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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

On Writ of Certiorari to the Court of Common Pleas
Appeal from Richland County
Honorable Daniel Coble, Post-Conviction Relief Judge
Honorable Clifton Newman, Trial Judge

Appellate Case No. 2023-001507

Keylan J. Durham, #347264,

Petitioner,

v.

State of South Carolina,

Respondent.

BRIEF OF RESPONDENT

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PETITIONER'S STATEMENT OF ISSUES ON CERTORARI

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

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON CERTIORARI

Whether the post-conviction relief court properly determined Petitioner failed to establish the requisite prejudice necessary to reverse his conviction and grant him a new trial based on trial counsel's failure to object to the trial court's jury instruction that malice could be inferred from the use of a deadly weapon where the record contained ample evidence of Petitioner's malice separate and apart from his use of a deadly weapon and the jury's verdict as a whole demonstrates that no prejudice could be gleaned from this error, and, accordingly, there was not a reasonable likelihood that the result of Petitioner's trial would have been different but for this jury instruction?

STATEMENT OF THE CASE

Petitioner Keylan J. Durham is presently confined in the South Carolina Department of Corrections. During its January 2015 term, the Richland County Grand Jury indicted Petitioner for three counts of attempted murder (2015-GS-40-0006, -0007, -0008), two counts of kidnapping (2015-GS-40-8388, -8389), first-degree assault and battery (2015-GS-40-0001), carjacking (2015-GS-40-0005), and possession of a weapon during the commission of a violent crime (2015-GS-40-0004). Fifth Circuit Assistant Public Defenders Tracy E. Pinnock, J. Rhodes Bailey, and Rebecca S. Williams represented Petitioner.

On April 11–14, 2016, the Petitioner proceeded to a jury trial before the Honorable Clifton Newman, Circuit Court judge. The jury convicted Petitioner as indicted on the following charges: two counts of attempted armed robbery, two counts of kidnapping, carjacking, first-degree assault and battery, one count of attempted murder, and possession of a weapon during the commission of a violent crime. On the second count of attempted murder, the jury convicted Petitioner of the lesser-included offense of first-degree assault and battery. The jury acquitted Petitioner of the third count of attempted murder. Judge Newman sentenced Petitioner to concurrent terms of imprisonment for ten years for each charge of first-degree assault and battery; twenty-two years for each kidnapping charge; twenty years for carjacking; twenty-four years for attempted murder; and five years for possession of a weapon during the commission of a violent crime.

Petitioner sought direct appellate review and was represented by Appellate Defender Susan B. Hackett of the South Carolina Commission on Indigent Defense-Office of Appellate Defense, who filed a brief pursuant to Anders v. California, 386 U.S. 738 (1976), along with a motion to be relieved. The South Carolina Court of Appeals dismissed Petitioner's appeal and granted appellate

counsel's motion to be relieved. State v. Keylan J. Durham, Op. No. 2018-UP-149 (Ct. App. filed April 11, 2018). The Remittitur was returned to the lower court on April 27, 2018.

Petitioner then sought post-conviction relief by filing a *pro se* application on February 26, 2019, with the following allegations:

1. Ineffective assistance of counsel;
2. The trial court erred by instructing the jury it could infer malice from the use of a deadly weapon;
3. Counsel erred by not objecting to the improper charge; and
4. Counsel failed to investigate the factual and legal circumstances surrounding the case.

On April 12, 2019, Petitioner filed *pro se* amendments to his PCR application alleging the following:

1. Ineffective Assistance of Counsel
   a. Failure to provide complete discovery and to review discovery before trial;
   b. Failure to properly investigate and prepare Petitioner for trial;
   c. Failure to object to the shoplifting video being played for the jury;
   d. Failure to impeach witnesses for contradictory testimony;
   e. Failure to give Petitioner advice about the Jackson v. Denno hearing;
   f. Failure to make all contemporaneous objections; and
   g. Failure to advise Petitioner of the new evidence brought in the day trial started.
2. Ineffective Assistance of Appellate Counsel
   a. Failure to raise all meritorious issues.

An evidentiary hearing on the matter was convened on May 9, 2023, before the Honorable Daniel Coble, Circuit Court judge. Michael H. Lifsey, Esquire, represented Petitioner. Petitioner testified on his own behalf, and Respondent presented testimony from Assistant Public Defender Tracy E. Pinnock, Esquire. Petitioner proceeded on all allegations as set forth in his original and amended applications. The post-conviction relief court denied relief and dismissed the application with prejudice by order filed September 12, 2023. In the Order of Dismissal, the post-conviction relief court found trial counsel's performance was deficient for failing to object to the jury charge that malice may be inferred from the use of a deadly weapon. Despite a finding of deficiency in

trial counsel's representation, the post-conviction relief court found Petitioner failed to prove prejudice where the jury convicted Petitioner as indicted on the first count of attempted murder, on the second count of attempted murder, the jury convicted Petitioner of the lesser-included offense of first-degree assault and battery, and on the third count of attempted murder, the jury acquitted Petitioner. The post-conviction relief court highlighted that malice is not an element of first-degree assault and battery. The post-conviction relief court further found that the implied malice from the use of a deadly weapon was not the only implied malice presented at trial; instead, Petitioner's actions in placing the vehicle in reverse and gunning it towards an officer clearly demonstrated a wanton or reckless disregard for human life. The post-conviction relief court concluded that there was no reasonable probability that the erroneous instruction affected the result of the proceeding. Petitioner filed a notice of appeal challenging the denial of relief. The South Carolina Court of Appeals granted the petition on March 21, 2025. On June 20, 2025, Petitioner filed his Brief of Petitioner.

This Brief of Respondent follows.

STATEMENT OF THE FACTS

In the early morning hours of August 4, 2014, Petitioner approached a car idling in the parking lot of the In-Town Suites. (App'x p. 137, ll. 10–12; pp. 139, l. 18–140, l. 11; pp. 184, l. 12–185, l. 21). Marck Drastich (Drastich) and his wife, Lashonda Edwards (Edwards), were talking inside the car, a mid-nineties Oldsmobile. (App'x pp. 137, l. 10–138, l. 24; p. 183 ll. 9–14; pp. 184, l. 12–185, l. 21). The couple had just returned home from the Ale House. (App'x pp. 137, l. 10–138, l. 24; pp. 182, l. 25–183, l. 5). Edwards was in the driver's seat, and Drastich was in the passenger seat. (App'x pp. 137, l. 10–139, l. 17; p. 185, ll. 1–6).

Petitioner approached the couple wearing a white shirt, a wig, a hat, glasses, and brandishing a silver handgun. (App. p. 193, ll. 6–20). Drastich told Petitioner he did not have any money and tried to exit the car. (App'x pp. 139, l. 19–140, p. 25; p. 185, ll. 7–21). When Drastich tried to exit, Petitioner struck him in the face with the gun. (App'x pp. 140, l. 21–141, l. 10). Petitioner then turned his attention towards Edwards, and Drastich was able to escape. (App'x pp. 142, l. 7–143, l. 10). Edwards exited, and Petitioner took the Oldsmobile. (App'x pp. 189, l. 13–192, l. 14). Drastich identified Petitioner out of a photo lineup and also made an in-court identification of Petitioner as the person who robbed him. (App'x pp. 147, l. 7–149, l. 17). Edwards was unable to identify the assailant. (App'x p. 196, ll. 15–24).

Officer Jason Van Valkenburgh (Van Valkenburgh) responded to the carjacking call. (App'x p. 162, ll. 16–19). Drastich informed him there was a "blacked out sports car" waiting nearby during the carjacking. (App'x p. 164, ll. 6–11). While conducting his investigation, Van Valkenburgh learned of a call concerning a civil disturbance at Paces Brook Apartments, which was across the street from In-Town Suites, involving a black Camaro. (App'x pp. 164, l. 13–165, l. 2). Then, Van Valkenburgh saw a black Camaro drive by at a high rate of speed. (App'x pp.

165, l. 9–166, l. 8). Van Valkenburgh then began chasing the Camaro. (App'x pp. 166, l. 7–168, l. 21). In addition to his testimony regarding the pursuit, the State introduced the dash-cam video from Van Valkenburgh's patrol car into evidence. (App'x p. 168, ll. 1–21). The Camaro eventually wrecked, and the two occupants fled on foot. (App'x p. 170, ll. 1–8). After an ensuing foot chase, the officers caught one of the men, Devontae Bryant (Bryant). (App'x p. 170, ll. 9–17). Once arrested, Bryant implicated Petitioner as the driver of the Camaro. (App'x p. 271, ll. 1–11).

Bryant testified at trial that he and Petitioner went to In-Town Suites in the Camaro. (App'x p. 271, ll. 17–19). According to Bryant, Petitioner told him he was "about to go handle something." (App'x p. 271, ll. 20–25). Bryant did not see Petitioner exit the Camaro with a gun or wig. (App'x p. 272, ll. 1–12). However, the next time Bryant saw Petitioner, Petitioner was in "an old kind of car" at a gas station; Bryant was driving the Camaro. (App'x p. 272, ll. 13–25). Bryant followed Petitioner from the gas station to Wal-Mart, and Bryant saw Petitioner go inside Wal-Mart while Bryant waited in the Camaro. (App'x p. 273, ll. 1–16). Thereafter, Bryant followed Petitioner to a hotel, where Petitioner parked the older-looking car. (App'x p. 273, ll. 17–25). Petitioner then got back into the Camaro, and Bryant moved to the passenger seat. Petitioner then drove the Camaro to an apartment complex. (App'x p. 274, ll. 1–16).

At the gas station, Cullen Bennecker (Bennecker) and Zane Harris (Harris) asked Petitioner to buy them some beer. (App'x p. 212, ll. 6–20). Petitioner was driving an Oldsmobile. (App'x p. 212, ll. 21–24). Petitioner agreed but asked them to follow him to Walmart. (App'x p. 212, ll. 15–20). When Petitioner and Harris went inside Wal-Mart, Bennecker stayed in the parking lot and noticed a black Camaro pull up. (App'x pp. 212, l. 25–214, l. 3). Additionally, Bennecker noticed a silver pistol holster in the Oldsmobile's driver's seat. (App'x p. 215, ll. 11–15). When Harris and Petitioner returned, Petitioner invited Harris and Bennecker to join him at Ale House.

(App'x p. 214, ll. 13–21). Bennecker and Harris agreed; however, instead, they went to Waffle House. (App'x p. 214, ll. 20–23). Thereafter, they returned to Harris's apartment at Paces Brook. Upon exiting their car, they saw headlights enter the parking lot of the complex. (App'x pp. 214, l. 25–215, l. 10). The Camaro entered the parking lot, and Petitioner and another man tried to wave Bennecker and Harris down. (App'x pp. 214, l. 25–215, l. 10). Bennecker and Harris ran into the apartment and called the police. (App'x pp. 176–177; p. 215, l. 1–20). Harris later identified Petitioner as the man he interacted with that night. (App'x pp. 215, l. 21–218, l. 15).

The Camaro pulled into Paces Brook, and Petitioner exited the car. Soon after, a police officer approached Petitioner. (App'x pp. 176–177; p. 215, l. 1–20). Petitioner ran back to the Camaro, which initiated the high-speed chase. (App'x pp. 231, l. 23–233, l. 6). The Camaro wrecked during the chase. (App'x p. 170, ll. 1–8). A search of the Camaro revealed a camera and its box, allegedly stolen from Walmart. (App'x pp. 372, l. 12–373, l. 9).

Officer Mark Sjolund spotted the Oldsmobile in the parking lot of the Wingate Inn two days later, on August 6. (App'x pp. 244, l. 21–245, l. 25). The police found a brown wig in the Oldsmobile. (App'x p. 377, ll. 11–17).

Petitioner's girlfriend, Kiane Warner (Kiane), testified for the State at trial. (App'x pp. 251, l. 18–263, l. 22). She recalled seeing Petitioner in a black Camaro but could not remember a timeframe seeing him in the car. (App'x p. 253, ll. 8–13). Kiane testified that Petitioner told her he had just taken the cops "on a high-speed chase, and when he got on the highway, he hit a curb" on August 4, 2014. (App'x p. 253, ll. 14–21). Petitioner also told Kiane he climbed over Bryant

to exit the car. (App'x pp. 253, l. 24–254, l. 3). Additionally, Petitioner gave Kiane some European currency.[1] (App'x p. 255, ll. 1–13).

On August 6, the police arrived at Kiane's apartment looking for Petitioner; however, Petitioner was not there. (App'x pp. 256, l. 16–257, l. 2). Kiane told them that Petitioner was in her car with her brother, Quinten Warner (Warner). (App'x p. 261, ll. 20–25). Petitioner was seen driving into the parking lot of Kiane's apartment complex, so officers from multiple agencies pulled behind Petitioner in an attempt to block him in. Petitioner got out of the vehicle; however, he jumped back into the vehicle in an effort to evade law enforcement again, this time in Kiane's car. (App'x p. 256; p. 257, ll. 8–20). Officer Marcus Brown (Officer Brown) pulled his vehicle in behind Petitioner. Officer Brown testified that he got out of his car, looked Petitioner in the eyes through his side mirror, and Petitioner hit the brakes and put the vehicle in reverse. Officer Brown testified that the back end of Petitioner's car raised and came at him. Officer Brown stated that Petitioner's rear bumper struck him in the leg as he jumped out of the way, and pinned him against his vehicle, and Petitioner's passenger side mirror struck Officer Brown in the arm and broke off Petitioner's vehicle. (App'x pp. 292, l. 25–293, l. 14). Then Petitioner struck a tree, came off the tree, hit another vehicle, then hit a light pole, and was apprehended. (App'x p. 257, ll. 8–20). During Petitioner's attempt to flee, Officer Brown fired several shots into the car. (App'x p. 293, ll. 14–16). Investigator Justin Britt and Agent Keith Thrower were at the scene to locate Petitioner and also testified that Petitioner nearly struck them with the car as they were trying to flee. (App'x p. 327, ll. 11–14; p. 452, ll. 1–23).

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[1] At trial, Drastich testified that Applicant stole his wife's car, his immigration documents, and some Euros he had in his pocket. (App'x p. 150).

Officer Brown sustained a torn ligament in his shoulder and bicep, which required surgery. Officer Brown also required nerve surgery on his hand as a result of the Petitioner striking him with his vehicle. (App'x p. 296, ll. 5–13).

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180–81, 810 S.E.2d at 839–40. Further, appellate courts "defer to the PCR court's credibility findings as to witnesses who testified before the PCR court." Thompson v. State, 423 S.C. 235, 247, 814 S.E.2d 487, 493 (2018). However, pure questions of law will be reviewed *de novo* without deference to the post-conviction relief court. Id. Appellate courts will reverse the decisions of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief court properly determined Petitioner failed to establish the requisite prejudice necessary to reverse his conviction and grant him a new trial based on trial counsel's failure to object to the trial court's jury instruction that malice could be inferred from the use of a deadly weapon where the record contained ample evidence of Petitioner's malice separate and apart from his use of a deadly weapon and the jury's verdict as a whole demonstrates that no prejudice could be gleaned from this error, and, accordingly, there was not a reasonable likelihood that the result of Petitioner's trial would have been different but for this jury instruction.

On appeal, Petitioner contends the post-conviction relief court erred in failing to recognize the prejudice stemming from trial counsel's failure to object to the trial court's jury instruction on the inference of malice arising from the use of a deadly weapon. Specifically, Petitioner contends the jury could have concluded Petitioner was guilty of attempted murder solely because he struck Officer Brown with a car, a deadly weapon. However, as the post-conviction relief court properly found, because the jury acquitted Petitioner of one of the attempted murder charges and found him guilty of the lesser-included crime of first-degree assault and battery—an offense that inherently lacks the element of malice—was indicative of the jury's ability to discern the complexities of the case, leading to the conclusion that there was no reasonable likelihood that the improper instruction affected their verdict in a manner that would violate the Constitution. The post-conviction relief court also properly found based on the evidence presented at trial, that malice was not solely or necessarily proven by the use of a deadly weapon—because a vehicle is not inherently a deadly weapon but may become one based on its manner of use—instead, malice is implied from Petitioner's deliberate actions where he readily saw law enforcement behind him, placed the vehicle in reverse, and gunned it in the direction of Officer Brown. The post-conviction relief court noted that Petitioner's actions demonstrated a wanton and reckless disregard for human life. Therefore, Petitioner failed to establish the requisite prejudice necessary for relief—that the result

of his proceeding would have been different but for trial counsel's failure to object to the jury charge. This Court should affirm.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee all criminal defendants the right to "assist[ance] by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." Strickland v. Washington, 466 U.S. 668, 685 (1984). In post-conviction relief actions, the reviewing court applies the two-part test outlined in Strickland to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the petitioner's conviction. Id. at 687. To obtain relief, a post-conviction relief petitioner must prove (1) counsel's performance fell below an objective standard of reasonableness; *and* (2) there is a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient performance. Williams v. State, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005) (citing Strickland, 466 U.S. 668). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Strickland, 466 U.S.at 700; see also Bell v. Cone, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)).

Petitioner bears the heavy burden of establishing both prongs of the Strickland standard. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); Rule 71.1(e), SCRCP. To prove deficient performance, the petitioner must establish that, in light of all the circumstances, the acts or omissions complained of "fell below an objective standard of reasonableness" as measured by "prevailing professional norms." Strickland, 466 U.S. at 688. Reviewing courts should be

deferential in this inquiry and apply "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689.

With respect to prejudice, the petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Id. When evaluating this probability, the reviewing court "should consider the specific impact counsel's error had on the outcome of the trial" coupled with "the strength of the State's case in light of . . . . the [totality of the] evidence presented to the jury." Smalls, 422 S.C. at 188, 810 S.E.2d at 843. Significantly, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Strickland, 466 U.S. at 696.

The purpose of a trial judge's jury instructions is "to enlighten the jury and to aid it in arriving at a correct verdict." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). When instructing a jury on the law, a trial judge must charge only the current and correct law of South Carolina. State v. Taylor, 356 S.C. 227, 231, 589 S.E.2d 1, 2 (2003). In doing so, a trial judge is only required to instruct the jury on the substance of the law and does not have to use any particular verbiage. State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002). A trial judge's jury charge is appropriate if it is substantially correct and adequately covers the law applicable to the case. State v. Foust, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996); see State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 464 (Ct. App. 2003) ("A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.").

At the time of Petitioner's trial, a jury instruction on implied malice derived from the use of a deadly weapon was prohibited when the defense presented evidence that would reduce, mitigate, excuse, or justify the killing. Belcher v. State, 385 S.C. 597, 610, 685 S.E.2d 802, 809

(2009). Here, the post-conviction relief court correctly found that trial counsel was deficient for failing to object to the jury instruction on implied malice derived from the use of a deadly weapon, as it was prohibited. However, Petitioner contends the post-conviction relief court erred in finding Petitioner suffered no prejudice from the erroneous charge.

To prove prejudice, Petitioner must prove "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 694). A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. In this case, the post-conviction relief court correctly found Petitioner was not prejudiced by the erroneous jury instruction because malice was not solely or necessarily proven by the use of a deadly weapon—because a vehicle is not necessarily a deadly weapon—and there was ample evidence separate and apart from his use of a deadly weapon.

"Malice is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong." State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998) (citations omitted). Express malice is "when there is a deliberate intention to unlawfully take the life of another." State v. Wilds, 355 S.C. 269, 276, 584 S.E.2d 138, 142 (Ct. App. 2003) (citations omitted). "Implied malice is when circumstances demonstrate a wanton or reckless disregard for human life or a reasonably prudent man would have known that according to common experience there was a plain and strong likelihood that death would follow the contemplated act." Id. at 276–77, 584 S.E.2d at 142 (citations omitted). "In its legal sense, 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.'" Id. at 276, 584 S.E.2d at 142 (citing State v. Mouzon, 231 S.C. 655, 662, 99 S.E.2d 672, 675 (1957)).

As discussed above, the evidence presented at trial showed Petitioner was outside his vehicle when the officers pulled in behind him, and he jumped back in his vehicle. As Officer Brown testified, Petitioner looked at him in his driver's side view mirror, placed the vehicle in reverse, and gunned it in the direction of Officer Brown.[2] Petitioner did not stop after he struck Officer Brown; instead, he continued in a reckless reverse in the direction of another officer, where he hit a tree. Petitioner still did not stop; instead, he continued in his reckless caprice and struck another vehicle. Thereafter, be it a person, tree, or vehicle, nothing would seemingly stop Petitioner's reckless foray, and he proceeded to drive the car into a light pole—and this was the final blow that ended Petitioner's reckless disregard for anyone or anything in his flight to—*just to get away*.

Accordingly, the record clearly and overwhelmingly demonstrates that the malice, in this case, was not proven solely or necessarily from the use of a deadly weapon—rather, malice reasonably could be implied from the fact Petitioner saw law enforcement behind him, placed the vehicle in reverse, and gunned it in their direction as this conduct clearly demonstrates a "wanton or reckless disregard for human life." See, e.g., Mouzon, 231 S.C. at 662, 99 S.E.2d at 675 (concluding evidence was sufficient to sustain conviction for murder although there was "no actual

[2] Petitioner argues that Dereka Brown (Dereka), a disinterested party, testified that Officer Brown was on the side of Petitioner's vehicle and not directly behind it. However, it escapes Respondent on how Petitioner relies on this testimony to further his argument, where Dereka observed the Petitioner's vehicular foray from her balcony, and the record does not provide Dereka's viewing angle. Arguably, if anyone should know where they were positioned with respect to Petitioner's vehicle, it would be Officer Brown, who testified he was directly behind it. Moreover, even accepting Dereka's perspective *arguendo*, it does not negate Officer Brown's direct testimony of Petitioner's deliberate reversal toward him, which supports implied malice through reckless conduct rather than mere accident.

intent to kill or injure another, there [was] 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"). see also State v. Perry, 440 S.C. 396, 892 S.E.2d 273 (2023) (affirming attempted murder conviction where jury recharge on intent did not prejudice defendant, given other evidence of malice from deliberate actions); State v. Campbell, 443 S.C. 182, 191–192, 904 S.E.2d 441, 446 (2024) (considering inferred malice instructions post-Burdette, but finding no reversible error where evidence of recklessness supported the verdict). Moreover, Petitioner's emphasis on mitigating factors, such as his alleged paranoia, does not undermine this implication, as the PCR court properly weighed the totality of the evidence and found no prejudice. See Smalls, *supra* (in PCR prejudice analysis, courts evaluate whether erroneous instructions undermine confidence in the outcome, considering the strength of the State's case).

Furthermore, any argument that the jury instruction was confusing is in and of itself nonsensical and confusing. Petitioner argues that he was convicted of attempted murder for his actions towards Officer Brown because of the confusing jury instruction of inference of malice from the use of a deadly weapon, which, in this case, Petitioner maintains his vehicle was the deadly weapon. However, if one follows Petitioner's logic and the jury erroneously applied the jury instruction, then Petitioner should have been found guilty of three attempted murders, as Petitioner used the same deadly weapon, his vehicle, against all three officers. Yet, we do not have those results in this case. Instead, the jury determined that Petitioner was guilty of first-degree assault and battery, which requires no element of malice, for his actions against Investigator Justin Britt, where Petitioner was using the exact vehicle that he maintains is a deadly weapon. Additionally, the jury *acquitted* Petitioner for the attempted murder of SLED Agent Keith Thrower, yet again, where Petitioner was using the exact vehicle that he maintains is a deadly

weapon. Clearly, the results of the Petitioner's trial indicate that the jury did not improperly apply the jury instruction, and the post-conviction relief court's denial of relief should be affirmed. See State v. Burdette, 427 S.C. 490, 504, 832 S.E.2d 575, 583 (2019) (while banning inferred malice instructions prospectively, noting that in cases with overwhelming evidence of malice from conduct, such errors may be harmless).

Therefore, because the post-conviction relief court properly found Petitioner failed to prove prejudice from trial counsel's deficient performance, where although the jury instruction was objectionable, there is no reasonable probability that the instruction affected the result of the proceeding, as the jury had ample evidence to find malice from other evidence and testimony, this Court should affirm.

CONCLUSION

For the reasons stated above, this Court should affirm the post-conviction relief court's denial of relief.

Respectfully submitted,

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