

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Appeal from Florence County  
Edgar W. Dickson, Circuit Court Judge

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THOMAS E. DAVIS,  
Petitioner,

v.

STATE OF SOUTH CAROLINA,  
Respondent.

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APPELLATE CASE NO. 2017-000105

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**BRIEF OF APPELLANT PURSUANT TO WHITE V. STATE**

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## STATEMENT OF ISSUES ON APPEAL

Did the trial judge err in failing to direct a verdict on the charge of attempted murder where the state produced insufficient evidence that Appellant had a specific intent to kill, and did the subsequent jury charge on attempted murder constitute reversible error?

## STATEMENT OF THE CASE

On September 8, 2011, the Florence County Grand Jury indicted Appellant Davis, Tyon Michael Evans, and Rasheem Kevin Thomas for attempted murder and armed robbery and additionally indicted Appellant Davis for possession of a weapon during the commission of a violent crime (2011-GS-21-1371). On June 18, 2012, Appellant selected a jury and proceeded to trial. Richard Strobel represented Appellant. John Jepertinger represented the State. The Honorable Thomas A. Russo presided. On June 20, 2012, the jury convicted Appellant as indicted of armed robbery and possession of a weapon during the commission of a violent crime and of the lesser-included offense of assault and battery of a high and aggravated nature. Judge Russo sentenced Appellant to twenty (20) years for assault and battery of a high and aggravated nature, thirty (30) years concurrent for Armed Robbery, and five (5) years consecutive for the weapons charge. Counsel did not file a notice of appeal.

On March 27, 2013, Appellant filed an application for post conviction relief. The State filed a return on December 17, 2013. On October 9, 2014, an evidentiary hearing was held before the Honorable Edgar W. Dickson. Jonathan D. Waller represented Appellant at the PCR hearing. Croom Hunter represented the State. In an amended written order filed December 29, 2016, Judge Dickson denied relief but found Appellant was entitled to a belated appeal pursuant to White v. State, 263, S.C. 110, 108 S.E.2d 35 (1974). A timely notice of appeal was served on January 19, 2017. This appeal and a separately filed petition for writ of certiorari follow.

## ARGUMENT

THE TRIAL JUDGE ERRED (1) IN FAILING TO DIRECT A VERDICT ON THE CHARGE OF ATTEMPTED MURDER BECAUSE THE STATE FAILED TO PROVE THAT THE APPELLANT HAD A SPECIFIC INTENT TO KILL AND (2) IN CHARGING THE JURY THAT PROOF OF IMPLIED MALICE WAS SUFFICIENT FOR ATTEMPTED MURDER.

### **Relevant facts**

Johnny Henicks (victim) testified that someone with hair similar to Appellant, a ponytail, came up from behind and struck Henicks in the back of the head with an object, shot him in his back, and stole his necklace and wallet. (App. 76-79). Henicks testified that the person who shot him was wearing a black shirt. (App. 76, l. 22). Arenthus Garrett testified that he looked out of the window after hearing the shot and saw the shooter wearing a light colored shirt and dreadlocks pulled into a ponytail. (App. 90). Garrett testified the shooter got into the back seat of the Nissan Altima that was used as the getaway car. (App. 92). Shortly after the Altima pulled away from the shooting, a vehicle driven by an undercover Florence Police Department officer took pursuit. Officer Fridley testified that after a high-speed chase, the Altima eventually came to a stop, and three people jumped out. All three were apprehended. (App. 98-108). Officer Jessie Collins testified he observed Appellant hiding underneath a house shortly after the suspects bailed out of the car. Collins testified that Appellant was the only one of the three suspects who had dreadlocks. (App. 111-18). Officer Kendrick Spears of the Florence Police Department testified that he found a gun in the wood line in the direction that Appellant and codefendant Rasheem Thomas ran from the car. Spears testified

Appellant had dreadlocks and codefendant Rasheem Thomas had cornrows (App. 149-51). Sergeant Nida of the Florence Police Department testified the victim's wallet was recovered at the scene where the suspects were apprehended. (App. 160). Ira Parnell, the SLED firearms examiner, testified the bullet recovered from the victim matched the gun that was recovered. (App. 184-86). Ila Simmons of SLED testified that both Appellant's hands tested positive for traces of gunshot residue (GSR). Simmons further testified that none of the other codefendants' hands tested positive for GSR. (App. 194-97). Codefendant Tyon Evans, who admitted driving the getaway car, testified that after Appellant got out of the car at the victim's house, he heard a gunshot. Evans testified Appellant came running back to the car, jumped in, and said, "go." Evans testified he saw the gun in the back seat with Appellant when he looked in the rearview mirror. (App. 255-57).

At the conclusion of the State's evidence, Appellant's trial counsel moved for a directed verdict, which was denied. (App. 271).

The Court instructed the jury that a finding of implied malice is sufficient to sustain a conviction for attempted murder. (App. 354-55). The Court further stated that "[i]mplied malice may be found to exist when circumstances demonstrate a wanton or a reckless disregard for human life or when a reasonably prudent person would have known that according to common experience there was a plain and strong likelihood that death would follow the contemplated act." (App. 355).

### **Discussion**

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. State v. Brown, 103 S.C. 437, 88 S.E. 21 (1916); State

v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). “If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused,” the trial judge may deny the motion for directed verdict. State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001); State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000); State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000).

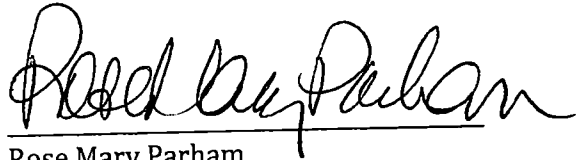
The charge of attempted murder requires proof that Appellant had specific intent to kill. State v. King, --- S.E.2d ---, 2017 WL 4800004 (2017). Further, “[o]ne cannot be guilty of attempted murder by implied malice because implied malice does not encompass the essential specific intent to kill.” Id. The State provided no evidence of a specific intent to kill in this case. The evidence surrounding the shooting was that whoever shot Mr. Henicks, walked up behind him, hit him in the head, shot him in the back, and took his necklace and his wallet. For these reasons, the Court erred in not directing a verdict on the charge of attempted murder.

In addition, the Court’s charge on attempted murder constituted reversible error. The Court instructed the jury that proof of implied malice was sufficient to prove attempted murder. This was clearly erroneous, according to State v. King, --- S.E.2d ---, 2017 WL 4800004 (2017).

**CONCLUSION**

Based on the above argument, Petitioner's convictions and sentences should be reversed and the case remanded for trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Rose Mary Parham", written over a horizontal line.

Rose Mary Parham  
Parham Law Firm, LLC

ATTORNEY FOR APPELLANT

This the 2<sup>nd</sup> day of March, 2018.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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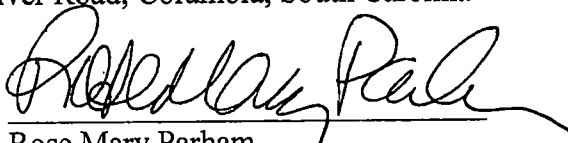
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**CERTIFICATE OF SERVICE**

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The undersigned attorney hereby certifies that a true copy of the Brief of Petitioner pursuant to White v. State has been served upon Lindsey McCallister at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, South Carolina 29201; and a copy of the Brief of Petitioner has been served on Thomas E. Davis, #00351299, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, South Carolina 29210.



Rose Mary Parham  
Parham Law Firm, LLC

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
This 2<sup>nd</sup> day of March, 2018.

  
Notary Public for South Carolina  
My Commission Expires: 10/17/2022