STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

THE STATE,

Respondent/Petitioner

vs.

PRESTON SHANDS, JR.,

Petitioner/Respondent.

Appellate Case No. 2018-001673

Petition for Writ of Certiorari

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STATEMENT OF ISSUE ON APPEAL

The Court of Appeals incorrectly found the trial court erred in providing an instruction that malice may be inferred from use of a weapon. The inferred malice instruction was proper since no evidence was presented reducing, mitigating, excusing, or justifying the charge from attempted murder. The repeated stabbings occurred during the commission of a kidnapping. Any error is harmless beyond a reasonable doubt based on the abundant evidence of Appellant's malice beyond just his use of a barbecue fork to stab his victim.

STATEMENT OF THE CASE

Petitioner/Respondent Shands was indicted by the Laurens County grand jury for first degree burglary, kidnapping, attempted murder, first degree assault and battery, and possession of a knife during the commission of a violent crime. Shands proceeded to jury trial on May 26-27, 2015, before the Honorable Edward W. Miller. Shands was found guilty of first-degree burglary, kidnapping, attempted murder, first-degree assault and battery, and possession of a knife during the commission of a crime. Judge Miller sentenced Shands to life without parole for burglary, kidnapping, and attempted murder, with concurrent sentences for the remaining charges.

Shands appealed and following briefing, the Court of Appeals held oral argument on November 8, 2017. The Court of Appeals issued an opinion on June 13, 2018 affirming all the convictions except the attempted murder conviction, finding that the conviction should be reversed due to the trial court instructing the jury on inferred malice from the use of a deadly weapon. State v. Shands, 817 S.E.2d 524 (2018). Both parties filed petitions for rehearing. The State challenged the reversal of the attempted murder conviction in its petition. The Court of Appeals denied both petitions for rehearing

on August 16, 2018. The State's Petition for Certiorari follows.

STATEMENT OF FACTS

Shands' wife decided to leave their house but Shands would not let her go. Shands seized, confined, and violently attacked his wife (Victim), repeatedly stabbing her with a barbecue fork, going for her throat. After she fled to a neighbor's house he smashed a sliding glass door and chased Victim out of the neighbor's house with a knife he took from the neighbor's kitchen. Covered in blood, she was taken to a hospital by helicopter due to the urgent need for treatment.

Shands and Victim were married and lived with their eight year-old son, Jalen, and Victim's sixteen year-old son, Trey. Victim testified she arrived home at 6:30 p.m. on Sunday. Victim changed her clothes and started watching television when Shands asked her why she would not talk to him. He started cursing. She told Shands she was going to leave and told the sons to come with her. R. pp. 55-59. When Victim was trying to leave, she tried to open the garage door, but then Shands would close the door each time. R. pp. 66-67. Shands also closed the car door on her leg. Victim recalled seeing Shands on top of her son, Trey. Victim tried to leave but the garage door was left half-way open preventing her from driving away. Jalen and Trey followed her in the garage, but Trey ran back in the house. Shands pulled Victim by the hair to try and get her back in the house. R. p. 59.

Trey came back, and Victim remembered Trey telling her to run. Victim and Jalen made it under the garage door. They went across the street to a neighbor's house. The neighbor was Bill Koon. R. p. 59. While inside Koon's house, she remembered glass shattering. Victim remembered trying to keep Shands from stabbing her. R. pp. 59-60. Victim suffered a number of wounds and scars. She did not know how many times she was stabbed, but she needed about forty to fifty stitches. R. pp. 62-65.

On cross-examination, Victim admitted nothing like this happened before. R. p. 70. Counsel asked Victim, "but the way Preston was acting that night, he was more agitated than usual right?" R. p. 70, lines 20-21. Victim answered, "I guess a little because he did stuff all the time." R. p. 70, line 22. Victim admitted Shands never physically harmed her before. R. pp. 70-71. However, on cross-examination, she testified in the months leading to the assault, he was "[c]ontrolling, we walked on pins and needles every day, we just didn't know what to expect." R. p. 71, lines 13-16. Victim did not smell alcohol on Shands. R. p. 69, lines 18-23.

Trey testified he was home earlier in the day with Shands. He saw Shands drinking a beer, but he did not know how much Shands drank. R. p. 73. Trey denied seeing Shands drinking from a clear glass containing cola. R. p. 80. When Victim arrived home, Victim and Shands started arguing after Shands asked why she would not talk to him. Victim told Trey and his brother they were leaving. Trey testified Shands shut the garage door to try to keep Victim from leaving. Shands also kicked the car door into her leg. R. pp. 73-75. Trey fell and Shands got on top of him. R. p. 75.

Trey managed to run back into the house and over to Koon's house. He told Koon to call 911 and ran back to his own house. Shands was off Victim long enough for her to run under the garage door towards Koon's house. However, Shands tackled Victim in front of Koon's house and started stabbing her. Trey grabbed Shands' hand to stop him from stabbing Victim. Shands left and returned with a hammer and started busting Koon's windows. Shands entered Koon's house and grabbed a knife. He chased Victim out of the house, but law enforcement arrived. R. pp. 75-77. Trey testified he thought Victim was going to die. R. p. 78.

Jalen confirmed an argument broke out between Shands and Victim. Jalen further confirmed

Shands kicked the car door into Victim's leg while she tried to leave. Trey told Jalen to call the police – that is when Shands got the fork. Jalen testified Shands held Victim by her hair and tried to stab Victim's throat with the fork, but the fork was bent up. R. pp. 82-83.

Clarence "Bill" Koon, the neighbor, testified Trey was banging on his door, and when Koon opened the door, Trey told him Shands was stabbing Victim. Victim and the children ended up running to his house, soon followed by Shands. Shands and Victim struggled on the front-room floor. R. p. 87. Koon described the melee:

> He was trying to, he looked to me he was trying to cut her throat with some kind of object wrapped around his hand, I couldn't tell at the time what it was. But when I finally got to see the handle, it was white or it looked white. And it was wrapped around his hand like a pair of steel nooks. And he was trying to use the bottom end of it, the broke end part and he was trying to go across her throat with it.

R. p. 88, lines 1-8. Victim was covered with so much blood that Koon testified, "I didn't even see no part of her, all I saw was blood." R. p. 88, lines 12-13.

Koon went to tell his wife in the bathroom, but she was in the shower. Victim screamed for Koon to help her. Koon grabbed his phone and called 911 from inside the shower. Returning from the bathroom, Koon saw the two boys holding Shands' hand to keep him from stabbing Victim. Koon started back for the bathroom, turned around, and they were gone. R. pp. 88-89.

The temporary reprieve ended when Shands returned with a hammer. Shands started smashing the front windows and went to the back of the house. Koon locked the back door. He told Shands to "cool off" but Shands busted two more windows in the back of the house and demanded Koon let him in. Shands threw his hammer through the sliding glass door and entered the house. R. pp. 89-90. Shands grabbed a knife from the kitchen and headed out the front door just as a law enforcement officer

pulled up to the house and drew his weapon. Shands dropped his knife under the officer's command. R. p. 90. Koon testified the house looked like a tornado went through it. Koon explained, "It took us a long time to get the blood off the floor and off the furniture. It was a nightmare." R. p. 94, lines 11-18 Koon told the jury, "that man was trying to kill that woman." R. p. 94, lines 19-22.

Martha Koon, Koon's wife, testified she heard the screams as she showered. She came out of the bathroom to find Shands on top of Victim. She did not see the weapon, but saw Shands holding something and going for Victim's throat. Victim incessantly screamed and blood was everywhere. The older son tried to pull Shands off Victim. R. pp. 99-100. Martha went back to the bathroom to dress, and Shands was gone when she returned, but he returned with a hammer. When Shands demanded Koon let him in, Koon told him no. Shands entered the house anyhow, smashing the sliding glass door. Shands went straight to the kitchen, took a knife, and started towards Victim. But the police arrived and he went outside. R. p. 100. Martha agreed Shands was always friendly and polite, except for that day of course. R. p. 103.

Sergeant Michael Gainey of the Laurens City Police Department responded to a 911 call about a neighbor trying to stab his wife. R. p. 105. Approaching the house, he heard Koon yelling "[H]elp, he is going to kill her." R. p. 106, lines 21-22. Sergeant Gainey saw Victim running out of the house, she ran towards his vehicle. A teenager also ran out of the house. Then Shands came out of the house with Jalen. His left hand was on Jalen's shoulder, his right hand held the knife. Sergeant Gaines pointed his revolver at Shands and told him to let Jalen go. Shands complied. Sergeant Gainey further demanded Shands drop his knife. Shands did. Shands also complied with Sergeant Gainey's request to get to the ground. Sergeant Gainey did not smell any alcohol on Shands. R. pp. 107-112.

Sergeant Gainey verified Shands suffered superficial injuries – he was treated for some lacerations on his hand. R. p. 118; p. 123. Sergeant Tony Lynch investigated the crime scene and recovered a knife, a hammer, and a broken fork with blood on it. He also found droplets of blood on the path between the two houses. R. pp. 147-152.

Andrew Heiney, a paramedic for the Laurens County EMS treated Victim, who appeared dazed. Her clothing was ripped, and blood was about her head, arms, and torso. The paramedics brought her into the ambulance where the lighting was better, and Heiney observed blood: She was briskly bleeding from a laceration on her head and her hair was matted with blood. R. pp. 129-30. She saw multiple stab wounds on Victim's arms. R. p. 131. Victim was in pain and experienced difficulty breathing. R. p. 132. Heiney opined the wounds were life threatening. R. p. 132. EMS decided, based on the severity of Victim's injuries, to transport Victim by helicopter rather than ambulance to the hospital. R. pp. 133-34.

Julie Medlin, also with the Laurens County EMS, was called by the defense, but on cross-examination confirmed Shands did not appear disoriented or intoxicated. R. p. 186, lines 13-16. Shands was covered with small glass shards. P. 186, lines 17-19. Shands' injuries were "a laceration to the right hand, fifth digit; . . . a laceration to the outside of his left calf and an abrasion to the back of the left shoulder." R. p. 186, lines 20-24.

Shands testified in his own defense to claim he was intoxicated while he committed the brutal crimes. He claimed he drank homemade moonshine that he never tried before but determined was very strong. R. pp. 191-92. Shands speculated the moonshine was laced with some drug. R. p. 194, lines 19-25; p. 201, lines 2-22.

Shands admitted he was responsible for what happened to Victim. He claimed he did not remember anything from the incident. R. pp. 195-96. Shands admitted although the marriage was good at first, he became jealous and controlling when he started drinking. R. p. 199, line 22 – p. 200, line 2.

Shands admitted he drank the moonshine of his own freewill, no one forced him to drink it. Shands admitted he knew it was stronger than normal alcohol. Even with the cola mixed in, it still tasted strong. R. p. 202. Shands did not deny his violent acts, he claimed, "I know I did it but I don't understand it, I don't understand what happened that night." R. p. 204, lines 9-10.

ARGUMENT

The Court of Appeals incorrectly found the trial court erred in providing an instruction that malice may be inferred from use of a weapon. The inferred malice instruction was proper since no evidence was presented reducing, mitigating, excusing, or justifying the charge from attempted murder. The repeated stabbings occurred during the commission of a kidnapping. Any error is harmless beyond a reasonable doubt based on the abundant evidence of Appellant's malice beyond just his use of a barbecue fork to stab his victim.

The Court of Appeals found the trial court erred in instructing the jury it could infer malice from the use of a deadly weapon, relying on State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). To reach this result, the Court of Appeals relied on this Court's opinion in State v. King, 422 S.C. 47, 54, 810 S.E.2d 18, 22 (2017). The Court of Appeals equated implied malice with inferred malice, and further found the jury could find Shands lacked specific intent to kill "[d]espite the number of times Shands stabbed [Victim] and the nature of the attack." State v. Shands, 817 S.E.2d 524, 537 (2018).

The trial court did not err in charging the jury the inferred malice instruction as no evidence presented reduced, mitigated, or justified the attempted murder charge. Further, the Court of Appeals erred in equating inferred malice with implied malice as discussed in King and the Nevada case law the **King** majority relied on. This Court relied on Nevada law to determine the legislature intended attempted murder to be a specific intent offense. In determining the South Carolina legislature intended the offense to be a specific intent offense, this Court determined that only evidence of express malice, not implied malice, supported an attempted murder conviction. However, the evidence presented showed express malice, not implied malice (also known as malice in law), accordingly, no evidence was presented lowering the level of intent to merely implied malice which requires only negligence or

recklessness. Further, Shands was not prejudiced by the instruction, and any error was harmless beyond a reasonable doubt.

The trial court gave the following instruction:

> Inferred malice may also arise when the deed is done with a deadly weapon.
>
> Now, deadly weapon is any article, instrument or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case. The following are examples of instruments which may be deadly weapons. A pistol, a shotgun, a rifle, a dirk, a dagger, a knife, a sling shot, metal knuckles, a razor, gasoline, fire bomb, a Molotov cocktail. And a gun may be a deadly weapon even when it is not operating. Ordinary objects may become deadly weapons when the facts show that they have been used to inflict serious bodily harm or death. If that's all proven beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction **this inference would simply be an evidentiary fact to be considered by you along with all the other evidence in the case and you may give it the weight that you decide it should receive.**

R. p. 244, line 14 – p. 245, line 7 (emphasis added). Note the trial court did not instruct the jury that a barbecue fork could be a deadly weapon. Further, unlike Belcher, in which the instruction contradicted the self-defense instruction, the instruction in this case did not negate any defense Shands presented.

This Court found a jury charge instructing malice may be inferred from the use of a deadly weapon is improper when evidence is presented that would reduce, mitigate, excuse, or justify the offense. Belcher, 385 S.C. 597, 685 S.E.2d 802, 803-804 (2009) (holding an inferred malice instruction was improper where evidence of self-defense was sufficient to reduce, mitigate, or justify the killing). On the other hand, if no evidence is presented reducing, mitigating, excusing, or justifying the offense, an instruction on the inference of malice from the use of a deadly weapon is permitted. State v. Price, 400 S.C. 110, 732 S.E.2d 652, 654 (Ct. App. 2012).

In Price, this Court held the trial court did not err in instructing the jury malice could be inferred from the use of a deadly weapon. Price, 400 S.C. at 114-15, 732 S.E2d at 654. The defendant was charged with ABWIK, and the trial court instructed the jury "malice may be inferred from the conduct of a person if that conduct shows a total disregard for human life," and it "may arise when the deed is done with a deadly weapon." Id. The trial court also charged ABHAN as a lesser-included offense. Id.

On appeal, the defendant argued his theory that the shooting was part of a drug deal gone wrong and therefore, the evidence precluded the deadly weapon inference charge. In rejecting that contention, this Court determined the instruction on ABHAN was not warranted by the evidence and further found no evidence tended to reduce, mitigate, excuse, or justify the crime, explaining:

> It is undisputed that someone shot Deon in the neck, causing him serious injury. The shooter raised the gun, pointed it at Deon, approached him, and shot him at close range as he stood with his hands up. There was no evidence to the contrary. There may have been conflicting evidence as to who did these things, but it is not possible to interpret the evidence to support any conclusion other than that the person who shot Deon committed ABWIK. Therefore, if the jury believed Price is the person who shot Deon, Price is necessarily guilty of ABWIK.

Id.

The Court of Appeals relied on State v. King, 422 S.C. 47, 54, 810 S.E.2d 18, 22 (2017). In King, decided after the parties in the instant case submitted their briefs to the Court of Appeals, the Supreme Court found the statutory offense of attempted murder is a specific intent crime. The Court of Appeals noted this Court's suggestion, in dicta, that absent express malice, attempted murder would involve a lower level of intent. Shands 817 S.E.2d at 537 (quoting King, 422 S.C. at 64 n.5, 810 S.E.2d at 27 n.5). The Court of Appeals interpreted the footnote in King to mean the State must

prove both specific intent **and** express malice to prove attempted murder. Shands, supra.

The Court of Appeals questioned whether an inferred malice instruction was appropriate in any attempted murder case, and further 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). The Court of Appeals 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.

No evidence was presented suggesting 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 (Nev. 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.
>
> ****
>
> 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 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 Shands acted with express malice as defined by Keys.

Further, the State respectfully submits 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 (ABWIK) 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).

Further, any error was harmless beyond a reasonable doubt. The Court of Appeals opinion did not analyze whether or not the instruction it found to be in error was harmless error. The State argued any error was harmless in its brief to the Court of Appeals and in its Petition for Rehearing. Even if a court errs in providing the jury 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.

The Court also analyzed the trial court's jury instructions as a whole and found they were consistent with the evidence presented. The court observed:

> The trial court instructed the jury that inferred malice may arise when the "deed is done with a deadly weapon." **The trial court also stated that malice "can be inferred from conduct showing total disregard for human life."** Appellant only contests the "deadly weapon" language. However, if the jury rejected Appellant's insanity defense, which it did, **the jury could also find that Appellant's conduct showed a total disregard for human life.** Thus, Appellant could not have suffered prejudice from any separate inference that his use of a deadly weapon also gave rise to an inference of malice.

Id. at 715 (emphasis added). The same instruction was provided, unchallenged, by the trial court in the instant case. R. p. 244, lines 13-14.

In the instant case, like Price, no evidence actually supported an instruction on the lesser included offense of ABHAN. Shands pulled victim's hair to keep her from leaving. She 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 continuing tostab 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.

As the Court of Appeals found, no evidence supported Shands' contention he was involuntarily intoxicated because he voluntarily consumed an illegal and unregulated intoxicant he never consumed

before knowing it was strong liquor. Shands, 817 S.E.2d at 534-35. Accordingly, no evidence supports the conclusion he lacked the requisite mental state for malice. As in Price, no evidence reduces, mitigates, excuses, or justifies the crime, so the trial court did not err in providing the inferred malice instruction.

Additionally, like Stanko, plenty of other evidence separate from his use of a barbecue fork supports a finding of malice. The violent incident starts with Shands cursing, pulling Victim's hair, fighting with the son, and tackling Victim on the neighbor's front porch. 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. The only way to construe the evidence is 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].").

Moreover, an instruction on a lesser offense is precluded because Shands stabbed Victim repeatedly during the commission of a kidnapping. State v. McCall, 304 S.C. 465, 405 S.E.2d 414 (Ct. App. 1991) *overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999) (finding defendant was not entitled to an instruction on involuntary manslaughter because the homicide occurred during the commission of the felonies of robbery and kidnapping); State v. Avery, 333 S.C. 284, 294, 509 S.E.2d 476, 481 (1998) ("If a person intentionally kills another during the commission of

a felony, malice may be inferred.") (citation omitted). Under the felony murder rule, he would not be entitled to an instruction on a reduced charge.

CONCLUSION

For the above reasons, certiorari should be granted. Should this Court see fit to grant the State's writ, the State respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

September 24, 2016

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal From Laurens County
The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No: 2018-00167

THE STATE, Respondent-Petitioner,

v.

PRESTON SHANDS, JR., Petitioner-Respondent.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Petition for Writ of Certiorari on Appellant by depositing two copies 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 St., Greenwood, SC 29646.

I further certify that all parties required by Rule to be served have been served.
This 24th day of September, 2018.

Anne Mueller

Anne A. Mueller
Legal Assistant for Respondent-Petitioner

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