Petitioner's actions towards Officer Brown. Notably, a disinterested witness, Dereka Brown, testified Petitioner's car "backed up out of control" before it hit Officer Brown. She also said Officer Brown was "on the side" of Petitioner's car, not "standing in the way" of it. App. 505, ll. 10-17. Dereka Brown's testimony would likely have been given weight by the jury, since she was a disinterested eyewitness, affiliated neither with Petitioner nor law enforcement. As seen, the defense's strategy was that law enforcement "provoked" Petitioner's conduct. App. 842, l. 21 – 843, l. 8. Investigator Moore testified that based on his interrogation of Petitioner, he thought Petitioner "was just paranoid and he's trying

to get away from the police[.]" App. 574, ll. 1-3. The jury could have reasonably found, based on this evidence, that Petitioner did not intend to hit Officer Brown, who was standing to the side of the car rather than in its path, but the car went out of control and struck Officer Brown. As the PCR court correctly recognized, *Belcher* applied, and the jury should not have been charged that malice could be inferred from the use of a deadly weapon.

The PCR court erred in finding this deficient performance did not prejudice Petitioner. The instruction was improper and confusing. *See Belcher*, 385 S.C. at 600, 685 S.E.2d at 803; *Blurton*, 352 S.C. at, 208, 573 S.E.2d at 804. Petitioner was prejudiced because there was a reasonable likelihood the jury could have found that although Petitioner did not intend to hit Officer Brown, since he was using a deadly weapon, a car, when he collided with Officer Brown, he had the requisite mental state for attempted murder. Petitioner has shown error and prejudice. *Battle*, 382 S.C. at 203, 675 S.E.2d at 739; *Smalls*, 422 S.C. at 190, 810 S.E.2d at 844; *Strickland*, 466 U.S. at 687.

CONCLUSION

Based on the forgoing argument, petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on this issue.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of February, 2024.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of her ability this Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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This 26th day of February, 2024.