STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Colleton County
The Honorable Perry M. Buckner, Circuit Court Judge

Appellate Case No. 2012-213520

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THE STATE,

Respondent,

v.

BRONSON SHELLEY,

Appellant.

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# FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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## STATEMENT OF ISSUE ON APPEAL

The trial court properly instructed the jury on the law of attempted murder, including its definition of malice, when it charged the current and correct law of South Carolina.

## STATEMENT OF THE CASE

A Colleton County Grand Jury indicted Appellant for two counts of attempted murder and possession of a weapon during the commission of a violent crime. (R.pp.276-279.) On November 13, 2012, Appellant proceeded to trial before a jury and the Honorable Perry M. Buckner. David Matthews, Esquire, represented Appellant, and Steven Knight, Esquire, represented the State. The jury found Appellant not guilty on one count of attempt murder but found him guilty on the other count and on the possession of a weapon charge. (R. p.263.) Judge Buckner sentenced him to twenty-five years' imprisonment for the attempted murder charge and five years' imprisonment for the weapon charge, to be served concurrently. (R. p.275.)

On November 19, 2012, Appellant filed a Notice of Appeal.

## STATEMENT OF FACTS

On July 12, 2012, Deputy Justin Eaches, of the Dorchester County Sheriff's Office, attempted to stop a vehicle for a traffic violation. (R. p.68, line 2-R. p.70, line 15.) While trying to stop the vehicle, he pulled beside it and was able to see both the driver and the passenger. (R. p.70, lines 16-24.) Deputy Joseph Burnette, II, also of the Dorchester County Sheriff's Office and driving a separate patrol car, participated in attempting to stop the vehicle and observed the passenger, Appellant, shooting out of the sunroof. (R. p.107, lines 19-25; R. p.116, line 15-R. p.117, line 15.) After a high-speed chase reaching 100 miles per hour, the vehicle turned over and both occupants exited. (R. p.73, lines 20-25; R. p.77, lines 1-13; R. p.78, lines 16-21.) Deputy Eaches went after Appellant and arrested him. (R. p.79, lines 1-12.) Appellant was charged with two counts of attempted murder and one count of possession of a weapon during the commission of a violent crime and proceeded to trial before a jury on November 13, 2012. (R.pp.276-279)

Prior to charging the jury, the trial court asked for jury charge requests from each party. (R. p.207, lines 1-6.) Appellant asked "for a definition of intent to kill, being a conscious purpose, as in the language used in State versus Sutton." (R. p.207, lines 11-13.) In response to Appellant's request, the following exchange took place:

> The Court: Well, I actually think the law in Sutton was talking about a different offense; however - - when I say different, it was talking about attempted murder, but not the statutory. I intend to charge the jury the same thing, Mr. Mathews, and that is intended means intending the result which actually occurs, not accident[al]ly or involuntarily. . . . But I will charge the jury that an attempt includes a specific intent to do a criminal act, and I will also charge the jury, along with an act falling short of the act intended. But I will charge them that for this offense, a person, who with the intent to kill attempts to kill another

person with malice aforethought, either express or implied, commits the offense of attempted murder[,] . . . as well as giving the jury the fact that this statutory offense of attempted murder requires that a person must have the intent to kill.

However, the jury has to know that the act falls short of the act, or the attempt does, even though it included a specific intent to do a particular criminal act, along with an act falling short of the act intended. And I think they need to be told that, and I intend to charge that, but I'll go over that with you in my charge conference.

Other than that charge, because I intend to define attempt and define the statute, Mr. Mathews, are there any other requests by the defendant as Requests to Charge?

[Defense counsel]: No, sir.

(R. p.207, line 14-R. p.208, line 21.)

After a charge conference in chambers, the following exchange took place on the record:

The Court: Mr. Mathews takes exception, although I'm charging the exact wording of the new attempted murder statute. Mr. Mathews wants me to add some additional wording, and we discussed it yesterday on the record. I think my charge adequately covers it, and I told him that.

I am going to define general intent. I'm going to define "attempt" since it is a word in the statute.

Mr. Mathews cited to me a 2000 case. That case was decided under - - it was for the offense of attempted murder, but that case was decided prior to the passage of the statutory offense that we have now of attempted murder. And, of course, the Legislature defined attempted murder when they passed that statute in 2010. And for that reason, I was hesitant to use language from a case dealing with an offense, which is not the statutory offense for which the defendant is charged.

Have I accurately stated what occurred in chambers, as far as the State is concerned?

[The State]: Yes, sir.

The Court: Insofar as the defendant is concerned?

Mr. Mathews: Yes, Your Honor.

(R. p.210, lines 4-24.)

After the trial court instructed the jury, Appellant took exception to the trial court's definition of malice. (R. p.256, lines 12-22.) His specific objection was to the language: "with an intent to inflict an injury." (R p.257, lines 5-25.) He argued "it waters down the defendant's purpose, the level of intent . . . ." (R. p.257, lines 24-25.) The trial court explained it defined malice because it is an element of attempted murder. (R. p.258, lines 4-10.) Furthermore, the trial court construed Appellant's exception as "a renewal of [his] request to charge the Sutton language." (R. p.259, lines 10-23.) Based on this assumption, the trial court again denied Appellant's request to charge under that language. (R. p.259, line 24-R. p.260, line 3.) Appellant did not correct this assumption by the trial court and did not ask for a ruling on his specific malice argument regarding the wording.

Ultimately, the jury found Appellant guilty of one count of attempted murder while finding him not guilty of the other. (R. p.263.) It also found him guilty of possession of a weapon during the commission of a violent crime. (R. p.263.) The trial court sentenced him to twenty-five years' imprisonment for the attempted murder charge and five years' imprisonment for the weapon charge, to be served concurrently. (R. p.275.)

## ARGUMENT

**The trial court properly instructed the jury on the law of attempted murder, including its definition of malice, when it charged the current and correct law of South Carolina.**

Appellant argues the trial court erred in instructing the jury when it defined malice as 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. He argues this was error because attempted murder requires a specific intent to kill. On the contrary, the trial court instructed the jury on the current and correct law of South Carolina, which is all that is required. As a whole, the charges contain the correct definition and adequately cover the law. Thus, this Court should find the trial court properly instructed the jury on the law of attempted murder and should affirm Appellant's conviction and sentence.

"Generally, the trial judge is required to charge only the current and correct law of South Carolina." State v. Zeigler, 364 S.C. 94, 106, 610 S.E.2d 859, 865 (Ct. App. 2005). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Id. "'Malice aforethought' is defined as 'the requisite mental state for common-law murder' and it utilizes four possible mental states to encompass both specific and general intent to commit the crime. These four possibilities are intent to kill, intent to inflict grievous bodily harm, extremely reckless indifference to the value of human life (abandoned and malignant heart), and intent to commit a felony (felony murder rule)." State v. Kinard, 373 S.C. 500, 503-04, 646 S.E.2d 168, 169 (Ct. App. 2007) (citations omitted).

In the discussion following Appellant's initial request to charge the language of State v. Sutton, 340 S.C. 393, 532 S.E.2d 283 (2000), the trial judge clearly agreed to charge the jury that an attempt includes a specific intent to do a criminal act along with an act falling short of the act intended. He also agreed to charge the jury that for this offense, a person, who with the intent to kill attempts to kill another person with malice aforethought, either express or implied, commits the offense of attempted murder. Additionally, he agreed to charge the jury on the fact that the statutory offense of attempted murder requires that a person must have the intent to kill. Furthermore, in the discussion following the charge conference, the trial judge agreed to charge general intent but explained he was hesitant to charge the jury based on a case that dealt with an offense other than the one under which this defendant was charged—statutory attempted murder. He pointed out that Sutton dealt with attempted murder prior to the 2010 statute.

In his jury instructions, the trial judge extensively explained attempt and what is required for the offense of attempted murder. Specifically, he stated:

> An attempt includes a specific intent to do a particular criminal act, along with that act falling short of the act intended. The State must show more than mere preparation, an intent. There must be some overt act committed in the effort to commit the crime.
>
> Intent means intending the result which actually occurs, not accident[al]ly or not involuntarily. . . . South Carolina Code Section 16-3-29 states as follows, and it is the attempted murder statute in South Carolina: A person, who with the intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder.

(R. p.247, line 1-25.) (emphasis added.) He then went into great detail explaining malice, including:

> Malice is hatred, ill-will or hostility towards another person. It is - - malice 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.

(R. p.248, lines 1-5.)

Appellant specifically argues the trial court "did not instruct the jury that 'attempted murder would require the specific intent to kill and conduct towards that end.'" On the contrary, the trial court charged the jury:

> An attempt includes a specific intent to do a particular criminal act, along with that act falling short of the act intended. The State must show more than mere preparation, an intent. There must be some overt act committed in the effort to commit the crime.
>
> Intent means intending the result which actually occurs, not accident[al]ly or not involuntarily. . . .
>
> South Carolina Code Section 16-3-29 states as follows, and it is the attempted murder statute in South Carolina: A person[] who[,] with the intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder.

(R. p.247, line 1-25.) (emphasis added.)

The above instructions clearly charged the jury that the crime of attempted murder undoubtedly requires specific intent to kill and, by charging that the State must show more than mere preparation and that there must be some overt act committed in the effort to commit the crime, also made clear to the jury that attempted murder requires "conduct towards that end." As South Carolina case law makes clear, "[a] jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Zeigler, 364 S.C. at 106, 610 S.E.2d at 865 (emphasis added). When read as a whole, one can easily see the trial court included both specific intent to kill and conduct toward that end in its charge on attempted murder.

As for Appellant's argument regarding the trial court's malice instruction, at trial Appellant took exception to the trial court's definition of malice, specifically objecting to the language "with an intent to inflict an injury." (R. p.256, lines 12-22; R. p.257, lines 5-25.) He argued "it waters down the defendant's purpose, the level of intent . . . ." (R. p.257, lines 24-25.) The trial court explained it defined malice in its instructions to the jury because it is an element of attempted murder. (R. p.258, lines 4-10.) When the trial court construed Appellant's exception as "a renewal of [his] request to charge the Sutton language" and again denied Appellant's request to charge under that language, Appellant did not correct this assumption by the trial court and did not ask for a ruling on his specific malice argument. (R. p.259, lines 10-23; R. p.259, line 24-R. p.260, line 3.) To the extent Appellant argues the trial court's malice charge was incorrect, that argument is waived. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (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]. Issues not raised and ruled upon in the trial court will not be considered on appeal.").

On appeal, Appellant asserts that "an intent to inflict an injury" should not have been included in the definition of malice because it is not part of the traditional definition of malice. In the list of cases Appellant cites that define malice, he included State v. Kinard, 373 S.C. 500, 503-04, 646 S.E.2d 168, 169 (Ct. App. 2007). However, he neglected to point out that in Kinard, this Court cited the *Black's Law Dictionary* definition of malice aforethought: "'the requisite mental state for common-law murder' and it utilizes four possible mental states to encompass both specific and general intent to commit the crime. These four possibilities are intent to kill, intent to inflict grievous bodily harm, extremely reckless indifference to the value of human life (abandoned and

malignant heart), and intent to commit a felony (felony murder rule)." Id. at 503-04, 646 S.E.2d at 169 (emphasis added). *Black's Law Dictionary*'s definition of "grievous bodily harm" directs one to "see serious bodily injury." Black's Law Dictionary 771 (9th ed. 2009). Moreover, *Black's Law Dictionary* defines "harm" as "injury," so it is apparent those words are interchangeable under the law. Id. 784 (9th ed. 2009). This Court noted "the South Carolina Supreme Court has found the *Black's Law Dictionary* definition of 'malice aforethought' does not vary in a meaningful way from a proper jury instruction." Id. at 504 n.3, 646 S.E.2d at 169 n.3 (citing State v. Harris, 340 S.C. 59, 64, 530 S.E.2d 626, 628 (2000)).[1]

Finally, Appellant argues he was prejudiced by the erroneous jury instruction because the malice instruction, which included intent to inflict an injury, somehow diluted the specific intent to kill that is required for attempted murder. It is unreasonable to believe the jury would not have understood that specific intent to kill was required in order for it to find Appellant guilty of attempted murder. The trial judge incorporated the statutory definition of attempted murder into his instructions. He clearly stated:

> An attempt includes a specific intent to do a particular criminal act, along with that act falling short of the act intended. The State must show more than mere preparation, an intent. There must be some overt act committed in the effort to commit the crime. Intent means intending the result which actually occurs, not accident[al]ly or not involuntarily. . . . South Carolina Code Section 16-3-29 states as follows, and it is the attempted murder statute in South Carolina: A person[] who[,] with the intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder.

[1] Indeed, the trial court's jury instruction came directly from the current version of the Criminal Charges Bench Book, which the judicial department updates each year and distributes to judges.

(R. p.247, line 1-25.) (emphasis added.)

While Appellant asserts there was only a single reference to intent to kill in the jury charge, the above quoted portion demonstrates the trial judge mentioned specific intent, intent, and intent to kill a total of four times. Jury charges must be read as a whole, not dissected into separate parts. See State v. Zeigler, 364 S.C. 94, 106, 610 S.E.2d 859, 865 (Ct. App. 2005) ("A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." (emphasis added). "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. The substance of the law is what must be instructed to the jury, not any particular verbiage." State v. Buckner, 341 S.C. 241, 246-47, 534 S.E.2d 15, 18 (2000) (citations omitted).

Appellant cites Buckner for the proposition that when a jury charge contains both the correct and incorrect law, an appellate court must assume the jury followed the incorrect charge. In Buckner, the Court found "the trial court erroneously charged the law on the offense of unlawful use of the telephone." Id. at 247, 534 S.E.2d at 18. Here, however, there was no incorrect law charged to the jury. The trial court charged the current and correct attempted murder statute and the correct definition of malice aforethought according to Kinard and Harris. Accordingly, the trial court correctly instructed the jury and should be affirmed.

## CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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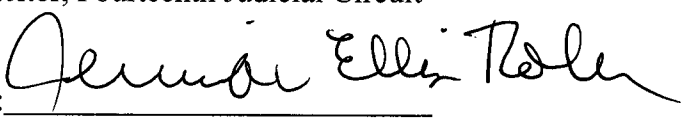
BY: 
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ATTORNEYS FOR RESPONDENT

March 12, 2014

STATE OF SOUTH CAROLINA

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Appellant.

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**CERTIFICATE OF COUNSEL**

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The undersigned certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.

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**PROOF OF SERVICE**

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I, Angela Bennett, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
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I further certify that all parties required by Rule to be served have been served. This 12th day of March, 2014.

ANGELA BENNETT
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ALAN WILSON
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March 12, 2014

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RE: State v. Bronson Shelley
Appellate Case No. 2012-213520

Dear Ms. Hudgins,

I am enclosing two (2) copies of the Final Brief of Respondent in the above-referenced case.

Sincerely,

Jennifer Ellis Roberts
Assistant Attorney General
Bar # 79818

JER/ab
Enclosures

cc: Honorable Jenny A. Kitchings
(original & 9 enclosed)
Victim Services