

**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.

**APPENDIX
VOLUME II**

**Alan McCrory Wilson
TOMMY EVANS, JR.
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211
S.C. Bar # 65282
tommyevansjr@scag.gov
(803) 734-6305**

Attorney for Respondent

**C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
S.C. Bar # 6188
(864) 229-5010
rauchwise@gmail.com**

Attorney for Petitioner

1 -- are -- are those tire tracks in that area?

2 A Yes. There was tire tracks in the mud in -- in that
3 general area.

4 Q Okay. And I'm going to hand you what's already been
5 admitted into evidence as State's No. 11. Do you
6 recognize State's 11?

7 A Yes. I do recognize State's Exhibit 11.

8 Q And what are those?

9 A So State's Exhibit 11 contains a fragment that was
10 collected from the Toyota Camry, as well as a projectile
11 collected from Marker 9 and a projectile collected from
12 Marker 10.

13 Q And was that eventually submitted to SLED firearms
14 department?

15 A Yes. It was.

16 Q To analyst Michele Eichenmiller; is that correct?

17 A It was submitted to the lab, and she ended up being
18 the assigned analyst and got the evidence in order to
19 analyze. That's correct.

20 Q All right. And lastly, did you collect, at the
21 hospital, any clothing items from anybody associated with
22 this case?

23 A Yes. I collected two bags of clothing items that
24 were said to be worn by the victim in this case, as well
25 as his sister.

1 Q Okay. You -- all right. Let's go to 168. All
2 right. What is that?

3 A This is tank top that was collected from the
4 hospital. It was said to have been worn by the victim in
5 this case.

6 Q Which -- which -- which victim?

7 A minor child.

8 Q Let's -- 169?

9 A State's Exhibit 169 is the pajama pants that were
10 said to have been worn by minor child.

11 Q 170?

12 A 170 depicts a pair of shoes that were said to have
13 been worn by minor child.

14 Q And then, 171?

15 A 171 depicts a T-shirt that was said to have been
16 worn by Penelope Davis.

17 Q Okay. And are you aware of when the autopsy took
18 place on minor child?

19 A Yes, I am.

20 Q Okay. Did you participate in the -- or did you
21 attend this autopsy?

22 A I was unable to be -- attend the autopsy. However,
23 a crime scene agent did respond and then transferred me
24 the evidence that was collected after the autopsy was
25 conducted.

1 Q Okay. And what evidence was collected from the
2 autopsy that was then transferred to you?

3 A There was photographs taken. The -- a blood spot
4 from minor child was collected, as well as a projectile
5 that was collected from minor child.

6 Q Okay. You recognize State's 13?

7 A Yes. I do -- yes. I do recognize State's Exhibit
8 13.

9 Q What is that?

10 A State's Exhibit 13 is going to be the projectile
11 that was collected minor child firearms --SLED firearms
12 department; is that correct?

13

14 A That's correct.

15 Q And Michele Eichenmiller tested that evidence?

16 A That's correct.

17 (Off the record briefly.)

18 Q Ms. McKay, please answer any questions Mr. Geoly has
19 for you. Thank you.

20 THE COURT: All right. Before we get into cross-
21 examination, I think we're going to go ahead and take a
22 short break. We've been at it a pretty good while.

23 Ladies and gentlemen, I'm going to excuse you back
24 to the jury room; take our afternoon break. We'll take
25 about a 10- or 15-minute break.

1 Do not discuss the case, even among yourselves.
2 We'll take a short break and bring you back in just a
3 minute.

4 Everyone else, please remain seated while the jury
5 is excused.

6 (Whereupon, the jury exited the courtroom at 3:23
7 p.m.)

8 (Off the record briefly.)

9 THE COURT: All right. Anything from the state
10 before we take a break?

11 MR. STUMBO: Nothing, Your Honor.

12 THE COURT: Anything from the defense?

13 MR. GEOLY: No, sir, Your Honor.

14 THE COURT: All right. Ms. McKay, we're still in
15 your testimony. So you can't discuss your testimony with
16 anyone, whether that be what you've testified to thus far
17 or what you anticipate testifying to in the future.
18 Okay? All right.

19 THE WITNESS: Thank you.

20 THE COURT: Thank you. We'll take about a 10- or
21 15-minute break.

22 (The Court went off the record at 3:24 p.m.)

23 (The Court went on the record at 3:41 p.m.)

24 THE COURT: All right. Matter of fact, let's --
25 let's go ahead and go back on the record now and correct

1 whatever we need to do. What is -- what do we got now?

2 MR. DANIEL: All right. Your Honor, Solicitor
3 Stumbo, when he examines the pathologist, which is the
4 state's last witness, he intends to get in three exhibits
5 -- admit those into evidence. And those are going to be
6 No. 1, 18, and 172. But if Mr. Geoly has no objection,
7 we would ask that -- or -- excuse me -- 2 through -- 2
8 through 85 be admitted into evidence, with the exception
9 of 18, because that -- that -- that will be done
10 momentarily with -- with Dr. Rose, the pathologist.

11 THE COURT: So 2 through 17 ---

12 MR. DANIEL: All right. 2 through ---

13 THE COURT: --- and 19 through 85?

14 MR. DANIEL: Yes, sir. Yes, sir. That's a better
15 way to say it.

16 THE COURT: Okay. And some of those are already in?

17 MR. DANIEL: Yes, sir. We're just making sure
18 they're in because we're -- we're trying to reconcile our
19 lists with the court reporter.

20 THE COURT: All right. And which ones ---

21 MR. GEOLY: Can I -- can I -- excuse me, Judge. I'm
22 sorry. But can I maybe know what y'all's ---

23 MR. STUMBO: This ---

24 MR. GEOLY: --- difference is?

25 MR. STUMBO: That's 172. One is ---

1 MR. GEOLY: I understand the 1, 18 ---

2 MR. STUMBO: --- one is ---

3 MR. GEOLY: --- and 172.

4 MR. STUMBO: --- the -- yeah.

5 MR. GEOLY: I'm just wondering: What's the
6 difference between your list and the court ---

7 THE COURT: Well ---

8 MR. GEOLY: --- reporter's list?

9 THE COURT: --- yeah. That's what I need to find
10 out too. What does -- madam court reporter, what do you
11 not have in evidence between 2 and 17, 19-85?

12 THE COURT REPORTER: Your Honor, I don't have 58 and
13 61.

14 THE COURT: So basically, you're moving to introduce
15 State's Exhibits 58 and 61.

16 MR. DANIEL: Yes, sir.

17 MR. GEOLY: Without objection, Your Honor.

18 THE COURT: All right. State's Exhibit 58 and 61
19 are admitted into evidence without objection.

20 (Whereupon, State's Exhibits 58 and 61 were entered
21 into evidence.)

22 THE COURT: So that now -- the state's list
23 corresponds with the court reporter's; is that correct?

24 THE COURT REPORTER: No, Your Honor.

25 THE COURT: No.

1 THE COURT REPORTER: That's just through No. 85.

2 And then ---

3 THE COURT: Oh.

4 THE COURT REPORTER: --- I believe Mr. Daniel said
5 90 through 171.

6 MR. DANIEL: 90 through 171, we would -- we would
7 offer into evidence as well, in case ---

8 THE COURT: 90 through 171?

9 MR. DANIEL: Yes, sir.

10 THE COURT: All right. And what do you not have in
11 between 90 and 171?

12 THE COURT REPORTER: Those would be Exhibits 134,
13 141, 145, 146, 148, 149, 158, 161, and 167.

14 THE COURT: All right. So we're talking about
15 Exhibits -- State's Exhibits 134 -- do you need to look
16 at these individually ---

17 MR. GEOLY: Your Honor, I'm ---

18 THE COURT: --- Mr. Geoly?

19 MR. GEOLY: --- I'm looking as you say them, Judge.

20 THE COURT: All right. 134 -- you want me to -- let
21 me just give you -- have you got them written down?

22 MR. GEOLY: Yes, sir.

23 THE COURT: All right. Let me just give you a few
24 minutes to take a look at them and ---

25 MR. GEOLY: Well, let ---

1 THE COURT: --- then let me know.

2 MR. GEOLY: Judge, let me double-check with you.

3 134, 141, 145, 146, 148, 149, 153 ---

4 THE COURT: No. I had 158.

5 MR. GEOLY: Oh, I'm sorry. 158. And then, what did
6 you say after that?

7 THE COURT: 161 and 167.

8 MR. GEOLY: Okay. I've got them, Judge, if you'll
9 just give me just a moment.

10 THE COURT: All right. Take -- take your time.

11 (Off the record briefly.)

12 MR. GEOLY: No more -- no -- no objection, Your
13 Honor.

14 THE COURT: All right. So State's Exhibits 134,
15 141, 145, 146, 148, 149, 158, 161, 167, are admitted into
16 evidence without objection.

17 (Whereupon, State's Exhibits 134, 141, 145, 146,
18 148, 149, 158, 161, and 167 were entered into
19 evidence.)

20 THE COURT: Anything else we need to address?

21 MR. STUMBO: I don't believe so, Judge. I think ---

22 THE COURT: All right.

23 MR. STUMBO: --- the only exhibits -- I think that
24 we're still to offer through the last witness would be 1,
25 18, and 172.

1 THE COURT: Okay.

2 MR. STUMBO: So three.

3 THE COURT: All right. Anything from the state
4 before we bring the jury in?

5 MR. STUMBO: Nothing, Your Honor.

6 THE COURT: Anything from the defense?

7 MR. GEOLY: No, sir, Your Honor.

8 THE COURT: All right. Let's go ahead and bring the
9 jury in.

10 (Off the record briefly.)

11 (Whereupon, the jury entered the courtroom at 3:48
12 p.m.)

13 THE COURT: All right. Ladies and gentlemen,
14 welcome back. We're ready to resume the trial of the
15 case.

16 Mr. Geoly, cross-examination.

17 MR. GEOLY: Thank you, Judge.

18 (Off the record briefly.)

19 CROSS-EXAMINATION

20 BY MR. GEOLY:

21 Q Madam witness, please state your name on the record
22 again.

23 A My name is Jaclynn McKay.

24 Q Thank you, Ms. McKay.

25 MR. GEOLY: Could -- could we pull up 100, Mr.

1 Bentley?

2 Q Now, I understood you to say, kind of back at the
3 beginning of your testimony, that you marked this,
4 thinking this was a -- a striking to the ground; is that
5 right?

6 A Yes.

7 Q Okay. And did you eventually determine that it was
8 a strike to the ground or there wasn't a strike to the
9 ground?

10 A We eventually determined that it was. We recovered
11 a projectile from the spot.

12 Q So that's actually the spot where you dig up, and
13 then, you have a picture of the bullet from right there?

14 A Correct. And this is going to be Marker 10.

15 Q Okay. And then, how many other bullets did you find
16 in the ground that day?

17 A This was the only one we recovered from digging in
18 the ground. However, we found a projectile just laying
19 on top of the ground at Marker 9.

20 Q So two?

21 A Correct.

22 Q Okay. Are found in the ground.

23 And how many are found in the car?

24 A There was one recovered from inside of the vehicle.

25 Q The back seat?

1 A That's correct.

2 Q So two, then, enter the vehicle?

3 A That's correct.

4 Q Okay. And you were actually describing ---

5 MR. GEOLY: Give me the picture of the -- the
6 defects of the car. Tell me number that is.

7 I'm sorry, Judge.

8 MR. STUMBO: Number ---

9 MR. GEOLY: Beg the ---

10 MR. STUMBO: --- Number 5.

11 MR. GEOLY: --- Court's indulgence one moment.

12 THE COURT: That's fine.

13 MR. STUMBO: Number 5. You talking about ---

14 MR. GEOLY: Number 5 ---

15 MR. STUMBO: --- the ---

16 MR. GEOLY: --- probably.

17 MR. STUMBO: Yeah. The diagram? Diagram or the
18 picture?

19 MR. GEOLY: Well, actually, we have a picture, I
20 think.

21 Beg the Court's indulgence one moment.

22 (Off the record briefly.)

23 Q If you'd give us just a moment; let me find the
24 right picture for you.

25 (Off the record briefly.)

1 Q All right. Let me ask you about -- I think it's
2 what you called Defect B that's ---

3 A Uh-huh.

4 Q --- on the B post?

5 A Defect B is going to be on the A pillar.

6 Q The -- okay. The A pillar?

7 A Uh-huh.

8 Q That -- that's one of the higher alleged strikes,
9 right?

10 A That's correct.

11 Q How positive are you that's a bullet?

12 A We called it a suspected bullet defect because we
13 have no way of 100 percent knowing on scene.

14 Q Okay.

15 A But based on the damage, it's relatively consistent
16 with what I've seen in my training and experience.
17 However, we can only call it a suspected bullet defect.

18 Q This car is pretty old, right?

19 A Say that one ---

20 Q The vehicle is pretty old. It's not a new vehicle.

21 A That's correct.

22 Q And it does have several indentions maybe that --
23 that maybe are and -- and maybe aren't actual bullet
24 strikes, right?

25 A That's possible.

1 Q Okay. In terms of bullets that strike this car
2 above, let's call it, the window line, you -- you
3 basically said as to the tire line, there were three
4 above and three below. That's right?

5 A That's correct.

6 Q That first one, what we're calling A, if -- if I
7 represented to you that -- you -- you remember the porch?

8 A Uh-huh.

9 Q And if you'll note, in -- in the porch pictures,
10 when you see the front of the house, that tire marks go
11 almost to the front porch, maybe even just a little
12 beyond, like she parks all the way where you open the
13 door and you get out and just go up the steps. Did you
14 take note of that?

15 A It's possible. However, we can't time-state --
16 time-stamp the ---

17 Q Sure.

18 A --- tire tracks. So I'm not exactly sure where the
19 vehicle was ---

20 Q But ---

21 A --- parked on this particular incident.

22 Q But is it logical that that A mark is when he steps
23 out onto the landing, I think you called it -- the -- the
24 front porch, but the top step's the landing -- and that
25 he's pointing down, essentially, and -- and doesn't it

1 seem to skid off to what we would call the passenger's
2 side of the vehicle?

3 A It is a ricochet defect from essentially the
4 driver's side of the vehicle to the passenger's side.
5 But ---

6 Q And -- and -- and wouldn't it indicate the fact that
7 it defects like that and goes off, that that's pretty
8 much point-blank range.

9 A I -- that's not necessarily what it means.
10 Sometimes with ricochet defects, if you're shooting in a
11 relatively equal angle as the substrate that's being
12 struck, that's kind of how it can ricochet off versus
13 going into.

14 Q Okay.

15 A So ---

16 Q So then ---

17 A --- I ---

18 Q --- actually, what I was saying could be wrong and
19 it be more indicative that he's actually on the ground
20 when he fires that into what would -- it seems like would
21 be firing into the engine.

22 A With this scenario, since there's so many moving
23 pieces at play, I can't really speculate on the shooter's
24 position, just because this vehicle was possibly in
25 motion during when this occurred. But it is possible

1 that he was on the ground.

2 Q Are there people that do, do that, though?

3 A That?

4 Q That -- that would analyze the situation and say,
5 "Hey, I can, from the trajectory, you know, determine
6 that this shot was fired from such-and-such or
7 somewhere," or -- and so that you could have somebody
8 come out there that works with your department that
9 actually does do that kind of thing.

10 A It's possible. But again, I think, even with all
11 the variables in this case, it would still be hard to
12 determine exactly where the vehicle was located when it
13 struck, as well as where the shooter's position was.

14 Q Did -- did any of those people come out from SLED?

15 A No. Normally, we do have people signed off in
16 shooting-incident documentation. That is more so done
17 kind of after the fact. But all of the measurements and
18 the scale tape and stuff is placed on the vehicle in
19 order to aid in that reconstruction, if it were deemed
20 necessary.

21 Q Okay. This bullet that hits Indigo's ankle ---

22 A Uh-huh.

23 Q --- we think that is D?

24 A It's going to be Defect E.

25 Q Okay. And -- and in fairness, it's about halfway up

1 the tire, maybe?

2 A I -- I would say that's accurate.

3 Q So midtire level is what actually hits her. Is that
4 the bullet that hits her that's found in the back seat?

5 A It's possible.

6 Q So it could've gone through her leg, bounced around
7 the compartment, and ended up -- did anybody come to look
8 for the -- the last one that I think everybody's assuming
9 or -- are -- are you assuming that F is the bullet that --
10 that actually probably takes minor child's life?

11 A That's correct.

12 Q And did anybody look to see what trajectory it is
13 coming from?

14 A I measured the angles; essentially, put a -- a
15 flight-path rod through. And I measured the vertical
16 angle, as well as left-to-right angle. However, I did
17 not do anything further than that, as far as shooting
18 reconstruction is concerned.

19 Q Is that more of a straight shot, as opposed to -- it
20 seems like most of these bullets, he's near the porch,
21 either on it or down by it, and he's shooting kind of as
22 she's backing up at the tires. And we see all these low
23 shots, and we -- you've told me about one or two that
24 enter -- one's on the ground; one's in the ground. Then,
25 you have at least three that are tire level or below. Do

1 we think these other shots -- or as she's now backed up
2 and driving up the drive, or do you have no opinion of
3 that?

4 A I have no opinion on that.

5 Q All right. For -- for where it's to be hit, though
6 -- and if you assume that -- that Indigo testified he's
7 standing right there at the bottom of the steps -- for --
8 for F to exist, it wouldn't be while she's backing up,
9 right? It would be while she's driving down the
10 driveway.

11 A (No audible response.)

12 Q I mean, didn't you put a -- a metal pole through ---

13 A Yeah. Can ---

14 Q --- through F?

15 A --- you inform me on how the vehicle was oriented in
16 ---

17 Q My -- my understanding from what Indigo said was
18 that it was pulled up in front of the -- the -- the
19 house; that she basically backed up through those tire
20 marks that you see that have a little puddle in them; and
21 then drove up the driveway to the road.

22 A Unfortunately, I can't really tell you exactly when
23 that shot was fired.

24 Q Okay. You don't know why he was shooting at this
25 car, do you?

1 A I do not.

2 Q You weren't here prior to this, obviously. I mean,
3 you couldn't be here before it happened.

4 A That's correct.

5 Q So you got nothing to say in -- in terms of malice
6 aforethought or whether they were in a fight or what was
7 going on prior to this. You have no knowledge of any of
8 that, right?

9 A I just have preliminary case information that was
10 given to me.

11 Q Okay. So nothing else to offer this jury?

12 A I don't believe so.

13 Q Thank you very much for your time.

14 MR. GEOLY: No further questions, Judge.

15 THE COURT: All right. Redirect?

16 MR. DANIEL: Very -- very briefly, Your Honor.

17 REDIRECT EXAMINATION

18 BY MR. DANIEL:

19 MR. DANIEL: 123, Mr. Bentley.

20 Q All right. What are we looking at there, Ms. McKay?

21 A In State's Exhibit 123, you can see Markers 1
22 through 4. And they all indicate the cartridge cases
23 that were found on the front steps or on the ground
24 beside the front step.

25 Q All right.

1 MR. DANIEL: 127, Mr. Bentley.

2 A In State's Exhibit 127, you can see Markers 5
3 through 8. And they mark the cartridge cases that were
4 found just inside the front door inside the residence.

5 Q All right. So all eight shell casings -- spent
6 shell casings are found -- there's four of them on the
7 porch area, correct?

8 A Yes.

9 Q And then, the other four are just inside the
10 entryway to the house?

11 A That's correct.

12 Q All right. And that storm door, did it have a
13 spring in it to where it would close automatically or
14 would it stay open?

15 A I'm not sure. I don't recall.

16 Q Okay. So all the shell casings are in that area,
17 the front porch inside the threshold to the house; that's
18 correct?

19 A That's correct.

20 Q All right. And typically, when you -- you fire a
21 weapon, how far will shell casings eject from the weapon?

22 MR. GEOLY: Objection, Your Honor: not in response
23 to direct.

24 THE COURT: Sustained.

25 MR. DANIEL: All right. Let's go to 58, Walter.

1 Q Mr. Geoly asked you about the flight path of the --
2 of the bullets. All right. What are we looking at in
3 58?

4 A In State's Exhibit 58, you can see Defect F, which
5 is in the C pillar on the driver's side of the vehicle.
6 And it has a flight-path rod through it to indicate the
7 flight path of the bullet.

8 Q All right. Go to 60, please. All right. And that
9 is just a -- what -- what do you call that? Is that a
10 dowel rod?

11 A Yes. A dowel ---

12 MR. GEOLY: I'm going ---

13 A --- rod is ---

14 MR. GEOLY: --- to object again, Your Honor. We're
15 not in response to cross-examination.

16 THE COURT: All right. How did the -- how has this
17 not been addressed on your ---

18 MR. DANIEL: He -- he ---

19 THE COURT: --- direct?

20 MR. DANIEL: Your Honor, he was asking about angles
21 in his cross. And I was just -- I was simply trying to
22 show the flight path. I -- I didn't highlight this -- or
23 Mr. Geoly broached that in his cross ---

24 THE COURT: Yeah. But ---

25 MR. DANIEL: --- about angles ---

1 THE COURT: --- I mean, you addressed it in your
2 direct, didn't you?

3 MR. DANIEL: (No audible response.)

4 THE COURT: I mean, you can't -- you can address
5 things on redirect that he addressed in cross that you
6 have not already addressed. You can't go back over what
7 you've already done.

8 MR. DANIEL: Yes, sir. I didn't -- he addressed the
9 angle. I -- my question is angle-specific ---

10 THE COURT: All right. I'll ---

11 MR. DANIEL: --- which ---

12 THE COURT: --- allow this one question. Go ahead.

13 MR. DANIEL: Thank you, Your Honor.

14 Q Does that dowel rod -- what does -- does that
15 indicate what kind of trajectory, a downward or upward
16 trajectory?

17 A So in this case, it's an ever-so-slight downward
18 angle.

19 Q And again, most of the shell casings were from an
20 elevated position; is that correct? At the house?

21 A That is where the shell casings were. That's
22 correct.

23 Q All right. All right.

24 THE COURT: All right.

25 MR. DANIEL: Thank you. That's all I have.

1 MR. GEOLY: If it please the Court, Judge. He --
2 may I ask permission to address that last point that ---

3 THE COURT: No. That's ---

4 MR. GEOLY: Yes, sir.

5 THE COURT: You can bring it out.

6 All right. You may step down.

7 (Whereupon, the witness exited the witness stand.)

8 (Off the record briefly.)

9 THE COURT: All right. The state can call your next
10 witness.

11 MR. STUMBO: Thank you, Your Honor. The state calls
12 Dr, Kelly Rose.

13 (Off the record briefly.)

14 (Whereupon, the witness came forward.)

15 KELLY ROSE, having been first duly sworn,
16 testified as follows:

17 DEPUTY CLERK OF COURT: Have a seat and state your
18 name for the record.

19 THE WITNESS: My name is Kelly Rose, like the
20 flower.

21 DIRECT EXAMINATION

22 BY MR. STUMBO:

23 Q Afternoon, Dr. Rose. What -- what are you a doctor
24 of?

25 A I am doctor of pathology with a -- an extra

1 subspecialty in forensic pathology.

2 Q Okay. And what kind of training and education did
3 you have to become a forensic pathologist?

4 A I did four years of college, where I studied
5 biology, chemistry, the normal stuff. Then I went to
6 medical school. After that, I did additional training.
7 I started it at MUSC and then finished in Emory in
8 Atlanta. After that, I did an additional year in just
9 forensics through Emory at Fulton County Medical
10 Examiners in Atlanta.

11 Q Okay. And so how long have you -- have you -- are
12 you board-certified?

13 A Yes.

14 Q How long ---

15 A I am ---

16 Q --- how long have you been board-certified?

17 A That's a good question. I've been board-certified
18 in anatomic and clinical pathology for going on -- not
19 quite ten years; and then, forensics for going on two
20 years.

21 Q Okay. And during that time when you're -- as you've
22 been board-certified, where have you worked?

23 A I've -- I worked in Newberry for about a year and a
24 half, doing autopsies. I also worked in Atlanta. I've
25 worked down in Florida, where I did not just autopsies,

1 but oncologic pathology, which is cancer. So I looked at
2 slides of people's cancer. I also did autopsies when I
3 was there. And now I've been back here since 2018,
4 November, doing strictly autopsy pathology.

5 Q Okay. Your first time in Newberry, did you work
6 with Dr. Ross over here at ---

7 A Yes.

8 Q --- the Newberry -- okay.

9 And since you've been back, have you essentially
10 taken over Dr. Ross's practice?

11 A Yes.

12 Q Okay. And since you've been a pathologist, how many
13 deceased individuals have you conducted autopsies on?

14 A Approximately 3,000.

15 Q Okay. You ever testified in a court of law in this
16 state as a -- an expert in pathology and forensic
17 pathology?

18 A Yes.

19 Q Okay. How many times?

20 A Approximately ten.

21 Q Okay.

22 MR. STUMBO: Judge, at this time, based on Dr.
23 Rose's extensive experience, qualifications, education,
24 and the fact that she's been qualified ten times in this
25 state before, we would ask her to be qualified as an

1 expert in pathology and forensic pathology.

2 THE COURT: All right. Any questions or challenges?

3 MR. GEOLY: No, sir, Your Honor.

4 THE COURT: All right. I find this witness to be an
5 expert in the field of pathology and forensic pathology.

6 Q Dr. Rose, did you have occasion to conduct an
7 autopsy on a young boy, 7 years old, by the name of
8 minor child?

9 A I did.

10 Q Okay. And I'm going to hand -- and -- and did you
11 conduct that autopsy and produce a report as a result of
12 that ---

13 A I did.

14 Q --- autopsy?

15 All right. I'm going to hand you through the clerk
16 what's been marked for ID as State's No. 1. If you
17 could, just briefly look at that and -- and do you
18 recognize that document?

19 A I do. It's my autopsy report.

20 Q Okay. And you have a -- another copy of that ---

21 A I brought ---

22 Q --- on the ---

23 A --- another ---

24 Q --- stand, right?

25 A --- copy.

1 Q Okay. If you could pass that back through the
2 clerk, No. 1 -- State's No. 1.

3 A (Complied.)

4 Q That's a fair and accurate representation of your
5 autopsy findings ---

6 A Yes.

7 Q --- Dr. Rose?

8 MR. STUMBO: Judge, we would offer State's 1 into
9 evidence.

10 THE COURT: Any objection?

11 MR. GEOLY: Without objection, Your Honor.

12 THE COURT: All right. State's Exhibit 1 admitted
13 into evidence without objection.

14 (Whereupon, State's Exhibit 1 was entered into
15 evidence.)

16 Q Now, Dr. Rose, it -- it -- just to -- I want to
17 clarify this. What -- what's the date of the autopsy
18 again?

19 A The date of autopsy is April 23rd, 2019.

20 Q Okay. And what's the date of death -- what is it
21 noted as on State's 1 of your report?

22 A It's noted as 4/22/12, which is a typographical
23 error. It was 4/22/2019.

24 Q Okay. So that was just a -- a transcription error
25 by ---

1 A Yes. And I have a new transcriptionist.

2 Q Okay. So the date of death was actually the day
3 before your autopsy?

4 A Yes.

5 Q And that would be April 22nd, 2019?

6 A Yes.

7 Q Okay. And what was minor child's dob?

8 A His date of birth was ---- 2012

9 Q And so he had just turned 7 years old.

10 A Yes.

11 Q Okay. Now, Dr. Rose, just to kind of cut to the
12 chase on this -- your -- your findings, did you -- were
13 you able to develop a cause of death for minor child?

14 A I was.

15 Q Okay. And -- and what was his -- his cause of
16 death?

17 A Pulpification of brain subarachnoid and subdural
18 hemorrhage. And I can explain that a little bit, since
19 ---

20 Q Well ---

21 A --- those are some ---

22 Q Okay. We -- we can follow up on ---

23 A Okay.

24 Q --- it in a moment. But that was ---

25 A That was ---

1 Q --- the cause ---

2 A --- due ---

3 Q Due to what?

4 A Due to a gunshot of the head.

5 Q All right. And the manner of death?

6 A Homicide.

7 Q Okay. Which just simply means caused by someone
8 else's hand, right?

9 A Yes.

10 Q Okay. Now, if you could, you've mentioned a second
11 ago that -- that -- tell me, you know, just medically or
12 tell -- not -- the jury, not me, if you could explain to
13 the jury what happens to the brain when a bullet passes
14 through it.

15 A Okay. An average handgun round that is consistent
16 with what I found minor child travels about 1200 to 1300 feet
17 per second. And the speed of sound is 1100 --
18 approximately 1100 feet per second. So something that's
19 traveling faster than sound enters the brain.

20 The brain is very well protected by the skull. But
21 it doesn't have a lot of room to move. So something
22 traveling supersonic enters the brain; travels through
23 the tissue. As it travels, that energy that it carries
24 with it -- because it's traveling so fast -- causes the
25 tissue surrounding the -- surrounding it to expand like

1 this.

2 So you have a bullet traveling through, fracturing
3 skull, causing bleeding. You have the tissue that the
4 bullet is in direct contact with that they have done
5 studies, and they're not even sure where that goes. It
6 almost vaporizes. And then, you have the surrounding
7 tissue that the bullet doesn't travel through that's
8 still being affected by this pressure wave.

9 It leads to a cascade of events: swelling; you
10 don't have much room in your skull for your brain to
11 swell. It short-circuits the -- you know, the brain --
12 the neural circuits. The communication of your brain
13 that keeps you alive, it short-circuits. Then, actual
14 blood itself is highly irritating and can lead to death
15 in and of itself.

16 Q Okay. Can your heart continue to beat after this
17 happens to ---

18 A It ---

19 Q --- your brain?

20 A --- can.

21 Q Okay. Can your -- your lungs continue to operate
22 and breathe ---

23 A Yes. For some period of time. It doesn't mean that
24 it's a survivable injury. It just means that the lower
25 part of your brain that controls your heartbeat and

1 respirations, that did not have bullet travel through it
2 or sustains an injury that would've immediately stopped
3 it. But the cascade of events that happens from the
4 wound traveling through the brain just sets off a chain
5 of events that you can't recover from. But it might take
6 some time.

7 Q Now, Dr. Rose, in -- in this particular case, to a
8 reasonable degree of medical certainty, what's your
9 opinion as to -- after this bullet travels through this
10 young boy's head, it -- can he feel anything after that?

11 A No. I don't believe so. It -- with that traumatic
12 a brain injury, he's basically alive in that his heart
13 and -- is still pumping and his lungs are still
14 breathing, but for what we consider to be alive, he's
15 dead. He's -- he's already dead.

16 Q Is that what's often referred to as being brain-
17 dead?

18 A Correct.

19 Q Okay. Would there have been anything that the
20 medical staff at Newberry emergency room that -- anything
21 they could've done to prevent minor child's death?

22 A No. Absolutely nothing.

23 Q Okay. All right. Dr. Rose, I'm going to -- I -- I
24 was able to show you before you got on the witness stand
25 State's for -- what's, for ID purposes right now, State's

1 18. And it was a -- a picture. Do you -- did you
2 recognize State's 18?

3 A Yes. I did.

4 Q Okay. And -- and what is in State's 18?

5 A During an autopsy, especially with gunshot wounds,
6 we'll take X-rays, looking for bullets, projectiles. And
7 that is an X-ray that we took of minor child during the
8 autopsy of his head.

9 Q Okay. And it's a fair and accurate representation
10 of -- of that X-ray that ---

11 A Yes.

12 Q --- you took at the autopsy?

13 MR. STUMBO: Judge, we'd offer State's 18 into
14 evidence.

15 THE COURT: Which one is that?

16 MR. STUMBO: State's 18.

17 THE COURT: Any ---

18 MR. GEOLY: Without objection, Your Honor.

19 THE COURT: State's Exhibit 18 is admitted into
20 evidence without objection.

21 (Whereupon, State's Exhibit 18 was entered into
22 evidence.)

23 Q Okay. Dr. Rose, if you could explain, just -- just
24 briefly for the jury, what's in State's 18.

25 A Okay. Can I get down there so I can ---

1 Q Yes.

2 A --- see myself?

3 Q You can.

4 (Whereupon, the witness exited the witness stand.)

5 Q Just if you could keep your -- your voice up for ---

6 A Okay.

7 Q --- the court reporter.

8 A All right. This is the X-ray of the head. This is
9 the marker designating right or left, because X-rays are
10 not necessarily like pictures. So you have to leave the
11 marker so you know. That's the right.

12 This is minor child's skull. It -- this is where his eyes
13 were. And this is the bullet right here. It's traveled
14 through the skull, through the brain, back out the skull,
15 and is in the very swollen soft tissue of his head on the
16 right. It was a big bulge, a lot of swelling. And
17 that's where the bullet was.

18 Q Okay. You can return to the stand.

19 (Whereupon, the witness resumed the witness stand.)

20 Q Were you able to recover this bullet out of minor child's
21 body?

22 A I was.

23 Q Okay. I'm going to show you what's already in
24 evidence as State's 35 -- or -- excuse me.

25 MR. STUMBO: Let's go to State's 34, Walter.

1 Q Okay. Is this the bullet that you pulled out at the
2 autopsy?

3 A That is. Yes.

4 Q Okay.

5 MR. STUMBO: State's 35, Walter.

6 Q Okay. Closer up, same bullet?

7 A Yes.

8 Q State's 36?

9 A Yes.

10 Q And this is just a measurement of that. Okay. Is
11 that correct?

12 A Yes, it is.

13 Q All right. And at that time after you were able to
14 document it and -- and you had a SLED crime scene
15 analyst, Ms. Jazic ---

16 A Yes.

17 Q --- at the time?

18 A Yes.

19 Q And she was able to take some photographs of ---

20 A Yes.

21 Q Okay. I'm going to hand you through the clerk
22 what's in evidence already as State's No. 13. It may be
23 easier to look at through the back side of it.

24 A Uh-huh.

25 Q What's in State's 13?

1 A It's the projectile that I recovered during autopsy.

2 Q Okay. And you know that from the little container
3 inside?

4 A Yes.

5 Q Okay.

6 A And it matches the pictures my recollection.

7 Q Right. And that -- that's the kind of container you
8 would use in your autopsy?

9 A Yes. When I recover any kind of projectile, I put
10 it in a heat-sealed bag, clear plastic, just like this.
11 Yes.

12 Q Okay. All right. Thank you. If you could pass
13 that back to the clerk. Thank you, Dr. Rose.

14 A (Complied.)

15 Q All right. Just one last thing, Dr. Rose: I did
16 show you a posterboard which is marked for ID as State's
17 172 right before you were called earlier. You recognize
18 this posterboard?

19 A I do.

20 Q Okay. And -- and it's a blown-up copy of what?

21 A Of a body diagram that we use in autopsies.

22 Q Okay. And fair and accurate representation of
23 something ---

24 A Yes.

25 Q --- you produced?

1 A Yes.

2 Q Okay. And it's a depiction of bullet entry, exit,
3 that sort of thing?

4 A Yes.

5 MR. STUMBO: Judge, we would offer 172 into evidence
6 at this time.

7 MR. GEOLY: I -- I want to object to relevance,
8 Judge.

9 THE COURT: All right. State's Exhibit 172 is
10 admitted into evidence over defendant's objection.

11 MR. GEOLY: Thank you, Your Honor.

12 MR. STUMBO: Thank you, Judge.

13 THE COURT: Thank you.

14 (Whereupon, State's Exhibit 172 was entered into
15 evidence.)

16 MR. STUMBO: All right. Walter, if you could pull
17 up 172 for Dr. Rose. It may be easier than the
18 posterboard.

19 Q Okay. And if you need to get down, just if you could
20 keep you voice up, Dr. Rose, and explain to the jury what
21 we see in this diagram.

22 (Whereupon, the witness exited the witness stand.) A
23 All right. This is a body -- or a diagram of a head that
24 I'll use in an autopsy. I will have the -- the name of the
25 person that's being autopsied; in this case, *minor child*.

1 This is my depiction of the entrance wound.
2 Initially, I drew it here. And then I -- when I looked
3 at it after it was all cleaned up, I was, like, that's
4 not the right position. I'm going to put it in the right
5 position. So that's what you see there. So I just did a
6 -- I crossed it out and initialed.

7 And then, this is showing where the bullet was
8 recovered. So the bullet was right here under the skin
9 here. And the bullet entered here above the ear.

10 Q Okay. You can return to the stand, Dr. Rose.

11 (Whereupon, the witness resumed the witness stand.)

12 Q Just one last question, Dr. Rose: To a reasonable
13 degree of medical certainty, what is your opinion as to
14 what killed minor child?

15 A The gunshot of his head.

16 Q Okay. Actually, I'd -- I said one last question.
17 One more: Was this a healthy young boy by your
18 examination?

19 A Yes. I found no evidence of any natural disease:
20 no disease he had developed; none that he had been born
21 with.

22 Q Okay. So other than the gunshot wound through the
23 head, this was a healthy 7-year-old boy?

24 A 100 percent.

25 Q All right. Thank you, Dr. Rose. Please answer any

1 questions Mr. Geoly may have.

2 MR. GEOLY: Please the Court, just a couple, Your
3 Honor.

4 THE COURT: All right.

5 CROSS-EXAMINATION

6 BY MR. GEOLY:

7 Q Hey, Dr. Rose.

8 A Hi.

9 Q Have we ever met before?

10 A I don't believe so.

11 Q I don't think so either.

12 You said this was a healthy boy prior to this
13 gunshot wound. Any signs of abuse or prior abuse to this
14 boy?

15 A No.

16 Q Doesn't look like he was a victim of parental abuse
17 of any kind, does it?

18 A No.

19 Q Okay. In terms of what you do -- and I appreciate,
20 you know, that you -- you basically just did your job;
21 here's a deceased young man; and -- and you filled out
22 the charts and stuff that you really do. Do you have any
23 special knowledge that tells you whether or not this
24 death was a result of murder or whether it was the result
25 of involuntary manslaughter?

1 A We have five manners of death in forensic pathology.
2 And that's out of my wheelhouse.

3 Q Okay. You don't have anything to say whether it's
4 one or the other, right?

5 A No.

6 Q No further questions, Doctor. Thank you.

7 THE COURT: All right.

8 MR. STUMBO: Just one more, Judge.

9 REDIRECT EXAMINATION

10 BY MR. STUMBO:

11 Q Dr. Rose, have you been trained in the law and what
12 the different degrees of homicide are?

13 A No. We actually aren't trained in that. That's not
14 -- we determine cause and our manner of death. And the
15 -- the courts and the legal field picks up after that.

16 Q Right. And all homicide means is a person was
17 killed by someone else.

18 A Yes.

19 Q Okay.

20 A That -- the person's death was the result of the
21 actions, whether it be on purpose or not on purpose, of
22 another. So if your actions leads to someone else's
23 death, that is a homicide.

24 Q Okay. And that's what you found here?

25 A Yes.

1 Q All right.

2 A He did not shoot himself.

3 Q Thank you, Dr. Rose.

4 MR. STUMBO: No further questions, Your Honor.

5 THE COURT: All right. You may step down.

6 (Whereupon, the witness exited the witness stand.)

7 (Off the record briefly.)

8 THE COURT: All right. Let me see the attorneys for
9 a second.

10 (Whereupon, a bench conference was held off the
11 record in the presence of the jury, but out of the
12 hearing of the jury.)

13 MR STUMBO: Your Honor, the state rests at this
14 time.

15 THE COURT: All right.

16 All right. Ladies and gentlemen, the state has
17 rested their case. And now is the time of the trial when
18 I have address some matters of law with the attorneys.
19 Given the time of day, I think we're going to go ahead
20 and let you go home for the day while I address these
21 matters of law with the attorneys.

22 And I'll tell you why we do it outside the presence
23 of the jury. It's not that we're trying to hide anything
24 from you or keep anything from you. But as I told you in
25 the opening charges, you and you alone decide the facts

1 of this case. And you decide those facts based upon the
2 testimony of witnesses and exhibits that are introduced
3 into evidence.

4 Well, when I discuss the law and the -- and the
5 procedures require that I discuss the law with attorneys
6 at this time, when I discuss the law and when the
7 attorneys discuss the law, it often requires us to
8 factual issues. Well, what we say is not evidence. So
9 we don't want you to be influenced by anything that I
10 might say or anything that the attorneys might say when
11 we discuss the law. We don't want that to influence your
12 decision on what the facts of this case are. And that's
13 why we excuse you.

14 In any event, it's a good time for us to go ahead
15 and break for the day. I'm going to let you go home for
16 the evening. Please be back at 9:15 tomorrow morning.

17 Again, do not discuss the case, even among
18 yourselves. It's too early for deliberations. Don't
19 conduct any independent investigations.

20 I hope everybody has a good -- good evening, and
21 we'll see you back at 9:15 tomorrow morning. Thank you
22 very much.

23 Everyone else, please remain seated while the jury
24 is excused.

25 (Whereupon, the jury exited the courtroom at 4:24

1 p.m.)

2 (Off the record briefly.)

3 THE COURT: All right. Any motions?

4 MR GEOLY: Please the Court, Judge, if I could ---
5 Here you go, David.

6 Your Honor, I took the opportunity at lunch. I -- I
7 figured they would finish up this afternoon, and so I
8 filed a motion. Judge, if -- if I -- I miscalculated for
9 some reason. Can I get a copy of this, Ms. Beth ---

10 CLERK OF COURT: Sure.

11 MR. GEOLY: --- and then give this to the judge.

12 CLERK OF COURT: Okay.

13 MR GEOLY: But I -- I have a motion, Your Honor, and
14 a memorandum in support of our motion for directed
15 verdict, if I could hand that up as soon as I get her to
16 make one copy, Your Honor.

17 THE COURT: All right. We'll let her make a copy.
18 That's fine.

19 MR GEOLY: Yes, sir. Thank you. Judge, while she's
20 doing that, I can lay the basis for you if you want.

21 THE COURT: All right.

22 MR GEOLY: Your Honor, since *Belcher* in 2009 and
23 then the *Burdette* case, which recently come out, you
24 know, since, it -- it's not appropriate to charge the
25 jury that they can presume malice by the use of a deadly

1 weapon. Since that is not acceptable charge -- because I
2 think *Burdette* is clear; that's -- that's not an
3 acceptable charge anymore -- I think that the state has
4 to produce at -- at least some credible evidence that all
5 elements of the crime have been met.

6 And, Judge, I think that in this case, malicious
7 aforethought is an element of the crime. It would be my
8 position, Your Honor, that the state has done nothing to
9 produce anything that could be considered by the jury to
10 be express or implied malice. There's been no testimony
11 of any maliciousness.

12 And -- and, in fact, I think the totality is
13 certainly the other: that he loved this child; he -- he
14 wasn't shooting at Mrs. Indigo Davis -- or Indigo Penny,
15 whichever you want to call her. But he wasn't shooting
16 at his wife; he wasn't shooting at his son. He was
17 shooting at the tires. Indigo Penny expressed that.

18 You couldn't -- toward that end, Judge, I -- I think
19 it would be impossible for a reasonable jury to find
20 beyond a reasonable doubt that he had acted with malice
21 aforethought, from what's been admitted. You know, I
22 would ask you, Judge, to -- that -- that's basically
23 the -- the -- the basis of my motion for directed verdict
24 at this time: that even with the -- considered in the
25 light most favorable to the state, the evidence put into

1 evidence at this point is insufficient that a reasonable
2 jury could give my client a fair trial and find beyond a
3 reasonable doubt unanimously that he -- he actually had
4 malice aforethought.

5 I -- I see the clerk is back, Judge. And I would --
6 would ask ---

7 THE COURT: Okay.

8 MR. GEOLY: --- you to consider our memorandum in
9 support of this motion. I've given the solicitor's
10 office a copy of it, Judge.

11 THE COURT: All right. Thank you.

12 All right. Mr. Stumbo, Mr. Daniel, who wants to
13 argue?

14 MR STUMBO: I -- I can argue it, Judge. Obviously,
15 on -- Your Honor is well aware of the -- the standard on
16 DV. You view the evidence in light most favorable to the
17 state as to whether there is sufficient evidence to put
18 forth to a jury whether this defendant killed minor child
19 with malice aforethought and attempted to -- to kill his
20 wife, Indigo Penny. Also, the -- obviously, the -- the
21 possession of a weapon during a violent crime kind of
22 piggybacks off the -- the murder indictment.

23 Judge, evidence in this case has -- far exceeds the
24 threshold for what a jury could consider to find this
25 defendant guilty of murder, attempted murder, and

1 possession of a weapon during the commission of a violent
2 crime.

3 First of all, Judge, it was clear the night of, when
4 he comes home -- when this defendant comes home, he's
5 angry. Ms. Vinnie Hunter testified that he was angry in
6 the -- his voice over the phone and -- and Mr. Wallace
7 Hunter, right after this incident happened. Before the
8 incident happened, Indigo admitted on the stand to me
9 that he was -- he was mad; he was angry.

10 I said, "Well, he -- was he calmly talking to you,
11 or was he angry?"

12 And she said, "He was mad."

13 And so the -- there was a -- there was an anger to
14 him that -- that several witnesses has -- have testified
15 to. She admitted that he said to her: "There ain't no
16 one living here if I'm going to jail tonight."

17 And that showed this anger, Judge, that -- he also
18 said, essentially, to her -- you know, he's trying to --
19 not to get her to leave, and he has a gun in his hand.
20 He fires into the air eight times with another gun as a
21 -- a -- as a threatening manner, that -- his actions,
22 again, showing that he was -- he was angry that night and
23 -- and -- and malicious.

24 Judge, the call that -- that was made right after
25 the gunshots, when he's saying to the parents -- his --

1 his in-laws, essentially, that: "I ain't no effing chap.
2 Don't play with me." It shows this -- this anger, this
3 aggression; Judge, and then, the fact, ultimately, in
4 combination with his words that he empties a pistol one
5 time into the air; goes back into the house; gets a
6 second pistol; and shoots every bullet that that gun can
7 hold into a car where knows there are four human beings
8 inside.

9 And, Judge, we would say that -- that the evidence
10 is far sufficient for a jury to find him guilty of
11 specifically trying to kill Indigo and the anger that he
12 had against her, based on his words and his actions.
13 Reasonable inferences can be drawn, from those words and
14 action, that he intended to kill Indigo; and the
15 transferred intent, which the law is fairly clear on, if
16 there's a specific intent to kill her and one of the
17 bullets ends up striking minor child and killing him.

18 So the evidence is sufficient to convict him of
19 murder and attempted murder, under that specific-intent
20 theory, based on his words and actions, Judge. And this
21 jury can draw reasonable inferences, viewing the light --
22 or the evidence, as Your Honor is in DV here, most
23 favorable to the state, a jury could find that.

24 Even if the jury goes with Indigo's, I believe,
25 testimony on the stand, which is -- is difficult to -- to

1 comprehend, that his sole purpose is to try to shoot the
2 tires out of this car -- Judge, even under that scenario,
3 on the totality of the evidence of this case, I believe
4 the Court will charge a theory of malice here, which is
5 essentially -- I believe the state -- *State v. Mouzon* --
6 M-o-u-z-o-n -- an old 1925 case that talks about this
7 depraved-heart condition of malice, an extreme
8 indifference to the value of human life, that even if
9 they don't believe that he specifically intended to kill
10 Indigo, that they can find him guilty under a theory of a
11 -- an -- acting in an extreme indifference to human life,
12 when he's emptying a pistol into a car from short range
13 that has four human beings in it, Judge.

14 I think, under either theory, I think both could
15 apply here, quite honestly. But we believe that the
16 evidence is sufficient for the jury, once Your Honor
17 charges them the law, to find him guilty of -- of what
18 he's accused of.

19 THE COURT: All right.

20 MR. STUMBO: Thank you ---

21 THE COURT: Anything ---

22 MR. STUMBO: --- Your Honor.

23 THE COURT: --- in reply?

24 MR. GEOLY: I'm sorry, Judge?

25 THE COURT: Anything in reply?

1 MR. GEOLY: Yes, sir, Judge. That -- that we think
2 that the evidence supports -- and I put also in my
3 memorandum -- that, you know, even though I'm asking you
4 to dismiss this, obviously, there's lesser-included
5 offenses to murder. We've said from the outset, we think
6 that this is an involuntary manslaughter. And we think
7 that -- that that could survive.

8 We don't see where anything's been introduced or
9 that the jury's going to be able to be instructed that
10 they can presume malice or raise an inference of malice
11 from use of a deadly weapon. And we think that leaves
12 them short, Your Honor, in having evidence before this
13 jury that a reasonable jury could find him guilty beyond
14 a reasonable doubt. We ask that you direct a verdict and
15 allow involuntary manslaughter and the attempted murder
16 perhaps to go to the jury.

17 THE COURT: All right. I'm going to deny your
18 motion. I think ---

19 MR. GEOLY: Yes, sir.

20 THE COURT: --- there's enough to get around a
21 directed verdict.

22 Anything else?

23 MR. GEOLY: Not right now, Your Honor.

24 THE COURT: All right. Do you anticipate putting up
25 any type of defense?

1 MR. GEOLY: Judge, I need to talk to my client about

2 ---

3 THE COURT: All right.

4 MR. GEOLY: --- that.

5 THE COURT: All right. And we'll do that. And I
6 just didn't know if you wanted me to question him now or
7 wait ---

8 MR. GEOLY: I ---

9 THE COURT: --- until tomorrow morning to ---

10 MR. GEOLY: I -- I'm fine ---

11 THE COURT: --- question him ---

12 MR. GEOLY: --- with you ---

13 THE COURT: --- on his ---

14 MR. GEOLY: --- questioning him now, Judge.

15 THE COURT: Okay. I won't make him make a decision
16 now.

17 MR. GEOLY: Yes, sir.

18 THE COURT: But I'll certainly go over his rights
19 and he can think about it overnight, okay?

20 MR. GEOLY: Thank you, Your Honor.

21 THE COURT: All right. Hold for one second.

22 (Off the record briefly.)

23 THE COURT: All right. Mr. Davis, if you would
24 please stand.

25 THE DEFENDANT: (Complied.)

1 XZAVIER DAVIS, having been first duly sworn,
2 responded and stated as follows:

3 THE COURT: All right. Thank you very much. You
4 can put your hand down now.

5 THE DEFENDANT: (Complied.)

6 THE COURT: Your name is Xzavier Sharif Davis?

7 THE DEFENDANT: Yes, sir. I'm a senior.

8 THE COURT: Huh?

9 THE DEFENDANT: Xzavier Sharif Davis, Sr.

10 THE COURT: Xzavier Sharif Davis, Sr.; is that
11 correct?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: All right. Mr. Davis, at this time I'm
14 going to explain to you certain rights that you have. If
15 you do not understand what I'm saying to you, please let
16 me know. And if you want me to explain anything in more
17 detail, please let me know. Do you understand that?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: All right. We've now reached the stage
20 of the trial where you may present your defense. You
21 have the right to claim the protections given to you by
22 the Fifth Amendment to the United States Constitution,
23 which states, in part, that no person shall be compelled
24 in any criminal case to be a witness against himself.

25 This means that you cannot be required to testify in

1 this case. You have the right to testify on your own
2 behalf. However, no one can make you testify. This is a
3 personal right, and no one can waive that right except
4 for you.

5 If you decide to testify, you will be subject to the
6 same rules that govern other witnesses. And you may be
7 examined and cross-examined on any relevant issue in this
8 case.

9 In addition, if you have any convictions involving
10 dishonesty or false statements or for crimes punishable
11 by imprisonment for more than year and this Court
12 determines that the probative value of admitting this
13 evidence outweighs its prejudicial effect to you, the
14 solicitor will be able to introduce your record to attack
15 your credibility.

16 Now, at this time are there any prior convictions
17 that the state would be using to attack his credibility?

18 MR. STUMBO: There are not, Your Honor.

19 THE COURT: Okay. All right. There are none that
20 they would be using.

21 If you decide to testify, this decision on your part
22 must be freely, voluntarily, and intelligently made, with
23 knowledge of the protections given to you by the Fifth
24 Amendment and the consequences of your decision to
25 testify. If you decide not to testify, I will instruct

1 the jurors that they cannot give the fact that you did
2 not testify any consider what -- any consideration
3 whatsoever and that there is to be absolutely no
4 prejudice to you because you did not testify.

5 It's left entirely up to you whether or not you
6 testify. You may talk with your attorney, your family
7 and friends, or anyone else. But the final decision will
8 be left entirely up to you.

9 Now, do you understand what I've explained to you?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Do you have any questions about what I
12 explained to you?

13 THE DEFENDANT: No, sir.

14 THE COURT: Okay. What we're going to do is we're
15 going to go ahead and break for the day. I'm going to
16 give you an opportunity to speak on this issue with your
17 lawyer or with anybody that you want to talk to about
18 whether or not you testify. And then when we come back
19 tomorrow morning, I'm going to go over these rights with
20 you again. And at that time I'm going to ask you whether
21 or not you wish to testify in this case. Okay?

22 THE DEFENDANT: Yes, sir.

23 THE COURT: All right. Thank you very much.

24 THE DEFENDANT: All right. Thank you.

25 THE COURT: All right. Now, if he chooses not to

1 testify, are there any other witnesses that you
2 anticipate calling or do you know?

3 MR. GEOLY: Judge, we had several witnesses on our
4 witness list.

5 THE COURT: Okay.

6 MR. GEOLY: It -- it's going to depend greatly if --
7 I -- I'll say this: If -- if I call Xzay to the stand,
8 Your Honor, then I will have other witnesses. If he
9 chooses not to testify, then we have a decision to make.

10 THE COURT: Okay. All right. That'll be fine.

11 All right. Anything from the state before we recess
12 for the evening?

13 MR. STUMBO: Nothing from the state, Your Honor. Do
14 -- I -- I don't know if Your Honor wanted to go ahead and
15 -- and preliminarily start looking at charges on this.
16 Or if you want to wait, that's fine.

17 THE COURT: Well, I -- we can do one of two things.
18 I've been preparing some proposed charges that are
19 straight out of our charge book.

20 MR. STUMBO: Yes, sir.

21 THE COURT: If you've got any you want me to take a
22 look at, you can go ahead and give them to me and I'll
23 take a look at them. Or if you want to wait and see what
24 I do and -- and make an objection then, however you want
25 to handle it.

1 If you've got anything you want to hand up -- well
2 -- hand up, I can go ahead and take a look at it.
3 Because there are some charges that kind of go routinely
4 out of the charge book. Now ---

5 MR. STUMBO: Yes, sir.

6 THE COURT: --- which raises a point. I mean, and
7 Mr. Geoly might be right. I was of the impression that
8 *Belser* -- *Belcher* said that the use of a deadly weapon
9 could not infer malice if the defendant was -- put forth
10 a defense where they legally had the right to have a gun.

11 MR. GEOLY: I'll -- I'll give it you that I think
12 *Belcher* is a little confusing, Your Honor, which is ---

13 THE COURT: Right.

14 MR. GEOLY: --- why I think the Supreme Court made
15 the decision they did in *Burdette*, which, you know,
16 *Burdette* is a good ten years later. I think it's maybe a
17 2019 case because ---

18 THE COURT: Maybe that's the one I need to go back
19 and ---

20 MR. GEOLY: And -- and ---

21 THE COURT: --- look at.

22 MR. GEOLY: --- and then, I don't think that *Mouzon*
23 has really been dealt with since we, you know, had
24 *Burdette*, whether this idea of *Mouzon* implied malice can
25 really exist, when I think our bench is prohibited now

1 after *Burdette* from saying: "Hey, you can infer malice."

2 I think it puts it in a difficult spot. But ---

3 MR. STUMBO: Well, Judge ---

4 MR. GEOLY: --- but that -- I mean, that would be my
5 position as to that.

6 Judge, the only, I think, charge that I can
7 anticipate me requesting, depending upon what you have,
8 would be kind of a -- an extension of what I've already
9 done, which would then be requesting that you -- you
10 charge involuntary, obviously. That -- that's kind of
11 how we've positioned it.

12 I know there's some cases out there, Judge, that
13 talk about if you intentionally fire a weapon, which I
14 think arguably he certainly did, that -- that then you're
15 prohibited from that charge. But all of those cases are
16 self-defense cases, where they're claiming: "Hey, I'm
17 acting in self-defense." And well, you can't claim self-
18 defense on firing, you know, intentionally.

19 But here, you have a whole different scenario, where
20 he's trying to stop her from leaving. She's testified
21 he's trying to stop her from leaving. She's testified he
22 isn't trying to kill anybody.

23 So you have facts that exist that we would argue
24 that are either he's doing a lawful act that is so, you
25 know, reckless that could rise to -- if that's the case

1 and a death occurs, then that's one of the definitions.
2 If he's doing an illegal act that doesn't rise to the
3 level of a felony, like malicious injury to property --
4 he's trying to shoot at, you know, car -- and -- and a
5 death results, that also could be -- could be involuntary
6 manslaughter.

7 So we think even though he intentionally fires a
8 weapon, that he's certainly not prohibited. We're
9 distinguishable from all of the self-defense case that
10 come. And we think now, the way the law sits with --
11 with both *King*, which has been recently decided, that
12 says there has to be specific intent for an attempted
13 murder, so your *Mouzon* malice isn't going to work for
14 that at all on -- on the attempted murder charge against
15 Indigo. And then, on the murder itself, we feel like, if
16 -- if -- if you are going to keep that, that it would be
17 appropriate to -- to charge involuntary manslaughter as
18 well. Because certainly, the jury, the trier of fact,
19 could determine that those are the facts.

20 THE COURT: Well, I mean, let me go back and read
21 the cases again. I don't know what I'm going to do at
22 this ---

23 MR. STUMBO: Yeah.

24 THE COURT: --- point in time. I was thinking, you
25 know, maybe -- maybe the *Bennett* case, *Mouzon* case, are

1 the ones I need to look at. But I was thinking *Belcher*.
2 *Belcher* was just if you're claiming self-defense, then
3 use of a deadly weapon cannot infer malice.

4 MR. GEOLY: Yeah.

5 MR. STUMBO: Right.

6 THE COURT: It was basically it. So ---

7 MR. STUMBO: And -- and ---

8 MR. GEOLY: But -- but then ---

9 MR. STUMBO: --- Judge ---

10 MR. GEOLY: --- *Burdette* cleaned that up, Your
11 Honor, if you go ---

12 THE COURT: All right.

13 MR. GEOLY: --- back and look.

14 THE COURT: All right, sir.

15 MR. STUMBO: And -- and -- and, Judge, just to -- to
16 give you a couple cases maybe that you and your law clerk
17 can pull tonight: *State v. Gibson* is a 2010 Court of
18 Appeals case. That's 390 S.C. 347, a 2010 case. Stood
19 for the proposition here that he voluntarily and
20 intentionally fired his weapon. And the trial court
21 properly denied involuntary manslaughter.

22 Judge, there's several other cases that stand for
23 that proposition as well. *Douglas v. State*, 332 S.C. 67,
24 that's a 1998 Supreme Court case, Judge. And *State v.*
25 *Sams* is a 2014 Supreme Court case that has a -- a -- a

1 very similar discussion as these other cases. That would
2 be 410 S.C. 303.

3 Judge, based on those cases and the facts of this
4 case, you know, clearly, it's not even just an -- one
5 intentional shot. It's -- it's multiple intentional
6 shots, Judge. And I think most of the case law would
7 reflect that an involuntary manslaughter is only
8 appropriate when there's an accidental discharge of the
9 gun for some reason or some other negligent purpose that
10 -- that's out there, Judge.

11 But I -- we don't believe that it's appropriate here
12 under the case law and the facts of this case for
13 involuntary. But we would stand on those.

14 As to -- I think Mr. Geoly brought this up as well.
15 If, you know, it -- the jury finds that there's no
16 specific intent to shoot and kill Indigo, we still
17 believe, under some of the very recent cases -- in fact,
18 *State v. Jeter* is one that came out last week, Judge.
19 And it's -- kind of piggybacks off *State v. King* and
20 *State v. Williams*.

21 But it seems to say that for -- that -- the Court of
22 Appeals said from a public-policy standpoint, the Supreme
23 Court has strongly suggested in both *Williams* and *Smith*
24 -- and Smith was the -- the girl that was paralyzed in
25 Five Points with a -- a bullet in a gang shootout -- but

1 that the lesser offense of ABHAN in cases would serve as
2 the appropriate punishment.

3 So I think there's some -- based on this recent case
4 law, Judge, it might be appropriate, as to the attempted
5 murder on Indigo, to charge ABHAN as a lesser-included.
6 But we don't believe that voluntary manslaughter applies
7 here, Judge, because we don't see any sufficient legal
8 provocation in -- in the case and the facts. And
9 involuntary manslaughter also, we believe, would be
10 inappropriate under the law.

11 THE COURT: Okay. Well, I was thinking the *Jeter*
12 case -- do we still have common law ABHAN?

13 MR. STUMBO: No, sir. That would be a statutory
14 ABHAN, if the -- if the individual ---

15 THE COURT: Okay.

16 MR. STUMBO: --- was struck. So like in this case,
17 Indigo was struck in the leg. And we -- we believe that
18 even if a jury -- we think that, based on the facts, they
19 could find that he was intending to kill her and it's an
20 attempted murder, specific intent.

21 If they find that it was just a -- a extreme
22 indifference to the value of human life in the way she
23 [sic] acted, they could find her [sic] guilty of murder
24 and ABHAN under that theory ---

25 THE COURT: All right.

1 MR. STUMBO: --- instead of murder and attempted
2 murder. So ---

3 THE COURT: All right.

4 MR. GEOLY: Judge, I would just echo: There's three
5 cases he cited initially. I -- I'm not positive of the
6 third. But two of them are self-defense cases, which I
7 mentioned. And -- and I think the third is probably as
8 well. I'll go back and look at it.

9 But I think all three are self-defense. This
10 clearly is not a self-defense case; hasn't been argued as
11 a self-defense case. And I think it's distinguishable
12 from all of those.

13 THE COURT: Okay.

14 MR. GEOLY: I ---

15 THE COURT: All right. Well, it's a little bit too
16 early to even be making a final decision on ---

17 MR. GEOLY: Yes, sir.

18 THE COURT: --- what the charges are ---

19 MR. GEOLY: Sure.

20 THE COURT: --- at this point in time. But ---

21 MR. GEOLY: Yes, sir.

22 MR. STUMBO: Yes, sir.

23 THE COURT: --- but we'll address these issues when
24 we get done with all the evidentiary portion. Okay?

25 MR. GEOLY: Thank you, Judge.

1 MR. STUMBO: Thank you, Judge.

2 THE COURT: All right. Anything from the state
3 before we recess?

4 MR. STUMBO: Nothing from the state, Your Honor.

5 THE COURT: Anything from the defense?

6 MR. GEOLY: Nothing from the defense, Judge. Judge,
7 could we be in a posture that if -- if -- if indeed we
8 didn't go forward or we rest or whatever point in time we
9 actually finish the trial, we -- we could get about a
10 15/20-minute break to -- to submit those charges to you
11 -- for our proposed charges, rather?

12 THE COURT: Yeah. But, I mean, go ahead and be
13 getting ---

14 MR. GEOLY: I'll work ---

15 THE COURT: --- them together.

16 MR. GEOLY: --- certainly, Judge.

17 THE COURT: Get them ---

18 MR. GEOLY: I -- I'll ---

19 THE COURT: --- together now.

20 MR. GEOLY: --- be working on them.

21 THE COURT: Yeah.

22 MR. GEOLY: Yes, sir.

23 THE COURT: Okay.

24 MR. GEOLY: Thank you, Your Honor.

25 THE COURT: All right.

1 MR. STUMBO: Thank you, Judge.

2 MR. GEOLY: Not ---

3 THE COURT: And I can ---

4 MR. GEOLY: --- not ---

5 THE COURT: --- tell you right now: I don't know
6 what we're going to do.

7 MR. GEOLY: Yes, sir.

8 THE COURT: And I don't want to influence one thing.
9 But generally, my practice is I am not going to charge a
10 jury after four o'clock.

11 MR. GEOLY: Yes, sir.

12 THE COURT: Okay?

13 MR. GEOLY: I understand.

14 THE COURT: Just because once I finish with the
15 charges and then they get in there and they're looking at
16 the clock and it's too close to five o'clock, so we're
17 not going to do it. So if we're getting close to four
18 o'clock tomorrow and I haven't charged them yet, we're
19 probably going to have to come back on Friday, okay?

20 MR. STUMBO: Yes, sir.

21 MR. GEOLY: Yes, sir.

22 THE COURT: So -- which I'll be here anyway, so it
23 doesn't really matter. It's just what will we be doing
24 Friday, whether it be finishing this up or I think
25 they've got some probation revocations and stuff they

1 want me ---

2 MR. STUMBO: Well, we ---

3 THE COURT: --- or that they ---

4 MR. STUMBO: --- might have a handful of pleas ---

5 THE COURT: Okay.

6 MR. STUMBO: --- Judge, to ---

7 THE COURT: Whatever they've ---

8 MR. STUMBO: --- to do. Yeah.

9 THE COURT: --- whatever we've got. But so -- but
10 that's generally my practice and I'll ---

11 MR. GEOLY: Yes, sir.

12 THE COURT: --- you know, that we won't go until ---

13 MR. GEOLY: Thank you for ---

14 THE COURT: --- after four.

15 MR. GEOLY: --- telling us, Your Honor.

16 THE COURT: All right.

17 MR. GEOLY: Are -- are we 9:30 again in the morning?

18 THE COURT: Nine-thirty tomorrow morning, yeah.

19 MR. GEOLY: Thank you, Judge.

20 MR. STUMBO: Thank you, Judge.

21 THE COURT: All right. Thank you.

22 (Whereupon, the proceeding adjourned at 4:49 p.m.)

23

24

25

1 TRIAL DAY 4 - 08/26/21

2 (Whereupon, the proceeding resumed at 9:35 a.m.)

3 THE COURT: All right. Good morning, ladies and
4 gentlemen. Before we get started, I don't know if -- if
5 the clerk has mentioned it to you or not.

6 CLERK OF COURT: No, sir, I haven't.

7 THE COURT: You haven't? Have not.

8 CLERK OF COURT: I have not.

9 THE COURT: You have not. Okay.

10 The juror we had that was with an employee that
11 tested positive for COVID, Juror No. 31, Vanessa
12 Matthews, No. 2 on the strike list, she has tested
13 positive for COVID. So I've gone ahead and excused her
14 to seat the alternate. If she has a positive test for
15 the coronavirus, then I'm going to go ahead and -- and
16 seat one of the alternates. Okay?

17 Anything the state wants to put on the record in
18 that regard?

19 MR STUMBO: No. I think that's wise, Judge. And --
20 and honestly, I think that's why I'm glad we do these
21 protocols with six feet apart and masks ---

22 THE COURT: Right.

23 MR. STUMBO: --- and cleaning. I think that
24 sufficiently has kept others safe, even if she's
25 positive.

1 THE COURT: All right. Anything defense wants to
2 put on the record in that regard?

3 MR GEOLY: Yes, sir, Your Honor. If it please the
4 court, one moment.

5 THE COURT: All right.

6 (Off the record briefly.)

7 MR GEOLY: Please the Court, Judge, obviously, we --
8 we don't have any -- apologize, Judge.

9 (Off the record briefly.)

10 MR. GEOLY: Judge, I apologize again. Beg the
11 Court's indulgence just a moment.

12 THE COURT: All right. Take your time. That's
13 fine.

14 MR. GEOLY: Yes, sir.

15 (Off the record briefly.)

16 MR GEOLY: Your Honor?

17 THE COURT: Yes.

18 MR. GEOLY: Please the Court, I apologize for the
19 delay.

20 THE COURT: That's all right.

21 MR. GEOLY: I wanted to consult with my client,
22 Judge. And I understand your decision, Your Honor. But
23 this -- this woman, who's obviously been here with all
24 us, has been here this week. I think -- I've actually
25 spotted her; certainly didn't make any contact with any

1 jurors, but spotted her eating lunch, I think, with other
2 jurors this week. So they've all been around each other.

3 It's my understanding the she is has actually had
4 the COVID vaccine. Now, maybe I'm misremembering. But I
5 -- I thought, the other day, you had indicated that she's
6 had the vaccine.

7 I -- I would ask that you consider if she -- if
8 she's not showing any symptoms, us considering finishing
9 this up. I think it would go quick today, and we
10 wouldn't even go into tomorrow. Or we consider declaring
11 a mistrial because now these other people are going to
12 have fears.

13 You know, I made a continuance motion at the
14 beginning of this case because of the kind of explosion
15 that we had going on. My concern now is if we've had one
16 juror already moved, other jurors are worried that
17 they've been around her. Now they're going to have to
18 all be in -- you know, if -- if they're saying, "Oh, no,
19 I'm sitting here with the lady and had lunch with her
20 yesterday; I want to get out of here as quickly as
21 possible," and then, they kind of shortchange giving my
22 client a fair trial at that point.

23 And I think that now this pressure is going to be on
24 them more than ever, as they sit there, you know, in this
25 jury room today probably or tomorrow, thinking, I want to

1 get out of here as quickly as possible.

2 So I would ask that you consider keeping her on if
3 -- if there's no symptoms and us finishing this trial.
4 We -- we've been at it for three days. I think it could
5 -- could potentially wrap up today or -- or you declare a
6 mistrial, Judge.

7 THE COURT: All right. I'm going to deny both
8 motions. I am going to go ahead and substitute her. And
9 that's why we have the alternate, so I'm going to bring
10 the alternate on.

11 MR GEOLY: Thank you ---

12 THE COURT: Okay?

13 MR. GEOLY: --- Judge. And -- and appreciate it;
14 understand your ruling.

15 THE COURT: All right. Now, the way we do it in
16 general sessions, I've got the two alternates. Who wants
17 to draw?

18 MR GEOLY: I'm fine with the clerk drawing ---

19 MR. STUMBO: Yeah. The ---

20 MR. GEOLY: --- Your Honor, or ---

21 MR. STUMBO: Ms. Beverly ---

22 MR. GEOLY: --- or you or ---

23 MR. STUMBO: --- or Ms. Beth ---

24 MR. GEOLY: --- whoever ---

25 MR. STUMBO: --- could draw, Judge.

1 (Off the record briefly.)

2 THE COURT: Who have we gotten?

3 CLERK OF COURT: Carl Cox.

4 THE COURT: All right. Carl J. Cox, III, Juror No.
5 8, No. 31 on the list.

6 (Off the record briefly.)

7 THE COURT: All right. Mr. Geoly, are we ready to
8 go ahead and question your client regarding his right to
9 testify?

10 MR GEOLY: Your Honor, you're welcome to do that.
11 But as you know, you did it yesterday.

12 THE COURT: Right.

13 MR. GEOLY: We've had opportunity to have
14 conversations. And after discussions with my client and
15 his family, we rest, Your Honor.

16 THE COURT: Okay. All right. Let me go ahead and
17 get -- Mr. Davis, if you would please stand.

18 THE DEFENDANT: (Complied.)

19 XZAVIER DAVIS, having been first duly sworn,
20 responded and stated as follows:

21 THE COURT: All right, sir. You can put your hand
22 down now. Thank you.

23 Your name is Xzavier Sharif Davis?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: All right. And I think yesterday you

1 said Xzavier Sharif Davis, Sr.?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: All right. All right, Mr. Davis.

4 Again, we did this yesterday. But I'm going to do it
5 again today because you did not -- I did not complete it
6 yesterday with regard to getting your decision on this
7 matter.

8 At this time I'm going to explain to you, like I did
9 yesterday, certain rights that you have. If you do not
10 understand anything that I say, please let me know. And
11 if you want me to explain anything in more detail, please
12 let me know. Now, do you understand that?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: All right. We've now reached the stage
15 of the trial where you may present your defense. You
16 have the right to claim the protections given to you by
17 the Fifth Amendment to the United States Constitution
18 states, in part, that no person shall be compelled in any
19 criminal case to be a witness against himself.

20 This means that you cannot be required to testify in
21 this case. You have the right to testify on your own
22 behalf. However, no one can make you testify. This is a
23 personal right; no one can waive this right except for
24 you. If you decide to testify, you will be subject to
25 the same rules that govern -- that govern other

1 witnesses. And you may be examined and cross-examined on
2 any relevant issue in this case.

3 In addition, if you have any convictions involving
4 dishonesty or false statement or for crimes punishable by
5 imprisonment for more than a year and this Court
6 determines that the probative value of admitting this
7 evidence outweighs its prejudicial effect to you, the
8 solicitor will be able to introduce your record to attack
9 your credibility.

10 And now, as I understand, the state has no prior
11 criminal record that they would introduce to attack the
12 credibility of this defendant; is that correct? ?

13 MR STUMBO: That's correct, Judge.

14 THE COURT: All right. If you decide to testify,
15 this decision on your part must be freely, voluntarily,
16 and intelligently made with knowledge of the protections
17 given to you by the Fifth Amendment to the United States
18 Constitution and the consequences of your decision to
19 testify.

20 If you decide not to testify, I will instruct the
21 jurors that they cannot get the fact that you did not
22 testify any consideration whatsoever and that there is to
23 be absolutely no prejudice to because you did not
24 testify. It is left entirely up to you whether or not
25 you testify. You may talk with your attorney, your

1 family and friends, or anyone else. But the final
2 decision will be left entirely up to you.

3 Now, do you understand what I've explained to you?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: And do you have any questions about what
6 I explained to you?

7 THE DEFENDANT: No, sir.

8 THE COURT: Have you discussed this with your
9 lawyer, whether or not you wish to testify or not
10 testify?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: You discussed with your lawyer?

13 THE DEFENDANT: (Nodded head up and down.)

14 THE COURT: Have you discussed it with anybody else
15 that you wanted to discuss it with?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: All right. Do you need any more time to
18 make a decision as to whether or not you testify in this
19 case?

20 THE DEFENDANT: No, sir.

21 THE COURT: All right. Do you wish to testify in
22 this case?

23 THE DEFENDANT: No, sir.

24 THE COURT: Is this your decision?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: All right. Is this what you want to do?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: All right. Anything further you want on
4 the record, Mr. Geoly, with regard to his right to
5 testify?

6 MR GEOLY: No, sir, Your Honor. It -- it's properly
7 protected. And -- and this is the result of discussion
8 with my client at -- at length about basically where we
9 are and -- and where I feel the case is and where he
10 feels the case is. And he's just made the decision that
11 at this point, Your Honor -- and I will -- the -- let
12 Your Honor know, we came in this trial fully intending to
13 testify. That had kind of been our game plan.

14 But over the last couple days, he has changed his
15 mind and I agree with that decision, Judge.

16 THE COURT: All right. Anything further the state
17 wants placed on the record with regard to the defendant's
18 decision not to testify in this case?

19 MR STUMBO: Nothing from the state, Judge.

20 THE COURT: All right. Is there any further defense
21 or any defense that the defendant will place -- present
22 to the jury?

23 MR GEOLY: Judge, there is nothing -- we -- we do
24 have some matters for the Court, we believe. I'd like to
25 renew and kind of supplement my motion yesterday.

1 THE COURT: Yeah. And I'll give you an opportunity
2 to -- to -- to raise any motions. I guess my question
3 is: Are you going to introduce any exhibits or call any
4 witnesses?

5 MR GEOLY: No, sir, Your Honor. We -- we
6 intentionally -- and I know there was kind of a moment
7 yesterday where I looked like I was caught deer in the
8 headlights. I wasn't really worried about the rule of
9 completeness as much as I was concerned that if I -- I
10 went further with the video, that I would give up last
11 argument. We've put nothing in, and -- and we intend to,
12 at this point, protect last argument. So we don't wish
13 to introduce any evidence, Your Honor.

14 THE COURT: All right. Any motions?

15 MR. GEOLY: Yes, sir, Your Honor.

16 THE COURT: All right.

17 MR GEOLY: Your Honor, if I could kind of go
18 backwards and -- and not address what I addressed
19 yesterday. As Your Honor know, recently in this case --
20 or recently in this state, we've had a case that -- that
21 directly weighs on attempted murders versus murders,
22 specific intent versus general intent. And my client is
23 actually charged today, as well as the -- the more
24 serious murder charge, he's charged with attempted murder
25 as to Indigo Davis, his wife.

1 We feel like that there's been nothing presented
2 that would justify or substantiate an attempted murder
3 charge at this point. It has to be a specific-intent
4 crime as the result of *State v. King*. I think it's a
5 2017 case, actually, Judge, that came out more recently
6 than that. But I -- I think it's 2017, *State v. King*.

7 If you look at that, Judge, for an attempted murder
8 charge to stand or even go to the jury, I think it has to
9 be a specific-intent crime. I think there's no question
10 he was trying to intend to kill his wife here. For
11 attempted murder, unlike murder, it can't just be a -- a
12 general-intent crime. It's a specific-intent crime.

13 And I think they've done nothing to present anything
14 in the way of his hope to attempt to murder Indigo. So
15 we would ask for directed verdict as to the attempted
16 murder.

17 And, Your Honor, we basically put on the record
18 yesterday -- nothing new has happened. But we would
19 renew our -- our motion to direct a verdict, just
20 weighing on, again, yesterday, Judge, not to beat a dead
21 horse, but to -- to remind you we -- we would take the
22 position that no reasonable jury, based on this limited
23 evidence, that there's any kind of malice aforethought.
24 Nothing has been introduced to that.

25 I think they're hoping to intend to rely on

1 basically a *Mouzon*-type theory. I think that's actually
2 a -- a '50s case, maybe '57 or so, Your Honor, and not
3 the 20s. But it has been around a long time and we just
4 really haven't addressed, since *Burdette* has come out. I
5 believe that's a 2019 case, which really shored up
6 *Belcher* beyond -- Your Honor was exactly right about what
7 *Belcher* did yesterday when you commented on it.

8 It's where he claimed self-defense and then, you
9 know -- but here, that's not the case. Certainly, we
10 don't have a self-defense claim. Certainly, he's not
11 claiming he shot a gun in self-defense. So things that
12 would normally disqualify it and -- and the -- that's our
13 basis for the motion for the -- the directed verdicts,
14 Your Honor, as to attempted murder and to murder.

15 If you want me to kind of roll in so that I don't
16 have to argue the -- the appropriateness, I guess, of the
17 involuntary manslaughter. Or I could do that at the time
18 that we talk about charges, Judge.

19 THE COURT: Well, I mean, I'm going to deny your
20 motion for directed -- for direct verdict as to attempted
21 murder, as well as your motion for directed verdict as to
22 murder.

23 MR GEOLY: Yes, sir.

24 THE COURT: All right. Any other motions?

25 MR GEOLY: I would just then, based on -- I guess,

1 would you let us read your charge before we propose ---

2 THE COURT: Yeah. Well, I've been working on
3 charges. First -- well, what I wanted to do is go over
4 with you now -- we've got -- if you -- if you want to ---

5 MR. GEOLY: Thank you, Judge.

6 THE COURT: --- be seated, that'll be fine.

7 All right. We've got the indicted charge for
8 murder. What -- are there any lesser-included?

9 MR. GEOLY: I -- I believe there are, Judge. And --
10 and I will tell you this: If you take the facts of this
11 case that -- that have come out from the stand the last
12 two days, it is absolutely beyond just reasonable -- it
13 would be likely than this jury could decide, Here's a man
14 shooting at his tires on his car in his yard. That is a
15 lawful act that results in the death of his son. And --
16 and that is literally a definition of involuntary
17 manslaughter in this state.

18 Now, let -- let's take a step back and say: Okay.
19 What if the jury doesn't find that's the facts? What if
20 the jury says: No; it's her car. Because there's
21 testimony it's her car, not his. And they say it's not
22 marital property; it could be a crime; it's malicious
23 injury to property because he's shooting at her tires.

24 Well, then, it's an act that doesn't -- isn't likely
25 to -- to -- to -- it is illegal, but it's not likely to

1 result in death. And it -- it does result in death.
2 That is another definition in this state of involuntary
3 manslaughter.

4 So you have not one, but two absolutely reasonable
5 factual scenarios that this jury could take from what's
6 happened -- or what's been presented from the stand the
7 last two days. Because that's what happened. He's doing
8 a legal act, shooting at his tires on his property out in
9 the county, but it resulted in death. That is
10 definition.

11 So when -- when the facts fit the -- the crime,
12 which in this case would be the felony involuntary
13 manslaughter, it's proper for it to be charged. And
14 certainly, that -- those facts fit this scenario both
15 ways, really.

16 So that jury certainly should have the opportunity
17 to say: Okay. This is law in South Carolina; this is
18 what we have here; this is what we're finding.

19 So I would give the finder of fact, Your Honor, the
20 ability to give him a fair trial, as guaranteed by the
21 Constitution and the South Carolina Constitution, that
22 all possibilities -- and certainly, you -- you, I would
23 think, acknowledge that either of those could be -- can
24 -- what the -- the jury decides are the facts in this
25 case. And if that's the case in either/or, it's

1 appropriate that they could find him guilty of
2 involuntary manslaughter. So think that would be an
3 appropriate lesser-included offense at this point, Judge.

4 THE COURT: All right. So what's the state's
5 position?

6 MR STUMBO: Judge, I know we sent you a -- an -- an
7 e-mail and your clerk this morning that cited some cases.
8 And I'll do it on the record here. *State v. Sullivan's* a
9 PCR case 407 S.C. 241, 2014, Court of Appeals case. It
10 basically says when a victim was killed by an -- by a
11 gunshot, no -- and no evidence is presented that the
12 defendant fired the gun unintentionally, the defendant is
13 not entitled -- entitled to an involuntary manslaughter.
14 That's -- and it's ---

15 THE COURT: Well, what are the -- excuse me for
16 interrupting.

17 MR. STUMBO: Yes, sir.

18 THE COURT: What are the facts of that case?

19 MR STUMBO: Judge, I'm not sure on *Sullivan*. I know
20 that in *Bozeman* -- it was another one I was going to cite
21 -- and *Morris*, there were two cases where: one the
22 defendant claimed to be shooting over the head of the --
23 the target or the person; one when they were shooting at
24 their feet.

25 And that was their excuse: Well, I didn't mean to --

1 to -- to kill them; I didn't mean to shoot them.

2 I was just shooting at them for some other purpose, to
3 scare them or whatnot.

4 And I think the *Bozeman v. State*, which is 307 S.C.
5 172, 1992, I believe that's the one was shooting over the
6 head. And I believe in *Morris*, it was -- that's 307 S.C.
7 480, a 1991 Court of Appeals case, shooting at the feet.
8 *State v. Cooney* stands for the same proposition. *State*
9 *v. Gibson* cites the same thing, Judge.

10 So I -- I think the cases are consistent that when
11 you're shooting in the direction at -- at someone, where
12 you know there's a person there -- and in fact, Mr. Geoly
13 says it's a lawful act. I would -- I would find -- take
14 exception to that. We have a statute in this state
15 that's a separate crime -- of course, he's not charged
16 with it here -- but discharging into a vehicle.

17 Judge, certainly, we could've indicted that and
18 called it. But it's 16-23-440.

19 THE COURT: All right.

20 MR. STUMBO: So it's ---

21 THE COURT: Hold on ---

22 MR. STUMBO: --- not a -- I don't believe this is a
23 lawful act that he committed when he's shooting at -- at
24 -- at a car with -- an occupied car, Judge. I don't -- I
25 just don't think that's the law in this state. I believe

1 all of these cases say that the Court was correct in not
2 charging voluntary in an intentional gunfire.

3 And, Judge, this wasn't just a -- a -- one --
4 one-shot intention. If there was some evidence that
5 maybe he tripped and fell or slipped and the gun
6 discharged once and happened to kill minor child, then we may
7 be talking about a completely different thing. But,
8 Judge, he empties a gun eight times, intentionally firing
9 the gun.

10 And every case that I could find on this, Judge, the
11 ones we -- the five we've just cited for Your Honor, were
12 very clear that this -- this intentional gunfire -- and
13 you know there's a person or people right there and
14 you're firing at that person, that that's not an
15 involuntary manslaughter. And there, again, to have
16 these cases -- he's not saying -- or the defense is not
17 alleging -- they're talking about shooting the tire out,
18 which is, there again, being built off one witness who
19 doesn't really see what -- even when he's doing. She's
20 trying to get out of the driveway as quickly as she can.

21 The physical evidence, Judge, I think corroborates
22 that he is intentionally shooting at her. But honestly,
23 Judge, I -- I don't think under any circumstances, if you
24 read these cases, that involuntary manslaughter is
25 appropriate with -- with this intentional gunfire here,

1 Judge.

2 THE COURT: All right. Hold ---

3 MR GEOLY: If it please the Court, Judge.

4 THE COURT: All right. One -- give me one second.

5 MR. GEOLY: Yes, sir.

6 THE COURT: I'll give you an opportunity.

7 MR STUMBO: And, Judge, if I could just -- just one
8 more case to cite: *Harris v. State* is 354 S.C. 382.

9 That's a 2003. And that's the defendant admitted he --
10 he was firing intentionally but it was warning shots.

11 And I think that's very similar to here. I guess
12 it's a -- it's shots to try to turn her around or scare
13 -- I -- I don't know, Judge. I -- I -- there again, he
14 -- he has the constitutional right not to take the stand
15 and testify to what was in his mind.

16 But I think there's plenty of physical evidence. If
17 you compare it to Indigo's testimony of what happened
18 that night, it -- this is not, in any sense of the word,
19 an unintentional, accidental shooting.

20 (Off the record from 9:59 a.m. until 10:08 a.m.)

21 THE COURT: All right, sir.

22 MR GEOLY: If it please the Court, Judge, Solicitor
23 Stumbo's absolutely right -- or at least he could be,
24 Judge. But -- but he's not the finder of the facts. And
25 -- and, Your Honor, with all due respect, you're not the

1 finder of the facts, and I'm not the finder of the facts.
2 But jury is the finder of the facts, Judge.

3 And -- and -- and I -- Your Honor, the -- with all
4 due respect, the case you were reading, if it was one of
5 the ones the solicitor gave to you, it's distinguishable,
6 because it's an attempted -- I mean, excuse me -- it --
7 it's a self-defense case.

8 And -- and the reason self-defense cases are -- are
9 -- are prohibited from an involuntary manslaughter charge
10 is because kind of the nature of self-defense is you're
11 trying to kill somebody to stop them from killing you.
12 So to say, "Wait, I wasn't trying to kill anybody," that
13 doesn't work.

14 But that's not the case here at all, Judge. The
15 case you have here -- and -- and my -- my client is
16 entitled to that the jury, as the finder of fact, could
17 find -- all the evidence is already in. Solicitor talks
18 about a lot of different stuff. But this isn't some
19 theory of his.

20 This is the state's witness who testified he was
21 shooting at tires. If he's shooting at his own tires on
22 his own property, that certainly could be considered by
23 the jury, the finder of fact, an unlawful act that
24 results in death -- or, excuse me -- a -- a -- a lawful
25 act, his tires on his property, that results in death.

1 That's a lawful act that results in death. That is a
2 definition in this state of involuntary manslaughter.
3 The cases have it over and over and over.

4 Well, this is involuntary manslaughter. Well,
5 you're not entitled to this charges if you're engaged in
6 self-defense. That's clear. That's the law. But all
7 these cases he's given are self-defense.

8 As Your Honor know -- you've been sitting here the
9 last few days -- we -- we've not claimed self-defense.
10 That's not what this case is at all. This case is he's
11 shooting at some tires, which, again, the jury could take
12 as he's shooting at his own tires, lawful act that
13 results in death. That is involuntary manslaughter in
14 this state.

15 Now, likewise, they could find what the solicitor's
16 saying. I don't think they will, but they could.
17 They're the finder of fact. They could find that. And
18 -- and that is certainly going to be one of the charges:
19 murder.

20 But, Judge, I want a clean trial as much as anybody
21 else. And -- and part of what could come back is
22 involuntary manslaughter. Once that is a reasonable set
23 of facts for the jury to determine -- and -- and I would
24 say, Judge, it's not just that. They could determine
25 that he is engaged in an unlawful act that doesn't rise

1 to the level of felony that -- that doesn't tend to
2 normally cause death, and it did. That's another --
3 that's the second set of -- way they could determine,
4 from this set of facts, that this is a -- literally a
5 definition for involuntary manslaughter.

6 If there's two different scenarios that the jury
7 could say, "Yes, we find this was the facts," that could
8 then fit the definition of involuntary manslaughter, then
9 for him to have a fair trial and due process, he has to
10 have the ability for them to find him guilty of that. So
11 we would respectfully request that you include it and put
12 it in your charge, Judge.

13 We think every, you know -- he's obviously, Your
14 Honor, distinguishable. And, Judge, I guess the other
15 part is: What does it hurt? I mean, if -- if -- if
16 we're, you know, asking this jury to come to a
17 determination of what this set of facts is, they're going
18 to have murder.

19 So if they believe he's got -- done the heinous
20 thing that they -- they're saying, he intentionally set
21 out and killed this 7-year-old, which is essentially what
22 they're saying -- because it can't be a negligent act;
23 it's not murder if it's negligent. So either they're
24 going to find that or the jury's going to say: Wait. We
25 believe what the witness, the state's witness, said from

1 the stand, that he was shooting at some tires.

2 That's evidence that's before this jury that the
3 state basically put in; their witness put it in. Now,
4 they kind of turned on their witness a little bit. But
5 she was clear that she doesn't think he was trying to
6 kill her. Her dad was clear. No way; he loved him.

7 All the evidence they have, they've done nothing to
8 show any malice aforethought. But they hope to get it in
9 by some old implied malice that Your Honor is not even
10 allowed to tell the -- the jury about anymore. You're
11 not going to be able to tell them: "Hey, you can imply
12 malice from this."

13 So when they're faced with what they've seen over
14 the last few days is certainly reasonable that they find
15 one of these two theories of involuntary manslaughter.
16 Both fit. I don't know that the solicitor's for murder
17 fits, but there's nothing that we're hurting to give them
18 that option. And if they, as the factfinder, find that
19 what he's saying is true, that's an option. But if they
20 find like I'm saying, either one of these scenarios, then
21 those are definitions for involuntary manslaughter. We
22 think that's distinguishable from any of these
23 self-defense case and would hope you would grant that for
24 him, Your Honor.

25 THE COURT: All right. All right. I'm going to

1 deny your motion. I think the case law is pretty clear.
2 This is not a voluntarily or involuntary manslaughter
3 case. I mean, involuntary manslaughter is the killing of
4 another without malice and unintentionally but while one
5 is engaged in the commission of some unlawful act not
6 amounting to a felony and not naturally tending to cause
7 death or bodily harm; or the killing another without
8 malice and unintentionally while engaged in doing a
9 lawful act with a reckless disregard of the safety of
10 others.

11 I think walking out of the door and firing a gun,
12 whether or not it's warning shots or whatever, that tends
13 to cause death and bodily harm naturally.

14 MR. DANIEL: If ---

15 THE COURT: So ---

16 MR GEOLY: If it please the Court, though -- but --
17 but with all due respect, Your Honor, you're not the
18 finder of fact in this case. They could find
19 differently.

20 THE COURT: Yeah. Well, I get -- I'm -- I just --
21 viewing these cases, I mean, the case -- you've got --
22 what is it? I don't even know this one ---

23 MR. GEOLY: Judge, I ---

24 THE COURT: --- that I just ---

25 MR. GEOLY: --- would beg you ---

1 THE COURT: --- cited ---

2 MR GEOLY: --- that as each one you look at, ask
3 yourself first: Is it self-defense? Because if it is,
4 it's distinguishable.

5 THE COURT: Well, it's -- *State v. Smith*, it doesn't
6 really deal with the -- it just says that two guys got in
7 a argument and one pulled a knife; wound up stabbing the
8 other. And they said whether or not he intended to kill
9 or unintended to kill, that he was not entitled to a
10 charge of involuntary manslaughter.

11 MR GEOLY: But ---

12 THE COURT: Pulling a knife ---

13 MR. GEOLY: Absolutely, Judge.

14 THE COURT: --- naturally causes seriously bodily
15 harm or death. And I think firing a gun is the same.

16 MR GEOLY: But that's the thing, Judge. It's --
17 it's their ---

18 THE COURT: Okay.

19 MR. GEOLY: --- their facts are -- and I --
20 absolutely, I -- I won't ---

21 THE COURT: Yeah.

22 MR. GEOLY: --- try to argue against you, Judge.
23 But I -- I think that if you look at it rationally, they
24 -- they could find differently than I find it or
25 solicitor or yourself. And if this fits -- and if it

1 fits, then I think he gets the benefit of in the light
2 most favorable to him. And -- and if they could find
3 that -- and I think that both the definitions you read
4 just now could fit this factual scenario, such that they
5 -- and the difference in the stabbing, Judge, is he's not
6 trying to do some lawful act. And I understand your
7 decision, Judge, that you would say that that does
8 naturally tend to cause death.

9 That's not what the jury may find. They may find
10 that shooting the tires doesn't naturally intend to cause
11 death and should be considered. That's why I think it's
12 a proper charge. But I understand your ruling. I
13 apologize for -- if you think I'm ---

14 THE COURT: That's all right. Well, I'm just going
15 to charge the murder. And it's going to be either or not
16 guilty of murder.

17 MR GEOLY: Yes, sir.

18 THE COURT: All right. No -- no lesser-included
19 offense on that. I mean, you've just -- is there -- I
20 can't think of another lesser-included.

21 MR GEOLY: I -- I just don't think voluntarily ---

22 THE COURT: So ---

23 MR. GEOLY: --- is appropriate, Judge. I think
24 involuntary ---

25 THE COURT: Yeah.

1 MR GEOLY: --- is appropriate for what we've had
2 come from this witness stand. I don't think voluntarily
3 is.

4 Judge, I -- I would, I guess, seek permission,
5 because I'm not going to try the Court's patience.
6 Obviously, I stood up at the beginning of this and argued
7 that I think that this is manslaughter. I still think it
8 is. I -- I would ask permission to then -- then at least
9 argue to the jury that the solicitor has failed to charge
10 him with something that he's guilty of and that that's
11 not their fault that -- that they're left with guilty or
12 not guilty.

13 And as to -- to murder, because he's not charged
14 with one of the other homicides that we've talked about
15 from the witness stand, so I think that's a proper
16 comment. And I -- I wouldn't want to ---

17 THE COURT: I understand.

18 MR. GEOLY: --- try the Court's patience without
19 seeking permission to allow that, Judge.

20 THE COURT: All right, sir.

21 MR STUMBO: Judge, if I -- I could, just for the
22 record, *State v. Condrey* -- C-o-n-d-r-e-y -- it's a 2002
23 Court of Appeals case, 349 S.C. 184. Judge, that's --
24 it's right on point, that particular case. And -- and it
25 was set -- essence that -- it -- it says that the judge

1 actually instructed the defense, when it was not a
2 charge, not to talk about it in closing.

3 Obviously, Mr. Geoly's brought it up in opening.
4 That was his choice to do. I don't think the law and the
5 facts here ever justified involuntary. So that's my
6 argument -- going to be the argument to the jury: that
7 the law is ---

8 THE COURT: So what ---

9 MR. STUMBO: --- what the judge ---

10 THE COURT: --- is that case ---

11 MR. STUMBO: --- gives it to you.

12 THE COURT: What's the case you just cited?

13 MR STUMBO: *State v. Condrey*, C-o-n-d-r-e-y.

14 THE COURT: C-o-n ---

15 MR. GEOLY: --- d-r-e-y ---

16 MR. STUMBO: --- d-r-e-y.

17 MR. GEOLY: --- is what he said, Judge.

18 MR STUMBO: You know, this was not a homicide case,
19 Judge. But it just stands for the holding that a -- an
20 attempt to argue a lesser-included offense that's not
21 charged by the Court's improper.

22 THE COURT: Well, I mean, did he argue that he was
23 -- they could find a lesser-included offense? Or did it
24 say, "You can't mention it at all"? \

25 MR. STUMBO: It -- the way I'm reading the holding

1 in the case, it said -- they found -- because it was
2 challenged on appeal. It says (as read): "The trial
3 judge did not err in limiting defense counsel's closing
4 argument."

5 And, of course, that was a discretionary call for
6 him to do that. I'm not ---

7 THE COURT: All right. I'll ---

8 MR. STUMBO: --- I -- I'm not asking Your Honor to
9 -- to do that. I -- you know, if he wants to continue to
10 argue a charge that's not even an option for the jury, I
11 -- I do think that's improper. But quite honestly, if he
12 wants to do that, I'm going to address that with ---

13 MR. GEOLY: Your -- Your Honor, I ---

14 MR. STUMBO: --- the jury.

15 THE COURT: Well, I mean ---

16 MR. GEOLY: --- I -- I -- if -- if it please the
17 Court, to be clear: I don't want to argue a charge not
18 to the jury. I want to be able to comment that he's
19 charged with murder; the solicitor could've charged him
20 with other homicides, which has been talked about in this
21 record. But he chose not to.

22 So, you know, you -- your decision here isn't to
23 consider any of those, but just murder with malice
24 aforethought or not. And I just want to comment on that:
25 that -- that they haven't given the opportunity to have

1 homicide.

2 THE COURT: All right. The whole ---

3 MR. STUMBO: Judge, for him to turn that on me, I
4 think, would be completely improper.

5 THE COURT: Well, I mean, I think -- well, let me
6 take a look at these cases.

7 The question is: It's one thing for him to stand up
8 and say, you know, "Y'all can find him guilty of
9 manslaughter," when I'm not charging manslaughter.
10 That's totally improper.

11 MR. STUMBO: Uh-huh.

12 THE COURT: Is it improper for him to stand up and
13 say, "The state has overcharged my client. They have
14 charged him with something that he did not commit, and
15 you can't find him guilty of this because you think he
16 committed another crime and you don't want him to go
17 free. He didn't commit murder. He committed
18 manslaughter. But because they didn't charge
19 manslaughter, you can't find him guilty of murder.

20 And that's what he's -- what he wants ---

21 MR. STUMBO: Well ---

22 THE COURT: --- to argue.

23 MR. STUMBO: And that's fine, Judge, as long as I'm
24 permitted to argue to the jury: "Look, the -- the judge
25 is going to instruct you on what the law in this state.

1 And these other offenses that have been mentioned by the
2 defense are not appropriate in this case. And it's the
3 reason why they're not being charged to you."

4 And I -- that's -- that would be my argument, Judge.
5 And I -- that -- if he wants to go that route, I -- long
6 as I'm at liberty to -- to address that, I think I'm fine
7 with it. I mean, I can't put ---

8 THE COURT: Well ---

9 MR. STUMBO: --- you know, I can't -- I can't unring
10 the bell. He -- he said that in opening. He said it in
11 his cross-examination of Dr. Rose yesterday; mentioned
12 involuntary.

13 Quite honestly, Judge, I -- I didn't object because
14 I -- I didn't really think it was worth, you know, making
15 that big deal in front of the jury. I -- I ---

16 THE COURT: What was that case you just stated?

17 MR STUMBO: *State v. Condrey*, C-o-n-d-r-e-y. That's
18 a 2002 case out of ---

19 THE COURT: Okay. Let me check and see what it
20 says.

21 MR. STUMBO: Yeah.

22 (Off the record briefly.)

23 MR. STUMBO: Yeah. Looks like Ralph -- Judge Ralph
24 King Anderson, Judge, was the -- wrote that opinion.
25 And, you know, essentially, it was challenged that --

1 that the trial judge, before closings, I -- I -- I don't
2 know -- it appears like the state asked the judge to
3 limit defense counsel's closing as to noncharged or -- or
4 lesser-includes that were not appropriate.

5 Quite honestly, Judge, I -- I think, because Mr.
6 Geoly's already talked about it in his opening and
7 mentioned it in a cross-examination, I -- I just would
8 prefer just to deal with it with the jury as is.

9 (Off the record briefly.)

10 MR. STUMBO: You know, ultimately, Judge, if he --
11 if he argues that we overcharged -- because it should
12 have been charged at all, because this was a big
13 misunderstanding and accident, then that's ---

14 MR. GEOLY: Not what I'm saying.

15 MR. STUMBO: --- he can argue that. But I -- I just
16 don't think he can say we overcharged and should've
17 charged something that's not even legally appropriate.

18 (Off the record from 10:21 a.m. until 10:25 a.m.)

19 THE COURT: Yeah. I think *State v. Condrey* is going
20 to prohibit you from arguing that this is a manslaughter
21 case. It's just going on the murder charge.

22 MR. GEOLY: Judge, I'm -- I'm not allowed to say that
23 this is a homicide, but this doesn't fit the crime of
24 murder?

25 THE COURT: I think you can say: Yes. This is a

1 homicide, but it is does not fit the crime of murder."

2 But you can't say that he should've charged voluntary or
3 involuntary manslaughter.

4 MR GEOLY: I'm not going to say, "You should've
5 charged anything." I'm going to say that this a homicide
6 that -- that doesn't amount to murder; that there's other
7 ---

8 THE COURT: You ---

9 MR. GEOLY: --- homicides he's not charged with.

10 THE COURT: Well, and I think you can say that.

11 MR GEOLY: That's all I want.

12 THE COURT: Yeah.

13 MR. GEOLY: That -- that's ---

14 THE COURT: You can say that.

15 MR GEOLY: --- that there are other homicides that
16 he's not ---

17 THE COURT: Yeah.

18 MR. GEOLY: --- charged with, but this homicide,
19 they've got to prove malice aforethought. And that, they
20 haven't done. That's ---

21 THE COURT: Yeah.

22 MR. GEOLY: --- that's what I want. Thank you,
23 Judge.

24 MR. STUMBO: I would ---

25 THE COURT: All right.

1 MR STUMBO: --- say, as long as he says that it's --
2 that this is a homicide that's accidental or justified,
3 but there is no other homicide that he could be charged
4 with, under these facts.

5 THE COURT: That's ---

6 MR. STUMBO: I just think that's inaccurate.

7 MR. GEOLY: Judge, he ---

8 THE COURT: There are not ---

9 MR GEOLY: --- he's not charged this. But, I mean,
10 this same solicitor's office, I mean, the hypocrisy's
11 getting ridiculous. We -- this same solicitor's office
12 ---

13 THE COURT: Well, name ---

14 MR. GEOLY: --- has a -- has a white man shooting --
15 or a boy shooting at a stop sign -- intentionally
16 shooting at a stop sign. Bullet ricochets and kills a
17 man on his porch. That young man gets an involuntary
18 manslaughter and a recommendation of YOA shock.

19 But a black man, similar circumstance, we're looking
20 at murder. And no offers; I mean, it -- you know,
21 murder. That's it.

22 I mean, the -- the -- the hypocrisy from here to say
23 that this shouldn't be involuntary, when -- when -- I
24 mean, certainly this solicitor's office here has done
25 cases very similar to involuntaries. But we're sitting

1 here at trial, where the -- the -- their witness has
2 testified that she believes that this is how this
3 occurred. She's testified she never met with the -- the
4 victim witness advocate from the solicitor's office.

5 He's had one meeting with her in 2 1/2 years to -- I
6 mean, we do have a victim's dish I mean we do have a
7 Victims' Bill of Rights. She's had no say-so with this
8 case -- zero. And -- and -- and now he sits here this --
9 and the solicitor's going to stand up and say this
10 doesn't fit, when this same solicitor's office
11 consistently takes charges just as severe and turns them
12 into involuntary manslaughter. So I, you know ---

13 THE COURT: So what other charge out there --
14 homicide charge do you say is available?

15 MR. GEOLY: It -- Your Honor, I ---

16 THE COURT: Because I've already ruled ---

17 MR. GEOLY: Yes, sir.

18 THE COURT: --- that involuntary and voluntarily
19 manslaughter do not apply. You can argue that this is a
20 homicide, but it does not arise to murder.

21 MR GEOLY: Yes, sir. I -- I ---

22 THE COURT: You cannot argue that there are other
23 charges out there that could've been brought and the
24 solicitor brought the wrong charge. Voluntary
25 manslaughter doesn't fit this case ---

1 MR. GEOLY: I -- yes, sir, Judge. I would ---

2 THE COURT: --- involuntary ---

3 MR. GEOLY: --- just like to ---

4 THE COURT: --- manslaughter ---

5 MR. GEOLY: --- object and -- and have my objection
6 noted for the record that what I would like to show is
7 that if they find, as the finder of fact, that this is
8 what occurred -- that there was an unlawful act that
9 doesn't typically cause death that did in this case --
10 that -- that -- but that that would be involuntary
11 manslaughter. But if I'm prohibited from arguing that to
12 them, then he's being denied due process of -- of the
13 facts. Because those facts sit -- fit this. I mean,
14 what ---

15 THE COURT: No, they don't.

16 MR. GEOLY: You've got ---

17 THE COURT: That ---

18 MR. GEOLY: --- because we ---

19 THE COURT: Firing the gun tends to cause great
20 bodily harm ---

21 MR. GEOLY: But that's ---

22 THE COURT: --- or injury ---

23 MR. GEOLY: --- us saying that, Judge ---

24 THE COURT: --- or death.

25 MR. GEOLY: --- not the jury saying that.

1 THE COURT: And I understand your argument.
2 MR. GEOLY: That -- that ---
3 THE COURT: But I'm -- I'm not going to allow you
4 ---
5 MR. GEOLY: And -- and I just ---
6 THE COURT: --- to argue ---
7 MR. GEOLY: --- wanted it clear ---
8 THE COURT: --- that.
9 MR. GEOLY: --- for the record, Judge, for ---
10 THE COURT: Yeah.
11 MR. GEOLY: --- to make ---
12 THE COURT: I'm not ---
13 MR. GEOLY: --- a clean ---
14 THE COURT: --- going to ---
15 MR. GEOLY: --- record.
16 THE COURT: --- let you.
17 MR. GEOLY: And -- and I certainly respect, Your
18 Honor. I ---
19 THE COURT: I'm not ---
20 MR. GEOLY: --- apologize for ---
21 THE COURT: --- going to let you argue about
22 voluntary manslaughter or involuntary manslaughter.
23 MR. GEOLY: I won't say any of those words, Judge.
24 THE COURT: All right.
25 All right. Anything else ---

1 MR. STUMBO: Not -- nothing ---

2 THE COURT: --- on the charge?

3 MR. STUMBO: --- Judge. Just the -- the last attack
4 on my office, I think, was improper and ---

5 THE COURT: Let's deal with ---

6 MR. STUMBO: --- but -- but ---

7 THE COURT: --- this case ---

8 MR. STUMBO: Yes, sir.

9 THE COURT: --- right now.

10 MR. STUMBO: I understand.

11 THE COURT: Okay?

12 MR. STUMBO: I -- I'm not ---

13 THE COURT: I'm just ---

14 MR. STUMBO: --- and I'm not going to ---

15 THE COURT: Okay.

16 MR. STUMBO: --- go down that road. I understand.

17 THE COURT: All right. Let's just deal with this.

18 MR. STUMBO: I'll deal with it later.

19 THE COURT: All right. Anything else? I need to go
20 back and work on these charges. Anything else?

21 (No audible response.)

22 THE COURT: What about attempted murder?

23 MR. STUMBO: Yeah. Judge, the attempted murder, I
24 do think, under the -- the *Jeter* case that came out last
25 week with the Court of Appeals, and they cite both the

1 *Smith* case, the -- which was the Five Points shooting,
2 and the *Williams* case. And the -- the whole discussion,
3 there was about specific intent not applying to attempted
4 murder -- or -- or specific intent being necessary for
5 attempted murder, which we think needs to be part of the
6 charge here.

7 THE COURT: It's in there.

8 MR. STUMBO: Yeah.

9 THE COURT: Yeah. I've put ---

10 MR. STUMBO: Yes.

11 THE COURT: --- that in there.

12 MR. STUMBO: Just -- just to make that clean. But
13 we do believe that if they don't find that he
14 specifically intended to kill Indigo but acted with kind
15 of a more general malignant-heart, *Mouzon* malice, that he
16 would still be guilty of ABHAN as to Indigo, because she
17 was shot in the leg.

18 THE COURT: I was going to charge ABHAN as a lesser-
19 included of attempted murder.

20 MR. STUMBO: Okay. And I think that's ---

21 THE COURT: What's your ---

22 MR. STUMBO: --- appropriate, Judge.

23 THE COURT: --- position on that?

24 MR. GEOLY: Judge, I -- I don't think that fits. I
25 mean, in a similar, you know -- let me back up and

1 reverse my ---

2 THE COURT: So you say just attempted murder and no
3 lesser-included offense of -- than attempted murder?

4 MR. GEOLY: Yes, sir. That's what I think would be
5 appropriate.

6 THE COURT: But ---

7 MR. GEOLY: Because if it -- if what they're
8 claiming is true, it's attempted murder. And he's --
9 he's ---

10 THE COURT: Oh, and I understand that. But if what
11 you're claiming is true ---

12 MR. GEOLY: I -- I'm just letting the facts be what
13 they are to the jury, Judge. He -- he's made no
14 affirmations other than not guilty.

15 THE COURT: Let's see. (As read): Assault and
16 battery of a high and aggravated nature is a lesser-
17 included offense of attempted murder. To convict the
18 defendant of assault and battery of a high and aggravated
19 nature, the state must first prove beyond a reasonable
20 doubt that the defendant unlawfully injured another
21 person. The state must also prove that the defendant's
22 act either caused great bodily injury to another person
23 or the defendant's act is accomplished by means likely to
24 produce death of great bodily injury.

25 MR. GEOLY: If it please the Court, Judge, focusing

1 on that last part right there ---

2 THE COURT: Yeah.

3 MR. GEOLY: --- there's been no medical testimony;
4 there's been no testimony that she ever had -- if
5 anything, the testimony's been that a week later, she's
6 meeting with law enforcement at their place and had no
7 problems. So there's been nothing elicited from this
8 stand to say that there was great bodily injury.

9 THE COURT: Okay. All right. I'm going to charge
10 assault and battery of high and aggravated nature as a
11 lesser-included offense of attempted murder.

12 All right. Anything else?

13 I note your objection.

14 MR. GEOLY: Thank you, Judge.

15 THE COURT: I mean -- well, let me ask this: Can I
16 charge a lesser-included offense that applies where the
17 defense does not want the lesser-included offense? Is
18 that a right of the defendant, or is it -- does the state
19 have the right to charge a lesser-included offense?

20 MR. STUMBO: Here -- here ---

21 THE COURT: Are the ---

22 MR. STUMBO: Here's my fear, Judge -- and -- because
23 there's been two different cases that, you know, we've
24 seen with this. One I was personally involved in here in
25 Newberry. We -- we tried this case in front of Judge

1 Knox McMahon before he retired back in 2013 in Newberry.

2 He did not charge voluntary manslaughter in a case
3 that was -- it was a -- a situation where there were
4 three different versions by the defendant. One of the
5 versions that might be a heat-of-passion thing, the --
6 the defendant herself took the stand and repudiated.

7 So I just said to the judge: "I'd kind of prefer
8 the jury not have that option."

9 And, of course, that came back and they said:
10 "Well, if there's any evidence, the any-evidence standard
11 for lesser-included offense -- if there's any evidence of
12 the lesser-included and it's not charged, then it's
13 reversible error," is what the Court said in *Mandy Smith*.

14 And that was my case. It came back. We ended up
15 pleading it on a -- when it came back, Judge.

16 But the second situation we've had -- and this has
17 -- hasn't involved me. But the -- the court -- the
18 appellate courts have chastised the -- some of the
19 solicitors -- and I don't have the cases right in front
20 of me -- for, at times, asking for lesser-included
21 offenses, I guess, to kind of hedge their bets, so to
22 speak. Maybe I'll get ---

23 THE COURT: Right.

24 MR. STUMBO: --- at least that, when it's maybe not
25 appropriate.

1 Here, Judge, I just think the law is what it is. I
2 think there is evidence here ---

3 THE COURT: Well ---

4 MR. STUMBO: --- that they could find ---

5 THE COURT: And I agree ---

6 MR. STUMBO: --- that it's ---

7 THE COURT: --- with you ---

8 MR. STUMBO: --- an ABHAN.

9 THE COURT: --- 100 percent.

10 MR. STUMBO: Yes, sir.

11 THE COURT: My question is: Is the state limited to
12 the charge that they indicted the defendant for, when the
13 defense says: "I'm indicted for attempted murder, so
14 it's either guilty or not guilty"?

15 MR. STUMBO: And ---

16 THE COURT: There's no ---

17 MR. STUMBO: Yeah -- yes.

18 THE COURT: --- "I don't want a lesser-included
19 offense because you overcharged and we're going to hold
20 your feet to the fire."

21 MR. STUMBO: And I -- I -- I kind of agree with you,
22 Judge, as long as the record's clear here when it goes up
23 on appeal. And I think we've made a clear record that
24 the defense doesn't want that option. And it's not the
25 state standing in its way, because there is evidence of

1 an -- could be if -- I mean, the jury could find a whole
2 number of different scenarios here, as far as general
3 intent versus specific in this case.

4 But I -- as long as the defense is waiving that as a
5 -- as a -- an issue they could bring up on appeal later,
6 I'm fine with it. I -- I just don't want them saying:
7 We don't want ---

8 THE COURT: Well, I don't ---

9 MR. STUMBO: --- it now ---

10 THE COURT: --- that he's ---

11 MR. STUMBO: --- and then it ---

12 THE COURT: --- waiving ---

13 MR. STUMBO: --- comes up ---

14 THE COURT: --- it ---

15 MR. STUMBO: --- on appeal, though.

16 THE COURT: --- on appeal. I think he's ---

17 MR. STUMBO: Yeah.

18 THE COURT: --- saying: "You're not giving me the
19 lesser-included on murder. It's straight up guilty or
20 not guilty, and so let's do the same thing with attempted
21 murder."

22 MR. STUMBO: Okay.

23 THE COURT: Now, I -- I disagree with the defense,
24 to the extent that I don't think, in this case, voluntary
25 manslaughter and involuntary manslaughter are lesser-

1 included offenses. Because I don't think there's
2 evidence of involuntary manslaughter, and I don't think
3 there's evidence of voluntary manslaughter to meet --
4 meet all those elements.

5 MR. GEOLY: Judge, may I ask ---

6 THE COURT: But ---

7 MR. GEOLY: --- a question?

8 THE COURT: Yeah.

9 MR. GEOLY: And -- and I -- I certainly don't want
10 to argue something that's already been decided. But --
11 but you kind of addressed the -- the one prong.

12 But what if this jury were to decide he is shooting
13 at his tires in his yard? That's not a lawful -- that's
14 not an unlawful act.

15 THE COURT: You're telling me that it is a lawful
16 act to shoot at the tires of car in a yard with people
17 sitting in the car, trying to leave in the middle of an
18 argument?

19 MR. GEOLY: It -- if he's shooting at the tires of
20 his car in his yard, I -- I think that's legal. I think
21 the problem you've got here is he doesn't realize the
22 kids are in the car. And I realize they can certainly
23 believe he realized the kids are in the car from the
24 thing.

25 I think the reality is he doesn't realize the kids

1 are in the car. He's trying to stop her from leaving.

2 And he's shooting at the tires.

3 And as much as the solicitor wants to say, "That's
4 not the evidence," we have five bullets that -- at --
5 that's halfway into the tire or below in the ground. How
6 they couldn't find he's shooting at tires, that's not
7 unlawful because he's shooting at tires on his land.

8 I'm not saying that -- that we find that, Judge.
9 But I'm saying the triers of fact could find that and
10 that, as such, what -- what he just said -- I mean, I
11 almost like his argument for my argument, is if there's
12 anything that -- that -- that they could find that the
13 defendant did -- and that fits. They could find he's
14 innocently shooting at tires, but that results in a
15 death.

16 I mean, he's almost arguing it. But he's saying,
17 "He's so unreasonable, I -- you know, that -- that --
18 that he's -- he is being so reckless." And that's no
19 question, it was reckless. But it wasn't illegal.
20 That's ---

21 THE COURT: Well ---

22 MR. GEOLY: --- something ---

23 THE COURT: --- no. I'm ---

24 MR. GEOLY: --- they could ---

25 THE COURT: --- ruling that it is illegal to shoot

1 at the tires of a car with people in it in the middle of
2 the heated argument.

3 MR. GEOLY: Judge, but you're -- you're taking that
4 as a fact that he knew that people were in it. And I
5 don't know that the jury's going to do that. But I
6 understand your ruling. And I'm sorry. I ---

7 THE COURT: Okay.

8 MR. GEOLY: --- feel like I've already argued it too
9 much.

10 THE COURT: All right. Well, I'm ruling that that
11 is not a lawful activity.

12 MR. GEOLY: And I -- I feel like we've protected the
13 record. But I -- I feel like ---

14 THE COURT: All right.

15 MR. GEOLY: --- what I'm saying is, I'm not trying
16 to say it is or isn't. I'm saying the jury certainly
17 could find that.

18 THE COURT: You're saying that the jury can find
19 that it is lawful to shoot at tires and a car with people
20 in the car?

21 MR. GEOLY: No. I'm saying that it -- they could
22 find that it's lawful to shoot at tires of your car in
23 your yard and that if that results in death, that --
24 that, I think, is a definition. So in terms of, you
25 know, what the solicitor just told you, in terms of is

1 there evidence that the jury could reasonably find that,
2 yes. We do have that evidence here.

3 THE COURT: Okay. All right. You've got it on the
4 record.

5 MR. GEOLY: Thank you.

6 THE COURT: All right.

7 MR. STUMBO: Did you intend to charge ABHAN? I -- I
8 just didn't know ---

9 THE COURT: Well ---

10 MR. STUMBO: --- if you ---

11 THE COURT: --- I mean, that's my question. Do you
12 -- does the state want me to charge ABHAN?

13 MR. STUMBO: I -- I fear, if I don't ask for it, it
14 could lay a landmine for appeal, unless the defense is
15 saying they absolutely don't want an ABHAN charge as a
16 lesser-included offense here on the record today.

17 MR. GEOLY: I'm saying -- I -- I mean, I think I've
18 made that clear. I want it to be the same way: guilty
19 or not guilty.

20 THE COURT: So, in other words, you do not want a
21 lesser-included offense charged for attempted murder?

22 MR. GEOLY: Correct.

23 THE COURT: All right. Now ---

24 MR. STUMBO: Well, I'm ---

25 THE COURT: --- what is the state ---

1 MR. STUMBO: I'm content -- I'm content with that,
2 Judge, if -- you know, I -- I don't care about that.
3 Because he's, you know -- Judge, the bottom line is: I
4 want it to be clear, when the appeal -- appellate courts
5 read this record later, that if we are -- happen to get a
6 conviction, that we believe that there could be some
7 evidence here, if they were to find that he just acted in
8 a general disregard or a *Mouzon*-type malice, disregard
9 for human life, that it could ultimately find to be
10 murder and ABHAN, instead of murder and attempted murder.

11 But if the defense would rather it be all or
12 nothing, I'm fine with that too. So I guess I want the
13 -- I want the -- the record to be clear that we think it
14 could be appropriate, if -- if Your Honor found it was.

15 But if the defense is saying, "We don't want it,"
16 I'm not going to force it either. I think that's the ---

17 THE COURT: All right.

18 MR. STUMBO: --- position I need to take, so I don't
19 have, you know, appellate courts upset with me later that
20 I either did ask for it to try to hedge my bet or I
21 didn't ask for it and it should've been charged. I -- I
22 just -- it puts us in a difficult position, Judge.
23 Because I've seen two different scenarios with cases that
24 that that's exactly what I thought when I read those
25 cases, the second case that chastised the -- the state

1 for asking for it.

2 And I thought, Well, you know, with *Mandy Smith*,
3 they -- they told me I -- I should've asked for -- I get
4 -- that -- that -- that I should've asked for it there.
5 And I just -- quite honestly, Judge, I think, if a jury
6 found it, they could have -- they would have a sufficient
7 basis to find it.

8 But if the defense is saying that they would rather
9 the jury not have that option -- it'd be all or nothing
10 like the murder charge -- I don't think that's
11 inappropriate either. I don't think it's a clear right
12 or wrong issue, I guess, is what I'm saying, based on my
13 reading of the case law.

14 THE COURT: All right. Is there -- so there's no
15 case on point on that, is there?

16 MR. STUMBO: I don't think so. The cases ---

17 THE COURT: Okay.

18 MR. STUMBO: --- I've seen have kind of depended on
19 the facts said different things. I -- I -- is there --
20 you know, under that any-evidence standard for the
21 general intent, could they find it? Yes. But if they
22 choose to find that they -- they may nullify ---

23 THE COURT: Well ---

24 MR. STUMBO: --- on that issue anyway. I -- I don't
25 know.

1 THE COURT: I can tell you, this is my feeling and
2 what I think the law says, is if there's any evidence of
3 a lesser-included offense, then I have to charge it. I
4 know I have to charge it, if it's requested by the
5 defense. I think I probably have to charge it if it's
6 requested by the state.

7 But right here, where neither side requests that it
8 be charged, am I bound by the parties' desire and not
9 charge it?

10 MR. STUMBO: I -- I don't think you're bound by it,
11 Judge. I think it's probably a discretionary call. That
12 -- that would be my reading of the case law. It'd be ---

13 THE COURT: Okay.

14 MR. STUMBO: --- probably in a -- you -- you know,
15 know of an -- on appeal, some kind of abuse-of-discretion
16 standard. But I think it would only -- it would only
17 maybe put in jeopardy that particular charge. I don't
18 think it would really affect the murder case, which is,
19 in our mind, really the most important one here anyway.

20 THE COURT: Yeah. Well, I'm going to have to just
21 do what I think. I don't think that there's any -- any
22 real guidance. I note -- I'm going to go ahead and let's
23 just put on the record and verify the defense does not
24 want the lesser-included; the state does not want the
25 lesser-included offense. But I'm going to charge it

1 because I think that there is evidence of the lesser-
2 included. So ---

3 MR. STUMBO: Yes, sir. I ---

4 THE COURT: --- I'm going to ---

5 MR. STUMBO: --- understand.

6 THE COURT: --- put it in there. But that's an
7 issue for an appellate court to deal with at a later
8 time.

9 All right. Anything else from the state?

10 MR. STUMBO: Nothing from the state, Your Honor.
11 I'm assuming that just -- and one more thing. I don't --
12 transferred intent is in your charge. I just hadn't seen
13 it yet.

14 THE COURT: Transferred intent applies to the murder
15 charge. Transferred intent does not apply to the
16 attempted murder charge.

17 MR. STUMBO: Correct. Yes, sir.

18 THE COURT: Yeah. It has -- matter of fact, I put
19 in there this -- I can tell you. I can go ahead and show
20 you. This is how I deal with -- and I'll give this to
21 you.

22 I say (as read): "Unlike the crime of murder,
23 attempted murder requires a specific intent to kill. A
24 specific intent to kill is an element of attempted
25 murder. Intent means intending the attempted result, not

1 accidentally or involuntarily causing the result.

2 "Also unlike murder, the intent required to prove
3 attempted murder cannot be transferred from one person to
4 another. The state must prove beyond a reasonable doubt
5 that the defendant intended to kill a specific person
6 with malice aforethought but failed in that attempt. In
7 other words, to convict the defendant in this case of
8 attempted murder, the state must prove beyond a
9 reasonable doubt that the defendant intended to kill
10 Indigo Davis with malice aforethought but failed in that
11 attempt."

12 And I think that's what the law is on attempted
13 murder ---

14 MR. STUMBO: Yes.

15 THE COURT: --- in this case, given those recent
16 cases, *Jeter* and all of those.

17 MR. STUMBO: Yes, sir. I -- I think you're -- I --
18 -- I ---

19 THE COURT: Matter of fact ---

20 MR. STUMBO: --- I agree.

21 THE COURT: --- I know -- I think it's the *Jeter*
22 case where they go into depth, talking about the
23 different jurisdictions, which seem to be pretty split as
24 to whether or not you can have transferred intent for
25 attempted murder. But they came down on the side that in

1 South Carolina, there is no transferred intent for
2 attempted murder.

3 MR. STUMBO: Okay.

4 THE COURT: You know, and it is what it is.

5 MR. STUMBO: Right.

6 THE COURT: So ---

7 MR. STUMBO: Which is -- I don't -- going back to
8 the first day of this case, why we didn't call those
9 other two indictments because of that very issue, the --
10 the other -- the two children in the car that were not
11 hit, we initially indicted ---

12 THE COURT: Yeah.

13 MR. STUMBO: --- I think because of the *Jeter* case.
14 After I read that last week, it seemed pretty ---

15 THE COURT: Right.

16 MR. STUMBO: --- pretty firm on that.

17 THE COURT: All right. Let me go back and finish
18 working on the charges some.

19 Now, it's quarter till 11. Do we want to let the
20 jury go ahead and leave and come back, or do we want to,
21 you know, give them a little early break to go eat lunch
22 and then come back and we'll do closing arguments,
23 charges, and deliberations? Or do we want to go ahead
24 and try to get this stuff together but then break for
25 lunch 12:30 ---

1 MR. GEOLY: Judge ---

2 THE COURT: --- one o'clock?

3 MR. GEOLY: --- I -- I would -- I don't necessarily
4 have a preference, Your Honor. But if you're still
5 working on your charge and it's going to be a while,
6 maybe we bring them in, you let them know that the
7 defense rests, and then release them and -- or I don't
8 know -- however you want to -- I mean, you don't have to
9 do ---

10 THE COURT: I would ---

11 MR. GEOLY: --- that but ---

12 THE COURT: Well, I was thinking about bringing them
13 in and saying ---

14 MR. GEOLY: They'll kind of relax a little and know
15 that ---

16 THE COURT: Yeah.

17 MR. GEOLY: --- that it's ---

18 THE COURT: We'll do the -- the substitution of the
19 seating of the alternate, let you rest on the record,
20 tell them that we're working on final phases of the --
21 the case, and have them come back at, say, one o'clock.
22 And we'll do closing charge -- closing arguments,
23 charges, and deliberations. How does that sound?

24 MR. STUMBO: That -- that's -- that's fine with us,
25 Judge.

1 THE COURT: Okay. All right.

2 (Off the record briefly.)

3 MR. STUMBO: Judge, I would -- one -- one more
4 thing. I -- I believe you said at the beginning of the
5 case -- and I do think this is appropriate. Now that all
6 the evidence is in and it's just time to close and charge
7 and for the jury to deliberate, I would ask the defendant
8 be in custody today while we're doing that.

9 THE COURT: Yeah. And I am going to need to go
10 ahead and hold him, since the defense is not putting up
11 anything; all of the evidence and testimony has been
12 presented. All we've got is closing arguments and
13 charges. We're going to have to go ahead and detain him
14 today. Okay?

15 Now, another thing that just came to mind -- mind.
16 I was looking through this (as read): "Possession of a
17 weapon during the commission of a violent crime." It can
18 be either guilty or negligence, but it can only be guilty
19 if they find the defendant guilty of murder or attempted
20 murder.

21 I've been looking, and I don't know ---

22 MR. STUMBO: Well ---

23 THE COURT: --- that involuntary manslaughter is
24 classified as a ---

25 MR. STUMBO: What ---

1 MR. GEOLY: You -- well, it ---
2 MR. STUMBO: --- you mean ---
3 MR. GEOLY: --- can't be ---
4 THE COURT: I mean ---
5 MR. GEOLY: --- that, Judge.
6 MR. STUMBO: You mean ---
7 THE COURT: --- assault and battery ---
8 MR. STUMBO: --- the ABHAN?
9 THE COURT: --- of a high and ---
10 MR. STUMBO: Yeah.
11 THE COURT: --- aggravated nature ---
12 MR. STUMBO: Right.
13 THE COURT: --- is that classified as ---
14 MR. STUMBO: Well ---
15 THE COURT: --- a violent crime?
16 MR. STUMBO: Judge, we're looking at ---
17 MR. DANIEL: Your -- Your Honor, it is violent ---
18 MR. STUMBO: Right.
19 MR. DANIEL: --- under 16-1-60 of ABHAN. It's ---
20 THE COURT: It is in there?
21 MR. DANIEL: Yes. And ---
22 THE COURT: Okay.
23 MR. DANIEL: And I ---
24 THE COURT: All right.
25 MR. DANIEL: --- I believe the language in the

1 indictment covers any lesser-included offenses. If they
2 were to come back guilty on the ABHAN ---

3 THE COURT: Okay. So -- but they have to find them
4 guilty of murder, attempted murder, or ---

5 MR. STUMBO: Or ---

6 THE COURT: --- ABHAN.

7 MR. STUMBO: --- ABHAN. Correct.

8 MR. DANIEL: Yes, sir.

9 MR. STUMBO: Judge, I think the only ABHAN -- the
10 old common law was not ---

11 THE COURT: Yeah.

12 MR. STUMBO: --- in that 16-1-60.

13 THE COURT: Well, and I ---

14 MR. STUMBO: The new ---

15 THE COURT: --- was thinking ---

16 MR. STUMBO: --- statutory ---

17 THE COURT: --- of the involuntary ---

18 MR. STUMBO: --- is.

19 THE COURT: --- manslaughter too. But I'm not ---

20 MR. STUMBO: Yeah.

21 THE COURT: --- not charging involuntary
22 manslaughter as well.

23 Okay. All right. Anything from the state before we
24 bring the jury in?

25 MR. STUMBO: Nothing from the state, Your Honor.

1 THE COURT: Anything from the defense?

2 MR. GEOLY: No, sir.

3 THE COURT: All right. Let's bring the jury in.

4 (Off the record briefly.)

5 THE COURT: Now, when we get to closing arguments,
6 the state will close in full, then defense; no rebuttal
7 or reply.

8 MR. STUMBO: Yes, sir.

9 (Off the record briefly.)

10 (Whereupon, the jury entered the courtroom at 10:50
11 a.m.)

12 THE COURT: All right. Ladies and gentlemen,
13 welcome back. I apologize for keeping you in the jury
14 room for so long. And I appreciate your patience, and I
15 appreciate you being on time today.

16 First thing we had to deal with, when we got back
17 this morning, is we did have a juror that called in sick.
18 I think you can tell that we are missing one. To let you
19 know, she did test positive for COVID. So I'm glad
20 whatever socially distanced and things of that nature.

21 Having said that, we have excused her. And the
22 alternates' names were put in a hat, drawn out, and Mr.
23 Cox, you are now part of the 12-panel jury. All right?
24 So you are part of the jury. You can keep that seat
25 where you are right now. Okay?

1 So -- now, we are -- as you recall yesterday, the
2 state rested their case. Now is the time where the
3 defense can present a defense, if they choose to.

4 Defense can call your first witness.

5 MR. GEOLY: If it please the Court, Your Honor,
6 after consultation with my client, we rest.

7 THE COURT: All right.

8 All right. Ladies and gentlemen, the defense has
9 rested. The state has rested. So all of the evidence
10 and testimony to be presented has been presented to you.

11 The only left is for the attorneys to make their
12 closing arguments, me to charge you on the law to be
13 applied, and for you to begin your deliberations on this
14 case. However, it will take a while for the attorneys to
15 get their arguments and me to get the charges together.
16 So I'm going to go ahead and excuse you for lunch.

17 We're going to take an earlier lunch today. I'm
18 going to give you a little bit longer break. I'm going
19 to ask that you please be back and one o'clock, okay? So
20 that'll give you an opportunity to get something to eat
21 or -- and -- and get back at one o'clock, and we'll
22 proceed then.

23 Again, it's still too early to deliberate on this
24 case. So don't discuss the case, among yourselves or
25 with anyone else. Don't conduct any independent

1 investigations.

2 I hope you have a good lunch, and we'll see you back
3 at one o'clock. Thank you very much.

4 (Whereupon, the jury exited the courtroom at 10:52
5 a.m.)

6 (Off the record briefly.)

7 THE COURT: All right. All right. Anything from
8 the state before we recess? I'm going to -- I've -- I've
9 gotten these closing charges where I've just thrown
10 everything in, so all I've got to do now is go back and
11 make some deletions. And then I'm going to -- I'll have
12 a copy out here for you to review.

13 As I said, the state will close; then the defense
14 will close. I'll charge and deliberate -- I'm assuming
15 y'all -- do y'all want me to charge after your closing
16 arguments? I -- I ask that simply because that's what
17 I've always done; that's what I think most judges do. I
18 know of one judge that does charge before closing
19 arguments.

20 MR. GEOLY: I -- I -- I mean, if you're going to
21 give us a druthers, Your Honor, I'd rather you charge so
22 that they know the law before we argue to them.

23 MR. STUMBO: I -- I kind of prefer after -- I think
24 afterwards, Judge, is -- I don't -- I -- I've -- I've
25 heard of that being done, but I don't know, in my 18

1 years, if I've ever had a judge charge before. So I'm --
2 I'm ---

3 THE COURT: Okay. Well ---

4 MR. STUMBO: --- comfortable ---

5 THE COURT: --- and I never have, so I'll do it
6 afterwards. But I'm doing it afterwards simply because
7 that's the way I've always done it. And I -- but I do
8 know ---

9 MR. STUMBO: Yes, sir.

10 THE COURT: --- of another judge that does it. And
11 he says it works well. And I've kind of ---

12 MR. GEOLY: I -- that -- that -- I just -- I think
13 that them hearing us but not yet knowing the law
14 sometimes it's -- and then, you know, depending on how
15 long, you know, I -- I always think it's a little funny
16 that we expect a jury to, you know, consume a -- a
17 15/16/20-page charge when it's read to them one time. I
18 think that's difficult after completing -- I -- I would
19 ask, Judge: You -- you don't give them the charge, do
20 you? I mean, I know some judges have started doing that
21 too.

22 THE COURT: If they request it ---

23 MR. GEOLY: --- then you give it to them?

24 THE COURT: --- then I give it to them. But I also
25 give it to them with an instructions that they're getting

1 the entire charge; they must consider the entire charge
2 as a whole and can't pick and choose parts of it and
3 ignore other parts of it.

4 MR. GEOLY: But you won't give it them unless they
5 ask?

6 THE COURT: Unless they request it.

7 MR. GEOLY: Thank you.

8 THE COURT: Yeah.

9 MR. STUMBO: And, Judge ---

10 THE COURT: Okay.

11 MR. STUMBO: --- the reason why I always prefer it
12 afterwards, I believe -- you know, obviously, the Court's
13 the final word on the law. What we say ---

14 THE COURT: Yeah.

15 MR. STUMBO: --- is not. The last thing they need
16 to hear on the law, to me, is from you, not from myself
17 or the defense. So ---

18 THE COURT: Well, I don't think that there's any
19 right or wrong. I think it's probably within the Court's
20 discretion. And just because I've always done it that
21 way, I'll keep doing it that way.

22 MR. STUMBO: Yes, sir.

23 THE COURT: All right?

24 All right. Anything else ---

25 MR. STUMBO: Nothing from ---

1 THE COURT: --- before we ---

2 MR. STUMBO: --- the state ---

3 THE COURT: --- take a break?

4 MR. STUMBO: --- Judge.

5 MR. GEOLY: Judge, should we -- would -- should we
6 wait around and you think the charge will be that quick,
7 or should we come back early and get the charge or ---

8 THE COURT: Whichever you prefer. It's probably
9 going to take me another 30/45 minutes ---

10 MR. GEOLY: Okay. But ---

11 THE COURT: --- and I'll have it.

12 MR. GEOLY: But then, we'll just be able to come by
13 the clerk and grab it?

14 THE COURT: Or what I -- well, I'll have them bring
15 it out and put it on your desk here.

16 MR. GEOLY: Thank you so much, Your Honor.

17 THE COURT: Okay. And we'll ---

18 MR. STUMBO: Yes.

19 THE COURT: --- do that it that way.

20 And I'll give you two opportunities to raise an
21 objection. Number one is after you read it; and then,
22 again after I charge the jury. Because sometimes it does
23 sound differently when you hear it charged than when you
24 just read it. So I'll give you two opportunities to
25 raise an objection.

1 MR. GEOLY: Thank you, Judge.

2 THE COURT: And I also will be preparing a -- a
3 verdict form. I generally don't send the indictment
4 where they -- unless it's -- if it was just a single
5 charge, guilty or not guilty on one single charge, I'll
6 -- a lot of times, I'll send the indictment back there.
7 But here, when you've got multiple charges and a lesser-
8 included offense, then I'll -- I'll usually just do a
9 verdict form, where they check the appropriate verdict.
10 All right?

11 MR. GEOLY: So will -- Your Honor, will you put it
12 murder, not guilty; attempted murder, assault and
13 battery, high and aggravated nature, not guilty; and
14 then, possession of a pistol during commission of a
15 violent crime, not guilty? Or ---

16 THE COURT: Well, what I'll do is I'll probably do a
17 verdict form for each indictment.

18 MR. GEOLY: Okay.

19 THE COURT: And then, for murder: We, the jury,
20 find the defendant guilty; we, the defendant -- we, the
21 jury, find the defendant not guilty. You check the
22 appropriate verdict.

23 Then, I'll do another verdict form on the charge of
24 attempted murder: We find the defendant guilty of
25 attempted murder; we find the defendant guilty of assault

1 and battery of high and aggravated nature; we find the
2 defendant not guilty.

3 Then, I'll do a separate verdict form, possession of
4 a weapon during the commission of a violent crime. And
5 then, I'll have instructions -- can only -- where -- we
6 find the defendant guilty. And I'll have under that:
7 Can only be if you find him guilty of one of these
8 others.

9 MR. GEOLY: Thank you, Judge.

10 THE COURT: And then, or not guilty. I'll give you
11 an opportunity to take a look at it. All right?

12 All right. Thank you ---

13 MR. STUMBO: Thank you.

14 THE COURT: --- very much.

15 MR. STUMBO: Thank you, Judge.

16 THE COURT: It -- and like I say, it'll probably
17 take me about 30/45 minutes to get it printed out and get
18 it out here. So if you want to come back a little bit
19 early or if you want to wait, whichever you prefer.

20 MR. GEOLY: Thank you, Judge.

21 THE COURT: All right. Thank you.

22 MR. STUMBO: Yes, sir.

23 (The Court went off the record at 10:58 a.m.)

24 (The Court went on the record at 12:57 a.m.)

25 THE COURT: All right. Gentlemen, I wanted to come

1 back a little bit earlier before the jury got -- got back
2 so we can discuss the charges, if necessary.

3 As I told you, I'll give you two opportunities to
4 raise any objections. You can raise one now after
5 reviewing them. And then, after I charge the jury, you
6 can raise any objections. I'll give you an opportunity
7 after that.

8 But at this point in time, are there any challenges
9 to the proposed charged from the state?

10 MR. STUMBO: No, sir, Your Honor. We're -- we're
11 satisfied with ---

12 THE COURT: All right. The verdict forms look okay
13 as well?

14 MR. STUMBO: Yes, sir.

15 THE COURT: Okay. All right. Mr. Geoly?

16 MR. GEOLY: Yes, sir, Judge. Your Honor, I -- I
17 don't think at this time that I have necessarily an
18 objection to the charges. I -- I would ask that -- a --
19 a couple of things, actually, kind of housekeeping,
20 Judge. I would ask that you consider adding this to your
21 instructions.

22 I don't have a copy of that. But I'll -- after I
23 give it to the judge, I'll get copies for all of us if we
24 need it.

25 MR. STUMBO: Judge, I -- I would just object. I

1 think it's confusing to ---

2 THE COURT: All right.

3 MR. STUMBO: --- but I'll ---

4 THE COURT: I can ---

5 MR. STUMBO: --- let Your Honor ---

6 THE COURT: --- I take a look ---

7 MR. STUMBO: --- take a look ---

8 THE COURT: --- and see ---

9 MR. STUMBO: --- at it.

10 THE COURT: --- what it says.

11 Yeah. I think -- that *Barfield* case, wasn't that
12 where they were cleaning a gun or something of that
13 nature? It was a completely different fact situation, as
14 I recall.

15 MR. GEOLY: Admittedly, it was, Judge.

16 THE COURT: Okay. Yeah. I think that was a
17 different fact situation.

18 MR. GEOLY: But I do think it still applies, Judge.

19 THE COURT: Well -- well, let me take a look at it.

20 MR. GEOLY: Your Honor, if I may, as to some other
21 things, I'm remiss I didn't address this before lunch,
22 Judge. I -- I -- and -- and I don't want to waive my
23 objection to assault and battery, high and aggravated
24 nature, being included. I -- I -- I hope that I made the
25 record clear that I objected to that. And -- but that

1 you -- you know, I understood your ruling and ---

2 THE COURT: Yeah.

3 MR. GEOLY: --- I appreciate it.

4 THE COURT: Because I ---

5 MR. GEOLY: And I ---

6 THE COURT: --- understand ---

7 MR. GEOLY: --- and I like it ---

8 THE COURT: --- assault and battery of a high and
9 aggravated nature ---

10 MR. GEOLY: I think you're right. But ---

11 THE COURT: Well, I mean, I think there's -- so the
12 record is clear -- I want to make sure the record is
13 clear. The defense does not want me to charge the
14 lesser-included offense of assault and battery of
15 aggravated nature?

16 MR. GEOLY: Correct. I'm objecting to that.

17 THE COURT: The state, likewise, would be happy if I
18 did not charge the lesser assault and battery of a high
19 and aggravated nature and that you do not oppose not
20 charging that. But the Court, because I find that the
21 evidence in this case supports that lesser-included
22 offense, I am including it over the objections of both
23 the defendant and the state.

24 MR. GEOLY: And thank you so much, Judge. I wanted
25 to make that clear.

1 THE COURT: Yeah.

2 MR. GEOLY: But once I find myself in this position,
3 then I think it's incumbent upon me to request that you
4 include what is statutorily defined as a lesser-included
5 of assault and battery, high and aggravated nature:
6 assault and battery, first-degree. And then, I think
7 it's incumbent upon me to ask you that to -- I think,
8 define statutorily, a lesser-included of assault and
9 battery, first-degree, is assault and battery, second-
10 degree. And I think that statutorily defined, assault
11 and battery, second-degree, a lesser-included is assault
12 and battery, third-degree, or what's commonly referred to
13 as simple assault and battery.

14 So I feel like if, once I'm in the position that it
15 is being charged, that assault and battery, high and
16 aggravated nature, and while I don't wish to waive my
17 objection, I think you've absolutely correctly stated
18 where we stand now. I do think it's incumbent upon me,
19 for my client to have a fair trial, to make everything
20 that's properly before the jury before them.

21 They can also find from these facts, Judge, that
22 it's an assault and battery, first-degree. They could
23 also find, then, from these same facts that it's assault
24 and battery, second-degree; or that it's assault and
25 battery, third-degree.

1 So we would ask that you include these in that
2 charge as well, because they are absolutely statutorily
3 defined, we believe, as natural lesser-includes of
4 assault and battery, high and aggravated nature.

5 THE COURT: All right.

6 MR. GEOLY: Thank you, Judge.

7 THE COURT: All right. I'm just going to leave it
8 as-is with assault and battery, high and aggravated
9 nature. I'm not going to do the first/second.

10 MR. GEOLY: Well, then, I would ask you to consider
11 at least assault and battery, first-degree, Judge. I
12 think it is literally defined ---

13 THE COURT: Well ---

14 MR. GEOLY: --- as a lesser-included.

15 THE COURT: I think it might be. But there still
16 has to be evidence of it. Let me -- let me check and
17 see.

18 MR. GEOLY: Yes, sir.

19 (Off the record briefly.)

20 THE COURT: All right. And what's the state's
21 position? Because ---

22 MR. STUMBO: Judge, the reason why we -- why I would
23 -- have argued this -- and our office has in the past.
24 And I don't think A&B-first here is appropriate for
25 Indigo because she was actually injured. There was an

1 injury that, under any circumstance, Judge, a gunshot
2 wound, from the intent of the defendant, is likely to
3 cause death or great bodily injury, by means likely to
4 cause those things. And there was an actual injury.

5 And I think the -- the ABHAN statute is right on --
6 on point with that. the streets can we mentioned before.
7 A&B-first -- and I -- and I think this is where we've
8 kind of landed on this, Judge, and why I mentioned before
9 -- if you have a -- a nonspecific intent case, where
10 there's shooting into, say, a house or a car, and
11 individuals are not struck with the bullets, then I think
12 the language of A&B-first fits. Because there's a --
13 there's language there that talks about not only an
14 injury, but -- to injure but an attempt to injure.

15 And here, Judge, I think, because she was struck
16 with the bullet, I don't think -- if -- if the jury
17 believes that he pulled the trigger, had a general
18 depraved-heart malice, and hit her with a bullet from his
19 gun, I think it's either an ABHAN or nothing, as far as
20 the assault statutes.

21 And again, Judge, I -- I think at some point the
22 legislature may need to revisit. But the state of the
23 law now, I think that's what we're -- what we're stuck
24 with.

25 THE COURT: Well, I think what I'm going to do ---

1 MR. STUMBO: I do think A&B-first would be
2 confusing, though, Judge. That -- that's -- that's why
3 -- you know, because the language, there's a lot of
4 overlap. And -- but I don't think it's the appropriate
5 charge or -- for these facts.

6 (Off the record briefly.)

7 THE COURT: All right. After looking at the
8 definitions, I think I am going to have to charge -- if I
9 charge high and aggravated nature, I think I have to
10 charge assault and battery, first-degree; and assault and
11 battery, second-degree. And I say that because of the
12 different definitions between great bodily injury and
13 moderate bodily injury.

14 MR. STUMBO: Right. Yeah. I -- I understand, Your
15 Honor. It's ---

16 THE COURT: And so I think he's -- now, I don't
17 think I can have -- I don't think third-degree is
18 applicable. But I think, because ---

19 MR. GEOLY: I understand, Judge.

20 THE COURT: Assault and battery of a high and
21 aggravated nature, you have to have great bodily injury.
22 First-degree, you just have to have the -- an act likely
23 to produce death or great bodily injury. An assault and
24 battery, second-degree, is if it's moderate bodily injury
25 ---

1 MR. STUMBO: Right. Judge ---

2 THE COURT: --- if it occurs.

3 MR. STUMBO: --- and our -- my position's generally
4 been -- and I -- I completely understands the Court's
5 position. The -- that part of ABHAN where it says "by
6 means likely to produce death or great bodily injury," my
7 position's always been a -- a gunshot wound, fired by
8 somebody intentionally, kind of what that general
9 criminal intent -- can't be anything less than an ABHAN.
10 But with the language, there's so much overlap between
11 the language.

12 THE COURT: There is.

13 MR. STUMBO: I -- I get the -- the problem with
14 that.

15 THE COURT: Well, and I think it is a jury question
16 as to whether or not ---

17 MR. STUMBO: Yes, sir.

18 THE COURT: --- there was moderate bodily injury or
19 great bodily injury, even though ABHAN, it just has to be
20 -- let's see -- it either has to be great bodily injury
21 or an act likely to produce death or great bodily injury.
22 I agree with you. If you fired a gun, it is likely to
23 produce death or great bodily injury. But I still think
24 that they can find that there was just moderate bodily
25 injury in this incident. And I think I'm going to have

1 to charge that.

2 MR. STUMBO: Yes, sir.

3 THE COURT: All right?

4 MR. GEOLY: Thank you, Your Honor.

5 THE COURT: All right. So I'm going to add first-
6 degree and second-degree with definitions of moderate --
7 of great bodily injury and moderate -- moderate bodily
8 injury.

9 MR. GEOLY: And -- and I appreciate that, Your
10 Honor. Thank you.

11 THE COURT: Yeah.

12 MR. GEOLY: I -- I did want to be clear, you know,
13 kind of how I started this. I -- I -- I'm doing that
14 because of the situation we find now. And I wouldn't
15 want it to be misinterpreted that by asking for this,
16 I've waived my objection to the -- the lesser-included.
17 I hope I've made that record clear. I -- I ---

18 THE COURT: Well, and I understand that. Yeah.

19 MR. GEOLY: Thank you, Judge.

20 THE COURT: All right.

21 All right. Anything else the state wants on the
22 record in that regard?

23 MR. STUMBO: No, sir, Your Honor. I just assume
24 that the verdict form for attempted murder will change to
25 add ---

1 THE COURT: Yeah. I ---

2 MR. STUMBO: --- two check boxes. And then, the
3 last box would say: "We, the jury, find the defendant
4 not guilty of" ---

5 THE COURT: Uh-huh.

6 MR. STUMBO: --- all four of those and ---

7 THE COURT: Yeah. It's ---

8 MR. STUMBO: --- just list them ---

9 THE COURT: --- going to be ---

10 MR. STUMBO: --- list them.

11 THE COURT: --- the -- the attempted murder is going
12 to be guilty of attempted murder; guilty of assault and
13 battery of a high and aggravated nature; guilty of
14 assault and battery in the first degree; guilty of
15 assault and battery in the second degree; or not guilty.

16 MR. STUMBO: Okay. Yes, sir. I understand.

17 THE COURT: All right.

18 MR. GEOLY: Thank you, Judge.

19 THE COURT: All right. It's going to take me a
20 while to get this done. Anything else that we need to
21 address?

22 MR. STUMBO: That's all, Judge.

23 MR. GEOLY: I think that's all, Judge.

24 THE COURT: All right. I'm not going to include
25 this -- that you handed up on that.

1 MR. GEOLY: I understand, Judge.

2 THE COURT: All right?

3 MR. GEOLY: Thank you.

4 THE COURT: All right. Is the jury back or do we
5 know?

6 CLERK OF COURT: Yes, sir.

7 THE COURT: Okay. All right. Y'all give me a
8 minute and let me go make these changes. Okay.

9 MR. STUMBO: Okay.

10 (The Court went off the record at 1:15 p.m.)

11 (The Court went on the record at 1:40 p.m.)

12 THE COURT: All right. Gentlemen, I've made those
13 corrections, the changes on the charges. I've sent them
14 to the clerk to print out for us. I've also added --
15 since I'm charging assault and battery in the second
16 degree, I've added the definitions of great bodily injury
17 and moderate bodily injury to the charges as well.

18 MR. STUMBO: That is straight out of the statute?

19 THE COURT: Yeah. Straight from ---

20 MR. STUMBO: Yeah?

21 THE COURT: --- the statute ---

22 MR. STUMBO: Okay. That's ---

23 THE COURT: --- verbatim.

24 MR. STUMBO: --- that's fine.

25 THE COURT: Okay?

1 MR. GEOLY: Judge ---

2 MR. STUMBO: Yeah.

3 MR. GEOLY: --- one other housekeeping matter, a --
4 a -- nothing really to do with the case. And I really
5 think Newberry might've already been so on top of it.
6 But when I came back in from lunch, we're apparently
7 having some demonstrators outside. One of the -- the
8 signs I -- I felt was particularly disturbing, all babies
9 -- you know, they got a little probably 4-year-old girl
10 out there carrying a -- "All babies' lives matter."

11 I'd hate if any of the jurors encountered that and
12 that has an impact on them. I mean, these people were
13 close enough that -- you know, obviously, they got First
14 Amendment rights, Judge. But I -- I think they were
15 probably closer than people allowed on election day, you
16 know, to -- to where this jury trial's taking place.

17 So it -- I -- I think it might be in our interest to
18 determine whether or not any of the jurors encountered
19 those people and/or that sign, "All babies' lives
20 matter," and whether it would impact them.

21 THE COURT: Okay. No. I'm not ---

22 MR. GEOLY: Yes, sir, Your Honor.

23 THE COURT: --- going to get into that.

24 All right. Anything from the state before we bring
25 the jury in?

1 MR. STUMBO: No, sir. We're ready.

2 THE COURT: Anything from the defense before we
3 bring the jury in?

4 MR. GEOLY: No, sir, Your Honor, other than we -- we
5 are going to, I guess, receive those new charges or were
6 ---

7 THE COURT: No. I'm ---

8 MR. GEOLY: --- we not?

9 THE COURT: --- not printing them out again. I've
10 just ---

11 MR. GEOLY: Okay.

12 THE COURT: --- gone ahead and added them in there.

13 MR. GEOLY: Sure.

14 THE COURT: All right.

15 MR. GEOLY: Then, no objection. Thank you, Judge.

16 THE COURT: All right. Let's go ahead and bring the
17 jury in.

18 (Off the record briefly.)

19 (Whereupon, the jury entered the courtroom at 1:43
20 p.m.)

21 THE COURT: All right. Ladies and gentlemen,
22 welcome back. We're ready to resume the trial of this
23 case. As I told you before we broke for lunch, the state
24 has presented their case, all of the evidence and
25 testimony has been presented to you, and now is the time

1 of the trial when the attorneys will make their closing
2 arguments.

3 Now, just like their opening statements, these
4 closing arguments are not evidence in this case. It is
5 simply the attorneys' contention as to what they think
6 the evidence has shown and the law to be applied in this
7 case. If, at any time, an attorney references a factual
8 matter that is different from the facts as you find them
9 to be or references the law that is different from the
10 law as I will charge you at the end of their closing
11 arguments, then you're to disregard that portion of their
12 closing arguments. Because these closing arguments are
13 not evidence of the facts, and they are not a charge on
14 the law. It is simply the attorneys' contention or
15 opinion as to what the facts are and the law to be
16 applied.

17 All right. Mr. Stumbo?

18 MR. STUMBO: Thank you, Your Honor. If it ---

19 THE COURT: Yeah.

20 MR. STUMBO: --- please the Court.

21 CLOSING ARGUMENT BY MR. STUMBO

22 MR. STUMBO: Newberry County Hospital. We all that
23 live around town in Newberry and probably those of you
24 who live in -- down in Prosperity or Little Mountain or
25 up in Silverstreet or Kinards, that's probably a building

1 that you encounter a good bit; probably drive by it on
2 Wilson Road; you see it up there on the left or the
3 right, depending which direction you're coming from; see
4 several times a week.

5 The building, folks, represents the bookends of minor child
6 life. , 2012, minor child's born.
7 Birth, happy time. Anytime a new life enters the world,
8 it's happy; it's joyous. minor child came into this world and
9 on this earth the -- of 2012, over at the hospital.

10 Seven years and seven days exactly, he returns to
11 that hospital with a bullet through his head, never to
12 see the light of day again. That building represents
13 that, the bookends of that young man's life.

14 Now, in the meantime of that seven years, seven days
15 -- and that's -- that's this young man right here. Seven
16 years and seven days, this young man, he thought; he
17 heard; he saw; he spoke. He did all the things that a
18 young, 7-year-old child does. Because of the actions of
19 Xzavier Davis, that seven years and seven days is all
20 that that young man had on this earth.

21
22 Now, I want to thank y'all. I know Mr. Daniel did
23 this in opening. But folks, I -- I know this. It -- it
24 is not lost on me that this is not something that you
25 folks have to deal with day in and day out in your lives.

1 Some of you may have been public servants or attorneys or
2 had other interaction with the legal system and seen some
3 of this stuff.

4 But, folks, as you saw Sheriff Foster on this
5 witness stand -- and the sheriff, your elected sheriff,
6 has been doing this for 45 years. And nothing prepares
7 you -- nothing prepared him for what he had to see that
8 day. No matter how many cases he works or has worked
9 over the years, the thousands, nothing prepares you for
10 seeing a boy that age come into an emergency room with a
11 bullet through his head.

12 And so, folks, I want to thank you. Because now you
13 have been brought into this situation where -- that we're
14 dealing with in the criminal justice system, where
15 there's an investigation. And there was a thorough, full
16 investigation in this case. And the sheriff's department
17 and SLED and all of their partners did a fantastic job.
18 Sheriff Foster should be proud of his guys; and then, the
19 prosecution of the case, what we're here for today.

20 Y'all have been brought into that. And it's a great
21 honor and duty. I know you didn't ask for it. I know,
22 when you got that summons in the mail, you had to come.
23 I get that. This isn't volunteer work. But y'all have
24 sat here attentively and you've listened to this case.

25 Folks, I know it was boring probably, you know, some

1 of the pictures, going through them one at a time, and
2 the -- the exhibits and the reports and everything that
3 we had to put in front of you. I know at times that got
4 very laborious or very tedious.

5 But the reason for that, y'all -- and -- and -- and
6 Taylor told y'all at this -- the beginning of this case
7 that the state always bears the burden of proof, okay?
8 Now, as your elected solicitor, I gladly bear that
9 burden, okay? The Constitution requires me to bear the
10 burden of proof and prove a case beyond a reasonable
11 doubt. And so I gladly bear that. I've -- I've spent
12 most of my adult life as a -- in -- in my professional
13 life doing that.

14 And in this case, I gladly bear the burden again,
15 folks, because the evidence is clear. The law is clear.
16 And there is one answer at the end of this that should
17 come out of that jury room after you deliberate.

18 Let's talk about the law a little bit. For what
19 kind of -- this is a road map here. We're going to talk
20 a little bit about the law. The judge, Judge Culbertson,
21 now -- and he told you this at the beginning -- he is the
22 judge of the law in this case. So if there's anything he
23 says different from me, obviously, he is the boss when it
24 comes to the law that you are to apply.

25 But I think what you'll find is, as you see some of

1 the -- the phrases that we're going to talk about here,
2 you're going to hear those from the judge's mouth in a
3 few minutes during his charge. Proof beyond a reasonable
4 doubt, if I can direct your attention on screen, each
5 element must be proved. And I want you to listen to this
6 -- for this phrase: firmly convinced. The judge will --
7 will say that phrase when he talks about the burden of
8 proof.

9 So the question you have to ask yourself as to these
10 offenses charged are: Are you firmly convinced? If you
11 are firmly convinced that Xzavier Davis did what he's
12 accused of doing, then we have met our burden and the
13 verdicts must be guilty.

14 So firmly convinced, that breaks it down to a little
15 more simple term. You don't hear "beyond a reasonable
16 doubt much" in everyday life. But firmly convinced is
17 something that -- that in a -- that happens
18 intellectually as you -- as you hear the testimony, as
19 you see the exhibits. Are you firmly convinced that he's
20 guilty of what we have indicted him for?

21 Murder is the first charge. That's the lead charge.
22 And I would -- I would indicate to y'all that from the
23 state's perspective, it's a most heavy charge here,
24 because we're dealing with minor child , 7-year-old boy.
25 And in South Carolina you have to prove murder by these

1 two primary elements: Killing another person -- that's a
2 homicide. Like you heard Dr. Rose say yesterday, that's
3 one of the manners of death, is homicide, that she can
4 determine as a -- as a pathologist.

5 And this is the key here: with malice aforethought,
6 either express or implied. And y'all have heard this
7 term now numerous times over the past several days in
8 this case. Mr. Geoly talked a lot about it in his
9 opening, and he talked about every time he crossed a
10 witness: "Well, do you know if they had malice
11 aforethought?"

12 Well, of course, they don't -- that -- that's not
13 their job to determine whether there's malice
14 aforethought and that standard's met; it's the jury's.
15 And we're going to talk a little bit about what malice
16 aforethought is, because it can be very easily
17 misunderstood, okay?

18 What is malice? The judge is going to tell you that
19 malice is the intentional doing of a wrong act without
20 just cause or excuse and with an intent to inflict an
21 injury or death. That's a -- the first kind of broad
22 view of what is malice.

23 Now, it can be either express or implied. So
24 express malice -- and the judge will tell you about this.
25 It's -- it's kind of more of a deliberate intent. You

1 know, you see this from the stuff like lying in wait for
2 someone or words coming out of somebody's mouth that,
3 "I'm going to kill you." That -- that is the sort of
4 express malice that we're talking about, where there is a
5 specific intent to kill.

6 And this is very important, ladies and gentlemen.
7 Because from the beginning in this case, the defense
8 attorney has told you that you have to have a specific
9 intent to kill, in terms of a *mens rea*, to be guilty of
10 murder. And, folks, that's not the law in our state.

11 Because an implied malice is this -- and the judge
12 is going to -- going to use this -- this phrase -- total
13 disregard for human life and that you can tell this by
14 circumstances, okay, words. Some words, they may not be
15 the words: "I am going to kill you."

16 But there may be words that -- that lead you,
17 combined with actions, to demonstrate this -- this
18 reckless indifference to life or a total disregard for
19 human life, okay, folks? This is a critical point in
20 this case. I can't emphasize this any more. In South
21 Carolina this has always been the law.

22 And it's that way for a reason, okay? And I want
23 you to think about this for a second. If it is, as Mr.
24 Geoly has said in his opening statement to you, the
25 defense attorney's position is you have to have a

1 specific *mens rea*, a specific intent to kill a specific
2 person.

3 Think about this -- and Mr. Daniel, I think, said it
4 real well in his opening. He talked about going down
5 Main Street here at 100 miles an hour during Oktoberfest
6 and hitting someone and killing them. Well, it's not
7 enough to afterwards to say: "Well, I was just trying to
8 get to work," or "I was just trying to get to school," or
9 "I was -- I was trying to get from Point A to Point B."

10 Driving that fast through a crowded area and killing
11 someone with a vehicle would demonstrate this total
12 disregard for the lives of the people that are out there.
13 When you see people there and you do it anyway, you do
14 care. There is an indifference to that. And that is
15 murder. In that -- that fact scenario, it'd be murder.

16 Think about this: Under this theory that -- that he
17 wants y'all to buy into, we see drive-by shootings
18 commonly. So in a drive-by shooting, someone comes by
19 and -- and empties a gun at a crowd of people. Is it
20 enough for that -- and say -- say, in that crowd of
21 people, there's a 7-year-old child that may not have been
22 the intended target of that drive-by shooting; they get
23 hit and killed.

24 Is it enough for the person that committed the
25 drive-by shooting to later say: "Well, I never meant to

1 kill that -- that 7-year-old," or to say, "I was just
2 trying to scare him," or "I was just trying to prove a
3 point." It's -- anything, that's not enough.

4 If you act in a total disregard of -- for human life
5 in the way that you conduct yourself, your actions, and
6 those circumstances show that, folks, that is malice.
7 And our -- and under our law, that is murder. It -- it
8 was yesterday; it is today. And that -- likely, that's
9 the way it will always be.

10 Because our -- we understand, under the law, that
11 this type of behavior that results in somebody's death
12 should result in a murder conviction, folks. So that is
13 what we have here.

14 But what I would -- I would propose to you is that
15 express malice matters too, okay? We're going to talk a
16 little bit more about that a second when we talk about
17 the other indictment, which is the attempted murder of
18 Indigo, who gets hit in the leg with a bullet. So it --
19 it's the state's position that both types of malice exist
20 in this case. And we're -- I'm going to tell you why.

21 Now, let's talk about aforethought. Premeditated is
22 a word you hear on TV and movies a lot. Premeditated
23 murder -- some states have what, you know, you would call
24 kind of a premeditation element.

25 In South Carolina we've never had that. In our

1 state it's called malice aforethought. And it's a
2 similar concept. But basically, there's no requirement
3 under the law that the malice has to be planned out.

4 So in other words, as it applies in this case, there
5 was an escalation of Xzavier Davis's anger and malice
6 here when he got home that night. Couldn't get -- wasn't
7 let in. He bangs on the front door, back door; goes
8 back; busts a window out. He's arguing; the kids wake
9 up. It's three in the morning.

10 He goes outside. He shoots in the air, okay? The
11 malice is building, folks. And ultimately, he has the --
12 the time, as Indigo gets her three kids into the backseat
13 of that car, to go back through the house, switch out the
14 guns -- and you'll have guns back in the jury room, the
15 .22 with the laser sights that she describes. He empties
16 that in the air and puts it in that green bin at the back
17 door.

18 And then he gets this 9-millimeter full of eight
19 bullets, which is the most that'll hold. And he comes
20 out that door. And, folks, his malice is evident at that
21 point, when he comes out that door and he empties that
22 clip, okay?

23 So doesn't require him planning out this shooting,
24 okay? The law doesn't require that. You'll -- what
25 you'll hear is that there's no requirement that must

1 exist for any appreciable length of time. It may be
2 conceived actually the moment that the assault occurs,
3 okay? So just to -- just to know, this is not
4 premeditation. It is malice aforethought.

5 Now, this is an important doctrine here. You're
6 going to hear the judge tell you about transferred
7 intent. And this is applicable in cases where there is a
8 specific intent to kill one person, okay.

9 And we believe that by his words and actions, he
10 intended to kill Indigo that night. And then he hit
11 somebody else that he didn't mean to kill. I don't think
12 our position is that he was trying to kill those kids.
13 He was trying to kill Indigo.

14 And we'll talk more about the facts in a second and
15 -- and -- and show you this. But six of the bullets hit
16 the car, and five of the six that hit the car right here
17 around the front driver's area, folks. Based on what he
18 said in the house to her: "If -- if -- ain't nobody
19 staying here tonight if I got to go to jail." He empties
20 a gun in the air. He's angry.

21 And then, ultimately, afterwards -- you heard Mr.
22 Wallace and Ms. Vinnie, Indigo's parents, say immediately
23 after the shooting -- they're trying to figure out what
24 happened. They call, and he says, "I ain't no mother-
25 effing chap. Don't play with me." That was that state

1 of mind and that intent, folks.

2 So that's the *mens rea*. Mr. Geoly has been talking
3 about this *mens rea*. And you won't hear the words *mens*
4 *rea* in the judge's charge, by the way. But that is just
5 a Latin term that talks about state of mind or this
6 criminal intent that the judge will tell you about.

7 But this is the doctrine of transferred intent: If
8 the defendant, with malice aforethought, attempts to kill
9 or seriously injure one person, but by mistake or
10 inadvertence kills a different person, the defendant
11 still has the intent to kill. That intent is merely
12 transferring the intent from the original person to the
13 actual person killed, okay?

14 So, folks, if you find that the malice, based on
15 Xzavier Davis's words and actions and the circumstances
16 around what he did -- shooting eight times into an
17 occupied car; and that his anger towards Indigo, furious
18 at her by this point; he shoots and one of those bullets,
19 as it did here, catches *minor child* and kills him. And
20 that's transferred intent. This is a classic case of
21 transferred intent, folks.

22 It's also been said at times, malice follows the
23 bullet. That's kind of a -- a -- a -- a -- a more
24 succinct way to -- to put the longer legal charge
25 transfer intent. Taylor ---

1 MR. GEOLY: I'm going to ---

2 MR. STUMBO: --- told you ---

3 MR. GEOLY: --- object, Your Honor, to "malice
4 follows the bullet."

5 MR. STUMBO: Case law says, Judge, that that is not
6 a charge, but it's ---

7 THE COURT: I've already ---

8 MR. STUMBO: --- can be ---

9 THE COURT: --- instructed the ---

10 MR. STUMBO: --- argued ---

11 THE COURT: --- jury ---

12 MR. STUMBO: Yeah.

13 THE COURT: --- that if it's different than as I'll
14 instruct -- overruled.

15 MR. STUMBO: Yes, sir.

16 THE COURT: Go ahead.

17 MR. STUMBO: Thank you, Judge.

18 And Mr. Daniel told you in opening -- he said: "A
19 bullet doesn't have eyes." Right? And that's kind of
20 this -- the -- the same idea that we're talking about
21 here.

22 When you shoot a gun and you're an adult human being
23 that knows what a gun is capable of doing -- and this is
24 a grown man here. We're not talking about a 5-year-old
25 who picks up a gun and shoots it and doesn't know the

1 power of the gun or what it can do. It's a grown man
2 shooting this gun. He knows what a gun can produce.

3 Then, the malice that you have -- I mean, to say
4 that he didn't know the kids were in the car -- Mr. Geoly
5 may say that to you -- folks, is ludicrous, based on what
6 you heard from Indigo. I mean, he's shooting the gun in
7 the air and she wouldn't admit to me that -- that -- that
8 they were crying today. But she said it at one point,
9 and you heard that -- it's part of the evidence in this
10 case -- that he did know they were the car?

11 Folks, ludicrous. No set of circumstances would
12 lead -- lead you reasonably to that conclusion.

13 Let's talk about attempted murder. This is a --
14 similar, but a little bit different. An attempt to kill
15 another person, so an attempted homicide, with malice
16 aforethought -- again, all the same concepts apply,
17 either express or implied. And this is the difference.

18 The -- our courts have said now that there is a
19 specific intent to kill in attempted murder that you
20 don't have in -- in murder. Murder is a general-intent
21 crime. It could be general or specific. This is a
22 specific intent to kill.

23 Now, the judge is also going to charge you -- and I
24 might put some slides up here on this, because it's a lot
25 of words the judge is going to read about assault and

1 battery of a high and aggravated nature as a lesser-
2 included offense of attempted murder or assault and
3 battery first-degree or an assault and battery second-
4 degree. Now, folks, what I will tell you is all of those
5 assault crimes are lesser-included offenses of an
6 attempted murder.

7 And generally, under the law they are charged in
8 cases like this. The reason is, there's different
9 degrees of injury that you can consider. But one thing I
10 want you to listen for, when the judge charges it, is
11 this: He says if there's an -- he'll tell you that in an
12 assault and battery high and aggravated nature, what we
13 call an ABHAN sometimes, is the -- the acronym for that
14 -- is that if it is -- there -- the means of the injury
15 is likely or could produce significant injury or death,
16 okay, or great bodily injury, is what the law says --
17 then -- then, that's typically an ABHAN.

18 So what -- if you find that he was fired wildly and
19 not firing at Indigo but was just acting in a extreme
20 indifference or a total disregard for human life, as we
21 talked about in that implied malice, then it would be an
22 -- an assault and battery, high and aggravated nature,
23 would be your verdict, instead of attempted murder.

24 But to keep it simple, folks, this is an attempted
25 murder of Indigo Penny -- or Indigo Davis. I'm sorry. I

1 -- I keep saying that because she had not changed her
2 name at the time of this crime. And I've been looking at
3 incident reports that continuously say Indigo Penny.

4 This is an attempted murder, folks. It is a
5 domestic incident that escalated to an attempted murder
6 of his wife and ended up in the murder of his child --
7 his stepchild. But if you find that he wasn't -- you
8 know, that there's not enough facts to show that he was
9 specifically intending -- I know Indigo sat on this
10 stand, folks, and said: "I don't think he was intending
11 to kill me. I think he was trying to shoot the tire."

12 Okay. Well, I mean, I -- folks, I -- let -- let's
13 talk about Indigo for just a moment. I'm not here to
14 beat up on Indigo. I'm not -- I'm not doing that. But I
15 will tell you that I think it's very clear that -- that
16 at this time, she's emotionally conflicted.

17 And it took a while sometimes for her to finally
18 admit to stuff that happened that night when we were
19 having this exchange the other day. And, of course, Mr.
20 Geoly's asking her what -- "Well, what do you think he
21 was trying to do?"

22 Well, this -- this story of he's trying to shoot out
23 the tire is pretty convenient at this point. But, folks,
24 she's fleeing. She has no idea what his intent is at
25 that point. She was furiously trying to get her kids in

1 the car and get away from him.

2 Why do you think she was doing that at three in the
3 morning? Because that night she was terrified of him, of
4 what he was capable of doing. Terrified.

5 But now there is a -- there has been a shift with
6 her, okay? I think that's pretty obvious, seeing her on
7 the stand. And I believe that emotional conflict, y'all,
8 has caused an extreme disconnect here between what
9 happened that night and the way she views it now. And I
10 think that's -- that's -- that's very clear.

11 But at the end of the day, folks, all of the facts
12 that were gathered that night in interviews and -- and
13 information that was gathered and all of this that law
14 enforcement did, the physical evidence, folks, it -- it
15 shows circumstances that lead to a specific intent to
16 kill. We believe that that applies in this case.

17 If you don't believe that he specifically intended
18 to kill her, I think there is still a very strong case
19 for assault and battery, high and aggravated nature.
20 Because there again, you fall back to this idea of -- of
21 this indifference to -- to the lives of human beings,
22 which would apply in an ABHAN, where it doesn't apply
23 here in an attempted murder.

24 The third indictment, y'all, is -- is very
25 straightforward. It's possession of a weapon during the

1 commission of a violent crime. If you finally that he
2 possessed a weapon, such as a gun or a knife, during the
3 commission of a crime in 16-1-60, which the judge will
4 tell you what those crimes are that -- murder, attempted
5 murder, and ABHAN, are all -- they're all violent crimes
6 under our law. And possession of a -- of a weapon during
7 the commission of those crimes would lead you to a guilty
8 verdict on that particular indictment.

9 Folks, I -- Sheriff Foster -- and I just want you to
10 -- to -- to think about this for just a moment. Defense
11 attorney asked not only him, but just about every law
12 enforcement witness: "What -- what is it that you -- you
13 know about what his intent was before this thing
14 happened?"

15 And the answer was the same, really, for all of
16 them. And I wasn't trying to be a -- you know, smart-
17 alecky when I asked them: "Have you ever been on the
18 scene of a crime before it happened or when it happened?"

19 And the -- the honest truth for law enforcement is
20 -- is no. They have to come -- and Sheriff Foster, I
21 think, put it perfectly. He said: "We have to come pick
22 up the pieces afterwards."

23 And, folks, I'm going to just briefly go through
24 some of this evidence. But these are the pieces that
25 they picked up to try to, you know, make their case. And

1 I think it -- it's pretty obvious that they did their
2 job. They secured those crime scenes.

3 They found these weapons after they went and got a
4 search warrant, like they're legally required to do.
5 They -- they followed all of the legal requirements that
6 they were supposed to -- to do and found the -- the
7 weapons involved with this crime. They found the shell
8 casings. And where they found them, we'll talk a little
9 bit about -- more about that a second. They processed
10 the car, and we'll look more -- more at that.

11 But, folks, essentially, this case is about anger
12 and an intent to kill because he wasn't happy with what
13 -- what happened that night. He got home. He expected
14 the door to be unlocked. He busts the window out, folks,
15 of his own house, he's so angry.

16 But the facts that we have here -- and you heard the
17 SLED agent testify and Lt. Dickert how they processed
18 this car that you have six bullet defects in this car.
19 And Defect F is pretty obviously the one that took Iven's
20 life, folks. But you have another one up here that was
21 -- that was a -- a -- not through-and-through shot, but a
22 defect and a defect on the hood where it was -- both of
23 those places where a bullet basically ricocheted.

24 Now, they were only able to recover two of the -- of
25 these projectiles in the yard. The other ones could be

1 anywhere. This one that went off the hood, if it skips
2 off a hood and keeps going that way at a high rate of
3 speed, it could've ended up a long way away from the
4 scene.

5 But there was one that -- that obviously lost
6 velocity after it hit the car. Looks like it hit Vinnie
7 and Wallace's house and just landed on the -- the
8 pavement. But they find these bullets in the car as well
9 -- or these fragments. And there's one that we believe
10 probably hits Indigo through the Defect E and bounces --
11 I mean, it -- once it loses velocity, it can hit anywhere
12 in the car and land. And it ended up landing in the
13 backseat with the kids and the other one there where the
14 center console was.

15 But law enforcement, folks, collected every piece of
16 evidence. And as Sheriff Foster said, they did pick up
17 the pieces of this case. And they did it methodically,
18 and they did it by the book.

19 And they gave you every tool you need that we've put
20 into evidence here. Now, do we put -- like the SLED
21 agent told you, she took over 500 pictures. We tried not
22 to show you 500, because there's a lot of them that are
23 extras and duplicates.

24 But we broke it down to the ones that we believed
25 were -- were necessary and critical. And the evidence

1 that we believe was critical in this case is right here
2 on this table. And it's evidence you'll have back in the
3 jury room when you deliberate in this case.

4 The bottom line, folks, is when is Xzavier Davis
5 comes out the front door of that house with this 9-
6 millimeter in his hand, this one -- and you'll have it
7 back in the jury room. It's -- we got it zip-tied to the
8 box and got the lock on it, like we're supposed to do to
9 keep it safe. When he comes out with this pistol in his
10 hand, there's malice in his heart. He shoots once,
11 twice, three times, four times, five times, six times,
12 seven times, eight times -- not an accidental shot, eight
13 shell casings right there together, which means he shot
14 them -- (gestured). How quickly does it take to empty a
15 gun of eight bullets? Not long.

16 And Indigo had backed up and was starting to drive.
17 What were they seeing at that point? There again, we
18 talked about his anger as he comes out at 3 a.m. Eight
19 times, knowing that there were four human beings inside.

20 And then he says this later too. You -- you don't
21 think there was not anger? This was right after the
22 shots were fired. "I ain't no mother-effing chap."

23 Wallace talked about it. Vinnie talked about it.
24 "Don't play with me." He was amped up because he was
25 angry. There was malice there.

1 But this is -- I want you to -- to take a look at
2 this. This is the scene that they came upon. And this
3 is taken from the driveway, kind of towards the -- the
4 back side of the driveway, looking back at the front
5 steps.

6 Indigo is parked in the front there, kind of where
7 that mud is. And I want you to imagine her backing the
8 car up to a position when she can drive straight out of
9 the driveway. The last thing likely that Penny
10 [sic] ever saw in his life was looking from this angle
11 back towards that door as his mother's starting to
12 accelerate.

13 And she says she even -- she even told y'all what he
14 said. The last thing she heard him say was: "Don't
15 worry, Mama. It'll be okay." Even at that point, he was
16 trying to comfort his mama, even though in this horrific
17 situation.

18 Folks, you heard Mr. Geoly talk about fatherly love?
19 Fatherly love? The last thing this young man saw, the
20 last thing that -- thought that probably went through his
21 head -- and in God's mercy, it probably only lasted a
22 couple of seconds -- was, Why is he shooting at us? Why
23 is the man that's supposed to be his protector, the man
24 that's supposed to be the one that loves him and gives
25 him that fatherly love, why is he shooting at us?

1 And then the lights go out. This bullet, traveling
2 faster than the speed of sound, like Dr. Rose told you,
3 goes through that young man's head. That's the last
4 thing he ever saw.

5 And, folks, that's not Indigo Penny's fault. She
6 locked the doors? That -- that justified this, this
7 level of anger?

8 What you're going to hear is it's -- it's not --
9 it's not his fault. He was just trying to stop them,
10 just trying to shoot out the tires. Are you kidding me?
11 This?

12 Seven years and seven days that -- that young man,
13 before he left this earth, seven good years. Gallman
14 Elementary School; almost finished his first grade year
15 when this horrific, horrific event happens.

16 Another Latin term that we've heard -- I believe
17 defense attorney used it in his opening -- was *verus*
18 *dictum* [sic], which is what the word verdict comes from.
19 And those words mean to speak the truth in Latin. And so
20 that's where we get verdict. So verdict literally means
21 speak truth -- or -- or speak -- to speak truth.

22 And I would submit to you, ladies and gentlemen,
23 that there is only one verdict this case. And it's three
24 separate verdict forms. And there's only one verdict
25 that will speak truth in this case. There's only one

1 verdict that will speak justice in this case for that
2 young man. And that's a verdict of guilty.

3 Thank you for the time and attention. I lay that
4 decision in your very capable hands. Thank you.

5 THE COURT: Mr. Geoly?

6 MR. GEOLY: Please the Court, Judge. I ---

7 THE COURT: Yes.

8 MR. GEOLY: --- I want to see the presentation. Beg
9 the Court's indulgence just one moment, Judge.

10 (Off the record briefly.)

11 CLOSING ARGUMENT BY MR. GEOLY

12 MR. GEOLY: Ladies and gentlemen of the jury, I want
13 to thank you for being here. You've paid attention. And
14 -- and I've seen that. And that's difficult to do
15 sometimes when you're here as long as we've been.

16 It seems like three weeks ago we were striking the
17 jury. But especially for the tediousness of -- of what
18 they had to present, and -- and I understand that. And
19 -- and y'all did an amazing job of staying awake and
20 watching them do it.

21 You know, at the beginning I -- I told you, the old
22 man told me once when he I had first started doing this
23 that the two most important thing you would do is serve
24 your country during a period of war or serve as a juror.
25 And part of that was -- and he explained to me; I didn't

1 believe it then. But you have to come and sometimes
2 listen to stuff like this. And then you have to do not
3 what you think is right, but you have to follow the law.

4 And -- and the sheriff's department, I -- I warned
5 y'all about them before I got here. They're good. This
6 Newberry County Sheriff's Department, they're as good a
7 law enforcement as you're going to find when they're --
8 they're doing law enforcement work.

9 This isn't that. I didn't put up much of a fight.
10 Y'all take all this. I -- I told you with this case was
11 about, and the solicitor was here and he heard it too.
12 This is about *mens rea*. And he's right. The judge isn't
13 going to talk to you about *mens rea*.

14 But the judge is going to talk to you about criminal
15 intent. And if you'll remember, I said that's a Latin
16 word, *mens rea*. But what it's talking about is your
17 criminal intent and whether or not you have an evil
18 mindset. And they knew that what -- that's what this
19 case was about.

20 And you take all of this, every picture; go look at
21 them; look at the guns. What they haven't done is shown
22 you one bit of malice aforethought. And they're banking
23 on the fact that they can go "dead 7-year-old," "dead
24 7-year-old." It is a tragedy. And it is a tragedy
25 beyond belief that there is a dead child.

1 But they, to prove he committed murder, have to show
2 malice aforethought. It means he has to have the malice
3 before it happens. Now, the judge will -- will probably
4 tell you, it's -- it's not premeditation.

5 And I told you at the beginning. It's been watered
6 down to. It's not a day; it's not a year; it's not a
7 month. It can literally be almost instantaneously
8 before.

9 But it has to happen. If there's no malice
10 aforethought, the bottom line is, it's not murder. And
11 that has to happen. Even though it can happen in an
12 instant, it, as a fact, has to happen. And it has to
13 happen beyond a reasonable doubt. It's not okay that,
14 well, maybe there was malice aforethought.

15 As much as this is about `minor child`-- let me back up.
16 There's no certainty like a mother's love. None. You
17 might get in a fight with your spouse. He might not be a
18 spouse next time. She -- she might not be a spouse a
19 year from now. But your child, there's no certainty like
20 a mother's love.

21 And if this were about `minor child` today, she'd be
22 sitting right there, where she has been all week, where
23 they moved her to, to sit. Because at first, she was
24 sitting over here. But they moved her.

25 Now, she'd still be here if this was about `minor child`

1 But this, because he's an American citizen, just like every
2 one of you, he's entitled to a jury of his peers. And as
3 much as this whole situation is about Minor child
4 , this is Xzavier Davis's day, where he's cloaked in
5 righteousness.

6 The judge is going to tell you, he's presumed
7 innocent. This is an innocent man. All this stuff they've
8 shown you, they have to prove the elements of a
9 crime beyond a reasonable doubt. He showed you his
10 little chart. I apologize. I don't have it click up
11 there and show you. They -- they got more resources than
12 I do.

13 And they should've proven to you beyond a reasonable
14 doubt -- whatever they had to do to come in here and
15 prove it, that should have been done. Sheriff's
16 department did their job; you got plenty of stuff. Not
17 one thing's been done to show you malice aforethought,
18 not one.

19 The -- they told you from the stand, one of those
20 SLED agents, she's not from that department. She went on
21 to tell you, she can't even tell you those are all
22 defects; that those are all -- excuse me -- shots. She
23 doesn't know that all the things they say are defects.
24 And she admitted right here that I can't tell you with
25 certainty that that's a bullet marking.

1 But you're supposed to take what he says and take
2 these little markings that SLED won't even say beyond a
3 reasonable doubt is a bullet, and you're supposed to then
4 infer? Because that's what they're going to want you to
5 do. Remember, we don't have malice, so let's infer it.

6 Well, I want you to pay close attention to what the
7 judge tells you. Because the judge is going to tell you,
8 criminal intent, you may infer for malice. Now, the
9 law's a funny thing. We use very particular words like
10 "may," which means you can do something. So I would
11 argue that even an inference can be raised, it's a
12 rebuttable inference. And it's something that you have
13 to do.

14 Remember, I told you at the beginning -- and if
15 anything I say is different than what the judge says,
16 judge is right. Judge is right about the law. But you
17 decide what the facts are. And they have to prove malice
18 aforethought: Before it happened, there was an evil
19 mindset. And they can't do it.

20 So they want you to do it. They want you to infer
21 it. We'll take implied malice, so -- and so now you can
22 infer it was some malice.

23 Because the bottom line is, it's not my witness.
24 They keep talking about my story and the story that
25 Xzavier Davis is going to tell you. It's not my story.

1 It's his witness's story.

2 Y'all heard the mama, after she affirmed that she
3 would tell the truth. Her husband affirmed too, after
4 she did. And -- and I -- I understand that. But, you
5 know, use your common sense.

6 That's one great thing about juries. At some point
7 -- that's your thing as an American citizen. At some
8 point it's not a judge to decide, and it's not Newberry
9 County Sheriff's Office deciding. And it's not the
10 solicitor to decide. It's you good people, 12 people --
11 they're a cross-section of the community -- so that you
12 can rely on each other's common experiences and bring all
13 that common sense together and -- and -- and talk about
14 things. Y'all have seen what's happened here.

15 I submit to you, that mama doesn't think -- I think
16 that mama thinks the same thing the daddy thinks. And
17 that was risky. But I asked him same question.

18 And did you feel the truthfulness in him? When he
19 looked and said: "Nah, he didn't mean to kill him. He
20 loved that boy."

21 And if that's not what was said, it was something
22 like that. I think that's what it was. "Nah, he didn't
23 mean to kill him. He loved that boy."

24 That's what Iven's grandfather, no blood relation to
25 Xzay, that's what he had to say. Then the child's mother

1 -- no certainty like a mother's love -- she sat there and
2 told you told you -- state's witness, not my witness --
3 state's witness tells you, not just what her dad says,
4 but goes beyond it and tells you, not only was he not
5 trying to kill me, which he easily could have -- she said
6 not only did he not do that, he certainly didn't mean to
7 hurt minor child. Told you he was a great dad; loved minor
8 child; just thrown minor child a birthday party; took him for a
9 haircut that day.

10 Let me say this: Judge is also going to charge you
11 about -- we have certain rules to this. And it -- it's
12 -- you know, it -- the sad part is, it's certainly not a
13 game. This is more serious than anything. But there's
14 rules to it. Like, you have to follow the rule to apply
15 the law -- the -- the -- the judge gives you. You have
16 to apply that to the facts of this case.

17 But I want you to remember, when you hear the word
18 "may," it means you may do something; doesn't mean you
19 have to do. And you, the jury, have the ability to
20 determine what the facts are in this case.

21 And I think it's been pretty obvious. They've done
22 nothing to show malice aforethought or that he was trying
23 to kill somebody. If anything, their own witnesses that
24 they put up have told you: "He wasn't trying to kill me;
25 he was shooting at the tire."

1 Now, they keep telling you: "Oh, you'll be able to
2 see. And if there's such a total disregard for human
3 life" -- that's what the judge is going to talk to you
4 about.

5 You can infer malice if there's a total disregard
6 for human life. May do it if there's a total disregard.
7 The fact that she sees him, he's not shooting like this,
8 like the solicitor would have you believe. He's shooting
9 like this.

10 Now, how in the world four shell casings are inside
11 the house, I'd like to understand that myself. I mean,
12 she says he starts shooting as he's coming down the
13 steps. The -- there's no sense that's really made of
14 this bullet on the hood unless he's -- "Where you going?
15 Don't go nowhere" -- and shoots at the hood right there
16 point-blank at the hood.

17 After that, she's backing up. And you see, as the
18 car is backing up, all of those shots are halfway up the
19 tire or below. Total disregard for human life, total
20 disregard is the guy that he's talking about that goes
21 into the movie theater and just starts shooting.

22 Or every window is busted out, because he's -- he's
23 shooting at the ground. She says it; she knows it. Not
24 my witness, solicitor witness tells you, she's [sic]
25 shooting at the tires. Because that's what she sees,

1 because she sees him pointing down.

2 The little boy -- I mean, we don't know. And guess
3 what? It's not our fault to know. Judge is going to
4 tell you my client doesn't have one obligation to prove
5 anything. They have the entire burden of proof of
6 proving him guilty beyond a reasonable doubt. And
7 they've got to prove each and every element of the crime
8 beyond a reasonable doubt, including that there was
9 malice aforethought; that he intended to kill somebody;
10 not that the somebody died as a result of an accident,
11 but he intended to kill somebody.

12 Now, I'm a brush on this. And, y'all, I apologize
13 for bouncing around a little bit. We also have an
14 attempted murder charge. Attempted murder is a very
15 specific-intent crime, meaning you have to be trying to
16 kill somebody. It can't even be this implied malice that
17 they're talking about, I don't believe. You have to
18 specifically intend to kill somebody.

19 Then, they're going to talk to you about transferred
20 intent. And you've already heard him say, they're trying
21 to say he was trying to kill Indigo but he really killed
22 minor child.

23 Where's the evidence he was trying to kill Indigo?
24 There isn't any. That he was trying to shoot at the
25 tires and missed and hit Indigo in the ankle? There's

1 some evidence of that. I don't think there's any
2 evidence that she had great bodily injury. She's talking
3 to police that night, the next day, a week later.

4 Remember how much she talked to the solicitor's
5 victim-witness advocate? One time that she didn't
6 remember that's with the solicitor. So one time they
7 talked to her in 2 1/2 years or 2 years and 4 months,
8 whatever we're at. Over two years, he talked to her one
9 time.

10 But she let this jury know he wasn't trying to kill
11 her; had perfect opportunity to kill her if that's what
12 he was trying to do. That's not what he was trying to
13 do.

14 Remember what she was she said? Y'all, if there's
15 anybody that knows what's going on in this neighborhood,
16 she told you told about -- it's Vinnie. Did you see how
17 close 633 and 631 are? They did a good job of showing us
18 a hundred times how closely -- her window stays open.

19 She told you. She knows what happens for three
20 streets. And when this happened that night, you heard
21 every police officer say: "I don't know. I don't know.
22 I don't know."

23 Because they don't go out to their house. If there
24 was trouble, Vinnie would be calling. But when this
25 happened: "Wake up. Wake up, Wallace. Wake up. Go

1 check on them. Somebody done shot somebody."

2 She's not saying Xzay shot Indigo. She's not saying
3 Indigo shot Xzay. Because they don't have a history of
4 problems like this. There's been nothing to indicate
5 that, never a raised hand. She said he didn't hit her.

6 You heard testimony about minor child. He's got no marks
7 on him. He's a healthy -- very healthy young -- doesn't
8 get struck. That's not what goes on this house.

9 This is a terrible, terrible accident and tragedy.
10 But at the end of the day, he didn't mean to do it. And
11 in this state, however much murder has changed, it hasn't
12 changed that you have to intend to kill somebody or being
13 so reckless with a total disregard for human life -- I
14 submit to you, there's no way that's a total disregard
15 for human life. Because when he's pointing down, that's
16 because he has a regard for human life.

17 And what he's trying to do is not kill anybody. He
18 wants to talk to her. She wouldn't let him in his house,
19 and he wants to talk about it.

20 And what'd she tell you? "I'm not talking about it.
21 I wanted to get out" -- she even said he wasn't, you
22 know, he -- she said he was mad. But he wasn't even
23 really loud. But he wanted her to stop and stay and
24 talk. She said that's what he'll do: Sometimes he just,
25 you know, go get a room or -- or get a motel room because

1 that way she can't leave so they can talk it out. He
2 just wanted to win an argument for once.

3 But she never -- there's nothing that's come from
4 this witness stand, which is where the judge is going to
5 tell you all the evidence come from, that says he was
6 wanting to kill her. It's just not there. She certainly
7 didn't testify. Beyond that, she told you: "I want my
8 husband to come home."

9 This is a tragedy that is beyond -- that boy was
10 precious. But these other three children, they're
11 precious too. And they're living without a daddy right
12 now that didn't mean to kill their brother.

13 This woman's brokenhearted. She's right. And --but
14 if this were about minor child -- I say this -- she'd be
15 here. But she knows this about Xzay. And guess what?
16 She's not over there. But she's already told you her
17 testimony.

18 There -- the -- there was nothing for me to put up.
19 They made my case for me with their witnesses. I'm not
20 asking you to believe what Xzay's family has to say or --
21 or what Xzay's saying for himself. I'm asking you to
22 listen to what the mother of minor child said, the person
23 that was out there that saw that.

24 The solicitor's office didn't see this. None -- the
25 point I'm making when I asked the sheriff's department,

1 "Do you know what's going on? Do you know if there was
2 malice aforethought?" because they don't. They weren't
3 out there.

4 But there was somebody out there that came and
5 testified for you. And she told you what his intent was.
6 You don't have to guess. You don't have to imply. She
7 told you point-blank what happened and what she believed.

8 Now we're supposed to disregard that, their own
9 witness? We're going and try make her out the liar? And
10 I submit to you this: The solicitor went to the extreme
11 measure of trying to discredit his own witness and say
12 they were crying as she was trying to get them in the
13 car. And -- and then, I -- you maybe heard me question
14 him about "in an instant?"

15 You know, these children were crying when they went
16 out the back door and he shot a gun in the air. He
17 didn't intend to kill anybody. He shot a gun in the air.
18 The kids were crying. They have to go from the back door
19 -- you've seen the pictures -- around the side and in the
20 car.

21 And at that point she says they're not crying. He
22 tells her that's a lie. Well, no. She thought about it
23 again. "No. They -- I -- they weren't crying when I got
24 them in the car."

25 Well, he's acting like, "Well, you said they were

1 crying in the backyard, so now you're a liar." Y'all,
2 this is this witness. This is who you have to count on.

3 This is a woman who loves her child. That, you can
4 bank on. I don't have any question about that, and I
5 hope you don't either.

6 And you know what? For -- for that fact, I'm sure
7 Vinnie loves her and loved minor child. That's why she's taking
8 the position she is. But I ask you to judge the
9 credibility. Do you think Wallace Hunter is going to say
10 what he says -- I assure you, it probably hasn't been
11 easy for Wallace Hunter the last couple days.

12 But he told you the truth. There's no way he meant
13 to kill him because he loved him. These are the people
14 that they're bringing as witnesses who are telling you
15 about my client and whether or not he had that
16 mischievous, evil heart. And they're telling you he
17 didn't.

18 But now they expect you to say: "Oh, 7-year-old,
19 7-year-old, 7-year-old is dead, so you need to convict
20 him. You can just presume malice aforethought, even
21 though it's a -- a -- a major element of this crime. We
22 just want to count that as it should've happened because
23 this is terrible."

24 This is terrible. But it'd be terrible, too, to
25 convict him of something he's not guilty of. And he's

1 not guilty of murder because he had no malice
2 aforethought.

3 Now, jumping to attempted murder, he has to have the
4 intent to kill Indigo for it to be attempted murder. If
5 he doesn't have the intent to kill Indigo, it's not
6 murder -- or not attempted murder. Excuse me.

7 It also, then, is not assault and battery, high and
8 aggravated nature, if he does not have the intent to hit
9 her. You have -- the evidence is not from what I'm
10 saying now, not from what the solicitor's saying now, but
11 from this bench. And you have no evidence in the record
12 that he intended to hit her in the ankle with that.

13 It doesn't even rise to the level of assault and
14 battery-second. I submit to you, the judge is going to
15 give you a verdict form that says attempted murder;
16 assault and battery, high and aggravated nature. Then,
17 it's going to go down to assault and battery, first-
18 degree; or assault and battery, second-degree; or not
19 guilty.

20 And that's what it -- what -- what it is. Because
21 you still have to have the criminal intent to assault
22 someone. He never meant to hit Indigo. You can't have
23 transferred intent either.

24 So this is what I want you to consider: Transfer
25 intent, that he was trying to kill Indigo? I mean, that

1 -- that one, I don't even know that I need to give the
2 time to address it. But he certainly wasn't trying to
3 kill Indigo. He wants to finish an argument with her.
4 What does killing her do for him? It doesn't help.

5 It's a tragedy, a nightmare, bad or worse than this
6 one is. And this is terrible. But he did not mean to do
7 it. And this is one of things when you come to court,
8 your intentions do matter. It's part of the crime.

9 They have to prove it beyond a reasonable doubt.
10 And it's not anybody's fault that they didn't. But for
11 two days, they've given you a bunch of pictures and guns
12 and -- that have nothing to do with did he intend to kill
13 his son, which he didn't.

14 And everybody they've put up, with the exception of
15 Grandma, has told you: "No way; he loved him." His wife
16 told you: "No way." He gets home late from a fish fry
17 at his dad's with his people; probably had something to
18 drink, I think they said.

19 But the officer told you: "He -- I don't recall him
20 being intoxicated." I -- the officer said: "I don't
21 recall him being under the influence." So he wasn't that
22 drunk.

23 He's mad; wouldn't let him in his house. Should he
24 have picked up a gun? No, never. But that's not what
25 he's charged with. He's charged with murder.

1 Did he do things wrong that night? Did he do things
2 that violate the law that night? No question. But
3 that's not what he's charged with. He's charged with
4 murder.

5 And for you, us, solicitor's office to tell that
6 lady, Indigo, that her husband murdered her son, I -- I
7 don't believe it. I don't think it's true. I don't
8 think she's conflicted. She knows it's not true. She
9 told you.

10 Y'all in courts you have standards of proof. In
11 criminal court, it's the high standard: beyond a
12 reasonable doubt. If you'll think about -- a lot of
13 courtrooms have Lady Justice. If you'll think of Lady
14 Justice holding the scales of justice up, and they're
15 equal.

16 Well, in some courts, you have to prove things by
17 the preponderance of the evidence, meaning it's more
18 likely than not. Other courts, you have to have things
19 proved by clear and convincing evidence, which that's --
20 you're convinced by it. That's not this.

21 This is beyond-a-reasonable-doubt evidence. That's
22 why they use the words -- when he showed you his little
23 can't think of a word -- on the screen that -- that, you
24 know, the -- the differences, it's firmly convinced.
25 Because you -- it's something more than convinced.

1 Because clear and convincing evidence isn't enough to
2 convict.

3 They have to prove each and every bit of the
4 elements of the crime beyond a reasonable doubt. It's
5 the highest standard we have under the law. It's not
6 enough that you are convinced. You have to be something
7 more than convinced. So we say "firmly convinced." You
8 have to be firmly convinced that not only did this young
9 man die, which obviously happened, but that this man did
10 it and caused it with malice aforethought.

11 Forget *mens rea*; you're not going to hear that word
12 again. Criminal intent: Was the criminal intent to kill
13 her, and did he have it ahead of time? Because it still
14 has to exist ahead of time. And it has to exist with
15 malice beyond a reasonable doubt.

16 Y'all, we're not there. Did he do something wrong?
17 Was it wrong to pick up a gun? No question. Was it
18 wrong to fire it up in the air? No question. Those
19 aren't murder. And they don't prove malice.

20 Beyond a reasonable doubt -- that's why it's good
21 that we have this jury and not a solicitor or the
22 sheriff's department to decide who's guilty. I -- as
23 much as a tragedy that this is, I don't want to equate
24 it. But what kind of tragedy for these two children grow
25 up without their daddy, who didn't mean to kill their

1 brother, who Mama says -- I hadn't had the opportunity to
2 -- I -- I -- there's no way. Use your common sense.

3 They haven't had the opportunity to mourn as a
4 family, to celebrate Ivory as a family, this newborn
5 child. This family has been wrecked by this. And I
6 realize that it's as the result of my client's actions.
7 There's no question that, y'all.

8 Don't -- don't question that -- that he wasn't
9 wrong. I get it. But he's not guilty of murder. And
10 his mother told you he wasn't. And grandfather told you
11 he wasn't.

12 And nobody told you he was, except the solicitor.
13 And he's not giving -- he's not giving -- he's not giving
14 testimony. Nothing he said is evidence. None of the
15 evidence indicates this was malice aforethought.

16 Remember, when the judge tells you about criminal
17 intent, he's going to tell you, you may infer malice.
18 But it's got to be a total disregard for human life. Did
19 he totally disregard human life? He made mistakes, no
20 question. He's a bad shot, no question.

21 But you heard from the biggest victim of all of
22 this, what she believed. And she was an eyewitness. Who
23 are we to place ourselves over her?

24 I -- I thank you for listening. I thank y'all for
25 paying attention. I know it's been long. And I beg you

1 to listen to the judge's charge, but then follow your
2 hearts and the law as to what this young man did that
3 night.

4 He didn't mean to kill anybody. His wife knows
5 that. His -- his father-in-law knows that, the boy's
6 grandfather. And I hope that by now, you know that and
7 will go and -- and speak the truth with a verdict of not
8 guilty on all these charges. Thank you for your time.

9 CHARGE OF THE COURT

10 THE COURT: All right. Ladies and gentlemen, all of
11 the testimony and other evidence in this case has been
12 presented to you; the attorneys have made their closing
13 arguments. And now is the time of the trial when I
14 charge you with the law to be applied in this case.

15 The indictments in this case allege three different
16 offenses against the defendant. The charges are murder,
17 attempted murder, and possession of a weapon during
18 commission of a violent crime. I remind you that the
19 fact that the -- the defendant was arrested, charged, and
20 indicted in this case is not evidence in this case, and
21 cannot be considered by you as evidence of guilt in this
22 case. Nor does the defendant's arrest, charge, and
23 indictment create any presumption or inference of guilt.

24 These documents are simply the formal written
25 instruments which contain the charges made against the

1 defendant. They are the formal documents by which this
2 case is brought into this Court. Also, each indictment
3 charges a separate and distinct offense. You must decide
4 each indictment separately on the evidence and the law
5 applicable to it, uninfluenced by your decision as to any
6 other indictment.

7 The defendant may be convicted or acquitted on any
8 or all of the offenses charged. You'll be asked to write
9 a separate verdict of guilty or not guilty for each
10 indictment.

11 The defendant pleads not guilty to all of these
12 indictments. That plea puts the burden on the state to
13 prove the defendant guilty. A person charged with
14 committing a criminal offense in South Carolina is never
15 required to prove his innocence. I charge you that an
16 important rule of law is that the defendant in a criminal
17 trial, no matter what the seriousness of the charge may
18 be, will always be presumed to be innocent of the crime
19 for which the indictment was issued, unless guilty has
20 been proven by evidence satisfying you of that guilt
21 beyond a reasonable doubt.

22 This presumption of innocence does not end when you
23 begin your deliberations. But it accompanies the
24 defendant throughout the trial until you reach a verdict
25 of guilt based on evidence satisfying you of that guilt

1 beyond a reasonable doubt. The presumption of innocence
2 is like a robe of righteousness, placed about the
3 shoulders of the defendant, which remains with the
4 defendant until it has been stripped from the defendant
5 by evidence satisfying you of the defendant's guilt
6 beyond a reasonable doubt.

7 The presumption of innocence is not a mere legal
8 theory. It is not just a legal phrase. The presumption
9 of evidence is a substantial right to which every
10 defendant is entitled unless you, the jury, are satisfied
11 from the evidence of the defendant's guilt beyond a
12 reasonable doubt.

13 Now, what is a reasonable doubt in the law? A
14 reasonable doubt is the kind of doubt that would cause a
15 reasonable person to hesitate to act. Proof beyond a
16 reasonable doubt is proof that leaves you firmly
17 convinced of the defendant's guilt.

18 We know very few things in this world with absolute
19 certainty. And in criminal cases, the law does not
20 require proof that overcomes every possible doubt. If,
21 based on your consideration of the evidence, you are
22 firmly convinced that the defendant is guilty of the
23 crime charged, you must find the defendant guilty. On
24 the other hand, if you think a real possibility exists
25 that the defendant is not guilty, you must give the

1 defendant the benefit of that doubt and find him not
2 guilty.

3 I remind you that during this trial, you and I have
4 certain duties to perform. As the trial judge, my
5 responsibility is to preside over the trial of this case.
6 I also have the duty to rule on the admissibility of the
7 evidence offered during this trial.

8 You're to consider only the competent evidence
9 before you. If any testimony was ordered stricken from
10 the record in this case during this trial, you must
11 disregard that testimony. You are to consider only the
12 testimony which has been presented from the witness
13 stand, any exhibits which have been made a part of the
14 record in this case, and any stipulations of counsel.

15 I have the additional duty to charge you the law
16 applicable to this case. As the presiding judge, I am
17 the sole judge of the law of this case. Your duty as
18 jurors is to accept and apply the law as I now state it
19 to you.

20 If you have any idea as to what the law is or what
21 the law ought to be and your idea is different from what
22 I now tell you the law is, you must disregard your idea
23 of what the law is or ought to be because you are sworn
24 to accept and apply the law exactly as I state it to you.

25 In every case tried in this Court before a jury, the

1 jury is the sole and exclusive judge of the facts in a
2 case. A trial judge cannot intimate, state, comment on,
3 or make any statement to a trial jury about the facts in
4 a case. Since you, the jury, are the sole judge of the
5 facts in this case, do not infer from what I have said
6 during the progress of this trial, in ruling upon the
7 admissibility of evidence or otherwise, or anything that
8 I say now during the course of this instruction to you
9 that I have any opinion about the facts in this case.
10 The law the law does not allow me to have an opinion
11 about the facts in this case. This is a matter solely
12 for you, the jury, to determine.

13 As jurors your duty is to determine the effect,
14 value, weight, and truth of the evidence presented during
15 this trial. Necessarily, you must determine the
16 credibility of witnesses who have testified in this case.
17 Credibility simply means believability. Your duty as
18 jurors is to analyze and to evaluate the evidence and
19 determine which evidence convinces you of its truth.

20 In determining the believability of witnesses who
21 have testified in this case, you may believe one witness
22 over several witnesses or several witnesses over one
23 witness. You may believe a part of the testimony of a
24 witness and reject the remaining part of the testimony of
25 that same witness. You may believe the testimony of a

1 witness in its entirety or reject the testimony of a
2 witness in its entirety.

3 You may consider whether any witness has exhibited
4 to you any interest, bias, prejudice, or other motive in
5 this case. You may also consider the appearance and
6 manner of a witness while on the witness stand.

7 Now, the rules of evidence ordinarily do not permit
8 witnesses to testify to opinions or conclusions. An
9 exception to this rule exists for witnesses we call
10 expert witnesses. A witness who, by education and
11 experience, has become expert in some art, science,
12 profession, or calling may state an opinion as to
13 relevant and material matter in which the witness claims
14 to be an expert and may also state the reasons for the
15 opinion.

16 You should consider any expert opinion received in
17 evidence in this case and, like any other evidence, give
18 it the weight you think it deserves. If you decide that
19 the opinion of an expert witness is not based on
20 sufficient education and experience, or if you conclude
21 that the reason given in support of the opinion are not
22 sound, or that the opinion is outweighed by other
23 evidence, you may disregard the opinion entirely. An
24 expert witness's testimony is to be given no greater
25 weight than that of other witnesses simply because the

1 witness is an expert. Further, you are not required to
2 accept an expert's opinion even though it is not
3 contradicted.

4 Now, I instruct you and emphasize that the fact the
5 defendant did not testify in this case is not a factor to
6 be considered by you in any way in your deliberations and
7 in your consideration of the question of the guilt or
8 innocence of the defendant. The defendant's decision not
9 to testify must not be considered by you in any matter
10 whatsoever.

11 A defendant has the constitutional right to remain
12 silent. And the assertion of this right must not be
13 considered by you in your deliberations. I repeat, under
14 your oath, you are to draw no conclusion whatsoever from
15 the fact that the defendant in this case did not testify.
16 The fact that this defendant did not testify should not
17 even be discussed in the jury room.

18 The burden of proof, as I have stated to you, is on
19 the state. The defendant is not required to prove his
20 innocence. The burden of proof remains on the state to
21 prove guilt beyond a reasonable doubt.

22 Now, in order to establish criminal liability,
23 criminal intent is required. For example, the mental
24 state required to be proven by the state for a particular
25 crime might be purpose, intent, knowledge, recklessness,

1 or criminal negligence. Criminal intent must be proven
2 by the state beyond a reasonable doubt. Criminal intent
3 is always a matter that must be determined by the jury
4 from the circumstances surrounding the situation.

5 Intent cannot be proved to a mathematical certainty.
6 Medical science cannot dissect a person's brain and
7 determine what the person had in mind. So the law says
8 that criminal intent may be proved from the circumstances
9 shown to have existed.

10 In other words, the state must show that the
11 circumstances in this case indicate beyond a reasonable
12 doubt the defendant had criminal intent. Intent does not
13 have to be established by direct and positive evidence.
14 Intent may be established like any other fact, by taking
15 into consideration the acts of the parties and all of the
16 facts and circumstances of the case.

17 Criminal intent is a mental state, a conscious
18 wrongdoing. You must determine what the defendant
19 intended to do, based on the circumstances shown to have
20 existed. Criminal intent can arise from action or a
21 failure to act. It may arise from negligence,
22 recklessness, or an indifference to duty or to
23 consequences that is considered by law to be the
24 equivalent of criminal intent.

25 Now, the defendant is charged with murder. To

1 convict the defendant of murder, the state must prove
2 beyond a reasonable doubt that the defendant killed
3 another person with malice aforethought. Malice is
4 hatred, ill will, or hostility towards another person.
5 It is the intentional doing of a wrongful act without
6 just cause or excuse and with an intent to inflict an
7 injury or under circumstances that the law will infer an
8 evil intent.

9 Malice aforethought does not require that malice
10 exists for any particular time before the act is
11 committed. But malice must exist in the mind of the
12 defendant just before and at the time of the act the --
13 or at the time the act is committed. Therefore, a
14 combination of the previous evil intent and the act
15 itself is required.

16 Malice aforethought may be express or inferred.
17 These terms, express and inferred, do not mean different
18 kinds of malice, but merely the manner in which malice
19 may be shown to exist, either by direct evidence or by
20 inference from the facts and circumstances which are
21 proved.

22 Express malice is shown when a person speaks words
23 which express hatred or ill will for another or when the
24 person prepared beforehand to do the act which was later
25 accomplished. For example, lying in wait for a person or

1 any other acts of preparation going to show that the deed
2 was within the defendant's mind would be express malice.

3 Malice may be inferred from conduct showing a total
4 disregard for human life. If facts are proved beyond a
5 reasonable doubt sufficient to raise an inference of
6 malice to your satisfaction, this inference is simply an
7 evidentiary fact to be considered by you, along with the
8 other evidence in the case. You may give it the weight
9 you decide it should receive.

10 Now, if the defendant, with malice aforethought,
11 attempts to kill a person, but by mistake kills a
12 different person, the defendant still has the intent to
13 kill. The intent to kill is merely transferred from the
14 original person the defendant attempted to kill to the
15 actual person killed. The defendant is guilty of murder
16 just as if the defendant killed the person he intended to
17 kill.

18 The defendant is also charged with attempted murder.
19 To convict the defendant of this crime, the state must
20 prove that the defendant attempted to kill another person
21 with malice aforethought. Now, unlike the crime of
22 murder, attempted murder requires a specific intent to
23 kill, not a general intent. A specific intent to kill is
24 an element of attempted murder.

25 Intent means the intending the attempted result, not

1 accidentally or involuntarily causing the result. Also,
2 unlike murder, the intent required to prove attempted
3 murder cannot be transferred from one person to another.
4 The state must prove beyond a reasonable doubt that the
5 defendant intended to kill a specific person with malice
6 aforethought, but failed in that attempt.

7 In other words, to convict the defendant in this
8 case of attempted murder, the state must prove beyond a
9 reasonable doubt that the defendant intended to kill
10 Indigo Davis with malice aforethought, but failed in that
11 attempt. As I previously instructed you, intent may be
12 shown by acts and conduct of the defendant and other
13 circumstances from which you may naturally and reasonably
14 find intent.

15 Evidence of the character of the act, the character
16 of the instrument used, the manner in which it was used,
17 the purpose to be accomplished, and the resulting wounds
18 or injuries may be considered in determining the intent
19 with which the act was committed. Intent may also be
20 demonstrated by proving that the defendant voluntarily
21 and willfully commits an act, the natural tendency of
22 which is to take another's life.

23 If you find that the state has failed to prove
24 beyond a reasonable doubt that the defendant committed
25 attempted murder, you may consider whether the state has

1 proved beyond a reasonable doubt that the defendant
2 committed assault and battery of a high and aggravated
3 nature. Included within the offense of attempted murder
4 is the lesser offense of assault and battery of a high
5 and aggravated nature.

6 To convict the defendant of assault and battery of a
7 high and aggravated nature, the state must first prove
8 beyond a reasonable doubt that the defendant unlawfully
9 injured another person. The state must also prove that
10 the defendant's act either caused great bodily injury to
11 another person or the defendant's act is accomplished by
12 means likely to produce death or great bodily injury.

13 Great bodily injury means bodily injury which causes
14 a substantial risk of death or which causes serious,
15 permanent disfigurement or protracted loss or impairment
16 of the function of a body -- bodily member or organ. An
17 assault occurs when a person unlawfully attempts to offer
18 to commit a violent injury upon another person and had
19 the present ability to complete the attempted injury. An
20 assault is the intentional creation of a reasonable fear
21 of immediate bodily harm.

22 Assault does not require that the attempted injury
23 or harm actually take place. For example, if I walk up
24 to you and, when we are within arm's reach, I draw back
25 to hit you, that is an assault.

1 A battery is the unlawful touching of another person
2 by a person who commits -- or by a person who has
3 committed the assault. An unlawful touching can be
4 caused by a part of the accused's body or by any object
5 the accused puts in motion. A battery is the completion
6 of the assault by using or applying force to another
7 person, however slight, in a rude, angry, or resentful
8 manner without legal justification for doing so. Using
9 my earlier example, if I carry through the assault by
10 hitting you, then that is a battery.

11 If you find that the state has failed to prove
12 beyond a reasonable doubt that the defendant committed
13 attempted murder and assault and battery of a high and
14 aggravated nature, you may consider whether the state has
15 proved beyond a reasonable doubt that the defendant
16 committed assault and battery in the first degree.
17 Included within the offense of attempted murder and
18 assault and battery of a high and aggravated nature, is
19 the lesser offense of assault and battery in the first
20 degree.

21 To convict the defendant of assault and battery in
22 the first degree, the state must prove beyond a
23 reasonable doubt that the defendant unlawfully injured
24 another person. The state must also prove that the
25 defendant's act offered or attempted to injure another

1 person with the present ability to do so and the action
2 is accomplished by means likely to produce death or great
3 bodily harm.

4 If you find that the state has failed to prove
5 beyond a reasonable doubt that the defendant committed
6 attempted murder, assault and battery of a high and
7 aggravated nature, and assault and battery of the first
8 degree, you may consider whether the state has proved
9 beyond a reasonable doubt that the defendant committed
10 assault and battery in the second degree. To convict the
11 defendant of assault and battery in the second degree,
12 the state must prove beyond a reasonable doubt that the
13 defendant unlawfully injured another person or offered or
14 attempted to injure another person with the present
15 ability to do so and moderate bodily injury to another
16 person resulted or moderate bodily injury to another
17 person could have resulted.

18 Moderate bodily injury means physical injury that
19 involves prolonged loss of consciousness or that causes
20 temporary or moderate disfigurement or temporary loss of
21 the function of a bodily member or organ or injury that
22 requires medical treatment when the treatment requires
23 the use of regional or general anesthesia or injury that
24 results in a fracture or dislocation. Moderate bodily
25 injury does not include one-time treatment and subsequent

1 observation of scratches, cuts, abrasions, bruises,
2 burns, splinters, or any other minor injuries that do not
3 ordinarily require extensive medical care.

4 The defendant is also charged with possession of a
5 weapon during the commission of a violent crime. To
6 convict the defendant of this crime, the state must prove
7 beyond a reasonable doubt that the defendant was in
8 possession of a firearm or visibly displayed what
9 appeared to be a firearm during the commission of a
10 violent crime. A firearm means any machine gun,
11 automatic rifle, revolver, pistol, or any weapon which
12 will, is designed to, or may be readily converted to
13 expel a projectile.

14 In order to find the defendant guilty of possession
15 of a weapon during the commission of a violent crime, you
16 must first find the defendant guilty of either committing
17 a violent crime or attempting to commit a violent crime.
18 Murder, attempted murder, and assault and battery of a
19 high and aggravated nature are violent crimes. Assault
20 and battery in the first degree and assault and battery
21 in the second degree are not violent crimes. The state
22 must prove beyond a reasonable doubt that the weapon
23 furthered, advanced, or helped in the commission of the
24 crime.

25 Now, as the jury you must find one of several

1 different verdicts for each indictment in this case. No
2 significance is to be given to the order in which I state
3 these possible verdicts to you. I simply must state one
4 first, one second, and so forth.

5 As to the indictment for murder, you may find the
6 defendant guilty or not guilty.

7 As to the indictment for attempted murder, you may
8 find the defendant guilty of attempted murder, guilty of
9 assault and battery of a high and aggravated nature,
10 guilty of assault and battery in the first degree, guilty
11 of assault and battery and the second degree, or not
12 guilty.

13 As to the indictment for possession of a weapon
14 during the commission of a violent crime, you may find
15 the defendant guilty or not guilty. However, you may not
16 find the defendant guilty of possession of a weapon
17 during the commission of a violent crime unless you also
18 find the defendant guilty of murder, attempted murder, or
19 assault and battery of a high and aggravated nature. If
20 you find the defendant not guilty of murder, attempted
21 murder, and assault and battery of a high and aggravated
22 nature, or if you find the defendant guilty of only
23 assault and battery in the first degree or second degree,
24 you must find the defendant not guilty of possession of a
25 weapon during the commission of a violent crime.

1 Now, ladies and gentlemen, your verdict for each
2 indictment must be unanimous. And as I previously
3 instructed you, you must decide each indictment
4 separately on the evidence and the law applicable to it,
5 uninfluenced by your decision as to the other
6 indictments.

7 Mr. Hill, as the foreperson of this jury, when the
8 jury agrees on a verdict for a -- an indictment, you will
9 fill -- check the appropriate verdict and then sign your
10 name as the foreperson for that -- for that -- for this
11 jury. When the jury has reached a verdict on each
12 indictment and you have completed the verdict forms, you
13 can then knock on the door and tell the bailiff that
14 you've reached a verdict and we'll bring you back into
15 the courtroom at that time.

16 Now, I'm going to excuse you to the jury room, but
17 please do not begin your deliberations at this time. I
18 need to check with the attorneys to see if they have any
19 additional charges that they deem appropriate or if they
20 have any challenges to the charges that I've -- as I've
21 given them to you.

22 If they do and I deem them appropriate, I'll bring
23 you back in and make whatever corrections or additional
24 charges are needed. If there are none, then the verdict
25 forms and the exhibits will be brought back to you in the

1 -- in the jury room and the bailiff will instruct you to
2 begin your deliberations. But please do not begin your
3 deliberations until the bailiff instructs you to do so.

4 All right. I'm going to excuse you to the jury
5 room, but do not begin your deliberations until the
6 bailiff tells you. Thank you very much.

7 (Whereupon, the jury exited the courtroom at 3:05
8 p.m.)

9 (Off the record briefly.)

10 THE COURT: All right. Any exceptions to the jury
11 charge by the state?

12 MR. STUMBO: None from the state, Your Honor. So I
13 -- I thought I heard you charge great bodily injury. Mr.
14 Daniel said he didn't think he heard it, but I thought
15 you just read it straight out of the statute.

16 THE COURT: I did.

17 MR. STUMBO: Right. I -- I thought you did.

18 THE COURT: Yeah, I did.

19 MR. STUMBO: No exception from the state, Your
20 Honor.

21 THE COURT: All right. Any exceptions from the
22 defense?

23 MR. GEOLY: None from the defense, Your Honor.

24 THE COURT: All right. Let's make sure that we've
25 got all of the exhibits.

1 Let me give you these verdict forms to put with the
2 exhibits.

3 CLERK OF COURT: Yes, sir.

4 THE COURT: And if we got all the exhibits, the
5 verdict forms, we can go ahead and take those. We got
6 somebody that'll take them to the jury room and tell them
7 to begin?

8 CLERK OF COURT: I'll do that.

9 THE COURT: You'll do that?

10 CLERK OF COURT: Yes, sir.

11 (The Court went off the record at 3:06 p.m.)

12 (Whereupon, the jury began deliberating at 3:09
13 p.m.)

14 (The Court went on the record at 3:27 p.m.)

15 (Whereupon, Court's Exhibit 2 was marked for
16 identification.)

17 THE COURT: All right. We've gotten a request from
18 the jury. It said (as read): "May we please get a copy
19 of the definition of murder, attempted murder, etc.?"

20 So I'm thinking just bringing them in; saying, "I'll
21 give you a copy of the entire charge" ---

22 MR. STUMBO: Judge, I ---

23 THE COURT: --- "you can" ---

24 MR. STUMBO: --- don't have a problem if you want to
25 send the charge in its entirety back to them, if you ---

1 THE COURT: That's what I was thinking, and ---

2 MR. GEOLY: I -- I -- I would ask Your Honor just to
3 respond to that question, since they haven't asked for
4 the charge, if you would just tell them what they're
5 asking.

6 THE COURT: Well, they're -- they're not -- they're
7 asking for the -- they're saying -- they're asking for a
8 portion of the charge.

9 MR. GEOLY: Yes, sir.

10 THE COURT: They're saying they want a copy of the
11 definition of murder, attempted murder, etc.

12 MR. GEOLY: Of the -- and -- and -- do we not just
13 want to give them a definition of murder, attempted
14 murder, A&B-first -- I mean, assault and battery high and
15 aggravated nature, and assault and battery-first and -
16 second?

17 MR. STUMBO: Judge, I think it's more simple, quite
18 honestly. Because there's a lot of judges that do send
19 back a written copy. I know our judges here in this
20 circuit typically do: Judge Addy, Judge Hocker ---

21 THE COURT: Yeah.

22 MR. STUMBO: That's why it's -- it's pretty common
23 practice for them to send it back. So I -- we don't have
24 a problem with that.

25 MR. GEOLY: I -- I just ---

1 MR. STUMBO: I think ---

2 MR. GEOLY: --- want to ---

3 MR. STUMBO: --- that simplifies things, Judge,
4 rather than ---

5 THE COURT: Yeah.

6 MR. STUMBO: --- reading it again.

7 THE COURT: And I've always operated under the --
8 the assumption that I need to instruct them that you have
9 to -- I mean, it's -- they're asking for definition.
10 They're not really asking for a copy of the charge. I
11 guess my question is -- is: Do I send back the entire
12 charge or do I just send back those portions of the
13 charge that deal with murder, attempted murder, assault
14 and battery of a high and aggravated nature, first- and
15 second-degree ---

16 MR. GEOLY: Judge, I'll -- I'll back up ---

17 THE COURT: --- and possession of ---

18 MR. GEOLY: --- and let you ---

19 THE COURT: --- a weapon ---

20 MR. GEOLY: --- send -- I -- I'll back up and let
21 you send the whole charge if he's fine with it. I mean,
22 I ---

23 THE COURT: Is that agreeable with you?

24 MR. STUMBO: It is, Judge. Because I think it puts
25 in context ---

1 THE COURT: Okay.

2 MR. STUMBO: --- everything you read them. I think

3 ---

4 THE COURT: All right.

5 MR. STUMBO: --- that's fine.

6 THE COURT: Well, I'm going to bring them in and I'm
7 going to tell them we're going to give them the charge.
8 But I do have to tell them that they have to -- or do you
9 want me to just sent it back there to them?

10 MR. STUMBO: I think you can just send it back,
11 Judge. I -- that's ---

12 MR. GEOLY: I'm fine ---

13 MR. STUMBO: --- that's ---

14 MR. GEOLY: --- with that.

15 MR. STUMBO: --- that's ---

16 THE COURT: Okay.

17 MR. STUMBO: --- perfectly fine with me.

18 THE COURT: All right. I'm going to -- let's go
19 ahead and mark my charges as Court's Exhibit 3.

20 (Off the record briefly.)

21 (Whereupon, Court's Exhibit 3 was marked for
22 identification.)

23 THE COURT: And is all right if the -- the clerk
24 just -- I'm going to have her take back their question
25 and the charge and then just tell them to make sure that

1 they bring this back ---

2 CLERK OF COURT: Yes, sir.

3 THE COURT: --- the -- not to throw that away, but
4 that they bring it back when they come back in with their
5 verdict. Is that agreeable?

6 MR. STUMBO: Yes, sir.

7 MR. GEOLY: Yes, sir.

8 THE COURT: All right. Anything from the state
9 before we recess?

10 MR. STUMBO: No, sir.

11 THE COURT: Anything from the defense?

12 MR. GEOLY: No, sir, Your Honor.

13 THE COURT: All right. We'll stay ---

14 MR. GEOLY: Judge?

15 THE COURT: --- in recess yeah.

16 MR. GEOLY: It may be just -- I'm here. Obviously,
17 we have a pretty strong force from the -- the police
18 force. I would ask, just so that in case there's another
19 question 30 seconds, we don't have to keep going back and
20 forth. Can he just stay here with us?

21 THE COURT: Well, I don't mind doing whatever law --
22 they're over security, and they're the ones that's in
23 charge of it. So however they ---

24 MR. GEOLY: I certainly ---

25 THE COURT: ---- want to ---

1 MR. GEOLY: --- would defer ---

2 THE COURT: --- handle it, I'll let ---

3 MR. GEOLY: --- to whatever ---

4 THE COURT: --- you handle it ---

5 MR. GEOLY: --- Mr. Dennis ---

6 THE COURT: --- the way ---

7 MR. GEOLY: --- says.

8 THE COURT: --- you want to.

9 MR. GEOLY: I mean, I -- I -- if they want to keep
10 going back and forth, but I just -- we're all here and
11 he's not going to do anything wrong out here. But -- but
12 I'll -- I'll defer to whatever y'all -- or the ---

13 THE DEPUTY: We'll have folks here in the courtroom,
14 Judge. But if we have to make any type of movement, then
15 we'll move him to a holding cell.

16 THE COURT: All right.

17 MR. GEOLY: Thank you both. Thank you.

18 THE COURT: Sounds good. Thank you.

19 (The Court went off the record at 3:31 p.m.)

20 (The Court went on the record at 4:49 p.m.)

21 THE COURT: Okay. We've got another question from
22 the jury. It says (as read): "Does total disregard for
23 human life supersede the intent to inflict injury?"

24 Now, I sense that they're probably trying to decide
25 between two charges. My proposed response -- I'll get

1 y'all's input. My proposed response would be: "You
2 cannot consider the guilt or innocence of the lesser-
3 included charge until you first find the defendant not
4 guilty of the greater charge."

5 MR. STUMBO: I ---

6 THE COURT: So in ---

7 MR. STUMBO: --- I think ---

8 THE COURT: --- other words ---

9 MR. STUMBO: --- that's an accurate statement of the
10 law, Judge.

11 THE COURT: So in other words, if they're trying to
12 decide: Well, if -- if a total disregard for human life
13 in this crime and intent to inflict injury in this crime,
14 it does seem to be a conflict there. Which -- which
15 crime do we convict him of?

16 Well, you don't convict him of the lesser-included
17 offense until you find him not guilty of the greater
18 offense, is my understanding.

19 MR. GEOLY: But, Judge, I -- I would hate to
20 instruct them as to how to conduct their -- their
21 deliberations. I mean ---

22 THE COURT: Well, I'm not telling them how to
23 conduct their deliberations. I'm just telling them that
24 you -- they are not to consider a lesser-included
25 offense, because that's the charge.

1 If you find the defendant not guilty of attempted
2 murder, then you must decide whether or not the defendant
3 is guilty of assault and battery of a high and aggravated
4 nature. If you find the defendant not guilty of assault
5 and battery of a high and aggravated nature, then you
6 decide whether or not the defendant is guilty of assault
7 and battery in the first degree. If you find the
8 defendant not guilty of assault and battery in the first
9 degree, then you decide.

10 MR. GEOLY: And -- and, Judge, I'm not trying to ---

11 THE COURT: Yeah.

12 MR. GEOLY: --- certainly, to -- to -- to take odds
13 with you or disagree. And I think that's an absolute
14 reasonable way to do it.

15 But if they walk back there and the -- the foreman
16 decided, "Let's take a straw-poll vote on assault and
17 battery second-degree," and -- and they vote and it's,
18 say, 9 to 3 the first vote, then I don't know that it's
19 improper to continue to consider that before considering
20 the first one. I would hate to put, you know, our
21 decision on them that you've got to consider this first
22 and tell them that.

23 I would ask you to -- to maybe just tell them that
24 you're the deciders of the fact and you have all the law,
25 you know, the ---

1 THE COURT: No. I mean, the fact of the matter is,
2 is if it's 9 to 3, then they haven't reached a verdict.
3 They have ---

4 MR. GEOLY: Oh, sure.

5 THE COURT: --- to unanimously agree to guilt:
6 guilty or not guilty.

7 MR. GEOLY: Yes, sir, I understand.

8 THE COURT: Now, if all 12 of them agree on guilty,
9 say, of an indicted charge, then they don't even consider
10 a lesser-included offense.

11 MR. GEOLY: But what if ---

12 THE COURT: If all of them ---

13 MR. GEOLY: What if, on first vote, instead of my 9
14 to 3, it's 12 to 0?

15 THE COURT: Okay. If they unanimously vote not
16 guilty, then they consider the lesser-included offense
17 under that.

18 MR. GEOLY: Okay.

19 THE COURT: They don't even consider any
20 lesser-included offense. They don't consider any charge
21 less than the one indicted until they find unanimously
22 that the defendant is not guilty of the indicted charge.

23 MR. GEOLY: Well, I -- I think that flies in the
24 face of the law, Judge, that says if you have a question
25 between one or the other, the defendant is entitled for

1 you to resolve that question in his favor. That flies in
2 the face you have ---

3 THE COURT: What law said ---

4 THE COURT: --- to find him not guilty first before
5 moving to the next. But I think the law is, isn't it,
6 that -- that if you have a choice between two and there's
7 a question, is he guilty of this or is he guilty of the
8 lesser, and there's a question there, it has to be
9 resolved in the defendant's favor, as I understand.

10 THE COURT: No, I don't think so.

11 MR. GEOLY: Okay. I -- I ---

12 THE COURT: I think that if you've been indicted on
13 -- for a crime, then they don't even consider a lesser-
14 included offense unless and until they reach a verdict of
15 not guilty on the crime that the defendant's been
16 indicted for.

17 MR. GEOLY: And I -- and I apologize, Judge. I
18 didn't ---

19 THE COURT: Yeah.

20 MR. GEOLY: --- realize that was the law.

21 THE COURT: I mean, that's my understanding of ---

22 MR. STUMBO: Yeah.

23 THE COURT: --- the law. I've never really had a
24 question. But I know the jury charges say: If you find
25 the defendant not guilty of this offense, then you may

1 consider whether or not they're guilty of this lesser
2 offense.

3 MR. STUMBO: Judge, the other thing that I would --
4 I -- the -- the only thing that I could say, just reading
5 between the lines -- and I don't know. It's hard, you
6 know, to look at this.

7 But they could be looking at -- at the two ways that
8 you can prove malice, because express malice, it -- it's
9 sometimes an -- is an intent to commit an injury or -- or
10 inflict a death or an injury. The other way for malice
11 to be proved is -- is implied through a total disregard
12 for human life. And both are in your charge.

13 It sounds like to me they may be asking if -- if one
14 is more important than the other. And I -- you know, I
15 don't know that they can draw any inference for the fact
16 -- from the fact that you talked about express malice
17 first and then implied malice. You know, they can decide
18 what weight to give both. That's what it sounds like
19 maybe ---

20 THE COURT: So what ---

21 MR. STUMBO: --- they're asking there.

22 THE COURT: --- should I tell them?

23 MR. STUMBO: That -- that they can give the weight
24 -- that -- that those are just two -- express malice and
25 implied malice, it sounds like what they're asking here,

1 are two different ways that malice can be proven under
2 the law. They can give the weight to either one that
3 they believe is appropriate; that Your Honor is not
4 saying it's -- express malice is more important than
5 implied malice.

6 So I -- maybe ---

7 THE COURT: But they're not even ---

8 MR. STUMBO: --- that's -- that's what they're
9 asking. I'm just -- maybe just a -- a different spin on
10 that. But I ---

11 THE COURT: Okay.

12 MR. STUMBO: --- I -- I just would hate if we -- you
13 -- you ---

14 MR. GEOLY: Judge, will you ---

15 THE COURT: I think ---

16 MR. GEOLY: --- ask the question again? Will --
17 will you repeat the -- I'm sorry.

18 THE COURT: (As read): "Does total disregard for
19 human life supersede the intent to inflict injury?"

20 MR. GEOLY: I think the answer to that is no.

21 MR. STUMBO: Well, I think the answer to that,
22 Judge, is --- from the ---

23 MR. GEOLY: I mean, I ---

24 MR. STUMBO: --- Court is ---

25 MR. GEOLY: --- think we're ---

1 MR. STUMBO: --- is the Court ---

2 MR. GEOLY: --- trying to guess at what they're
3 asking instead of answering their question, which,
4 clearly, Your Honor, the -- the answer to that is no.

5 MR. STUMBO: Yeah. But I think they can -- they
6 could -- they could ---

7 MR. GEOLY: I mean, I don't ---

8 MR. STUMBO: --- take an ---

9 MR. GEOLY: --- think we should guess ---

10 MR. STUMBO: What ---

11 MR. GEOLY: --- what they're asking. I think we
12 should answer the question.

13 THE COURT: Well, how about I'll just send them back
14 another question, saying: "Are you trying to decide
15 between the guilt or innocence in two different charges?"

16 How about that? And then, if they come back and say
17 yes, then we know you can't even consider the lesser-
18 included until you find him guilty of the ---

19 MR. GEOLY: I -- I -- I would hate to take the
20 position that we're going to send back a question to a
21 question, Judge, when they've asked a question that the
22 answer is no to. I mean, I think, under the law ---

23 THE COURT: Okay.

24 MR. GEOLY: --- the answer to that is no.

25 THE COURT: All right. Well, what I'm going to is

1 I'm going to bring them in. And I'm going to say: "It
2 -- it's really irrelevant for the purposes of your
3 deliberation because you must first consider" ---

4 MR. GEOLY: Okay.

5 THE COURT: --- "the indicted charge."

6 MR. GEOLY: Yes, sir.

7 THE COURT: And then, if you unanimously find him
8 not guilty of that, then you consider the lesser-included
9 charge. I mean, it -- to me, because if they're talking
10 -- if they trying to argue over the jury charge for
11 intent on one single charge, then, there again, it's --
12 you're just talking about the different way you prove ---

13 MR. STUMBO: Different ways to ---

14 THE COURT: --- malice.

15 MR. STUMBO: --- prove malice, it sounds like, is
16 what they're ---

17 THE COURT: Yeah.

18 MR. STUMBO: --- asking. And that could apply to
19 either attempted murder or murder -- the attempted murder
20 and the lessers or just the murder. Both -- you know,
21 malice is a part of both of those. It sounds like to me
22 that -- that ---

23 THE COURT: Well, I think I'm going to bring them in
24 and ---

25 MR. STUMBO: Yeah.

1 THE COURT: --- and I'll say that: If you're trying
2 to decide between express or implied malice -- or not
3 implied ---

4 MR. STUMBO: Inferred.

5 THE COURT: --- inferred malice, then you're just
6 talking about ---

7 MR. STUMBO: Two different ---

8 THE COURT: --- two different ---

9 MR. STUMBO: --- ways to ---

10 THE COURT: --- ways that ---

11 MR. STUMBO: --- show malice.

12 THE COURT: --- the -- the state ---

13 MR. STUMBO: Yeah.

14 THE COURT: --- attempted to prove their case. If
15 you're trying to decide between the elements of one crime
16 and the elements of another crime, then you don't even
17 consider the lesser charge unless and until you reach a
18 unanimous verdict of not guilty on

19 MR. STUMBO: I think that covers your bases on both,
20 Judge, based on their question.

21 MR. GEOLY: With -- with ---

22 THE COURT: Well ---

23 MR. GEOLY: --- all due respect, Judge, I -- I don't
24 think it's responsive to the question. And -- and I
25 would object.

1 THE COURT: Okay.

2 MR. GEOLY: Thank you.

3 THE COURT: All right. You've noted your objection.
4 And that's how I'm going to handle it.

5 Anything from the state before we bring the jury in?

6 MR. STUMBO: Nothing, Judge.

7 THE COURT: Anything from the defense?

8 MR. GEOLY: No, sir.

9 THE COURT: All right. Let's go ahead and bring the
10 jury.

11 And if I could get you to mark this as Court's
12 Exhibit -- whatever it is.

13 THE COURT REPORTER: Yes, Your Honor. This will be
14 Court's 4.

15 THE COURT: Four? All right.

16 MR. GEOLY: Four?

17 THE COURT: Yeah, Court's Exhibit 4.

18 MR. GEOLY: Yes, sir. Thank you, Judge.

19 (Whereupon, Court's Exhibit 4 was marked for
20 identification.)

21 (The Court went off the record at 4:59 p.m.)

22 (The Court went on the record at 5:03 p.m.)

23 THE COURT: You know, the more I'm thinking about
24 this, more I'm -- they're not addressing malice. They're
25 addressing intent, total disregard for human life versus

1 intent to inflict injury.

2 MR. STUMBO: Right. Just ---

3 THE COURT: So I ---

4 MR. STUMBO: --- sounds like, when they say
5 "supersedes," Judge, it's almost like they're saying is
6 one more important than the other. Does one ---

7 THE COURT: Exactly.

8 MR. STUMBO: --- supersede the other?

9 THE COURT: And I think that's why they are trying
10 -- I think I'm just going to ask them: Are you trying to
11 decide between two different crimes for purpose ---

12 MR. GEOLY: But, Judge ---

13 THE COURT: --- do you ask the question for the
14 purpose of trying to decide guilt or innocence on two
15 different charges?

16 MR. GEOLY: But -- but if -- if I might, Judge, with
17 all due respect, why do we care? I mean, if the question
18 is ---

19 THE COURT: Because what they're saying is: If his
20 actions means that he -- and -- and just to throw this
21 out there as a ---

22 MR. GEOLY: Right, right.

23 THE COURT: --- let's say his actions mean he is
24 guilty of attempted murder.

25 MR. GEOLY: Yes, sir.

1 THE COURT: Well, by definition, he's also -- it --
2 it also means that he's guilty of -- of assault and
3 battery in the first degree, because that's a lesser-
4 included offense. Now, does one supersede the other?
5 Does the fact that he ---

6 MR. GEOLY: And I -- I think ---

7 THE COURT: --- had a total disregard for human life
8 supersede the fact that he intended to inflict injury?

9 MR. GEOLY: And I could be wrong, but I think the
10 answer to that is no. So why will you just answer -- why
11 wouldn't you just answer what they're asking, if they're
12 not asking us for anything else but that question.

13 THE COURT: Because the fact of the matter is, is it
14 -- it almost leads you to believe -- or it -- I think, if
15 I just said no, then they're, like, "Well, we can pick to
16 convict him of whatever we want to convict him of without
17 first finding him not guilty of the charge he's been
18 indicted for."

19 MR. GEOLY: I see your point. I just don't know
20 that we can presume that that's what they're doing. But
21 I understand, Judge. I -- and I ---

22 THE COURT: Well, and that's why I was going to ask
23 them: Are you trying to determine the guilt or innocence
24 of the defendant as to two separate charges? Is that the
25 reason for your question? Or on two different crimes ---

1 MR. GEOLY: Well, and -- and ---

2 THE COURT: --- rather than ---

3 MR. GEOLY: --- let me maybe throw a hypothetical
4 back at you, Judge. What if there's one holdout that
5 they're trying to satisfy with an answer and -- and they
6 just want the answer, and now we're going to throw them
7 into a whole nother turmoil, almost stepping into their
8 province to, "Wait; you're doing it wrong."

9 THE COURT: No. If they've got one holdout, then
10 they don't have a verdict on the greater charge.

11 MR. GEOLY: Yes, sir.

12 THE COURT: Because they haven't reached a unanimous
13 verdict yet.

14 MR. GEOLY: Yes, sir.

15 THE COURT: They've got to reach a unanimous
16 verdict.

17 MR. GEOLY: Thank you, Judge.

18 MR. STUMBO: Right. And ---

19 THE COURT: So ---

20 MR. STUMBO: --- the -- the only reason why I threw
21 the other in there, Judge, is I -- I'm just looking at
22 your malice charge. You know, the general, big-picture
23 definition malice includes doing a wrongful act without
24 just cause or excuse and with an intent to inflict an
25 injury, it -- that -- the phrase they use.

1 And then, later on in the charge, it says (as read):
2 "Malice may also be inferred from a conduct showing total
3 disregard for human life," which they use.

4 So it's almost as if they're ---

5 THE COURT: Well, then ---

6 MR. STUMBO: --- they're trying to ---

7 THE COURT: --- yeah, you're right.

8 MR. STUMBO: --- they -- they're trying to ask: Is
9 one of these forms of malice superseding the other one or
10 vice versa?

11 THE COURT: Okay.

12 MR. STUMBO: And I -- I think the answer to that is
13 pretty easy: that that's -- that's not the case; that
14 they're both just different ---

15 THE COURT: Different ways ---

16 MR. STUMBO: --- ways to ---

17 THE COURT: --- of proving malice.

18 MR. STUMBO: --- prevent malice. And ---

19 THE COURT: Yeah.

20 MR. STUMBO: --- you can consider either one for
21 whatever weight you choose to give it.

22 THE COURT: Okay.

23 MR. STUMBO: And I think, at that point, you're not
24 stepping on their province. You're saying: Either --
25 either one is the law ---

1 THE COURT: Okay.

2 MR. STUMBO: --- and you can determine the weight of
3 either -- either method of malice. I think that's what
4 they're getting after ---

5 THE COURT: Okay.

6 MR. STUMBO: --- honestly.

7 THE COURT: All right.

8 MR. STUMBO: Because malice -- it -- it -- your
9 malice charge applies to both murder and attempted
10 murder.

11 THE COURT: Yeah.

12 MR. STUMBO: So ---

13 THE COURT: Are they ready?

14 (The Court went off the record at 5:07 p.m.)

15 (The Court went on the record at 5:09 p.m.)

16 (Whereupon, the jury entered the courtroom at 5:09
17 p.m.)

18 THE COURT: All right. Ladies and gentlemen,
19 welcome back. I've received your question: "Does total
20 disregard for human life supersede the intent to inflict
21 injury?"

22 If your question is to distinguish between express
23 malice and inferred malice, then, one does not supersede
24 the other. Because express malice and inferred malice
25 only deal with the way in which the state proves malice:

1 whether it is express or whether it is inferred through
2 other actions.

3 If your question is because you're trying to decide
4 the defendant's guilt or innocence on two separate
5 crimes, then you do not even consider the lesser crime
6 until you unanimously find the defendant not guilty of
7 the greater crime. I don't know if that answers your
8 question or not.

9 JURY FOREPERSON: (Gestured.)

10 THE COURT: Yes, sir.

11 JURY FOREPERSON: I think we're trying to figure
12 with intent and ---

13 JUROR: Disregard.

14 JURY FOREPERSON: --- disregard for human life, I
15 guess. Are those on par with each other, in terms of
16 being able to -- I -- I guess the verbiage is really what
17 we're ---

18 THE COURT: Well ---

19 JURY FOREPERSON: --- getting a little confused ---

20 THE COURT: --- intent ---

21 JURY FOREPERSON: --- about.

22 THE COURT: --- intent deals with the defendant's
23 state of mind. What did the defendant intend to do?
24 Disregard for human life deals with the defendant's
25 actions or the results of those actions. Was it with a

1 disregard for human life?

2 JURY FOREPERSON: Does that sort of answer your
3 questions?

4 THE COURT: I mean ---

5 JUROR: Your Honor, I -- I don't know if this is
6 appropriate. I -- you -- you know, I'm a practicing
7 attorney, also and a -- a civil litigator, so I'm a
8 little out of my depth in -- in criminal law. But in
9 reading over your instructions, I read that malice
10 aforethought requires the showing of an intent to do
11 harm. And then, further on down, it says or it can be
12 inferred by reckless disregard for human life.

13 THE COURT: Yeah. That deals with the way the state
14 proves malice.

15 JUROR: Okay.

16 THE COURT: There is no distinction whether they
17 prove it by a disregard for human life or whether they
18 prove it by the intent to inflict injury.

19 JUROR: So it could ---

20 THE COURT: That just ---

21 JUROR: --- be one or ---

22 THE COURT: --- deals with ---

23 JUROR: --- the other. It -- it doesn't have to be
24 -- because I had made a distinction -- and I think some
25 other people did too -- between a specific intent to do

1 harm -- to, for instance, the people in that vehicle --
2 and a total disregard for human life; that they are --
3 they're not the same thing. And -- and if a -- there
4 were -- was a requirement to show an intent to do harm to
5 the people -- any of the people in the car, even if was
6 an act of total disregard for human life, you would have
7 to show that specific intent to harm the people in the
8 car. But that apparently ---

9 THE COURT: Specific ---

10 JUROR: --- is not ---

11 THE COURT: Excuse me for interrupting you.

12 Specific ---

13 JUROR: Sure.

14 THE COURT: --- intent only applies to the charge of
15 attempted murder.

16 JUROR: Uh-huh.

17 THE COURT: Okay?

18 JUROR: (Nodded head up and down.)

19 THE COURT: So there is a requirement. As I said,
20 before you can find the defendant guilty of attempted
21 murder in this case, you have to show the he specifically
22 intended to murder Indigo Davis ---

23 JUROR: Thank you ---

24 THE COURT: --- whereas murder and the lesser-
25 included charges of attempted murder just require a

1 general intent. All right?

2 JUROR: I -- I think so. Again, under murder, we
3 don't need to show a specific intent if we have the
4 implied inference that ---

5 THE COURT: For murder, you do not have to show
6 specific intent. No. All right?

7 All right. I'm going excuse you to the jury room
8 and let you continue your deliberations.

9 Oh, wait a minute. Before we go, does the court
10 reporter -- I need -- we've got the foreperson's. Your
11 name, the ---

12 JUROR: Rudy Barnes, or Rudolph Barnes.

13 THE COURT: Okay. All right. I just need it for
14 the court reporter so she could put into the record who
15 was asking the question.

16 (Off the record briefly.)

17 THE COURT: All right. Yeah, you can go ahead and
18 go. Thank you.

19 (Whereupon, the jury exited the courtroom at 5:15
20 p.m.)

21 THE COURT: All right. Anything from the state?

22 MR. STUMBO: Judge, I think that adequately
23 instructed them on the law of South Carolina at the --
24 what you replied to them, which was the only one of these
25 that they're considering that requires specific intent is

1 attempted murder. The rest of them, it can be specific
2 or general intent.

3 THE COURT: Right.

4 MR. STUMBO: And I think that's what you said. I
5 think that accurately states the current law of the
6 State, Judge.

7 THE COURT: All right. Anything the defense wants
8 put on the record?

9 MR. GEOLY: Judge, just that I think they actually
10 had kind of a confused question that wasn't what you --
11 the solicitor was thinking or what Your Honor was
12 thinking. And I feel like we've kind of stepped on their
13 province. I'd just renew my, you know, earlier
14 objection.

15 I understand your position. I'm not trying to beat
16 a dead horse, but I just want to be noted for the record.

17 I -- I do think it's worth noting, too, Judge, both
18 Rudy Barnes, when he started addressing Your Honor, and
19 Your Honor, in replying back to him, said a disregard for
20 human life, when actually, the instruction -- and I think
21 the law -- is a total disregard for human life. So both
22 of you left out the word "total," when I think that's
23 actually appropriate. So I hate, you know, to think he'd
24 be going back to the room and look, if there's a
25 disregard for human life.

1 I think, actually, the rule is, it's a total
2 disregard for human life. So I'd just note that for the
3 record, Your Honor.

4 MR. STUMBO: Well ---

5 THE COURT: All right.

6 MR. STUMBO: -- I would say they're probably picking
7 apart the -- the words of the charge.

8 MR. GEOLY: I -- I hate ---

9 MR. STUMBO: And total ---

10 MR. GEOLY: --- to try to figure ---

11 MR. STUMBO: --- is clearly ---

12 MR. GEOLY: --- that out.

13 MR. STUMBO: -- in there so ---

14 THE COURT: All right. Anything -- we'll stand in
15 recess until we get a verdict.

16 MR. GEOLY: Yes, sir, Judge. Thank you.

17 THE COURT: Thank you.

18 (The Court went off the record at 5:17 p.m.)

19 (The Court went on the record at 5:24 p.m.)

20 THE COURT: All right. I understand that the jury
21 has reached a verdict. Anything from the state before we
22 bring the jury in?

23 MR. STUMBO: Nothing from the state, Your Honor.

24 THE COURT: Anything from the defense?

25 MR. GEOLY: Nothing from the defense, Your Honor.

1 THE COURT: All right. Let's go ahead and bring the
2 jury in.

3 (Off the record briefly.)

4 (Whereupon, the jury entered the courtroom at 5:26
5 p.m.)

6 THE COURT: All right. Ladies and gentlemen,
7 welcome back. Mr. Hill, I understand the jury has
8 reached your verdict; is that correct?

9 JURY FOREPERSON: We have, Your Honor.

10 THE COURT: Have you completed and signed all of the
11 verdict forms?

12 JURY FOREPERSON: We have.

13 THE COURT: All right. If you would please hand
14 them to the bailiff.

15 JURY FOREPERSON: (Complied.)

16 VERDICT OF THE JURY

17 THE COURT: All right. Regarding Indictment 2019-
18 GS-36-00359, in the *State of South Carolina v. Xzavier*
19 *Sharif Davis* -- excuse me; I apologize. (As read): Case
20 of the *State of South Carolina v. Xzavier Sharif Davis*,
21 regarding Indictment 2019-GS-36-00356, on the charge of
22 murder: We, the jury, find the defendant guilty of
23 murder. Regarding Indictment 2019-GS-36-00359, on the
24 charge of attempted murder, we, the jury, find the
25 defendant guilty of assault and battery of a high and

1 aggravated nature. On the -- on Indictment 2019-GS-
2 36-00357, on the charge of possession of a weapon during
3 the commission of a violent crime, we, the jury, find the
4 defendant guilty of possession of a weapon during the
5 commission of a violent crime.

6 Ladies and gentlemen, if these are your verdicts,
7 please signify by raising your right hand.

8 (Whereupon, all jurors raised their right hands.)

9 THE COURT: All right. Let the record reflect that
10 all jurors raised their right hand.

11 Any polling of the jury by the state?

12 MR. STUMBO: None from the state, Your Honor.

13 THE COURT: Any polling of the jury by the defense?

14 MR. GEOLY: No, sir, Your Honor.

15 THE COURT: All right.

16 All right. Ladies and gentlemen, that will conclude
17 your duties as jurors in this case, and I want to thank
18 you for your service. That will also conclude your duty
19 as jurors for this week. We don't have any other trials.

20 And I want to thank you for your service. I know
21 that performing jury duty is not anything fun; it's not
22 what anybody wants to do. But it is a vital part of our
23 judicial system. And you've done it very consciously,
24 and I want to thank you for that.

25 You've got a one-year disqualification from serving

1 on jury duty. You've got a three-year exemption -- I
2 hope you don't exercise your exception because we need
3 good jurors. And I want to thank for your service.

4 You're free to go for the remainder the day, and I
5 hope everybody has a good evening. Thank you very much.

6 (Whereupon, the jury exited the courtroom at 5:29
7 p.m.)

8 (Off the record briefly.)

9 THE COURT: All right. Any posttrial motions at
10 this time?

11 MR. GEOLY: Please the Court, Judge, I would renew
12 my previous motions, Your Honor, and move for you to
13 vacate this verdict and set a new trial.

14 THE COURT: All right. Your motion is noted. I'm
15 going to deny it.

16 MR. GEOLY: Yes, Judge.

17 THE COURT: All right. Anything else?

18 MR. GEOLY: (No verbal response.)

19 THE COURT: All right. Are we ready to go ahead
20 with sentencing?

21 MR. STUMBO: Yes -- yes, sir, we are. We're ready
22 to proceed. I think we have the -- the sentencing sheets
23 that are appropriate ---

24 THE COURT: You have the sentencing sheets? All
25 right.

1 MR. STUMBO: Yes, sir.

2 THE COURT: Let me see.

3 MR. STUMBO: Sheriff, you want to come over here?

4 (The Court went off the record at 5:30 p.m.)

5 (The Court went on the record at 5:34 p.m.)

6 MR. STUMBO: Judge, I think we're ready to proceed
7 with sentencing.

8 THE COURT: I mean ---

9 MR. STUMBO: If I may ---

10 THE COURT: --- I need the sentence sheets.

11 MR. STUMBO: All right.

12 THE COURT: Oh, you've got them.

13 MR. STUMBO: Yes, sir. If I may approach?

14 THE COURT: All right.

15 MR. STUMBO: I don't know. Do we need to wait on
16 the clerk? I'm not sure.

17 (Off the record briefly.)

18 THE COURT: All right. What I generally do, I'll
19 certainly listen to defense counsel, Mr. Geoly, the
20 defendant, or anybody that wants to speak on his behalf.
21 And then I'll listen from the state, victim or victims
22 and then -- if they wish. And then I'll ask for his
23 prior record, and then I'll impose the sentence. Okay?

24 MR. STUMBO: Yes, sir.

25 THE COURT: All right. Mr. Geoly, anything in

1 mitigation on any of these charges?

2 MR. GEOLY: Your Honor, my client is 28 years old
3 now. He was 26 years old at the time that this occurred.
4 As you may or may not realize, Your Honor, he was working
5 full-time -- actually, mostly overtime -- at Georgia-
6 Pacific; had a great job; was the primary wage-earner for
7 his family; took care of both his stepson, minor child, who was
8 like a son to him, and -- and his wife. And they -- as
9 you know, they have property there that's actually in her
10 dad's name. But he paid the down payment; he made the
11 payments. He totally supported his family.

12 He has been away from his family for the majority of
13 the last two years, Judge. He's been out on bond,
14 actually, about the last 3 1/2 weeks. They're were no
15 incidents while he was out on bond.

16 He had no real incident prior to this happening. I
17 think he may have a paid fine for possession of marijuana
18 on his record. That's, I think, the only thing that I'm
19 aware of that -- that has ever been on his record. He
20 took responsibility for that.

21 Judge, I -- I know there's a tendency, not
22 necessarily to punish, but to not give a -- a individual
23 that takes a trial credit for taking responsibility for
24 their actions. I remember when I was cutting my teeth,
25 you know, 25 years ago. Judge Cottingham was before us,

1 and Judge Rushing was the other judge here a lot. But I
2 can remember Judge Cottingham pulling some attorneys in
3 the and saying: "Listen, Supreme Court says -- the
4 Constitution says I can't hold it against him for -- for
5 taking a trial. But if he takes the stand and he lies
6 and they find him guilty, well, then, that's a different
7 story. And I -- I can punish him for that."

8 I -- I'd like to point out that here, he didn't
9 belabor anything with anybody. He -- he, you know,
10 didn't try to change the game or act like he didn't do
11 this; they could've been somebody else shooting. That
12 certainly wasn't our position.

13 And -- and certainly, you know, maybe I erred. But
14 I felt like we were in a good position, after the state's
15 case, that they had maybe not carried their burden. So
16 we talked, and he -- he decided not to offer any
17 evidence.

18 But he certainly didn't misrepresent anything to
19 this Court. He did take his constitutionally -- right to
20 a jury trial. And -- and that's what he did. He didn't
21 misrepresent anything in this Court. He didn't try to
22 hide the ball or say he had done something that he didn't
23 do or didn't remember something that he didn't remember.

24 He has no, you know, real record, Judge, certainly
25 no general-sessions criminal history and, prior to this,

1 was working hard to care for this family. We -- we would
2 ask you to, you know, temper justice with mercy and
3 impose the minimum sentence.

4 Your Honor, the jury has ruled. I mean, clearly,
5 they -- they thought that he committed this heinous act.
6 But I would point out that -- that, you know, the true
7 victim of this, other than society and minor child are Indigo,
8 who -- who does love her husband, who doesn't think he was
9 trying to kill her, and -- and would like him to come home
10 at some point. So we would ask that you do temper justice
11 with mercy -- mercy and consider giving him the minimum,
12 which obviously as Your Honor knows, is a -- is a time
13 that is -- is beyond what he's already lived. I mean, he
14 -- at 30 years, he's going to be serving two more years
15 than he's been on this planet.

16 And as you know, Your Honor, that's day-for-day.
17 That's not one of these 85 percent crimes. I mean, you
18 have to give him at least 30 years, and he'll do at least
19 30, not any kind of 85 percent or anything like that.

20 So we would ask that you consider running these
21 concurrent and just giving him the -- the minimum, which,
22 again, is -- is over the life that he's lived at this
23 point. And certainly, the victims, I don't think, would
24 -- would be dissatisfied with that. And his -- I hope,
25 at this point, his lack of a criminal record will count

1 for something, Your Honor.

2 THE COURT: All right.

3 MR. GEOLY: All right.

4 THE COURT: Mr. Davis, anything you want to say?

5 (Off the record briefly.)

6 THE DEFENDANT: Hey, Your Honor, I just ask that you
7 give justified time on the charge and make -- make -- you
8 know, so I can be able to get back home to my family.

9 THE COURT: All right. Thank you, sir.

10 THE DEFENDANT: All right. Thank you.

11 THE COURT: All right. Anything else from the
12 defense?

13 MR. GEOLY: No, sir, Your Honor. Obviously, I would
14 ask for that. That -- I think it -- Your -- Your Honor,
15 you know, would give that as a -- just a natural course
16 of action. He's served about two years and maybe three
17 months, and I'd just ask you to give the credit for the
18 time served that he's entitled to.

19 THE COURT: All right.

20 MR. GEOLY: Thank you, Judge.

21 THE COURT: Any victims wish to speak or anything
22 from the state?

23 MR. STUMBO: Judge, and as heartbroken as I am about
24 this -- and I think you could see, when Indigo was on the
25 stand the other day -- what Mr. Geoly said is the

1 defendant never took the stand and -- and lied. He
2 exercised his constitutional right to not testify. And
3 that's his right, Judge.

4 But the influence that he now has or seems to have
5 over Indigo has made it extraordinarily difficult for us
6 and the sheriff's office to move forward on this case.
7 Mr. Daniel and Mr. Bentley, they went out there to the
8 house a couple weeks ago. She was very hostile; on the
9 state, the same thing.

10 So it doesn't surprise me that she's not here,
11 speaking on behalf of her son today. I think her parents
12 are very hurt by this whole thing, and they have stayed
13 away today.

14 And, Judge, who we have left standing for this child
15 is my office, myself; we're fighting for this child and
16 justice -- and the sheriff, who's behind me. I thought
17 him testifying in this case was very appropriate because
18 of not only his involvement, being, really other than
19 uniform deputies, the first one on scene, but someone who
20 was very, very involved and concerned about what had
21 happened to minor child in this case.

22 And it breaks my heart that there's no family
23 members sitting here on their behalf. I see Mr. Logan
24 there, who -- who's been very vocal on social media about
25 -- about standing for this -- this child. And he's here,

1 but -- but no family members, Judge. And I think that
2 speaks volumes about the emotional conflict that this
3 defendant has put in Indigo's life.

4 We had two jail letters, Judge, that if he had taken
5 the stand, I would've put into evidence in
6 cross-examination. He sent two letters from the jail to
7 Indigo, Judge, and said that, "I can't believe you did
8 what you did at the hospital." Essentially, it's her
9 fault.

10 And, Judge, that -- that to me -- and I -- it -- I
11 think he was wise not to take the stand because I
12 would've confronted him with those letters he sent from
13 the jail, basically making it look like Indigo is the one
14 who caused this event, which is just unbelievable to me,
15 Judge. It shows a lack of remorse.

16 I -- I -- I've been waiting because he really can't
17 -- I know Mr. Geoly has advised him to this point: "You
18 can't really say anything about remorse if it's a trial."
19 I get that.

20 But I didn't hear any remorse even today, Judge, not
21 one ounce; not when he was arrested by the sheriff's
22 department; not when he was served with the murder
23 warrants; and not today. He's still looking at me like
24 he wants to hurt me, like it's my fault or the sheriff's
25 office. And, Judge, to me -- that to me says volumes

1 about who this -- this defendant is.

2 His record is fairly minimal: malicious injury to
3 property in 2010; public disorderly, 2013; alcohol
4 violation, in '14; and a driving under suspension, '15.
5 So we don't have any substantial criminal record. But I
6 -- I just cannot get over the lack of remorse in this
7 case, Judge, for what he did to this child. It -- it's
8 -- it's just staggering to me.

9 Judge, the sheriff's department brought me this
10 today. And I think it is for sentencing. Obviously, I'd
11 never show it to a jury. But the attorney general and
12 SLED do these renderings of children that go missing or,
13 you know, they're kidnapped for purposes of trying to
14 find them later. And obviously, that's not the purpose
15 of this.

16 But they did, based on his picture, the -- the SLED
17 and attorney general's office artists that do these
18 things, show this picture of what minor child would be at age
19 18. And that's what this is about, Judge. I heard Mr.
20 Geoly say several times that if this was about minor child,
21 that Indigo would be here, in his closing. Judge,
22 there's no question, this is about minor child. And quite
23 honestly, I think the jury reached the right decision on
24 finding a guilt -- a -- a guilty verdict on the ABHAN.

25 But that one to me, because Indigo has been so

1 difficult for us, quite frankly, Judge, I think this is
2 about this little boy here, who should be now in the
3 third grade or going into the fourth grade. The COVID
4 took us a while to get this case to trial.

5 Judge, I -- I said enough today. I've said enough
6 in -- in my closing. You -- Your Honor heard that. I
7 would like for the sheriff to have an opportunity to
8 address Your Honor ---

9 THE COURT: No. I mean ---

10 MR. STUMBO: --- I think, as the elected sheriff.

11 THE COURT: --- just the state or the victims'
12 family.

13 MR. STUMBO: Yes, sir.

14 THE COURT: So I can't -- I can't hear from law
15 enforcement or any ---

16 MR. STUMBO: That's fine. And I -- I will tell you,
17 just, Judge, we are on the same team on this. And quite
18 honestly, Judge, I've never been one to ask a court to
19 give a particular sentence. That's -- that's, I believe,
20 out of my lane, so to speak.

21 Judge, I believe that you were elected to the
22 position you're in. You've been in it for many years.
23 And I trust Your Honor's judgment. I believe you've made
24 fair rulings throughout this case to both sides. You've
25 instructed the law. And I trust you to -- to render a

1 sentence in this case, Judge.

2 Based on the horrific nature of the crime and what
3 has been lost and the lack of remorse from this man,
4 sentence him appropriately, Judge.

5 THE COURT: All right.

6 MR. STUMBO: That's all from the state.

7 THE COURT: Any other prior criminal record that you
8 haven't already referenced?

9 MR. STUMBO: That is -- that is all, Judge.

10 THE COURT: All right.

11 MR. STUMBO: Judge, just -- just one final thing --
12 and I don't know if I articulated this very well. But
13 obviously, the range is 30 to life. When there's remorse
14 and responsibility taken, I think you go towards the
15 lower end of that range. When there's not, I think it --
16 it moves up. And, Judge, I -- I'll leave it at that and
17 leave it in your discretion, Judge.

18 THE COURT: All right.

19 (Off the record briefly.)

20 SENTENCE OF THE COURT

21 THE COURT: All right. Mr. Davis, you have been
22 found guilty by a jury trial on the charges of murder,
23 assault and battery of a high and aggravated nature and
24 possession of a weapon during the commission of a violent
25 crime. On the charge of murder, the sentence of the

1 Court is that you be confined to the State Department of
2 Corrections for 35 years. On the charge of assault and
3 battery of a high and aggravated nature, the sentence of
4 the Court is that you be confined to the State Department
5 of Corrections for 20 years. On the charge of possession
6 of a weapon during the commission of a violent crime, the
7 sentence of the Court is that you be confined to the
8 State Department of Corrections for 5 years. All
9 sentences will run concurrently. You'll be given credit
10 for any time served thus far.

11 That's all.

12 MR. GEOLY: Thank you, Judge.

13 THE COURT: All right. Thank you.

14 (Whereupon, the proceeding was concluded at 5:52 p.m.)

15 --- END OF TRANSCRIPT OF RECORD ---
16
17
18
19
20
21
22
23
24
25

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

STATE

VS.

XZAVIER SHARIF DAVIS, JR.

AKA: XZAVIER SHARIF DAVIS, JR.

Race: Black Sex: M Age: 28

DOB: [REDACTED]/1993 SS#: [REDACTED]

Address: [REDACTED]

City, State, Zip: Newberry, SC 29108

DL# [REDACTED] SID# SC01935602

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the above indictment comes now the Defendant who was

TO: Murder

In violation of § 16-03-0010 of the S.C. Code of Laws, bearing CDR Code # 0116

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS ☐ § 17-25-45

(CSC w/minor 1st or CSC w/minor 3rd)

The charge is: ☒ As indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (def.'s initials)

The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

David M. Stumbo 72105

David M. Stumbo, Solicitor SC Bar # Defendant

Attorney for Defendant

SC Bar #

WHEREFORE, the Defendant is committed to the ☒ State Department of Correction ☐ County Detention Center,

for a determinate term of 35 days/months/years Time Served ☐ Youthful Offender Act not to exceed X years

and/or to pay a fine of \$ X; provided that upon the service of X days/months/years/Time Served and or payment

of \$ X; plus costs and assessments as applicable*; the balance is suspended with probation for X

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

The sentence shall run

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:

8/26/2021

☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by SCDOC. days/months

☐ To include time spent on monitored house arrest prior to trial and sentencing.

☐ The Defendant Shall be Released from County Detention Center.

Pursuant to 18 U.S.C. § 922 and § 16-25-30 it is unlawful for a person convicted of a violation of § 16-25-20 or § 16-25-65 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2019GS36-00356

A/W#: 2019A3610100161

Date of Offense: 04/20/2019

S.C. Code §: 16-03-0010

CDR Code #: 0116

SENTENCE SHEET

*30 yrs to Life
Without Parole*

☒ CONVICTED OF or ☐ PLEADS

STATE VS. XZAVIER SHARIF DAVIS, JR.INDICTMENT/CASE#: 2019GS36-00356☐ **PTUP** after _____ months/years**And Other Terms Listed Below:**

- ☐ Substance Abuse Counseling ☐ Completion of GED ☐ Random Drug/Alcohol Testing
- ☐ Attend Voc. Rehab. Or Job Corp ☐ No Contact with Victim ☐ Domestic Violence Intervention Program
- ☐ Mental Health Counseling ☐ May serve W/E beginning: _____
- ☐ Sex Offender Registry pursuant to S.C. Code § 23-3-430 ☐ Public Service Employment _____ days/hours
- ☐ Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.
- ☐ Other: _____

☐ **RESTITUTION** ☐ **Deferred** ☐ **Def. Waives Hearing** ☐ **Ordered**

Total \$ _____ plus 20% fee: _____ \$ _____

Payment Terms: _____ ☐ Set by SCDPPPS

Recipient: _____

*Fine:		\$
Fine may be pd. in equal consecutive weekly/monthly pmts. of	\$ _____ Beginning	
§14-1-206 (Assessments 107.5%)		\$
§14-1-211 (A)(1)(Conv. Surcharge)	\$100	\$ 100.00
§14-1-211 (A)(2)(DUI Surcharge)	\$100	\$
§56-5-2995 (DUI Assessment)	\$12	\$
§56-1-286 (DUI Breath Test)	\$25	\$
§14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§14-1-213 (Drug Court Surcharge)	\$150	\$
§34-11-70(b)and(c), and 34-11-90(c)and(d) (Admin Fraud Check Court Costs)	\$41	\$
§50-21-114 (BUI Breath Test Fee)	\$50	\$
§56-5-2942(I) (Vehicle Assessment)	\$40/ea	\$
3% to County (if paid in installments)	TBD	\$ 3.75
☐ Appointed PD or appointed other counsel, Proviso requires \$500 be paid to Clerk during probation and shall be collected before any other fees	\$500	\$
☐ § 17-3-30(B) Unpaid Application Fee to be paid to the Public Defender Fund	TBD	\$
TOTAL		\$ 128.75

 Clerk of Court/Deputy Clerk: Beverly J. Bruchner
 Court Reporter: Maryann Rivers

 Presiding Judge: Maryann Rivers
 Judge Code: 2148
 Sentence Date: Aug 26, 2021

Ryan Dickert

WITNESSES

Newberry County Sheriff's Department

(**WARRANT NUMBER**

2019A3610100161

TRUE BILL

Wade Dickert

Foreman of the Grand Jury

Date: 6/21/19

(**VERDICT**

GUILTY

Patricia Hill 8/26/21

Foreman

THE STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

COURT OF GENERAL SESSIONS

June Term, 2019

Indictment # 2019-GS-36-00356

THE STATE

vs.

XZAVIER SHARIF DAVIS

INDICTMENT FOR

Murder

SC Code: § 16-03-0010

CDR: 0116

I hereby waive presentment to the Grand Jury.

Defendant

Witness:

THE STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

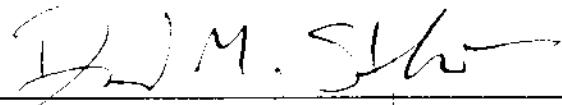
INDICTMENT FOR

**Murder
§16-03-0010**

At a Court of General Sessions, convened on the 21st day of June, 2019, the Grand Jurors of Newberry County present upon their oath:

That Xzavier Sharif Davis, on or about April 20, 2019, in Newberry County, ^{did} willfully, feloniously, and with malice aforethought kill one Iven James Caldwell by means of shooting and that Iven James Caldwell did die as a proximate result thereof on or about April 22, 2019 in violation of Section 16-3-10 of the South Carolina Code of Laws, 1976, as amended. (MAL)

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.



David M. Stumbo
Solicitor

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

STATE

VS.

XZAVIER SHARIF DAVIS, JR.

AKA: XZAVIER SHARIF DAVIS, JR.

Race: Black Sex: M Age: 28

DOB: 1993 SS#: -0978

Address: 633 Cherry Lane

City, State, Zip: Newberry, SC 29108

DL#* SID# SC01935602

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2019GS36-00357

A/W#: 2019A3610100156

Date of Offense: 04/20/2019

S.C. Code §: 16-23-0490

CDR Code #: 0549

SENTENCE SHEET

5 yrs

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the above indictment comes now the Defendant who was

☒ CONVICTED OF or ☐ PLEADS

TO: Possession Of A Weapon During The Commission Of A Violent Crime

In violation of § 16-23-0490 of the S.C. Code of Laws, bearing CDR Code # 0549

☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS ☐ § 17-25-45

(CSC w/minor 1st or CSC w/minor 3rd)

The charge is: ☒ As indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (def.'s initials)

The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

David M. Stumbo 72105

David M. Stumbo, Solicitor SC Bar # Defendant

Attorney for Defendant

SC Bar #

WHEREFORE, the Defendant is committed to the ☒ State Department of Correction ☐ County Detention Center,

for a determinate term of 5 days/months/years/Time Served ☐ Youthful Offender Act not to exceed X years

and/or to pay a fine of \$ X; provided that upon the service of X days/months/years/Time Served and or payment

of \$ X; plus costs and assessments as applicable*; the balance is suspended with probation for X

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

The sentence shall run

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 8/26/2021

☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by SCDoc. days/months

☐ To include time spent on monitored house arrest prior to trial and sentencing.

☐ The Defendant Shall be Released from County Detention Center.

Pursuant to 18 U.S.C. § 922 and § 16-25-30 it is unlawful for a person convicted of a violation of § 16-25-20 or § 16-25-65 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

☐ **PTUP** after _____ months/years

And Other Terms Listed Below:

- ☐ Substance Abuse Counseling ☐ Completion of GED ☐ Random Drug/Alcohol Testing
- ☐ Attend Voc. Rehab. Or Job Corp ☐ No Contact with Victim ☐ Domestic Violence Intervention Program
- ☐ Mental Health Counseling ☐ May serve W/E beginning: _____
- ☐ Sex Offender Registry pursuant to S.C. Code § 23-3-430 ☐ Public Service Employment _____ days/hours
- ☐ Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.
- ☐ Other: _____

☐ **RESTITUTION** ☐ **Deferred** ☐ **Def. Waives Hearing** ☐ **Ordered**

Total \$ _____ plus 20% fee: _____ \$ _____

Payment Terms: _____ ☐ Set by SCDPPPS

Recipient: _____

***Fine:**

Fine may be pd. in equal consecutive weekly/monthly pmts. of	\$ _____	Beginning	\$ _____
§14-1-206 (Assessments 107.5%)			\$
§14-1-211 (A)(1)(Conv. Surcharge)		\$100	\$ 100.00
§14-1-211 (A)(2)(DUI Surcharge)		\$100	\$
§56-5-2995 (DUI Assessment)		\$12	\$
§56-1-286 (DUI Breath Test)		\$25	\$
§14-1-212 (Law Enforce. Funding)		\$25	\$ 25.00
§14-1-213 (Drug Court Surcharge)		\$150	\$
§34-11-70(b)and(c), and 34-11-90(c)and(d) (Admin Fraud Check Court Costs)		\$41	\$
§50-21-114 (BUI Breath Test Fee)		\$50	\$
§56-5-2942(J) (Vehicle Assessment)		\$40/ea	\$
3% to County (if paid in installments)		TBD	\$ 3.75
☐ Appointed PD or appointed other counsel, Proviso requires \$500 be paid to Clerk during probation and shall be collected before any other fees		\$500	\$
☐ § 17-3-30(B) Unpaid Application Fee to be paid to the Public Defender Fund		TBD	\$
TOTAL			\$ 128.75

Clerk of Court/Deputy Clerk: _____
Court Reporter: _____

Beverly J. Behnen
Nayana Davis

Presiding Judge: _____
Judge Code: _____
Sentence Date: _____

Margaret Culbert
2148
Aug 26, 2021

Ryan Dickert

WITNESSES

Newberry County Sheriff's Department

WARRANT NUMBER

2019A3610100156

TRUE BILL

Wade Danks

Foreman of the Grand Jury

Date: 6/21/19

VERDICT

GUILTY

Dan Hines 8/26/21

Foreman

THE STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

COURT OF GENERAL SESSIONS

June Term, 2019

Indictment # 2019-GS-36-00357

THE STATE

vs.

XZAVIER SHARIF DAVIS

INDICTMENT FOR

Possession Of A Weapon During The Commission Of A

Violent Crime

SC Code: § 16-23-0490

CDR: 0549

I hereby waive presentment to the Grand Jury.

Defendant

Witness:

THE STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

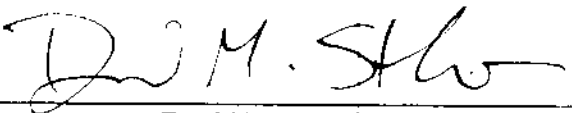
INDICTMENT FOR

**Possession Of A Weapon During The Commission
Of A Violent Crime
§16-23-0490**

At a Court of General Sessions, convened on the 21st day of June, 2019, the Grand Jurors of Newberry County present upon their oath:

The defendant, Xzavier Sharif Davis, did on or about April 20, 2019, in Newberry County, South Carolina, while committing the violent crime(s) of murder, attempted murder(s) and/or any lesser included violent crime(s) defined in Section 16-1-60, possess a firearm. All in violation of 16-23-0490, South Carolina Code of Laws (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.



David M. Stumbo
Solicitor

General Sessions Tracking Sheet
Indictment # 0000GS36

Name: Davis, Xzavier Sharif
AKA:
Addr: 5 [REDACTED]
Newberry, SC 29108

Warrant/Ticket #: 2019A3610100156
Date of Arrest: 04/20/2019
Date of Offense: 04/20/2019
Date Rcv by Clerk 04/23/2019
Magistrate: Clerk Of Court C P, G S, And Family Court
Counts: Code: 0549/Weapons / Poss. weapon during
violent crime, if not also sentenced to life
without parole or death

SSN# [REDACTED]
Sex: M Race: B
DOB: [REDACTED] 1993
DL# SC/ [REDACTED]

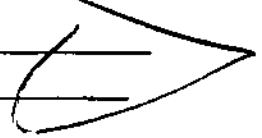
Indictment # 0000GS36

Disposition Information

1. Transmitted to SOL & SCCA:
2. Disp Received by Clerk:
3. Date of Disposition: 8-26-2021

Disposition	☒ 1. Guilty plea	
	☐ 2. Trial -- guilty	
	☐ 3. Trial -- not guilty	
	☐ 4. Dism/Not Pros/Pros Ended	Explain: _____
	☐ 5. Judicial Commitment	Explain: _____
	☐ 6. Judicial Dismissal	
	☐ 7. Remanded	Explain: _____
	☐ 8. Dismissed at Prelim	
	☐ 8. No Bill	
	☐ 9. Failure to Appear	Explain: _____
	☐ 10. Other	Explain: _____

Judge: _____
Defense Atty: _____
Counts: _____ Code: _____
Sentence: _____

Court Reporter: _____
Solicitor: Payton Davis 

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

STATE

VS.

XZAVIER SHARIF DAVIS, JR.

AKA: XZAVIER SHARIF DAVIS, JR.

Race: Black Sex: M Age: 28

DOB: [REDACTED] SS#: [REDACTED]

Address: [REDACTED]

City, State, Zip: Newberry, SC 29108

DL#* [REDACTED] SID# SC01935602

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2019GS36-00359

A/W#: 2019A3610100159

Date of Offense: 04/20/2019

S.C. Code §: 16-03-0029

CDR Code #: 3410

SENTENCE SHEET

0-20 yrs

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the above indictment comes now the Defendant who was

☒ CONVICTED OF or ☐ PLEADS

TO: Assault & Battery of a High & Aggravated Nature

In violation of § 16-03-0600(B)(1) of the S.C. Code of Laws, bearing CDR Code # 3411

☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS ☐ § 17-25-45

(CSC w/minor 1st or CSC w/minor 3rd)

The charge is: ☐ As indicted, ☒ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (def.'s initials)

The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

David M. Stumbo 72105

David M. Stumbo, Solicitor SC Bar # _____ Defendant

Attorney for Defendant

SC Bar # _____

WHEREFORE, the Defendant is committed to the ☒ State Department of Correction ☐ County Detention Center,

for a determinate term of 20 days/months/years Time Served

☐ Youthful Offender Act not to exceed X years

and/or to pay a fine of \$ X; provided that upon the service of X days/months/years/Time Served and or payment

of \$ X; plus costs and assessments as applicable*; the balance is suspended with probation for X

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

The sentence shall run

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 8/26/2021

☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by SCDoc. _____ days/months

☐ To include time spent on monitored house arrest prior to trial and sentencing.

☐ The Defendant Shall be Released from County Detention Center.

Pursuant to 18 U.S.C. § 922 and § 16-25-30 it is unlawful for a person convicted of a violation of § 16-25-20 or § 16-25-65 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

☐ **PTUP** after _____ months/years

And Other Terms Listed Below:

- ☐ Substance Abuse Counseling ☐ Completion of GED ☐ Random Drug/Alcohol Testing
- ☐ Attend Voc. Rehab. Or Job Corp ☐ No Contact with Victim ☐ Domestic Violence Intervention Program
- ☐ Mental Health Counseling ☐ May serve W/E beginning: _____
- ☐ Sex Offender Registry pursuant to S.C. Code § 23-3-430 ☐ Public Service Employment _____ days/hours
- ☐ Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.
- ☐ Other: _____

☐ **RESTITUTION** ☐ **Deferred** ☐ **Def. Waives Hearing** ☐ **Ordered**

Total \$ _____ plus 20% fee: _____ \$ _____

Payment Terms: _____ ☐ Set by SCDPPPS

Recipient: _____

***Fine:**

Fine may be pd. in equal consecutive weekly/monthly pmts. of	\$ _____	Beginning	\$ _____
§14-1-206 (Assessments 107.5%)			\$
§14-1-211 (A)(1)(Conv. Surcharge)		\$100	\$ 100.00
§14-1-211 (A)(2)(DUI Surcharge)		\$100	\$
§56-5-2995 (DUI Assessment)		\$12	\$
§56-1-286 (DUI Breath Test)		\$25	\$
§14-1-212 (Law Enforce. Funding)		\$25	\$ 25.00
§14-1-213 (Drug Court Surcharge)		\$150	\$
§34-11-70(b)and(c), and 34-11-90(c)and(d) (Admin Fraud Check Court Costs)		\$41	\$
§50-21-114 (BUI Breath Test Fee)		\$50	\$
§56-5-2942(J) (Vehicle Assessment)		\$40/ea	\$
3% to County (if paid in installments)		TBD	\$ 375
☐ Appointed PD or appointed other counsel, Proviso requires \$500 be paid to Clerk during probation and shall be collected before any other fees		\$500	\$
☐ § 17-3-30(B) Unpaid Application Fee to be paid to the Public Defender Fund		TBD	\$
TOTAL			\$ 128.75

Clerk of Court/Deputy Clerk: _____
Court Reporter: _____

Beverly J. Brannen
Maryann News

Presiding Judge: _____
Judge Code: _____
Sentence Date: _____

Margaret Culbert
2148
Aug. 26, 2021

Ryan Dickert

WITNESSES

Newberry County Sheriff's Department

WARRANT NUMBER

2019A3610100159

TRUE BILL

Wade Daulton

Foreman of the Grand Jury

Date: 6/21/19

VERDICT

GUILTY AS TO ABHARU

Perth Hill 8/26/21

Foreman

THE STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

COURT OF GENERAL SESSIONS

June Term, 2019

Indictment # **2019-GS-36-00359**

THE STATE

vs.

XZAVIER SHARIF DAVIS

INDICTMENT FOR

Attempted Murder

SC Code: § 16-03-0029

CDR: 3410

I hereby waive presentment to the Grand Jury.

Defendant

Witness:

THE STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

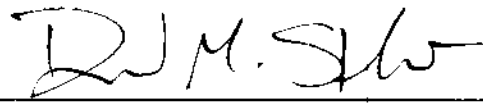
INDICTMENT FOR

**Attempted Murder
§16-03-0029**

At a Court of General Sessions, convened on the 21st day of June, 2019, the Grand Jurors of Newberry County present upon their oath:

The defendant, Xzavier Sharif Davis, did on or about April 20, 2019, in Newberry County, South Carolina, did unlawfully, with malice aforethought, either express or implied, and with the intent to kill, attempted to kill Indigo Caldero Penny. All in violation of 16-03-0029, Code of Laws of South Carolina (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.



David M. Stumbo
Solicitor

COURT OF GENERAL SESSIONS
EIGHTH JUDICIAL CIRCUIT
INDICTMENT # 2019-GS-36-00359

VERDICT
RE: ATTEMPTED MURDER

General Sessions Tracking Sheet
Indictment # 0000GS36

Name: Davis, Xzavier Sharif

Warrant/Ticket #: 2019A3610100159

AKA:

Date of Arrest: 04/20/2019

Addr: [REDACTED]
Newberry, SC 29108

Date of Offense: 04/20/2019

Date Rcv by Clerk 04/23/2019

Magistrate: Clerk Of Court C P, G S, And Family Court

Counts: Code: 3410/Assault / Attempted Murder

SSN# [REDACTED]

Sex: M Race: B

DOB: [REDACTED] 5/1993

DL# [REDACTED]

Indictment # 0000GS36

Disposition Information

1. Transmitted to SOL & SCCA:

2. Disp Received by Clerk:

3. Date of Disposition: 8-26-2021

- Disposition ☒ 1. Guilty plea
☐ 2. Trial -- guilty
☐ 3. Trial -- not guilty
☐ 4. Dism/Not Pros/Pros Ended
☐ 5. Judicial Commitment
☐ 6. Judicial Dismissal
☐ 7. Remanded
☐ 8. Dismissed at Prelim
☐ 8. No Bill
☐ 9. Failure to Appear
☐ 10. Other

Explain: _____

Explain: _____

Explain: _____

Explain: _____

Explain: _____

Judge: _____

Court Reporter: _____

Defense Atty: _____

Solicitor: Taylor Daniel

Counts: _____ Code: _____

Sentence: _____

RECEIVED

SEP 07 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of General Sessions

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2019-GS-36-000356
2019-GS-36-000357
2019-GS-36-000359

The State,

Respondent,

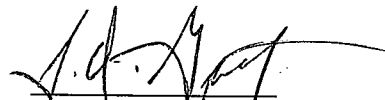
v.

Xzavier Sharif Davis,

Appellant.

NOTICE OF APPEAL

Xzavier Sharif Davis appeals his conviction and sentence in this case. The sentence was imposed by the Honorable Benjamin H. Culbertson on August 26, 2021.



Stephen Drew Geoly
222 Phoenix Street
Greenwood, South Carolina 29646
(864) 223-3352
Attorney for Appellant

September 3, 2021

Other Counsel of Record:
David M. Stumbo
Solicitor
Post Office Box 516
Greenwood, South Carolina 29649
(864) 942-8800
Attorney for Respondent

FILED
NEWBERRY COUNTY
2021 SEP . 3 PM 2:46
ELIZABETH P FOLK
CLERK OF COURT

I, Elizabeth P. Folk, Clerk of Court, Newberry, South Carolina, do hereby certify that this is a true and correct copy of the original on file in this office.
SEP 03 2021
Elizabeth P. Folk
Clerk of Court

RECEIVED

Oct 20 2021

SC Court of Appeals



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1345

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

October 20, 2021

The Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: The State v. Xzavier Sharif Davis - Appellate Case No. 2021-000982

Dear Ms. Kitchings:

Our office has been notified by former trial counsel Stephen D. Geoly that the family of Xzavier Davis has retained private counsel, Rauch Wise, to handle his appeal. It is also our understanding from Mr. Geoly that Rauch Wise will be making the request to order the transcript from the court reporter since he has been retained to handle the appeal.

Consequently, given the information above, we are closing our file in this case. If you need additional information, or have any questions or concerns, please contact me.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD/ab

cc: Stephen D. Geoly, Esquire
C. Rauch Wise, Esquire
Xzavier Sharif Davis, # 385846

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

Jan 18 2023

APPEAL FROM NEWBERRY COUNTY
Court of General Sessions
Honorable Benjamin H. Culbertson, Circuit Court Judge

SC Court of Appeals

Appellate Case No. 2021-000982
Trial Court Case No. 2019GS3600356, 600357, 600359

The State Respondent,

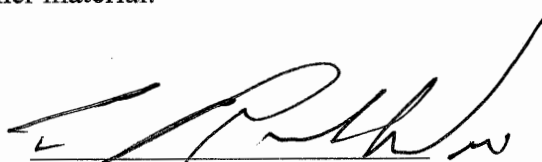
v.

Xzavier Sharif Davis Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

January 10th, 2023



C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
(864) 229-5010
S.C. Bar No. 00188

Attorney for Appellant

RECEIVED

Jan 31 2023

SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**APPEAL FROM NEWBERRY COUNTY
Court of General Sessions
Benjamin H. Culbertson, Circuit Court Judge**

**Appellant Case № 2021-000982
Lower Court Case Nos. 2019GS3600356, 2019GS3600357, 2019GS3600359**

The State Respondent,

vs.

Xzavier Sharif Davis Appellant.

FINAL BRIEF OF APPELLANT

**C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
S.C. Bar # 6188
(864) 229-5010
rauchwise@gmail.com**

Attorney for Appellant

Index

	Page:
Table of Authorities	
Statement of Issues on Appeal	i
Statement of the Case	
Procedural History	2
Factual History	2
Standard of Review.....	5
Argument:	
Question I: Did the trial court err in failing to charge involuntary manslaughter when the record contained evidence that Xzavier 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? ..	6
Question II: Did the trial court err in to giving 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?	10
Question III: Did the trial court err in failing to quash the indictment as to attempted murder when the indictment contained the improper language of implied malice?	13
Conclusion	15

Table of Authorities

Cases:	Page:
<i>Bozeman v. State</i> , 307 S.C. 172, 414 S.E.2d 144 (1992).....	7, 8
<i>People v. Aaron</i> , 409 Mich. 672, 299 N.W.2d 304 (1980)	7
<i>Smalls v. State</i> , 422 S.C. 174, 810 S.E.2d 836 (2018).....	5
<i>State v. Belcher</i> , 385 S.C. 597, 685 S.E.2d 802 (2009).....	12
<i>State v. Blackmon</i> , 304 S.C. 270, 403 S.E.2d 660 (1991)	14
<i>State v. Blassingame</i> , 271 S.C. 44, 244 S.E.2d 528 (1978).....	9
<i>State v. Brown</i> , 205 S.C. 514, 32 S.E.2d 825 (1945)	8
<i>State v. Burdette</i> , 427 S.C. 490, 832 S.E.2d 575 (2019).....	12
<i>State v. Coleman</i> , 342 S.C. 172, 536 S.E.2d 387 (Ct. App. 2000).....	6
<i>State v. Crosby</i> , 355 S.C. 47, 584 S.E.2d 110 (2003).....	6
<i>State v. Foust</i> , 325 S.C. 12, 479 S.E.2d 50 (1996)	10
<i>State v. Gentry</i> , 363 S.C. 93, 610 S.E.2d 494 (2005)	13
<i>State v. King</i> , 422 S.C. 47, 810 S.E.2d 18 (2017).....	13
<i>State v. Perry</i> , 434 S.C. 92, 862 S.E.2d 451 (Ct. App. 2021).....	12
<i>State v. Quick</i> , 168 S.C. 76, 167 S.E. 19 (1932).....	7, 8
<i>State v. Reese</i> , 370 S.C. 31, 633 S.E.2d 898, (2006)	8
<i>State v. Sams</i> , 410 S.C. 303, 764 S.E.2d 511 (2014).....	6
<i>Tisdale v. State</i> , 378 S.C. 122, 662 S.E.2d 410, (2008)	8
<i>Yates v. Evatt</i> , 500 U.S. 391 (1991)	12
 Statutes:	
S.C. Code § 16-11-510(B)(3).....	8
S.C. Code § 16-23-440.....	8

Statement of Issues on Appeal

Question I: Did the trial court err in failing to charge involuntary manslaughter when the record contained evidence that Xzavier 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?

Question II: Did the trial court err in to giving 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 trial court err 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

Xzavier 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.

Factual History

On April 19, 2021, Xzavier Sharif Davis, spent the morning of that day taking his step-son, the unfortunate victim of this tragic shooting, to get a hair cut. Rec. on App. at 223, ll 18-25. He had spent most of the day with his children, including his step-son. Rec. on App. 188, 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. Rec. on App. at 222, 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. Rec. on App. at 192, 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." Rec. on App. at 192, 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. Rec. on App. at 193, 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." Rec. on App. at 194, l 25 to 195, 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. Rec. on App. at 199, ll 9-20. Mr. Davis was following her as she was leaving with the children. She noticed a gun in his hand. Rec. on App. at 200, ll 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. Rec. on App. at 205, ll 21-24. Mr. Davis was on the porch when the shooting started. Rec. on App. at 206, 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 Mrs. Davis in the ankle. Rec. on App. at 207, ll 1-12. Tragically one of the stray bullets also hit his step-son. Rec. on App. at 209, ll 5-15.

Mrs. Davis testified she did not believe Mr. Davis was intentionally shooting at her or his step-son. Rec. on App. at 213, ll 11-24. She stated she was certain he was not trying to shoot anyone in the automobile. Rec. on App. at 215, 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." Rec. on App. at 215, ll 14-15. She further stated all Mr. Davis was doing was trying to stop her from leaving so "we could talk it out." Rec. on App. at 221, 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. Rec. on App. at 118, 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." Rec. on App. at 119, 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. Rec. on App. at 285, ll 6-24. A 9-millimeter pistol was found under a mattress in the master bedroom of the house. Rec. on App. at 293, ll 2-10.

Mr. Davis was taken into custody about 4:06 am. Rec. on Appeal at 160, l 21 to 161, l 1. Officer Shawn Carnes testified they had received the initial call at about 3:16 am. Rec. on App. at 157, 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. Rec. on App. at 161, l 23 to 162, l 1. He was cooperative with the arresting officers. Rec. on App. at 166, 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 trial court err in failing to charge involuntary manslaughter when the record contained evidence that Xzavier 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 South Carolina Supreme 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, 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 involving the charge of involuntary manslaughter and the use of a firearm. The supreme court of our state has previously 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. The supreme court has further said,

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.

“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 accidentally 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. Trial counsel argued below that Mr. Davis could have been guilty of malicious damage to personal property. Rec. on App at 520, 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 for either charge. 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 hold of the court in our state.

Further, supreme 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,

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

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. Rec. on App. at 182, 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 Iven?

A. No

Q. I'm sorry for your loss. Next to you, who loved Iven as much as anybody?

A. Xzavier.

Rec. on App. at 213, ll 15-24.

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

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 . 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 trial court err in giving 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? Rec. on App. at 657, ll 18-19. Defense counsel the question be answered wit a simple “no.” Rec. on App. at 657, l 20.

The trial judge brought the jury back into the court room to discuss the issue. The discussion, found on pages 666, l 18 to 813, l 15. The jury foreperson initially stated, “I think we’re trying to figure with intent and . . . Disregard for human life, I guess.” Rec. on App. at 667, ll 11-15. 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?” Rec. on App. at 667, l 22 to 668, l 1. The court, at one point, told the jury, incorrectly, that “intent only applies to the charge of attempted murder.” Rec. on App. at 669, 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 be convicted 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. Rec. on App. at 668, 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.” Rec. on App. at 668, ll 9-12. Again, the key word “total” was not used. Granted the juror later mentioned the word “total.” Rec. on App. at 669, 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.” Rec. on App. at 657, l 23 to 658, 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.” Rec, on App. at 636, 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 undermined what the jury was told as to general intent. Rec. on App. at 637, 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.

As the supreme 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 is 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.” Rec. on App. at 671, 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

³ The judge further charged the jury “Malice may be inferred from conduct showing a total disregard for human life.” Rec. on App. at 637, 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)

granted.

Question III

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

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. Rec. on App. at 13, ll 6-25. Defense counsel objected to the proposed amendment. Rec. on App. at 14, ll 10-16. When defense counsel refused to consent to amendment, the trial court denied the motion to quash. Rec. on App. at 19, ll 14-20.

The request to amend the indictment was based upon the ruling of the supreme court in *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017). The court decided *King* on October 25, 2017, some 18 months before this case arose. The decision of the solicitor to request to amend the indictment was proper as the grand jury could not have indicted Mr. Davis if they 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 given the choice between implied and expressed 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 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 of expressed malice. At the argument on the motion to amend, the state dismissed two attempted murder charges against

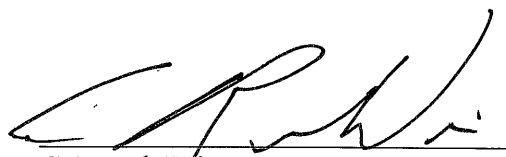
the children in the automobile based upon his inability to prove expressed malice. Rec. on App. at 17, 11, 18, 12 to 19, 19. This admission is enough to conclude the high probability is the grand jury found only implied malice. Thus, the indictment was not proper at it was based upon an improper basis. "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.

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 quash the indictment for the attempted murder charge for which Xzavier 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, the murder charge should be reversed. As the trial court confused the jury in its discussion as to intent and malice through his reference to disregard for human life, both convictions should also be reversed.

January 30th, 2023



C. Rauch Wise
305 Main Street
Greenwood, SC 29646
(864) 229-5010
S. C. Bar № 6188
rauchwise@gmail.com

Attorney for Xzavier S. Davis

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

Jan 31 2023

SC Court of Appeals

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

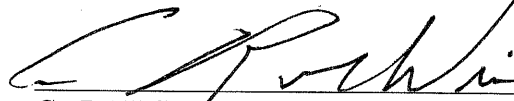
Appellant Case № 2021-000982
Lower Court Case Nos. 2019GS3600356, 357, 359

The State Respondent,
vs.
Xzavier Sharif Davis Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

JANUARY 30th, 2023



C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
S.C. Bar No. 6188
(864) 229-5010

Attorney for Appellant

RECEIVED

Feb 07 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM NEWBERRY COUNTY
The Honorable Benjamin H. Culbertson, Circuit Court Judge

THE STATE,.....RESPONDENT

v.

XZAVIER SHARIF DAVIS,.....APPELLANT

FINAL BRIEF OF RESPONDENT
Appellate Case No. 2021-000982

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

TOMMY EVANS, JR.
Assistant Attorney General
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-3970

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit
P.O. Box 516
Greenwood, South Carolina 29648
(864) 942-8800

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

Table of Contents.....	i
Table of Authorities.....	ii
Appellant statement of issues on appeal.....	iii
Respondent counter-statement of issues on appeal.....	iv
Statement of the case.....	1
Arguments	
1. Based on the facts that were presented the actions of the Appellant did not apply to the elements of involuntary manslaughter, therefore, he was not entitled to a jury instruction for involuntary manslaughter. The trial court did not err in denying the request of the Appellant for a jury charge for involuntary manslaughter.....	6
2. The jury charge given by the trial court fully explained the proper definition of malice as a total disregard of human life and intent to inflict bodily injury, there exists no confusion by the explanation given by the trial court while answering the jury's question.....	10
3. Appellant never made a motion to quash the indictment prior to the selection of the jury therefore, losing the ability to persuade the trial court to quash the indictment. Since it was not raised before the trial court the Appellant has waived the ability to raise this issue during an appeal.....	13
Conclusion.....	19

TABLE OF AUTHORITIES

Cases

<i>Bozeman v. State</i> , 307 S.C. 172, 414 S.E.2d 144 (1992).....	9
<i>Casey v. State</i> , 305 S.C. 445, 409 S.E.2d 391 (1991).....	7
<i>Douglas v. State</i> , 332 S.C. 67, 504 S.E.2d 307 (1998)	7
<i>Gentry</i> , 363 S.C. at 102-103, 610 S.E.2d at 500	15
<i>Mathis v. South Carolina State Highway DepR.</i> , 260 S.C. 344, 195 S.E.2d 713, (1973).....	17
<i>State v. Adkins</i> , 353 S.C. 312, 577 S.E.2d 460 (CR. App. 2003).....	11
<i>State v. Aleksey</i> , 343 S.C. 20, 538 S.E.2d 248 (2000).....	12
<i>State v. Burdette</i> , 427 S.C. 490, 832 S.E.2d 575 (2019)	9, 11
<i>State v. Craig</i> , 267 S.C. 262, 227 S.E.2d 306 (1976)	9
<i>State v. Dunbar</i> , 356 S.C. 138, 587 S.E.2d 691 (2003)	16
<i>State v. Fennell</i> , 340 S.C. 266, 531 S.E.2d 512 (2000).....	17
<i>State v. Fripp</i> , 397 S.C. 455, 725 S.E.2d 136 (2012).....	13
<i>State v. Gentry</i> , 363 S.C. 93, 610 S.E.2d 494 (2005).....	14
<i>State v. Heyward</i> , 197 S.C. 371, 15 S.E.2d 669 (1941)	8
<i>State v. Hill</i> , 315 S.C. 260, 433 S.E.2d 848 (1993)	7
<i>State v. Hoffman</i> , 312 S.C. 386, 440 S.E.2d 869 (1994).....	11
<i>State v. Kinard</i> , 373 S.C. 500, 646 S.E.2d 168 (2007)	11
<i>State v. King</i> , 422 S.C. 47, 810 S.E.2d 18 (2017).....	14
<i>State v. Middleton</i> , 407 S.C. 312, 755 S.E.2d 524.....	18
<i>State v. Mouzon</i> , 231 S.C. 655, 99 S.E.2d 672 (1957).....	8
<i>State v. Pittman</i> , 373 S.C. 527, 647 S.E.2d 144 (2007)	7
<i>State v. Prioleau</i> , 345 S.C. 404, 548 S.E.2d 213 (2001).....	17
<i>State v. Rabon</i> , 275 S.C. 459, 272 S.E.2d 634 (1980)	11
<i>State v. Shands</i> , 424 S.C. 106, 817 S.E.2d 524 (2018).....	18
<i>State v. Smickleovich</i> , 268 S.C. 411, 234 S.E.2d 230 (1977).....	7
<i>State v. Smith</i> , 315 S.C. 547, 446 S.E.2d 411 (1994).....	10
<i>State v. Smith</i> , 391 S.C. 408, 706 S.E.2d 12 (2011).....	8
<i>State v. Wilson</i> , 345 S.C. 1, 545 S.E.2d 827 (2001).....	7

Statutes

S.C. Code Ann. §17-19-90 (1976)	13

Other Authorities

Black’s Law Dictionary 813 (7ed. 1999).....	11

APPELLANT'S ISSUES ON APPEAL

1. Did the trial court err in failing to charge involuntary manslaughter when the record contained evidence that Xzavier Sharif Davis was intending to commit the misdemeanor crime of malicious injury to personal property when he fired the shot that killed his stepson?
2. Did the trial court err into giving 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?
3. Did the trial court err in failing to quash the indictment as to attempted murder when the indictment contained the improper language of implied malice?

RESPONDENT'S COUNTER-ISSUES ON APPEAL

1. Did the trial court err in not accepting the Appellant's request to charge the jury of the offense of involuntary manslaughter when the facts presented did not match the elements of involuntary manslaughter, the evidence revealed that the Appellant intentionally shot at the victim's vehicle eight times; therefore, failing to meet the elements of involuntary manslaughter?
2. Did the trial court give the proper definition within his jury instructions regarding malice as being a total disregard of human life and the intent to inflict bodily injury, thereby, not confusing the jury to the point it had any bearing on the final verdict?
3. Did the failing of the Appellant to make a motion to quash the indictment prior to the swearing of the jury deny him the ability to raise if during appeal, since elements of attempted murder were placed in the indictment and is this argument moot due to the fact the Appellant was convicted of Assault and Battery of a High and Aggravated Nature?

STATEMENT OF THE CASE

On April 20, 2019, the Appellant Xzavier Sharif Davis (Appellant) returned home in the early morning hours from a fish fry held by his father. (R. p. 189 l. 15-18). Appellant arrived home to find his back door locked. He knocked on the door and he received no answer. Appellant then walked to the front door to also find it locked. Appellant knocked on that door, and also, no one answered. The Appellant then proceeded to break glass near the door, reach in and unlock the door. (R. p. 192 l. 9-12).

Once inside he proceeded to the bedroom where his wife Indigo Penny (Indigo) was asleep. Appellant inquired as to why she did not open the door. Indigo informed him that she was sleeping, and due to her taking Benadryl she did not hear the door. (R. p. 192 l. 23-25). An argument quickly ensued, Indigo then told the Appellant that she did not wish to argue. (R. p. 193 l. 7-14). She woke their three children, the victim **minor child** who was seven years old, Penelope who was three and Xzavier Jr. who was nine months, to take them away from the house. (R. p. 182 l. 6 – p. 183 l. 3; p. 194 l. 25 – p. 195 l. 4). At the time of this event Indigo was also pregnant with their fourth child, the Appellant was aware of this pregnancy. (R. p. 187 l. 6-8; p. 187 l. 18-21)

As she left the back door with the children the Appellant grabbed a .22 caliber revolver and shot into the air eight times. (R. p. 204 l. 1-5; p. 407 l. 10-14). Afraid, Indigo quickly gathered the children and rushed them inside her Toyota Camry. As they were leaving the Appellant grabbed another handgun, a 9mm, and shot at the vehicle eight times. Two of the shots hit the ground, one hit the car's front hood, another hit the wheel well, another entered the passenger door and stuck Indigo in the leg just above the ankle, another hit just above the side mirror, another in the front drivers side quarter panel, and another hit behind the driver's side back door. The bullet that hit

behind the driver side back door penetrated the vehicle and struck seven-year-old minor child the head. (R. p. 435 l. 15 – p. 436 l. 5; p. 319 l. 21 – p. 333 l. 9).

Indigo was not aware that minor child was injured until Penelope complained that minor child would not get off her. At that time Indigo checked in the rear seat and noticed that minor child was struck. She rushed them to Newberry Memorial hospital. (R. p. 209 l. 7-11). In the meantime, Indigo's mother Ms. Vinnie Ray Hunter, after having heard the gun shots, woke up her husband Wallace and asked him to call over to Indigo's house to find out what occurred. (R. p. 113 l. 5-17). Appellant answered the phone angry, and told Wallace, "Mr. Bo. I ain't no fucking chap. I ain't; nothing to be played with," Appellant then hung up the phone. (R. p. 119 l. 17-20). Wallace called once again and the Appellant told him, "Like I said Mr. Bo, I ain't no fucking chap. I ain't no chap. Ain't going play with me," Appellant hung up again.¹ (R. p. 120 l. 23 – p. 121 l. 2).

Newberry County Sheriff Lee Foster heard on the radio that two individuals arrived at Newberry hospital with gunshot wounds. (R. p. 85 l. 14-17). Sheriff Foster immediately went to the hospital, once he arrived he received a briefing from two deputies and head nurse Ms. Phifer Suber. Ms. Suber informed Sheriff Foster that one of the victim's was a seven-year-old child who was in grave condition after being shot in the left side of the head. (R. p. 87 l. 23 – p. 88 l. 2). Investigator Ryan Dickert of the Newberry Sheriff's Department also responded to the hospital. (R. p. 306 l. 17-18). Once he arrived he noticed the Toyota Camry in the parking lot with a bullet hole in the center of the front hood. (R. p. 309 l. 10-12). Investigator Dickert entered the emergency room and spoke to Indigo. She appeared to have a gunshot wound to the left leg just above the ankle in which the bullet went all the way through. (R. p. 312 l. 19-20). During this interview Indigo identified the Appellant as the person who shot her. (R. p. 313 l. 13-15). Indigo also told

¹ "Mr. Bo" was a nickname that the Appellant called Wallace Hunter.

him that the Appellant stated, “If I’m going to jail tonight, ain’t nobody staying here.” (R. p. 194 l. 8-15). She informed Investigator Dickert of the positioning of the children inside the vehicle. Indigo stated that each of the children were in the back seat. None of them were in car seats, Penelope and Xzaiver Jr. were seated behind the driver’s seat, minor child seated in the middle. (R. p. 334 l. 15-20). After Investigator Dickert gathered this information he obtained a search warrant and informed deputies at the crime scene to place the Appellant into custody. The Appellant was arrested that morning at 4:06 a.m. (R. p. 314 l. 8-9). On April 22 Investigator Dickert received a phone call informing him that minor child was deceased. (R. p. 355 l. 6-8).

After a search warrant was obtained, Investigator Dickert, Sergeant Ran Henderson, Sergeant Rusty Fulmer, and Deputy Odell Schumpert of the Newberry County Sheriff’s Department conducted a search of the crime scene. (R. p. 280 l. 2-3). Sheriff Foster also contacted the South Carolina Law Enforcement Division (SLED) for additional support in collecting evidence. (R. p. 89 l. 21-24). The SLED crime unit arrived that morning. (R. p. 280 l. 1-3). During this search Deputy Schumpert found in a crate located near the back door, a .22 caliber eight shot revolver. (R. p. 288 l. 18-19). Within that crate he also found a paper bag containing a box of ammunition. Deputy Schumpert then searched the master bedroom. He turned over the mattress and found a semi-automatic 9mm pistol. (R. p. 293 l. 5-10). Deputy Schumpert observed one of the dresser drawers slightly open. He looked inside that drawer and found several unspent rounds of ammunition. (R. p. 296 l. 20-23). It was later discovered that there were twenty-six (26) rounds of ammunition in that bedroom dresser drawer. (R. p. 408 l. 15-19; p. 409 l. 12-13).

The Appellant was later indicted by the Newberry County Grand Jury for the offense of murder, three counts of attempted murder and possession of a weapon during the commission of a violent crime.²

On August 23, 2021, this case was called for trial before Circuit Court Judge, the Honorable Benjamin H. Culbertson. Present before the trial court was the Appellant with his counsel Stephen D. Geoly. Representing the State of South Carolina was Solicitor David M. Stumbo and Assistant Solicitor Taylor W. Daniel of the Eighth Circuit Solicitor's Office.

During trial SLED agent Michelle Eichenmiller testified. Agent Eichenmiller was accepted by the trial court as an expert in the field of firearm identification. (R. p. 395 l. 5-6). During her testimony Agent Eichenmiller testified that she examined a Ruger LCR .22 caliber long rifle with a laser sight attached. (R. p. 396 l. 6-9; p. 396 l. 13). This revolver held eight rounds and the shell casings were still in the cylinder of the .22 caliber weapon. (R. p. 396 l. 17-18; R. p. 407 l. 21-25).

Agent Eichenmiller also examined a Taurus model 709 slim 9mm Luger. (R. p. 397 l. 1-2). She testified that the bullet found lodged in the back seat of the Camry, two fired bullets found at the scene, and the bullet removed from the head of the victim all were consistent with a 9mm. (R. p. 398 l. 23-25; p. 400 l. 13-15; p. 404 l. 11-12). She was also given eight shell casings that were found at the crime scene. She testified that each of these shell casings matched the Taurus 9mm pistol. (R. p. 402 l. 20-24). Agent Eichenmiller also testified that the twenty-six rounds of ammunition found in the bedroom dresser drawer was for a 9mm Luger. (R. p. 408 l. 15-19).

SLED Agent Jaclynn McKay also testified. Agent McKay was the crime scene investigator who examined Indigo's Toyota Camry. (R. p. 417 l. 18-19). Agent McKay found that the vehicle

² The two counts of attempted murder regarding the other minor children were eventually dismissed. (R. p. 18 l. 12-13).

had six bullet “deficits.” (R. p. 425 l. 12-14). She was also the person who collected the 9mm found under the mattress in the master bedroom by Deputy Shumpert. When she recovered the 9mm pistol it was fully loaded. (R. p. 443 l. 19-23).

Forensic pathologist Kelly Rose also testified. Trial court accepted her as an expert in the field of pathology and forensic pathology. (R. p. 470 l. 4-5). On April 23, 2019, Dr. Rose performed an autopsy on the victim. (R. p. 471 l. 19). She determined that the victim’s cause of death was a pulpification of brain subarachnoid and subdural hemorrhage. (R. p. 472 l. 15-18). This was due to a gunshot wound to the head. (R. p. 473 l. 3-4). Dr. Rose ruled the manner of death a homicide. (R. p. 473 l. 5-6). She testified that the bullet entered right above the left ear, traveled through the skull, through the brain, and back out of the skull and was found in a big bulge under the skin. (R. p. 477 l. 13-17).

After four days of testimony, a jury of his peers found the Appellant guilty of murder, ABHAN, and possession of a weapon during the commission of a violent crime. (R. p. 673 l. 17 – p. 674 l. 5). After the reading of the verdicts Appellant appeared before the trial court for sentencing. The trial court sentenced the Appellant to a thirty-five (35) year period of incarceration for the offense of murder; twenty (20) years for ABHAN and five (5) years for possession of a weapon during the commission of a violent crime. The trial court ordered that the Appellant would serve these sentences concurrently. (R. p. 685 l. 21 – p. 686 l. 10).

During his incarceration the Appellant filed a timely notice of appeal before this court. Within this appeal the Appellant argued that the trial court erred in failing to instruct the jury on the crime of involuntary manslaughter; that the trial court gave an improper definition of malice and a confusing explanation of intent when the jury expressed confusion over the meaning of the

total disregard of human life; and the trial court erred in failing to quash the indictment for attempted murder.

The Respondent will argue that there was no evidence presented revealing that the Appellant committed the offense of involuntary manslaughter; therefore, the trial court was not obligated to instruct the jury on that offense. The trial court gave adequate jury instruction that followed the law. The Respondent will also argue that the Appellant's trial counsel failed to make a motion to quash prior to the swearing of the jury; therefore, he was not entitled to a quashing of this indictment. And this issue is moot due to the Appellant eventually being found guilty of ABHAN. The Respondent's brief supporting these arguments follows.

ARGUMENTS

- 1. Based on the facts presented the actions of the Appellant did not apply to the elements of involuntary manslaughter, therefore, he was not entitled to jury instruction for involuntary manslaughter. The trial court did not err in denying the request of the Appellant for a jury charge for involuntary manslaughter.**

Relevant Facts

Upon conclusion of the State's case in chief, and the denial of the directed verdict motion, the trial court instructed the parties to make a request for which charges that they wished for him to give to the jury. One of the charges requested by the Appellant was that the jury be charged the law for involuntary manslaughter. (R. p. 500 l. 2-6). The Appellant's position was that he could have been found to be committing the misdemeanor offense of malicious injury to personal property; therefore, giving rise to a charge for involuntary manslaughter. Appellant's counsel also argued that since their claim was that he was shooting at the tires on his property, he was doing a lawful act that resulted in death which equates to a charge of involuntary manslaughter. (R. p. 520 l. 13-17).

The trial court decided to deny the Appellant's request for a charge for involuntary manslaughter. The trial court decided that due to the Appellant shooting a firearm whether it be in the air or at someone constitutes something that tends to cause death or bodily harm. (R. p. 530 l. 11-13).

Standard of Review

In criminal cases the appellate court sits to review errors of law only. *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). On appeal, the trial court ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law. *State v. Smicklevich*, 268 S.C. 411, 234 S.E.2d 230 (1977). An abuse of discretion occurs when the trial court's ruling is based on an error of law, or when grounded in factual conclusions that are without evidentiary support. *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 167 (2007). Trial court may and should refuse a charge on a lesser included offense where there is no evidence that defendant committed the lesser rather than greater offense. *Casey v. State*, 305 S.C. 445, 409 S.E.2d 391 (1991). The law to be charged to the jury is determined by the evidence presented at trial. *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). When the victim is killed by a gunshot, and no evidence is presented showing the defendant fired the gun unintentionally, the defendant is not entitled to a charge of involuntary manslaughter. *Douglas v. State*, 332 S.C. 67, 74-75, 504 S.E.2d 307, 310-11 (1998).

Discussion

Appellant claims that the trial judge erred in not deciding to give the jury charge for involuntary manslaughter. The Respondent will argue that since there was no evidence revealing that the Appellant committed involuntary manslaughter the trial court made the proper decision in refusing to charge the jury on the law of involuntary manslaughter.

Involuntary manslaughter is defined as an unintentional killing of another without malice while engaged in: (1) an unlawful activity not naturally tending to cause death or great bodily harm; or (2) a lawful activity with reckless disregard for the safety of others. *State v. Smith*, 391 S.C. 408, 414, 706 S.E.2d 12, 15 (2011). When looking at the definition of involuntary manslaughter, and the unlawful act committed by the Appellant, there are two things the court looks for, was there any malice, and whether the activity tends to cause death or great bodily injury. In looking at the present case, the Appellant passes neither prong for a jury to be allowed to consider the crime of involuntary manslaughter.

In *State v. Mouzon*, the South Carolina Supreme Court defined malice an essential element of murder. In *Mouzon*, the Supreme Court decided,

Malice is an essential ingredient of murder, and it does not necessarily import ill-will toward the individual injured, “but signifies rather a general malignant recklessness of the lives and safety of others, or a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief.”

State v. Mouzon, 231 S.C. 655, 662, 99 S.E.2d 672, 675-676 (1957), quoting, *State v. Heyward*, 197 S.C. 371, 15 S.E.2d 669, 671 (1941).

In the present case there is no dispute that the Appellant took eight shots at a vehicle carrying his then pregnant wife and their three minor children. Their argument was that he had no intentions in shooting anyone, he was shooting at the tires. Pursuant to *Mouzon* that does not matter. There is no need for the intent to kill. If there is a reckless disregard for human life, malice exists. In *Mouzon* the Supreme Court decided,

Although it may be fairly assumed there was no actual intent to kill or injure another, there is evidence of such recklessness and wantonness as to indicate a depravity of mind and disregard of human life, from which a jury could infer malice.

Id.

There exists no doubt that the Appellant had a total disregard for any life when he decided to shoot at a vehicle eight times. This act alone reveals malice therefore denying the Appellant a charge of involuntary manslaughter.

The second prong that exists is an act not naturally tending to cause death or great bodily harm. Although malice cannot be inferred just by the use of a deadly weapon. *See, State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019). The use of a handgun is something that will naturally cause death or great bodily harm. Once the Appellant decided to shoot a car occupied by a pregnant woman and children, the oldest being seven, the obvious result could be that someone could be killed or seriously injured, which both occurred. 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, 414 S.E.2d 144, 147 (1992). In *State v. Craig*, 267 S.C. 262, 227 S.E.2d 306 (1976), the South Carolina Supreme Court decided that the trial court made the correct decision in not charging the jury the law regarding involuntary manslaughter when the defendant admitted intentionally firing a shotgun but claimed he only meant to shoot over the victim's head. The courts tend to rule that the killing of another must be unintentional in order to receive an involuntary manslaughter charge. Unintentional does not mean intentionally shooting at a person and hitting them when you did not mean to. Unintentional means using a weapon in a reckless manner, then a defendant deserves a jury charge for involuntary manslaughter. However, a defendant that intentionally shoots at a person, that is not an unintentional act, so the defendant does not warrant an involuntary manslaughter jury charge. *See, Bozman v. State*, 307 S.C. 172, 414 S.E.2d 144 (1992)(Defendant however intended to shoot the gun. So, there is no evidence to support an allegation of mere criminal negligence in the use of dangerous instrumentality. The evidence in the record does not support a charge of involuntary manslaughter.), *State v. Smith*, 315

S.C. 547, 446 S.E.2d 411 (1994)(Whether the defendant intended to hurt the victim is irrelevant. The stabbing is clearly not a lawful act, and the intentional use of a dangerous instrumentality does not support the allegation of mere criminal negligence.)

2. **The jury charge given by the trial court fully explained the proper definition of malice as a total disregard of human life and intent to inflict bodily injury. There exists no confusion by the explanation given by the trial court while answering the jury's question.**

Relevant Facts

During jury deliberations the jury came back with a question, “Does total disregard for human life supersede the intent to inflict injury?” (R. p. 651 l. 22-23). At the time the question was read the trial court believed that the jury was deciding between attempted murder or ABHAN. The trial court wished to inform the jury that they had to find the defendant not guilty of the higher offense before they can consider if he committed the lesser included offense. Once the jury was brought out the jury foreman explained to the trial court that within the instructions it read, “that malice aforethought requires a showing of an intent to do harm. However, further down it says it can be inferred by reckless disregard for a human life.” (R. p. 668 l. 8-12). The court responded, that “deals with the way the state proves malice.” (R. p. 668 l. 13-14). The trial court further informed the jury that, “there is no distinction whether they prove it by a disregard for human life or whether they prove it by the intent to inflict injury.” (R. p. 668 l. 16-18). The trial court fully explained to the jury, “before you can find defendant guilty of attempted murder in this case, you have to show he specifically intended to murder Indigo Davis.”(R. p. 669 l. 20-22). “Whereas murder and the lesser included charges of attempted murder just require a general intent.” (R. p. 669 l. 24 – p. 670 l. 1). A juror responded, “Again under murder, we don’t need to show a specific intent if we have the implied inference?” (R. p. 670 l. 2-4). The court informed the jury, for murder you do not have to show specific intent.” (R. p. 670 l. 5-6).

Standard of Review

A jury charge is correct if when the charge is read as a whole, it contains the correct definition and adequately covers the law. *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 464 (CR. App. 2003). A jury charge which is substantially correct and covers the law does not require reversal. *State v. Hoffman*, 312 S.C. 386, 395, 440 S.E.2d 869, 874 (1994), *citing*, *State v. Rabon*, 275 S.C. 459, 272 S.E.2d 634 (1980).

Discussion

The Appellant argues that the trial court erred in not informing the jury concerning the “total” disregard of human life, and informing the jury that intent is not necessary to find a person guilty of murder. It is obvious the court was differentiating between specific intent and general intent. Appellant argues within his brief that the Court stated to the jury that intent only applies to attempted murder. If this Court looks at the record the trial court stated, “Specific –” (R. p. 669 l. 12) and then was interrupted by the juror. The trial court completed his sentence stating, “intent only applies to the charge of attempted murder.” (R. p. 669 l. 14-15). So, when observing the sentence of the trial court as a whole, he stated, “Specific intent only applies to the charge of attempted murder,” which correctly follows South Carolina law. Specific intent is required for attempted murder and Murder and ABHAN are general intent crimes.³ It is obvious that the trial court did not mistake or give wrong instructions when he addressed the jury regarding their questions.

³ “General intent” is defined as “the state of mind required for the commission of certain common law crimes not requiring specific intent.” *State v. Kinard*, 373 S.C. 500, 504, 646 S.E.2d 168, 169 (2007), *overruled on other grounds*, *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019), *quoting*, Black’s Law Dictionary 813 (7ed. 1999).

At time of his explanation, it is obvious the trial court was discussing specific intent as only applying to attempted murder. The trial court stated that specific intent only applied to attempted murder, while the other crimes such as murder and ABHAN are general intent crimes.

The Appellant also argues that the trial court erred when he told the jury that the State only needed to prove a disregard for human life and not a “total” disregard for human life. The written jury instructions that were given to the jury had the instruction which stated, “total” disregard for human life. It is obvious that the jury understood that it was a “total” disregard for human life, that is because it was stated that way within their question. The Appellant is getting into semantics in making this argument. It is obvious the trial court and jury knew that it included the word “total.”

Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error. *State v. Aleksey*, 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000). Appellant raised no objections as to the written instructions that were given to the jury, just to some confusion during this question, which answers were given that applied to South Carolina law. The Appellant is making a big deal about the judge saying that intent only applied to attempted murder which he did not say, and the written instructions definitely stated, “specific” intent. The trial court instruction stated, “criminal intent must be proven by the state beyond a reasonable doubt.” (R. p. 635 l. 1-2.). The trial court’s written instructions also stated, “ the defendant’s is also charged with attempted murder” . . . “now unlike the crime of murder attempted murder requires a specific intent to kill not general intent.” (R. p. 637 l. 18; l. 21-23). The trial court within its instructions also stated “criminal intent is a mental state, a conscious wrongdoing. You must determine what the defendant intended to do, based on the circumstances shown to have existed.” (R. p. 635 l. 17-20). Within his instructions the court

also stated, “malice may be inferred from conduct showing a **total** disregard for human life.” (R. p. 637 l. 3-4).

There is nothing confusing about how the jury charges were given by the trial court. They followed the law, and no objections were raised by trial counsel when asked if there were any objections to the jury charges. (R. p. 645 l. 23). There was no prejudice raised by the instructions given, so there is no reversible error. In order to warrant reversal, the jury instruction must have been prejudicial. *State v. Fripp*. 397 S.C. 455, 459, 725 S.E.2d 136, 139 (2012).

- 3. Appellant never made a motion to quash the indictment prior to the selection of the jury therefore, losing the ability to persuade the trial court to quash the indictment. Since it was not raised before the trial court the Appellant has waived the ability to raise this issue during an appeal.**

Relevant Facts

The indictment for attempted murder stated the words “expressed or implied malice.” The State moved not to have the indictment amended removing the words implied, in order not to confuse the jury when the court gave their jury instructions. (R. p. 13 l. 20-24). Because due to the South Carolina Supreme Court decision of *State v. King*, for an attempted murder to occur, malice must be expressed. At that time, Appellant’s counsel objected to any removal of the word “implied” from the indictment. It was Appellant’s counsel’s position that everything within the indictment must be proven, and the State should not be allowed to remove any elements from the indictment. The court noted the Appellant’s objections however, the trial court decided to leave the indictment as it was and not remove any language. (R. p. 19 l. 21).

Standard of Review

Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury be sworn and not afterwards. S.C. Code Ann. §17-19-90 (1976). If an indictment is challenged as insufficient or defective, the

defendant must raise that issue before the jury is sworn and not afterwards. *State v. Gentry*, 363 S.C. 93, 101, 610 S.E.2d 494, 499 (2005)

Discussion

The Appellant argues that the trial court erred in not quashing the indictment as to attempted murder because the indictment contained improper language of implied malice. The Respondent will argue that the indictment was lawful on its face and the trial court did the proper thing by not quashing the indictment.

Pursuant to *State v. King*, the South Carolina Supreme Court did rule that, “one cannot be guilty of attempted murder by implied malice because implied malice does not encompass the essential specific intent to kill. *State v. King*, 422 S.C. 47, 57, 810 S.E.2d 18, 23 (2017). The indictment stated either “expressed or implied” which the State wished to remove implied. This request was denied by the trial court. Therefore, it was the obligation of the State to prove that attempted murder can be conducted through implied malice. Since that was not part of the jury charges that attempt failed and the Appellant was eventually convicted of ABHAN, which can occur through implied malice.

The Appellant argues that the indictment should have been quashed due to the word “implied malice” found on the indictment. However, the elements of the crime, the allegations, and the charges were also on the indictment. If they are on the indictment, that indictment is lawful, so the court did the proper thing not to quash the indictment but allow it to proceed as it was. This challenged the State to prove these allegations beyond a reasonable doubt. In *Gentry*, the South Carolina Supreme Court established what must be considered by the Court in order to quash an indictment. *Gentry* specifically states:

The indictment is a notice document, challenge to the indictment on the ground of insufficiency must be made before the jury is sworn as provided by §17-19-90. If

the objection is timely made, the circuit court should judge the sufficiency of the indictment by determining whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that it intended to be charged.

Gentry, 363 S.C. at 102-103, 610 S.E.2d at 500.

The indictment clearly raised the charges against the Appellant, and allegations. The court had knowledge of what the Appellant was accused of, and it gave the Appellant the opportunity to either accept the allegations or go through with a trial.

Within his brief the Appellant argued that the trial court denied the Appellant's motion to quash. However, no such motion was ever made by the Appellant before the jury was sworn. When the State made a motion to amend the indictment, the Appellant just objected to that motion. There was never a motion raised by the Appellant to have the indictment quashed. (R. p. 19 l. 14-23). Since that motion was never made, the Appellant does not now have the ability to request that this court decide if the trial court erred in not quashing said indictment. In *Gentry*, the Supreme Court also stated,

The indictment is the charge of the state against the defendant, the pleading by which he is informed of the fact, and the nature and scope of the accusation. When that indictment is presented, that accusation made, that pleading filed, the accused has two courses of procedure open to him. He may question the propriety of the accusation, the manner in which it has been presented, the source from which it proceeds, and have these matters promptly and properly determined; or, waiving them, he may put in issue the truth of the accusation, and demand the judgment of his peers on the merits of the charge. If he omits the former, and chooses the latter, he ought not, when defeated on the latter - when found guilty of the crime charged, - to be permitted to go back to the former and inquire as to the manner and means by which the charge was presented.

Id., 363 S.C. at 102, 610 S.E.2d at 499-500.

There was never a mention by the Appellant that the court should quash the indictment. It was the intention of the State to prove that the Appellant specifically intended to murder Indigo. This is

proven by the dismissal of the other two indictments accusing the Appellant of attempting to murder the other two children in the vehicle. This indictment was never wrong on its face. The State just wished that one word be removed in order not to cause confusion between the indictment and the jury charges that were given by the trial court. However, since an indictment is never evidence, no prejudice ever occurred due to the fact the jury decided that the State did not prove there was a specific intent to kill. They decided to find the Appellant guilty of ABHAN.

The State will also argue that since there was never a motion to quash made by the Appellant before the trial court, that argument was never preserved and cannot be brought before this Court. In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal. *State v. Dunbar*, 356 S.C. 138, 139, 587 S.E.2d 691, 693 (2003). The Appellant argues that the indictment should have been quashed, however, there was never a motion raised by the Appellant to have the trial court consider a quashing of the indictment. It would be unfair of this court to make a ruling that the trial court was in error when the trial court never had an opportunity to decide the legality of the indictment and whether it should be quashed. Since that issue was never raised before the trial court, it is waived and should not be allowed to be considered by this court. An issue that was not preserved for review should not be addressed by the Court of Appeals. *Id.*, 587 S.E.2d at 694.

During trial the Appellant argued that the indictment should not be amended. The reason was because they felt the State could not prove the allegations as listed on the indictment, therefore, possibly getting the trial court to honor a motion for directed verdict. Trial counsel never requested that the trial court quash this indictment. Now the Appellant presents a different argument on appeal. The argument cannot be made one way before the trial court and then another total new

argument be made on appeal. A party may not argue one ground at trial and an alternate ground on appeal. *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 217 (2001).

The indictment on its face was proper, so the trial court made the proper decision in not amending it and allowing the allegations to go forward before the jury. The trial court committed no errors in not quashing this indictment. This issue was also not preserved by the Appellant's trial counsel; therefore, since it was not preserved, it should not be addressed by this court.

The State also argues that this allegation is moot due to the fact the Appellant was convicted of ABHAN and not attempted murder. An offense which the State presented sufficient evidence in proving Appellant committed beyond a reasonable doubt.

South Carolina law defines ABHAN as,

An unlawful act of violent injury to another accompanied by circumstances of aggravation. Circumstances of aggravation include the use of a deadly weapon, the intent to commit a felony, infliction of serious bodily injury, great disparity in the ages or physical conditions of the parties, a difference in gender, the purposeful infliction of shame and disgrace, taking indecent liberties or familiarities with a female, and resistance to lawful authority.

State v. Fennell, 340 S.C. 266, 274, 531 S.E.2d 512, 516-517 (2000).

The Appellant shot into the car occupied with his pregnant wife, hitting her in the ankle. The Appellant's act caused great bodily injury and it was done by means that could produce death or great bodily injury. There was never any denial that the Appellant shot into the vehicle which caused an injury to the leg of Indigo, therefore, he was guilty of ABHAN.

Since the Appellant was convicted of ABHAN and not attempted murder this argument becomes moot. A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy. This is true when some event occurs making it impossible for the reviewing court to grant effectual relief. *Mathis v. South Carolina State Highway Dept.*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). If this court decides that the trial court erred by not

quashing the indictment the Appellant would be indicted for the lesser included offense of ABHAN.⁴ Since the Appellant was convicted of the offense of ABHAN and is currently serving a sentence for that conviction, the court will bring no remedy to the Appellant in ruling that the trial court erred in not quashing this indictment. Therefore, this issue should be considered moot.

⁴ ABHAN is a lesser-included offense of attempted murder. *State v. Shands*, 424 S.C. 106, 130, 817 S.E.2d 524, 537 (2018), *quoting*, *State v. Middleton*, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014).

CONCLUSION

The trial court made the proper decisions regarding this matter the State respectfully request this court to affirm the decisions of the trial court.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

TOMMY EVANS, JR.
Assistant Attorney General

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

By: s/ Tommy Evans, Jr.
Tommy Evans, Jr.
Office of the Attorney General
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

February 7, 2023

RECEIVED

Feb 07 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM NEWBERRY COUNTY
The Honorable Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2021-000982

THE STATE,

Respondent,

v.

XZAVIER SHARIF DAVIS,

Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled “Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”

This 7th day of February 2023.

s/Tommy Evans, Jr.
Tommy Evans, Jr.
Assistant Attorney General

ATTORNEY FOR RESPONDENT

RECEIVED

Jan 31 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Appellant Case № 2021-000982
Lower Court Case Nos. 2019GS3600356, 357, 359

The State Respondent,

vs.

Xzavier Sharif Davis Appellant.

FINAL REPLY BRIEF

C. RAUCH WISE
Attorney at Law
305 Main Street
Greenwood, SC 29646
SC Bar No. 6188
rauchwise@gmail.com
864-229-5010

Index

	Page:
Table of Authorities	
Argument:	
Question I: Did the trial court err in failing to charge 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? . .	1
Question II: Did the trial court err in failing to giving the jury a improper definition of malice as being a disregard for human 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?	2
Question III: Did the trial court err in failing to quash the indictment as to attempted murder when the indictment contained the improper language of implied malice?	4
Conclusion	6

Table of Authorities

Cases:	Page:
<i>State v. Belcher</i> , 385 S.C. 597, 685 S.E.2d 802 (2009)	3
<i>State v. Burdette</i> , 427 S.C. 490, 832 S.E.2d 575 (2019)	3
<i>State v. Coleman</i> , 342 S.C. 172, 536 S.E.2d 387 (Ct. App. 2000)	2
<i>State v. Means</i> , 367 S.C. 374, 626 S.E.2d 348 (2006).	5
<i>State v. Quick</i> , 168 S.C. 76, 167 S.E. 19 (1932).....	2
 Statutes:	
S. C. Code § 16-3-600(B)	4

Argument

Question I

Did the trial court err in failing to charge 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 stepson?

As to this issue, the state makes a forceful argument that the facts were sufficient to support a conviction for murder by pointing out that the reckless conduct of Mr. Davis was sufficient to permit the jury to find implied malice based upon his conduct. The issue, however, is whether there was any evidence to support the argument of Mr. Davis that the trial judge should have instructed the jury on involuntary manslaughter.

The State in an attempt to justify not charging the jury on involuntary manslaughter states, "However, a defendant that intentionally shoots at a person, that is not an unintentional act, so the defendant does not warrant an involuntary manslaughter charge." Br. of Resp. at 9. The problem with the position of the State is that testimony in this case supports the proposition that Mr. Davis was not intentionally shooting at anyone. The testimony from Indigo Davis, the wife of Mr. Davis, is very clear that she did not believe Mr. Davis was shooting at her but was in fact shooting at the tires of the car. She stated:

Q. (By Mr. Geoley) Any doubt in your mind whether or not he was trying to shoot you?

A. (By Ms. Davis) No, ain't no doubt in my mind. He was - - -

Q. What?

A. - - - not trying to - - -

Q. - - - what - - -

A. - - .- shoot me.

Q. What was he trying to shoot?

A. Well looking at the pictures, he was trying to shoot at the tires.

Rec. on App. at 215, ll 6-15.

The State may not believe her testimony. The State may think her testimony is not plausible. When determining if a charge should be given, all that is required is the existence of evidence to support the charge. *State v. Coleman*, 342 S.C. 172, 536 S.E.2d 387 (Ct. App. 2000). Unless this court were to hold that the intentional discharge of a firearm can never support an involuntary manslaughter charge, then this conviction should be overturned. Such a holding, however, would have the impact of overturning *State v. Quick*, 168 S.C. 76, 167 S.E. 19 (1932). This Court does not have the power to overrule an opinion of the Supreme Court. In addition, the record in this case shows that the solicitor in this case had also previously permitted a defendant to plea to involuntary manslaughter where the firearm was intentionally discharged without the intent of hurting anyone. Rec. on App. at 540, l 9 to 541, l 12

As evidence in the record exists by which the jury could have concluded that Mr. Davis was acting reckless when shooting at the tires of the automobile, the lesser included charge of involuntary manslaughter should have been given. This court is not required to believe that evidence in order for the charge to be given. Only the existence of that evidence is required.

Question II

Did the trial court err in failing to giving the jury a improper definition of malice as being a disregard for human 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?

The discussion among the solicitor, the defense attorney and the court as to how to answer the jury question “Does total disregard for human life supersede the intent to inflict

injury” Rec on Appeal at 651, 1 21 to 666, 1 10. During the entire discussion, defense counsel constantly urged the court to simply answer the question with one word, “no.” The attempt by the trial judge to give meaning to the question resulted in total confusion. The discussion with the jury extends from line 18, of page 666 of the Record on Appeal to line 18 of page 670 of the Record on Appeal.

During the discussion with the jury, the trial judge mentioned specific intent and general intent. He also mentioned inferred intent. The juror asked the question, “Again, under murder, we don’t need to show a specific intent if we have the implied inference that - - -” Rec. on App. at 670, ll 2-4. The juror seems to suggest that implied malice is something the jury accepts if the state proves circumstances to show implied malice. The trial judge does not attempt to tell the juror that any implied malice is an inference the jury is justified in rejecting even if the facts are proven by the state. This failure to instruct the right to reject the inference makes the entire conversation prejudicial to Mr. Davis.

Our Supreme Court has said, “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). The exchange between the jury and the trial judge was confusing. Defense counsel was correct when he stated the answer to the question was a simple “no.”

Arguably, because the jury acquitted Mr. Davis of attempted murder, the discussion as to specific intent is simply not relevant. The problem is with the specific intent instruction. While the state is correct when they argue that at the end of the original jury charge, defense counsel raised no objection, the same is not true when the issue as to the jury question was raised. At that

point defense counsel made numerous objections as to what the trial judge had instructed the jury. Those issues are clearly preserved for review by this court. The confusion is as to how the trial judge's instructions during the colloquy with the jury prejudiced Mr. Davis as to the assault and battery of a high and aggravated charge.

At line 19 of page 668, the juror starts explaining the confusion the jury was having as to the question they presented. As the jury is explaining the confusion, the trial judge interrupts and attempts to guess at what the juror is trying to explain. The trial judge correctly notes that attempted murder requires a specific intent. Rec. on App. at 669, ll 19-22. The use of the words "general intent" at this point could have confused the jury to believe the general intent of assault and battery of a high and aggravated nature is the general intent to simply fire the weapon. At the original charge as to assault and battery of a high and aggravated nature, no mens rea was given. Rec. on App. at 639, ll 6-21. Thus, when the trial judge told the jury only a general intent is required, the jury could easily have interpreted that to mean an intent to fire the weapon.

Under what was charged to the jury, both originally and the colloquy, and arguably even under the definition contained in S. C. Code § 16-3-600(B) Mr. Davis could be convicted simply based on a negligent act. Defense counsel was correct when he said the answer to the question was simply, "no."

Question III

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

Counsel agrees that defense counsel did not use the word "quash" in stating his objection to the proposal of the State to amend the indictment. Had the trial judge decline to accept the

State's proposed amendment, the practical affect would have been to require the State to go back and seek another indictment. The State conceded that the indictment was not proper because it contained the charge of attempted murder by implied malice.

The fact that Mr. Davis was convicted of assault and battery of a high and aggravated nature simply re-enforces his argument. The trial jury did not find expressed malice. From this, the logical conclusion is that the grand jury also did not find expressed malice but relied upon implied malice. To the extent the grand jury relied upon implied malice, the indictment is a nullity.

The State has argued that the trial court did not grant the State's motion to amend the indictment. This may not be entirely correct. The trial judge did say to the solicitor, "We'll leave it in there." Rec. on App. at 19, l 21. The trial judge in charging the jury took out the implied malice. As noted in the opening brief, the indictment as presented by the grand jury is improper. The improper indictment was brought to the attention of the trial judge by both the solicitor and defense counsel. Defense counsel refused to consent to amending the indictment. At that point the only choice available to the trial judge was to dismiss the indictment and permit the state to present a valid indictment to the grand jury. Instead, the trial judge elected to not amend the indictment, but did in fact also elect not to charge the jury was to implied malice as to attempted murder. This had the effect of amending the indictment.

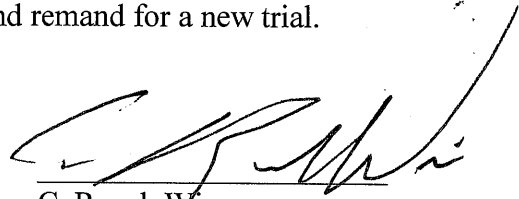
As the Supreme Court has said, "Thus, a motion to amend an indictment should be granted when the proposed amendment does not change the nature of the offense or affect the sufficiency of the indictment." *State v. Means*, 367 S.C. 374, 387, 626 S.E.2d 348, 356 (2006). In this case, the elimination of 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.

CONCLUSION

For the foregoing reasons and for the reasons stated in the opening brief, this Court should reverse the conviction of Xzavier Shariff Davis and remand for a new trial.

January 30, 2023



C. Rauch Wise
305 Main Street
Greenwood, SC 29646
(864) 229-5010
rauchwise@gmail.com
S. C. Bar No 6188

Attorney for Xzavier Shariff Davis

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

Jan 31 2023

SC Court of Appeals

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

Appellant Case No 2021-000982
Lower Court Case Nos. 2019GS3600356, 357, 359

The State Respondent,

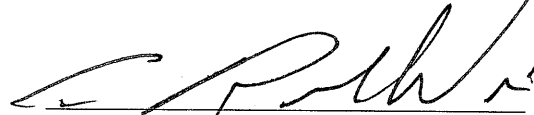
vs.

Xzavier Sharif Davis Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

Jan. 30th, 2023



C. RAUCH (WISE)
Attorney at Law
305 Main Street
Greenwood, SC 29646
S.C. Bar No. 6188
(864) 229-5010

Attorney for Appellant

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Xzavier Sharif Davis, Appellant.

Appellate Case No. 2021-000982

Appeal From Newberry County
Benjamin H. Culbertson, Circuit Court Judge

Unpublished Opinion No. 2024-UP-247
Submitted June 1, 2024 – Filed July 3, 2024

AFFIRMED

Clarence Rauch Wise, of Greenwood, for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Tommy Evans, Jr., both of Columbia,
for Respondent.

PER CURIAM: Xzavier Sharif Davis appeals his convictions for murder, assault and battery of a high and aggravated nature (ABHAN), and possession of a weapon during the commission of a violent crime, and his aggregate sentence of thirty-five years' imprisonment. On appeal, Davis argues the trial court erred in (1) failing to charge the jury on involuntary manslaughter, (2) instructing the jury on

an improper definition of malice and stating intent only applied to attempted murder, and (3) failing to quash the indictment for attempted murder. We affirm pursuant to Rule 220(b), SCACR.

1. We hold the trial court did not abuse its discretion when it declined to give an involuntary manslaughter charge because (1) Davis did not engage in a lawful act when he fired into an occupied vehicle and (2) firing eight times at a vehicle occupied by four people is an act that naturally tends to cause death or great bodily harm, and was not mere criminal negligence. *See State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) ("An appellate court will not reverse the trial [court]'s decision regarding a jury charge absent an abuse of discretion."); *State v. Sams*, 410 S.C. 303, 308, 764 S.E.2d 511, 513 (2014) ("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."); *id.* ("In determining whether the evidence requires a charge on a lesser-included offense, the [appellate c]ourt must view the facts in the light most favorable to the defendant."); *State v. Smith*, 391 S.C. 408, 414, 706 S.E.2d 12, 15 (2011) ("Involuntary manslaughter is: (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not amounting to a felony and 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."); S.C. Code Ann. § 16-23-440(B) (2015) ("It is unlawful for a person to discharge or cause to be discharged unlawfully firearms at or into any vehicle, aircraft, watercraft, or other conveyance, device, or equipment while it is occupied."); *Bozeman v. State*, 307 S.C. 172, 177, 414 S.E.2d 144, 147 (1992) (holding the court did not err in refusing to charge involuntary manslaughter where the defendant intentionally fired a gun and there was no evidence of mere criminal negligence); *State v. Craig*, 267 S.C. 262, 269, 227 S.E.2d 306, 310 (1976) (holding the court did not err in refusing to charge involuntary manslaughter where the defendant claimed he only meant to shoot over the victim's head).

2. We hold the trial court did not abuse its discretion in its explanation of malice and intent in answering the jury's question because 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. *See Mattison*, 388 S.C. at 479, 697 S.E.2d at 584 ("An appellate court will not reverse the trial [court]'s decision regarding a jury charge absent an abuse of discretion."); *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) ("In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues

presented at trial." (quoting *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003))). Although the trial court did not include the word "total" when it used the language "disregard for human life" in answering the jury's question, the original charge stated that "[m]alice may be inferred from conduct showing a total disregard for human life" and the trial court provided the written charges to the jury; accordingly, when viewed as a whole, the jury charge contained the correct definition and adequately covered the law. *See id.* at 549, 713 S.E.2d at 603 ("A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." (quoting *Adkins*, 353 S.C. at 318, 577 S.E.2d at 464)). Furthermore, although Davis contends the trial court informed the jury that intent only applied to attempted murder, the record reflects the trial court was briefly interrupted by a juror, and the trial court's full statement indicated "specific" intent only applied to attempted murder, not that intent only applied to attempted murder.

3. We hold Davis waived the issue of quashing the indictment because he did not make a motion to do so. Although Davis opposed the State's request to amend the indictment and stated his failure to agree with the State did not mean he would not "have a motion to quash" before trial, he never moved to quash the indictment and the trial proceeded. *See State v. Gentry*, 363 S.C. 93, 101, 610 S.E.2d 494, 499 (2005) ("[I]f an indictment is challenged as insufficient or defective, the defendant must raise that issue before the jury is sworn in and not afterwards."); S.C. Code Ann. § 17-19-90 (2014) ("Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn and not afterwards."); *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court].").

AFFIRMED.¹

WILLIAMS, C.J., and KONDUROS and TURNER, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

Aug 07 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Xzavier Shariff Davis, Appellant

Appellate Case №. 2021-000982

Appeal From Newberry County
Benjamin H. Culbertson, Circuit Court Judge

Unpublished Opinion № 2024-UP-247
Submitted June 1, 2024 - Filed July 3, 2024

Petition for Rehearing

Pursuant to Rule 221 of the South Carolina Appellate Court Rules, X'zavier Shariff Davis, the Appellant above named, hereby Petitions this court to rehear this matter based upon the following grounds:

1. This court erred in failing to consider or acknowledge *State v. Quick*, 168 S.C. 76, 167 S.E. 19, 20 (1932) where the South Carolina Supreme Court 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.” The same factual situation exists in this case. The record contains testimony that Mr. Davis did not intent to hurt anyone. As our supreme court has said, “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). In this case the killing was unintentional.

This Court erred in concluding as a matter of law Mr. Davis could not have been convicted of malicious injury to personal property when he shot into the automobile. As noted in the Appellant’s brief, “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). No court can say as a matter of law, the act Mr. Davis committed was not malicious injury to personal property. The determination as to which act Mr. Davis committed should have been decided by the jury. This court should rehear this matter an issue an opinion stating there was a misdemeanor that the jury could have concluded was the predicate offense to make this act involuntary manslaughter.

2. The trial court originally instructed 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 an intent to inflict an injury or under circumstances that the law will infer an evil intent.” Rec, on App. at 779, ll 3-8. During the colloquy with the juror, this portion of the intent requirement as to the murder charge for which Mr. Davis was convicted was not repeated or discussed. The emphasis in the colloquy was as to general intent and not an “intent to inflict injury” as originally given to the jury. If the trial judge was going to engage in such a lengthy discussion as to the intent portion of the jury charge, the trial judge should have given the full

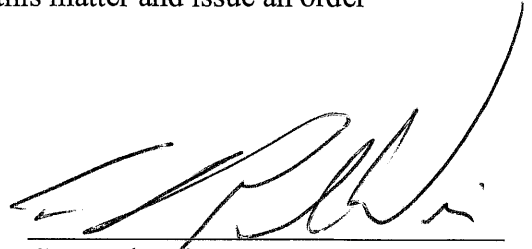
charge to include the “intent to cause injury.” By discussing intent without the full meaning of intent simply mislead the jury. This court held, “[W]hen viewed as a whole, the jury charge contained the correct definition and adequately covered the law.” *State v. Davis*, Op. № 2024-UP-247 (S.C.Ct.App. filed July 3, 2024) at 3. What this conclusion ignores is that when the jury was asking specific questions about intent, to fail to give the full charge about the intent required to convict is to imply to the jury the court had given during the discussion the jury the relevant portion to answer their questions. As noted by trial counsel, the simple answer to the question was “no.” The trial judge should have given that answer and not engage in a confusing discussion with the juror.

3. Prior to the jury being sworn, Solicitor David Stumbo brought to the attention of the court the indictment was improperly worded. Rec. on App. at 13, ll 12-25. He suggested to the court that the phrase “expressed or implied” be stricken from the indictment. Trial counsel objected to permitting the state to amend the incorrect indictment. Rec. on App. at 19, ll 10-16. While trial counsel did not use the word “quash” this point, the record is clear that trial counsel was calling to the attention of the trial judge that the indictment as prepared was defective. The state even conceded this point as the state dismissed two indictments against others because they could not prove specific intent. Rec. on App. at 18, ll 15-22. At this point the state should have elected to simply not call the case and present a proper indictment to a new grand jury. The record is clear that all parties knew the indictment was defective. This court erred in holding that trial counsel did not preserve this issue for review.

CONCLUSION

For the foregoing reason, this court should rehear this matter and issue an order remanding the case for a new trial.

August 7, 2024

A handwritten signature in black ink, appearing to read 'C. Rauch Wise', written over a horizontal line.

C. Rauch Wise
305 Main Street
Greenwood, SC 29646
(864) 229-5010
S. C. Bar № 6188
rauchwise@gmail.com

Attorney for X'Zavier S. Davis

The South Carolina Court of Appeals

The State, Respondent,

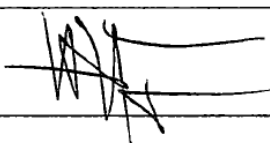
v.

Xzavier Sharif Davis, Appellant.

Appellate Case No. 2021-000982

ORDER

After careful consideration of the petition for rehearing, the court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Clarence Rauch Wise, Esquire
Tommy Evans, Jr., Esquire

FILED

Sep 20 2024