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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI -COA
APPEAL FROM NEWBERRY COUNTY
Court of General Sessions
Benjamin H. Culbertson, Circuit Court Judge

Appellant Case № 2024-001773

The State ..... **Respondent,**

vs.

Xzavier Sharif Davis..... **Petitioner.**

PETITION FOR WRIT OF CERTIORARI

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Question II: Did the court of appeals` err in holding the trial court did not give the jury an improper definition of malice as being a disregard for human life and a confusing explanation of intent when the jury expressed confusion over the meaning of total disregard for human life and intent to inflict injury?

Question III: Did the court of appeals err in failing to hold the trial court erred in failing to quash the indictment as to attempted murder when the indictment contained the improper language of implied malice?

Statement of the Case

Procedural History

X'zavier Sharif Davis was arrested on April 20, 2019 for the shooting death of his step-son. The state indicted him for three counts of attempted murder, murder and possession of a firearm while engaged in a violent crime. Prior to trial two attempted murder charges as to two of the children in the car were dismissed.

The state called his case for trial on August 23, 2021 before the Honorable Benjamin H. Culbertson and a jury. He was tried on one count of attempted murder, murder and possession of a firearm while engaged in a violent crime. On August 26, 2021 he was convicted of assault and battery of a high and aggravated nature as a lesser included of attempted murder, murder and possession of a firearm while engaged in a violent crime.

On August 26, 2021, Judge Culbertson sentenced him to 35 years for murder, 20 years for the assault and battery of a high and aggravated nature, five years for the possession of a firearm while engaged in a violent crime. All sentences were to run concurrently.

On September 3, 2021, Mr. Davis filed his notice of appeal.

On July 3, 2024 the South Carolina Court of Appeals, in an unpublished opinion, affirmed the conviction. A timely petition for rehearing was denied on September 20, 2024.

Factual History

On April 19, 2021, X'zavier Sharif Davis, spent the morning of that day taking his step-son, the unfortunate victim of this tragic shooting, to get a hair cut. App. at 225, ll 18-25. He had spent most of the day with his children, including his step-son. App. 190, ll 13-18. Later that day he attended a fish fry with his father, cousin, and other relatives. He had asked Indigo

Davis, the mother of the minor child and now his wife, to go with him. App. at 224, ll 12-25.

Mr. Davis arrived home well after midnight. His wife had gone to sleep. The doors to the house were locked. She was awakened when she heard him knocking on the doors. He ultimately broke the glass on the front door to gain access to his house. App. at 194, ll 2-20. When asked why she did not get up to let him in she explained, "I had done took two Benadryls prior to, because I a party to deal with. So, I'm just, like, really just waking up." App. at 194, ll 23-25.

After Mr. Davis obtained entry to the house, an argument between Mr. Davis and his wife ensued. The argument was about her not opening the door for him. App. at 195, ll 4-20. Rather than argue with Mr. Davis, Mrs. Davis stated she decided to just leave the house with the children. She testified she told her husband, "'Look, we'll just leave.' And I got the kids up off the pallet and stuff like that. And after that, I left, going out of the back door." App. at 196, l 25 to 197, l 2.

Her car was parked at the front of the house. She went out the back door because there was broken glass at the front entrance. App. at 202, ll 9-20. Mr. Davis was following her as she was leaving with the children. She noticed a gun in his hand. App. at 202, ll 4-20. As she was leaving with the children, Mr. Davis fired the gun in the air. She was backing out as Mr. Davis was shooting. App. at 207, ll 21-24. Mr. Davis was on the porch when the shooting started. App. at 208, ll 8-11. Although Mr. Davis started shooting in the air, he eventually started shooting in the direction of the car. During the shooting, Mr. Davis used two different guns. As he was shooting in the direction of the automobile, a stray bullet wounded Ms. Davis in the ankle. App. at 209, ll 1-12. Tragically one of the stray bullets also hit his step-son. App. at 211,

ll 5-15.

Ms. Davis testified she did not believe Mr. Davis was intentionally shooting at her or his step-son. App. at 215, ll 11-24. She stated she was certain he was not trying to shoot anyone in the automobile. App. at 217, ll 6-12. In response to a question as to what Mr. Davis was shooting, she responded, "Well looking at the pictures, he was trying to shoot at the tires." App. at 217, ll 14-15. She further stated all Mr. Davis was doing was trying to stop her from leaving so "we could talk it out." App. at 223, ll 1-9.

Vinnie Ray Hunter, the mother of Mrs. Davis, testified she heard gunshots somewhere around 2:30 am. She woke her husband who had slept through the gunshots. She had her husband call her daughter. When she was unable to reach her, her husband called Mr. Davis. App. at 120, ll 2-10. When Mr. Davis was questioned about the shots, he said over the speaker phone, "Mr. Bo, I ain't no f----- chap. Nobody gone play with me. Don't play with me. Ain't nothing to play with." App. at 121, ll 18-20. He was not asked about anyone being shot. He did not make a statement about anyone being shot.

The investigating officer found one of the firearms used in a green storage container near the back door. App. at 287, ll 6-24. A 9-millimeter pistol was found under a mattress in the master bedroom of the house. App. at 295, ll 2-10.

Mr. Davis was taken into custody about 4:06 am. App. at 162, l 21 to 163, l 1. Officer Shawn Carnes testified they had received the initial call at about 3:16 am. App. at 159, ll 1-4. Mr. Davis remained at the house after the shooting. As both firearms were found, he did not destroy or otherwise try to get rid of either weapon. The shell casings were also found at the house. Mr. Davis surrendered himself shortly after the officers made contact with him at the

house. App. at 163, l 23 to 164, l 1. He was cooperative with the arresting officers. App. at 168, ll 12-18.

Standard of Review

As all three issues involved in this appeal are questions of law, the standard of review is de novo. "We review questions of law de novo, with no deference to trial courts." *Smalls v. State*, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839 (2018)

Argument

Question I

Did the court of appeals err in holding that trial court properly denied a request for a jury charge as to involuntary manslaughter when the record contained evidence that X'Zavier Sharif Davis was intending to commit the misdemeanor crime of malicious injury to personal property when he fired the shot that killed his step-son?

Unlike a directed verdict, when a defendant requests a charge on the law, the appellate courts must view the evidence in the light most favorable to the defendant to determine if the requested charge should have been given. *State v. Coleman*, 342 S.C. 172, 536 S.E.2d 387 (Ct. App. 2000). "The trial court is required to charge a jury on a lesser-included offense if there is evidence from which it could be *inferred* that the defendant committed the lesser, rather than the greater, offense." *State v. Sams*, 410 S.C. 303, 308, 764 S.E.2d 511, 513 (2014)(emphasis added). The issue is not what would the justices of this court do under the facts nor what any rational juror would believe. The sole question is whether any evidence to support the defense theory as to involuntary manslaughter should be charged to the jury. Viewing the evidence in the light most favorable to the defendant, the answer is yes.

The court of appeals in affirming this conviction did not view the evidence in the light most favorable to Mr. Davis as is required by the law in South Carolina. They took the position

that the firing into the automobile is not malicious injury to personal property, which would be an act not normally causing injury to a person. The court of appeals treated the case as if the only crime that could have been committed was a violation of South Carolina Code § 16-23-440(B). While this is one possible act, it does not preclude the offense also being a malicious damage to personal property.

This court has defined involuntary manslaughter saying, "Involuntary manslaughter is (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others." *State v. Crosby*, 355 S.C. 47, 51–52, 584 S.E.2d 110, 112 (2003). At various times the appellate courts have also said "unlawful act" must not be a felony. This distinction, in today's world, is not only artificial but confusing. In this case, the issue need not be reached as there is evidence from which the jury could have concluded Mr. Davis was committing the misdemeanor of malicious injury to personal property.[1] In the typical felony murder case the jury is only told they may infer malice through the doing of an unlawful felony. This is also confusing as the jury is then told to acquit a defendant for a murder charge if they do not infer malice. At common law, as all felonies were punishable by death, so whether the jury convicted the defendant of the murder or the underlying felony, the defendant would still be hung.

The first issue this court has to resolve is the contradictory cases in South Carolina

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[1] While not raised at the trial below and therefore not part of this appeal, some courts have abolished the felony murder rule. *People v. Aaron*, 409 Mich. 672, 299 N.W.2d 304 (1980) contains an excellent discussion as to why the felony murder rule has little application in today's jurisprudence.

involving the charge of involuntary manslaughter and the use of a firearm. This court has previous said, "Here, petitioner's actions do not fall into the first category, as he fired a gun which naturally tends to cause death or bodily harm." *Bozeman v. State*, 307 S.C. 172, 177, 414 S.E.2d 144, 147 (1992). This case did not discuss a holding from decades earlier which said, "The defendant, while admitting that she fired the shot that killed Stanton, testified that she did not mean to hurt any one; that she was trying to quiet the McManus woman, who was drunk, very boisterous, and using profane language; that she asked her to be quiet and to go into the rear room and lie down, but she would not do so; that defendant merely intended to shoot through the floor to scare her, but that the bullet went at such an angle through the counter as to strike Stanton and mortally wound him." *State v. Quick*, 168 S.C. 76, 167 S.E. 19, 20 (1932). *Quick* has not been overturned. In *Quick*, as in this case, the defendant did not intend to shoot an individual nor did they even intend to shoot at an individual. This court has further said, "It is the established rule in this jurisdiction that one who causes the death of another by the negligent use of a deadly weapon or instrumentality may be convicted of involuntary manslaughter." *State v. Brown*, 205 S.C. 514, ___, 32 S.E.2d 825, 827 (1945).

In *Bozeman*, the defendant intended to fire a weapon in the direction of people he knew were present in the dark. *Bozeman* is thus not similar to *Quick* nor this case. If *Bozeman* is to be applied literally, then a defendant who uses a firearm with never be able to claim involuntary manslaughter unless the firearm accidently discharges. No court in South Carolina has so held.

As to whether the firearm was fired in furtherance of a felony, this Court must again look at the facts in the light most favorable to Mr. Davis. "If there is *any* evidence warranting a charge on involuntary manslaughter, then the charge must be given." *State v. Reese*, 370 S.C. 31,

36, 633 S.E.2d 898, 900 (2006) (emphasis added). Granted, discharging a firearm into a vehicle is classified as a felony. S.C. Code § 16-23-440(B). Trial counsel below argued that Mr. Davis could have been guilty of malicious damage to personal property. App at 524, ll 21-13. This act would have been a misdemeanor. S.C. Code § 16-11-510(B)(3). The state did not elect to indict Mr. Davis for either firing a weapon into an occupied vehicle or malicious injury to personal property. As long as there is evidence in the record to support this misdemeanor charge, the trial court is required to charge involuntary manslaughter. If the state had so indicted and the jury convicted Mr. Davis for malicious damage to personal property, this court could not say as a matter of law the conviction could not stand. Thus, there is evidence of the crime of malicious injury to personal property.[2] This has long been the holding of the courts in our state.

Further, this court has said, "Involuntary manslaughter is a lesser included offense of murder only if there is evidence the killing was *unintentional*." *Tisdale v. State*, 378 S.C. 122, 125, 662 S.E.2d 410, 412 (2008) (emphasis added). In this case the mother of the child who was killed testified the killing of her son was not intentional. Both the solicitor and the mother referred to the tragic shooting as an accident. App. at 184, ll 2-6. The mother further testified:

> Q. (Mr. Geoley) Did you ever tell an officer Xzay shooting at you?
> A, (Ms. Davis) No
> Q. Do you think Xzay was shooting at [minor child]?
> A. No
> Q. I'm sorry for your loss. Next to you, who loved [minor child] as much as anybody?
> A. Xzavier.
> App. at 215, ll 15-24.

The state never produced any evidence that Mr. Davis intended to harm his stepson. The

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[2] While not raised below, could the defense counsel have requested a jury charge that if they believed Mr. Davis could have committed a misdemeanor, they are to find him not guilty?

failure to charge involuntary manslaughter in this case lead to a rather absurd result. In a manslaughter case, a defendant usually intends to kill the person who is killed. "Voluntary manslaughter, of course, is an offense which does involve intent on the part of the perpetrator but lacks the element of malice." *State v. Blassingame*, 271 S.C. 44, 46, 244 S.E.2d 528, 529 (1978). This is further supported by the jury in its verdict finding no specific intent to kill Ms. Davis. In this case, with no proof Mr. Davis intended to harm, much less kill his stepson or anyone, Mr. Davis was convicted of murder. This court has further held, "We reasoned that involuntary manslaughter is at its core an unintentional killing." *Douglas v. State*, 332 S.C. 67, 74, 504 S.E.2d 307, 310 (1998)

One of the problems with the failure to charge involuntary manslaughter is Mr. Davis never contended he did not do an act for which he should be punished. As to his step-son, the jury was left with the decision of punishing Mr. Davis for the only crime they had before them, or finding him not guilty. This was unduly prejudicial to Mr. Davis. The finding of not guilty as to attempted murder shows the jury would have considered a lesser included offense.

Question II

Did the court of appeal err in holding the trial court did not give the jury an improper definition of malice as being a disregard for human life and a confusing explanation of intent when the jury expressed confusion over the meaning of total disregard for human life and intent to inflict injury?

After the jury had deliberated for a period of time they asked the this question: Does total disregard for human life supersede the intent to inflict injury? App. at 661, ll 18-19. Defense counsel stated the question be answered with a simple "no." App. at 661, l 20.

The trial judge brought the jury back into the court room to discuss the issue. The discussion is found on pages 670, l 18 to 674, l 15. The jury foreperson initially stated, "I think we're trying to figure with intent and . . . Disregard for human life, I guess." App. at 671, ll 11-11 5. As the trial judge and two jurors were talking over each other the record is confusing. The Court first incorrectly told the jury, "intent deals with the defendant's state of mind. What did the defendant intend to do? Disregard for human life deals with the defendant's actions or the results of the actions. Was it with a disregard for human life?" App. at 671, l 22 to 811, l 1. The court, at one point, told the jury, incorrectly, that "intent only applies to the charge of attempted murder." App. at 673, ll 14-15. Thus, the trial court told the jury no intent was required for the charges of assault and battery of a high and aggravated nature or murder. All murder charges and assault and battery of a high and aggravated nature involve an intent. *State v. Foust*, 325 S.C. 12, 15, 479 S.E.2d 50, 51 (1996). While the trial judge later stated that the state did not have to prove specific intent, this did not tell the jury they still must find an intent to convict Mr. Davis of murder or assault and battery of a high and aggravated nature. Again, the jury was misled as to being required to find an intent for the two charges upon which the jury convicted Mr. Davis.

The trial court compounded the error by having a discussion with the juror in which the trial court told the jury the state need only prove a disregard for human life and not a total disregard for human life. App. at 672, ll 16-18. This incorrect statement was then picked up by the juror who stated, "I read that malice aforethought requires the showing of an intent to harm. And then, further on down, it says or it can be inferred by reckless disregard for human life." App. at 672, ll 9-12. Again, the key word "total" was not used. Granted the juror later

mentioned the word "total." App. at 673, ll 1-8. The trial judge, however did not use the word total nor did he correct the juror when the juror improperly failed to include the word.

Prior to the discussion with the jury, defense counsel argued the answer to the question should be a simple "no." As he argued, "I mean, I . . . think we're . . . trying to guess at what they're asking instead of answering their question, which, clearly, Your Honor, the - - the answer to that is no." App. at 661, l 23 to 662, l 4. A simple "no" would have answered the question and enabled the jury to come back with further questions if they were confused by the answer. What transpired once the jury entered the courtroom to discuss the issue, was to eliminate intent for the two charges for which he was convicted. The jury, in essence, was told if he did the act, he did the crime.

The error here is further compounded when what the trial judge told the jury in the full charge is analyzed. The judge originally told the jury, "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 in intent to inflict an injury or under circumstances that the law will infer an evil intent." App. at 640, ll 3-8.[3] The answers given to the judge in its discussion with the jury, contradicted this initial charge. Furthermore, the discussion never mentioned the malice from the wrongful act is implied malice. It can be rejected by the jury. The discussion simply told them intent on assault and battery of a high and aggravated nature and murder were not relevant. If Mr. Davis did a dangerous act, he was guilty. The discussion with the jury simply completely

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[3] The judge further charged the jury "Malice may be inferred from conduct showing a total disregard for human life." App. at 641, ll 3-4. This charge violates the principle established in *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019); *see also Yates v. Evatt*, 500 U.S. 391 (1991), disapproved of on other grounds by *Estelle v. McGuire,* 502 U.S. 62 (1991)

undermined what the jury was told as to general intent. App. at 641, ll 21-23.

The fact that the incorrect exchange of the law happened in response to a jury question, heightens the prejudice. "Further, because the definition of intent was given in response to the jury's question, it was unduly emphasized as well, instead of just being part of the original instructions given." *State v. Perry*, 434 S.C. 92, 104, 862 S.E.2d 451, 457 (Ct. App. 2021). Nine minutes after these erroneous instructions, the jury convicted Mr. Davis. Not enough time passed for the jury to have re-read and discussed the written instructions.

The court of appeals ignored the fact that the discussion came from a jury question. The court stated, "[B]cause the jury charge as a whole contained the correct definition of malice and the trial court did not tell the jury that intent only applied to attempted murder." *State v. Davis*, Op.№ 2024-UP-247 (S.C. Ct. App. filed July 3, 2024) at 2. When what the jury is told in response to a question, considering the charge as a whole only increases the confusion and the prejudice.

As this court said over a decade ago, "A jury charge is no place for purposeful ambiguity." *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009), extended by *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019). In this case the error was beyond "purposeful ambiguity." Here the error was grossly negligent contradiction. Trial counsel was correct in his objection when he said, "And I feel like we've kind of stepped on their province. I'd just renew my, you know, earlier objection." App. at 675, ll 12-14.

As the confusing, at best, answer to the jury's question permitted Mr. Davis to be convicted of the two charges with no intent, both convictions should be reversed and a new trial granted.

Question III

Did the court of appeals err in failing to hold the trial court erred in failing quash the indictment as to attempted murder when the indictment contained the improper language of implied malice?

The court of appeals held this issue was not preserved as trial counsel did not use the proper terminology and move to "quash" the indictment. The ruling by the court of appeals simply places form over substance. As this court has said, "We are mindful that issue preservation rules should not be applied in a technical manner as if this is some sort of game of 'gotcha' elevating form over substance to trap trial lawyers so as to prevent the appeal of a legitimate issue." *State v. Morales*, 439 S.C. 600, 609, 889 S.E.2d 551, 556 (2023).

The state knew and acknowledged they had an indictment that was not legally proper. Prior to trial the state moved to alter or amend the indictment to exclude the words "either express or implied malice" as to the attempted murder charge. App. at 13, ll 6-25. Defense counsel objected to the proposed amendment. App. at 16, ll 10-16. When defense counsel refused to consent to amendment, the trial court denied the motion to amend. App. at 21, ll 14-20. At that point everyone knew the indictment was improper. The defendant is entitled to have a grand jury determine if the state present sufficient evidence of a specific intent to kill in an attempted murder case.

The request to amend the indictment was based upon the ruling of the this court in *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017). This court decided *King* on October 25, 2017. The shooting in this case occurred on April 20, 2019. The solicitor was on notice not to include implied malice in the indictment. The decision of the solicitor to request to amend the

indictment was necessary as the grand jury could not have indicted Mr. Davis if the grand jury found only implied malice existed. As the wording of the indictment permitted the jury to indict Mr. Davis on an improper ground, the indictment is a nullity. The grand jury should never have been told they can convict for attempted murder using implied malice. The indictment on its face is insufficient. "A challenge to the indictment on the ground of insufficiency must be made before the jury is sworn as provided by § 17–19–90." *State v. Gentry*, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005). The entire discussion occurred before the jury was sworn.

Mr. Geoly was not obligated to consent to the amendment of the indictment. The state indicted Mr. Davis on June 20, 2019. This case was called for trial on August 23, 2021, over two years after Mr. Davis was indicted. When Mr. Geoly did not consent to amend the indictment, the state at that point should have simply declined to go forward on the attempted murder charge or continued the case and attempt to obtain a proper indictment. The state elected to do neither.

Under the law at the time of the indictment, the grand jury could not have indicted Mr. Davis for attempted murder based upon implied malice. On the face of the indictment we do not know if the grand jury indicted Mr. Davis for attempted murder based upon expressed malice or because of implied malice. We know from the verdict of the jury says the state produced insufficient evidence of expressed malice. At the argument on the motion to amend, the state dismissed two attempted murder charges against the children in the automobile based upon his inability to prove expressed malice. App. at 20, l 2 to 21, l 9. This admission is enough to conclude the high probability is the grand jury found only implied malice. Thus, the indictment was not proper as it was based upon an improper basis. "An indictment which does not charge a valid offense is clearly insufficient." *State v. Blackmon*, 304 S.C. 270, 274, 403 S.E.2d 660, 662

(1991). As implied malice for attempted murder is not an offense, no valid offense was alleged. If the facts as a matter of law are not sufficient to sustain a conviction, the facts alleged in an indictment are not as a matter of sufficient to indict.

As this has said, "Thus, a motion to amend an indictment should be granted when the proposed amendment does not change the nature of the offense or affect the sufficiency of the indictment." *State v. Means*, 367 S.C. 374, 387, 626 S.E.2d 348, 356 (2006). In this case, the elimination of the improper basis for the indictment changed the nature of the charges. As an indictment that alleges a defendant committed attempted murder by an inference of malice is not a valid indictment, the trial judge should not have permitted the state to go forward on the improper indictment.

The fact that Mr. Davis was convicted of assault and battery of a high and aggravated nature is of no importance. The indictment that brought Mr. Davis to court on the attempted murder charge was not valid. He should never have been tried on that indictment.

CONCLUSION

For the foregoing reasons this court should grant the Petition for Writ of Certiorari and reverse the court of appeals and dismiss the indictment for the attempted murder charge for which X'zavier Davis was convicted of assault and battery of a high and aggravated nature and remand for a new trial. As the trial court erred in failing to charge the lesser included offense of involuntary manslaughter, this court should grant the Petition for Writ of Certiorari and reverse the murder charge and remand for a new trial. As the trial court confused the jury in its discussion as to intent and malice through his reference to disregard for human life, this court should grant the Petition for Writ of Certiorari and reverse the murder conviction and remand for a new trial.

November 19, 2024

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