STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County
Edward W. Miller, Circuit Court Judge

THE STATE,

Respondent,

vs.

PRESTON SHANDS, JR.,

Appellant.

Appellate Case No. 2015-001199

STATE'S PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, the Petitioner State now requests a rehearing on the following points that this Court may have overlooked or misapprehended:

I.

This Court reversed Appellant Shands' conviction and sentence for attempted murder while affirming the remaining convictions and sentences. State v. Preston Shands, Jr., Op. No. 5569 (S.C. Ct. App. filed June 13, 2018). This Court found the trial court erred and Shands was prejudiced because the trial court instructed the jury on implied malice from use of a deadly weapon in contravention of State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

The State argued in its brief that although the trial court instructed the jury on ABHAN, there was no error because the evidence did not support an instruction on a lesser included offense. See State v. Price, 400 S.C. 110, 732 S.E.2d 652, 654 (Ct. App. 2012) (finding the trial court did not err by instructing the jury that malice may be inferred from the use of a deadly weapon because although the jury was instructed on a lesser included offense, no evidence supported an instruction on the lesser included offense).

Responding to the State's reliance on Price, this Court relied on State v. King, 422 S.C. 47, 54, 810 S.E.2d 18, 22 (2017). In King, which was decided after the parties in the instant case submitted their briefs, the Supreme Court found the statutory offense of attempted murder is a specific intent crime. This Court in the instant case noted the Supreme Court, in dicta, suggested that absent express malice and a specific intent to kill, the crime would involve a lower level of intent. Shands, supra (quoting King, 422 S.C. at 64 n.5, 810 S.E.2d at 27 n.5). This Court interpreted the footnote in King to mean the State must prove both specific intent **and** express malice to prove attempted murder.

This Court questioned whether an implied malice instruction was appropriate in any attempted murder case, but opined, "Despite the number of times Shands stabbed Sharon and the nature of the attack, a jury could have found Shands only had a general intent to kill instead of the higher mens rea of specific intent to kill." Shands, supra (citations omitted). This Court concluded, "Therefore, because there was evidence to reduce Shands's charge, the trial court erred in instructing the jury that malice could be inferred from the use of a deadly weapon." Id.

I.

The State respectfully submits that no evidence was presented suggesting that Shands committed the lesser included offense to the exclusion of the greater offense. A lesser included offense should be charged only where evidence warrants the instruction. State v. Coleman, 342 S.C. 172, 536 S.E.2d 387 (Ct. App. 2000). "It is not error to refuse to charge the lesser included offense unless there is evidence tending to show the defendant was guilty *only* of the lesser offense." Id., 342 S.C. at 175, 536 S.E.2d at 389 (emphasis in the original).

In the instant case, the uncontroverted evidence of express malice forecloses an instruction on a lesser included offense. In Sheppard v. State, 357 S.C. 646, 662, 594 S.E.2d 462, 471 (2004), the Supreme Court found no error in the trial court's instruction that, in part, advised the jury, "[M]alice can be expressed where there is manifested a deliberate intention to violently and unlawfully take the life of another human being. For instance with words." Note the "for instance" modifier clarifies that evidence of express malice is not simply limited to words such as announcements of intent.

King itself relied heavily on a Nevada Supreme Court case, Keys v. State, 766 P.2d 270 (1988). Keys found that attempted murder under Nevada law required a specific intent to kill and that intent could only be proved by express malice rather than implied malice. The Nevada Supreme Court then explained express versus implied malice as follows:

> The mens rea requirement denoted by the term *express malice* is different from that of *implied malice*. Express malice, called malice in fact, is the deliberate intention to kill; implied malice, called malice in law, does not relate to a deliberate, intentional killing but is rather a mens rea inferred in law from the "circumstances of the killing." . . . Proving express malice means proving a deliberate intention to kill; while proving implied malice means proving only the commission of wrongful acts from which,

> absent any proof of an actual intent to harm, the archaic but essential "abandoned and malignant harm" can be inferred in law.
>
> Attempted murder can be committed only when the accused's acts are accompanied by *express malice*, malice in fact. One cannot *attempt* to kill another with implied malice because there "'is no such criminal offense as an attempt to achieve an unintended result.'" . . . . An attempt, by nature, is a failure to accomplish what one *intended* to do. Attempt means to try; it means an effort to bring about a desired result. **Thus one cannot *attempt* to be negligent or *attempt* to have the general malignant recklessness contemplated by the legal concept, "implied malice."** One cannot be guilty of attempted murder by implied malice because implied malice does not encompass the essential specific intent to kill.
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> ****
>
> Attempted murder is the performance of an act or acts which tend, but fail, to kill a human being, when such acts are done with express malice, namely, with the deliberate intention to unlawfully kill. This is all there is to it. There is no need for the prosecution to prove any additional elements, such as, say, premeditation and deliberation.

Id. at 740-41 (italics in the original, emphasis in bold added).

In the instant case, manifestations of Shands's deliberate intent include preparation – his retrieval of a barbecue fork which he utilized as a weapon. Shands armed himself with the barbecue fork after Sharon escaped from the garage and ran to a neighbor's house. Esculating his attack further, Shands pursued her and stabbed her repeatedly in front of a neighbor's house. Manifestation of express malice comes not from mere use of the weapon, but from the repetitious nature of the stabbing. When Sharon escaped once more, Shands retrieved a hammer to commit the burglary and retrieved a butcher knife from the neighbor's house, chasing Sharon outside, actions expressly manifesting his intent to continue the assault despite already stabbing Sharon multiple times and already inflicting significant injury. The preparation and willingness to continue with the assault after having already inflicted injuries constitutes irrefutable express

malice that precludes an instruction on a lesser included offense. There is no evidence that his behavior constituted mere negligence or general malignant recklessness in accordance with implied malice as defined by Keys. Accordingly, no evidence supports the lesser included offenses because the only evidence was that Shands acted with express malice as defined by Keys.

II. Further, this Court did not conduct a harmless error analysis as to the attempted murder conviction. As advanced by the State in its brief, even if a court errs in charging the jury on an inferred malice instruction, the error is subject to harmless error analysis, and harmless error may arise when evidence of malice is not limited to the use of a deadly weapon. State v. Stanko, 402 S.C. 252, 741 S.E.2d 708, 714 (2013).

In Stanko, the defendant argued the trial court erred in instructing the jury it could infer malice from the use of a deadly weapon when the defendant had presented an insanity defense. Stanko, 741 S.E.2d at 711. The Supreme Court held the defendant's evidence of insanity was sufficient to preclude the deadly weapon inference charge, but found the error in giving it was harmless. Id. at 264-65, 741 S.E.2d at 713-14. In reaching its harmless error conclusion, the Court distinguished Belcher:

> The State presented uncontested evidence that Appellant shot the Victim, his elderly and unarmed friend, in the back using a pillow as a silencer. Appellant then robbed the Victim, and for the next several days used his automobile to travel across the state, where he engaged in social activities and drinking. Authorities apprehended Appellant in possession of the Victim's vehicle and the gun used in the murder. Thus, the evidence of malice in this case is not limited to Appellant's use of a deadly weapon. *See* Belcher, 385 S.C. at 612, 685 S.E.2d at 810 ("It is entirely conceivable that the only evidence of malice was Belcher's use of a handgun.").

Id.

Like Stanko, plenty of other evidence separate from Shands's use of a barbecue fork supports a finding of malice. The violent incident starts with Shands cursing, pulling Sharons's hair, and fighting with the son. Sharon freed herself and ran across the street to a neighbor's house, but Shands tackled her in front of the house and proceeded to stab her repeatedly with a barbecue fork. The sons stopped Shands from stabbing Victim, but Shands retrieved a hammer, busted the windows in the front of the neighbor's house and entered through the sliding glass door in the back of the house, which he also smashed with the hammer. Shands retrieved a knife from the neighbor's kitchen and chased Victim to the front of the house where he was finally apprehended by law enforcement, although initially he was holding his own son hostage. Shands did not challenge this evidence when he testified; instead he claimed he did not remember the events due to his purported intoxication. Shands committed the assault during a kidnapping and committed a burglary to pursue Victim, arming himself with the neighbor's kitchen knife. As in Stanko, plenty of evidence supports a finding of malice and any error is harmless. There was no other interpretation of the evidence except that Shands was attempting to kill Victim. See State v. Middleton, 407 S.C. 312, 319, 755 S.E.2d 432, 436 (2014) (finding error in failing to charge lesser included offense of assault and battery in the first degree was harmless beyond a reasonable doubt: "[T]he only conclusion established by the evidence is that Appellant was guilty of attempted murder . . . . [T]here is no other way to construe the evidence in this case but that Appellant was attempting to kill [the victims].").

III. Further, the State believes King was wrongly decided and reserves the right to argue against precedent in the Supreme Court that attempted murder is a general intent, rather than specific intent crime.

Note the legislature stated in S.C. Code §16-3-29 that malice may be express **or** implied. It is a "well-settled rule of statutory construction, that a court is bound, if possible, to give some place and effect to **every** word found in a statute." Burns v. Gower, 34 S.C. 160, 13 S.E. 331, 332 (1891) (emphasis added); see also Breeden v. TCW, Inc./Tennessee Exp., 355 S.C. 112, 120, 584 S.E.2d 379, 383 (2003) (finding every "word, clause, and sentence must be given some meaning, force, and effect, if it can be done by any reasonable construction").

The State would argue, as opined by Justice Kittredge in his dissenting opinion, that S.C. Code section 16-3-29 is the codification of the common law offense of assault and battery with intent to kill (ABWICK) which only requires a general intent to kill. King, 422 S.C. at 73, 810 S.E.2d at 32 (J. Kittredge, dissenting). As Justice Kittredge noted, the legislature chose to use the verbatim definition of ABWIK. Id. (citing State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996) (finding a jury must find only a general intent, not a specific intent to kill to find a defendant guilty of ABWIK).

WHEREFORE, Petitioner/Respondent requests this Court to grant the petition for rehearing and affirm the conviction and sentence for attempted murder.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER/RESPONDENT

June 27, 2018

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PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within State's Petition for Rehearing on Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorney of record, E. Charles Grose, Jr., Esquire, Grose Law Firm, 404 Main Street, Greenwood, SC 29646.

I further certify that all parties required by Rule to be served have been served.
This 27th day of June, 2018.

Anne Mueller

Anne A. Mueller
Legal Assistant

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ALAN WILSON
ATTORNEY GENERAL

June 27, 2018

E. Charles Grose, Jr., Esquire
Grose Law Firm
404 Main St.
Greenwood, SC 29646

Re: The State v. Preston Shands, Jr.
Appellate Case No: 2015-001199

Dear Mr. Grose:

Enclosed please find two copies of the State's Petition for Rehearing in the above-referenced case.

Sincerely,

David Spencer
Senior Assistant Attorney General
S.C. Bar No: 68571

DS/aam
Enclosures

cc: The Honorable Jenny A. Kitchings (with original and 6 copies)
Victim Advocacy Division