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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

THE STATE,……RESPONDENT

v.

XZAVIER SHARIF DAVIS……APPELLANT

RETURN TO PETITION FOR WRIT OF CERTIORARI
Appellate Case No. 2024-001773

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PETITIONER'S QUESTIONS PRESENTED

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

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

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

RESPONDENT'S COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Did the court of appeals err in ruling that the trial court did not err in not accepting Appellant's request to charge the jury for the offense for involuntary manslaughter when the facts presented did not match the elements of involuntary manslaughter?

2. Did the court of appeals err in ruling that the trial court gave the proper definition within the jury instructions regarding malice as being a total disregard of human life with the intent to inflict bodily injury, not confusing the jury at any point?

3. Did a court of appeals ruling that the Petitioner failing to raise a motion to quash the indictment prior to the swearing of the jury deny him the ability to raise the issue during appeal, and is this argument moot due to the fact the Appellant was convicted of Assault and Battery of an High and Aggravated Nature?

STATEMENT OF THE CASE

On June 21, 2019, Xzavier Sharif Davis (Petitioner) was indicted by the Newberry County Grand Jury for the offenses of Murder (Indictment No. 2019-GS-36-00356)(R. pp. 689-690); and, possession of a weapon during the commission of a violent crime. (Indictment No. 2019-GS-36-000357)(R. pp. 693-694). Representing Petitioner was attorney Stephen D. Geoly. Representing the State of South Carolina was Solicitor, David Stumbo and Assistant Solicitor, Taylor W. Daniel of the Eighth Circuit Solicitor's Office.

The case was called for trial on August 23, 2021 before the Honorable Benjamin H. Culbertson. After four days of testimony by fourteen (14) witnesses, a jury of his peers found Petitioner guilty of each offense. After the reciting of the verdict, Petitioner appeared before the trial court for sentencing. Petitioner was sentenced to a thirty-five (35) year period of incarceration for the offense of murder, and five years for possession of a weapon during the commission of a violent crime. The trial court ordered that these sentences were to be served concurrently.

During his incarceration Petitioner filed a timely notice of appeal on September 3, 2021. Within this appeal Petitioner argued that the trial court erred by: 1) rejecting the Petitioner's request to give a jury charge for the offense of involuntary manslaughter; 2) giving the jury the improper definition of malice within the jury charge; and, 3) failing to quash the indictment for attempted murder when the indictment had the improper language for implied malice. On June 1, 2024, Judges Williams, Konduros, and Turner of the South Carolina Court of Appeals issued an unpublished opinion without the benefit of a hearing. Within this opinion they determined unanimously that: that the trial court did not abuse discretion when it declined to give a jury charge for the offense of involuntary manslaughter; that the trial court did not abuse discretion within the

explanation of malice, and intent; and, that Petitioner failed to move to quash the indictment prior to the swearing of the jury, thereby, waiving this issue.

Petitioner now requests a writ of certiorari seeking review from this Honorable Court. Respondent will argue that the decision of the Court of Appeals does not fall within any of the parameters found in South Carolina Appellate Court Rule 242. This petition should be subject to dismissal. The return of the Respondent follows.

WHY CERTIORARI SHOULD BE DENIED

The Supreme Court reviews the Court of Appeals by writ of certiorari only where special reasons justify the exercise of that power. *Douglas v. State,* 369 S.C. 213, 631 S.E.2d 542, 544 (2000). Pursuant to Rule 242 of the South Carolina Rules of the Appellate Court, "a writ of certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power review in general indicates the character of reasons which will be considered:

1. Where there are novel questions of law;
2. Where there is a dissent in the decision of the Court of Appeals;
3. Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court;
4. Where substantial constitutional issues are directly involved;
5. Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Rule 242 SCACR.

In reviewing each of these criteria the present case does not apply to any of them. The Court of Appeals properly and unanimously affirmed the decision of the trial court. This decision should not be subject to review.

There have been numerous South Carolina Supreme Court decisions relating to the properly denied request to inform the jury of a lesser included offense within a jury instruction. It is clear in previous Supreme Court decision that a trial judge cannot give the jury a charge of a lesser included offense unless all of the elements of that offense was in evidence. This was not

what happened in the present case so the trial court made the right decision in not charging the jury on the offense of involuntary manslaughter.

There have also been decisions from the Supreme Court involving the definition of malice and what a trial judge should mention to a jury while explaining malice during jury charges. The Court of Appeals was correct in their decision regarding what was told to this jury is the definition of malice. The instruction given by the trial court was proper and should not be subject to review by this Court.

The Court of Appeals was also correct in ruling that Petitioner waived the quashing of the indictment because he failed to move to quash prior to the swearing of the jury. Once Petitioner's trial counsel failed to do this, he waived the issue. Decisions by this Court are clear that a motion to quash an indictment must be made before the jury is sworn. This was never done by trial counsel so the Court of Appeals was correct in ruling that this issue was never preserved for appeal.

STATEMENT OF FACTS

On April 20, 2019, Petitioner arrived home in the early morning hours from attending a fish fry being held by his father. (R. p. 189 l. 15-18). The back door was locked, so he knocked but received no response. Petitioner went to the front door to also find it locked, so he knocked but received no response. Petitioner proceeded to break a window, so he could reach in to unlock the door. (R. p. 192 l. 9-12).

Once inside he confronted his wife Indigo Penny (Indigo) about why she did not answer the door. Indigo informed Petitioner that she was sleeping due to taking a Benadryl and did not hear Petitioner knocking. (R. p. 192 l. 23-25). An argument quickly ensued, Indigo informed the Petitioner that she did not wish to argue so she woke their three children to leave the house. (R. p. 182 l. 6 – p. 183 l. 3; p. 194 l. 25 – p. 195 l. 4). Indigo was also pregnant with their fourth child, Petitioner was aware of this pregnancy. (R. p. 187 l. 6-8; l. 18-21).

As Indigo left with the children Petitioner grabbed a .22 caliber revolver and shot into the air eight times. (R. p. 204 l. 1-5; p. 407 l. 10-14). Indigo quickly rushed the children into her Toyota Camry. As they were leaving Petitioner grabbed his 9mm and began shooting at Indigo's vehicle while she and the kids were still inside. Two of the shots hit the ground. Petitioner's shots also hit the front hood, the front wheel well, the passenger door which stuck Indigo in the leg just above the ankle, the side mirror, the front drivers side quarter panel, and behind the driver's side back door. The bullet that hit the drivers side back door penetrated the vehicle striking their seven-year-old son in the head. (R. p. 435 l. 15 – p. 436 l. 5; p. 319 l. 21 – p. 333 l. 9).

Indigo was not aware that her child was shot until her daughter complained he would not get off her. Indigo checked the rear seat where the children were seated and noticed that the child was struck. She then rushed him to the hospital. (R. p. 209 l. 7-11). At the hospital an ER nurse

informed Newberry County Sheriff Lee Foster and other responding deputies that young child was in "grave" condition. (R. p. 87 l. 23 – p. 88 l. 2). While in the hospital Indigo was questioned by Newberry County deputies. During this interview Indigo informed deputies that Petitioner was the person that shot her. (R. p. 313 l. 13-15). Indigo also told deputies that Petitioner told her, "If I'm going to jail tonight, ain't nobody staying here." (R. p. 194 l. 8-15).

Deputies received a search warrant for the residence. While searching, they found under a mattress a semi-automatic 9mm pistol. (R. p. 293 l. 5-10). Deputies also found in a dresser drawer several unspent rounds of ammunition. (R. p. 296 l. 20-23). Deputies later received word that the minor child had died. Petitioner was then arrested and charged with the offenses of murder and attempted murder. (R. p. 314 l. 8-9; p. 355 l. 6-8).

During the trial SLED agent Michelle Eichenmiller testified. Agent Eichenmiller was found qualified as an expert in the field of firearm identification. (R. p. 395 l. 5-6). Agent Eichenmiller testified that the bullets found in the Camry, at the scene, and removed from the head of the victim were consistent with a 9mm. (R. p. 398 l. 23-25; p. 400 l. 13-15; p. 404 l. 11-12). She also examined the shell casings found at the crime scene. She testified that each of these shell casings matched the Taurus 9mm pistol that was found inside the home. (R. p. 404 l. 20-24).

Forensic pathologist Kelly Rose also testified. Dr. Rose was found qualified as an expert in the field of pathology and forensic pathology. (R. p. 470 l. 4-5). Dr. Rose performed the autopsy on the victim. (R. p. 471 l. 19). She determined that the victim's cause of death was a pulpification of the brain subarachnoid, and a subdural hemorrhage, due to a gunshot wound to the head. (R. p. 472 l. 15 – p. 473 l. 4). Dr. Rose also testified that the bullet entered right above the left ear, traveled, through the brain, and was found in a big bulge under the skin. (R. p. 477 l. 13-17). Dr. Rose determined the manner of death as being a homicide. (R. p. 473 l. 5-6).

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 a jury charge for involuntary manslaughter. The Court of Appeals was correct in affirming the decision of the trial court to deny request of the Petitioner for a jury charge of involuntary manslaughter.**

At the conclusion of trial Petitioner requested the trial court charge the jury on the law of involuntary manslaughter. It was the Petitioner's position that he could have been found guilty of committing the misdemeanor offense of malicious injury to personal property, giving rise to a jury charge of involuntary manslaughter. Petitioner also argued that he was just shooting at the tires, so he was doing a lawful act that resulted in the death which equates to involuntary manslaughter. (R. p. 520 l. 13-17).

The trial court may and should refuse a charge on a lesser included offense where there is no evidence that the defendant committed the lesser rather than the greater offense. *Casey v. State,* 305 S.C. 445, 409 S.E.2d 391 (1991). Involuntary manslaughter is defined as: 1) the unintentional killing of another without malice, but while engaged in 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 lawful activity with reckless disregard of the safety of others. *State v. Smith* 391 S.C. 408, 414, 706 S.E.2d 12, 15 (2011). Petitioner argues that these events could equate to the crime of malicious injury to personal property; therefore, he was not committing a felony so this should be considered involuntary manslaughter. First, depending on the value of the property damaged due to a person's actions, malicious injury to personal property can be considered a felony.[1] However, the Court of Appeals was correct in equating this to the crime of discharging a firearm into a dwelling, structures, enclosures, vehicles or equipment, which

[1] *See,* S.C. Code Ann. §16-11-510.

is considered a felony, pursuant to Section 16-23-440(B) of the South Carolina Code of Laws which specifically state:

> 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. A person who violates the provisions of this subsection is guilty of a felony and upon conviction, must be finded not more than one thousand dollars or imprisoned not more than ten years or both.

S.C. Code Ann. §16-23-440.

The Court of Appeals was correct in applying the present case to this Court's decision of *Bozman v. State*. In *Bozman,* this Court decided, that since the defendant intended to shoot the gun there was no evidence to support an allegation of mere criminal negligence in the use of a dangerous instrumentality. The evidence in the record does not support a charge of involuntary manslaughter. *Bozman v. State,* 307 S.C. 172, 414 S.E.2d 144 (1992). It was clear from the evidence presented Petitioner intentionally shot at a vehicle in which he knew his wife and children were occupying. This reveals a total disregard for human life, which does not equate to a charge of involuntary manslaughter. The decision of the Court of Appeals was correct and should not be reviewed by this Court.

2. **The jury charge given by the trial court fully explained the proper definition of malice as a total disregard for human life and an intent to inflict bodily injury, there exists no confusion regarding the explanation given by the trial court while answering the jury's question. The Court of Appeals did not err in affirming the decision of the trial court.**

The Petitioner argues that the trial court gave the jury an improper definition of malice. The Court of Appeals was correct, the definition given by the trial court was the correct definition. During jury deliberations the jury came out with a question, "Does total disregard for human life supersede the intent to inflict injury?" (R. p. 651 l. 22-23). The jury foreman explained to the trial court their confusion was that the instructions stated, "that malice aforethought requires a showing

of an intent to do harm." However further down is stated, "Malice can be inferred by reckless disregard for a human life." (R. p. 668 l. 8-12).

Within their opinion the Court of Appeals correctly ruled that there was no abuse of discretion because the actual jury instructions contained the correct definition of malice and the trial court informed the jury that "before you can find defendant guilty of attempted murder in this case, you have to show he specifically intended to kill Indigo Davis." (R. p. 669 l. 20-22) Which was correct because attempted murder is a specific intent crime. *See, State v. King,* 422 S.C. 47, 810 S.E.2d 18 (2017).

Petitioner argues that the trial court erred when the jury was informed that they needed to prove a disregard for human life and not a "total" disregard for human life. However, the Court of Appeals was correct in their finding that the original charge stated, "malice may be inferred from conduct showing a total disregard for human life." (R. p. 637 l. 3-4).

Within his petition the Petitioner argues that the trial court erred in the answers it gave to the jury for their question. Petitioner states that the trial court's answers to the jury's question contradicted with the original jury instructions. The jury charges given were a correct interpretation of the law. The trial court charges stated "criminal intent must be proven by the state beyond a reasonable doubt." (R. p. 635 l. 1-2). The charges also stated, "the defendant is also charged with attempted murder … not unlike the crime of murder attempted murder requires a specific intent to kill not general intent." (R. p. 637 l. 18; l. 21-23). Jury charges 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). There was no violation of the law in the charges that were given. A jury charge is correct if the charge contains the correct definition and adequately covers the law. *State v. Adkins,* 353 S.C. 312, 318, 577 S.E.2d 460, 464

(Ct. App. 2003). The evidence presented by the State is clear, Petitioner shot at a vehicle with knowledge that his wife and children were inside. This is clearly a total disregard for human life. *See, State v. Cottrell,* 421 S.C. 622, 809 S.E.2d 423 (2017)(Trial court was correct in instructing the jury only that malice could be inferred from conduct showing a total disregard for human life). The jury charge covered the law as it exists; therefore, it should not be subject to reversal. 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, 463 (Ct. App. 2003). A jury charge which is substantially correct and covers the law does not require reversal. *State v. Foust,* 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996).

3. **Appellant never made a motion to quash the indictment prior to the selection of the jury, thereby, losing the ability to persuade the trial court to quash the indictment. Since a motion to quash was not raised before the trial court Petitioner waived the ability to raise it during appeal, also Petitioner was convicted of ABHAN making this argument moot.**

Petitioner argues that the court of appeals erred in deciding that Petitioner waived quashing the indictment because a motion to quash was not made prior to the jury being sworn. Petitioner also argues that once they refused to consent to the amendment of the indictment, everyone knew the indictment was improper; therefore, the indictment should have been quashed. However, the trial court is not obliged to quash an indictment prior to a party making a motion to do so. 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 is sworn and not afterwards. S.C. Code Ann. §17-19-90. 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).

In *Gentry* this Court determined what must be considered prior to the quashing of an indictment. In *Gentry* this Court specifically stated:

> 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 if intended to be charged.

Gentry, 363 S.C. at 102-103, 610 S.E.2d at 500.

It was clear according to *Gentry* it is the responsibility of the Petitioner to raise a motion to quash prior to the swearing of the jury. It is not the responsibility of the trial court just to *sua sponte* quash an indictment. Especially if those two qualifications listed in *Gentry* do not apply. The Respondent argues that those *Gentry* qualifications did not apply to the present case. The trial court did the correct thing allowing the indictment to go forward as is without any corrections, and not to quash because there was no motion presented by Petitioner's trial counsel.

Respondent will further argue that the Court of Appeals, made the correct decision that Petitioner's failing to make a motion to quash did not preserve this issue for appeal. 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). A motion to quash was never made by trial counsel. This issue was never preserved; therefore, the Court of Appeals was not obligated to consider this issue.

Though not raised by the Court of Appeals Respondent further argues mootness. The evidence presented by the Solicitor was sufficient to prove beyond a reasonable doubt that Petitioner committed the offense of ABHAN. Petitioner argues that the Solicitor erred in suggesting that attempted murder was a general intent crime. Although that is correct pursuant to

the *King* decision*,* ABHAN is a general intent crime which Petitioner could be found guilty of committing without any intent to kill. In the State of South Carolina ABHAN is defined 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).

There is no argument as to the facts of this case. There is no doubt that Petitioner shot into a car occupied by his pregnant wife and three children. One of the shots entered the driver's door hitting his wife in the ankle. This act caused great bodily injury to Indigo, and it was done by means that could produce death or great bodily injury. There was never any argument on the part of the Petitioner as to him not shooting into that vehicle or that he did not have knowledge that Indigo and the three kids were inside the car when he shot. He was guilty of the offense of ABHAN beyond a reasonable doubt, which he was found guilty of by a jury of his peers. Since the was found guilty of the offense he committed, an argument regarding the quashing the indictment should be considered 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). ABHAN is a lesser included offense of attempted murder.[2] If the indictment was quashed the State could have easily indicted the Petitioner for the offense of

[2] 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).

ABHAN. Since ABHAN it is a general intent crime[3] and the evidence revealed that the Petitioner did shoot Indigo in the leg, an act not in dispute. Petitioner was properly convicted of an offense he committed. No remedy that can be brought by this court that will affect the final result; therefore, this issue should be considered moot.

Petitioner has not revealed any error made by the Court of Appeals. The affirming decisions made by the Court of Appeals was correct. So, this petition should be subject to dismissal.

[3] ABHAN is a general intent crime. *State v. Williams,* 435 S.C. 288, 298, 867 S.E.2d 430, 435 (2021), *rev'd on other grounds, State v. Williams,* 439 S.C. 620, 889 S.E.2d 562 (2023).

CONCLUSION

Based on the foregoing reasons, the Respondent submits Petitioner has failed to reveal that the questions presented warrant certiorari review. This Court should deny this petition and let stand the decision of the Court of Appeals.

Respectfully submitted,

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