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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LAURENS COUNTY
Court of General Sessions
Edward W. Miller, Circuit Court Judge

Court of Appeals Case No. 2015-001199
State v. Shands, 424 S.C. 106, 817 S.E.2d 524 (Ct. App. 2018)

The State, ... Respondent-Petitioner,

v.

Preston Shands, Jr., ... Petitioner-Respondent.

RETURN TO STATE'S PETITION FOR WRIT OF *CERTIORARI*

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STATE's STATEMENT OF QUESTION PRESENTED

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 of 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.

PRESTON SHANDS JR.'s STATEMENT OF QUESTION PRESENTED

Relying on *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), the Court of Appeals correctly found the trial judge erred by instructing the jurors they could infer malice from the use of a deadly weapon. This Court additionally should deny the State's petition for writ of *certiorari* because the State conflates the separate elements of a specific intent to kill and malice aforethought required to prove the offense of attempted murder.

STATEMENT OF THE CASE

Mr. Shand's statement of the case is set forth in his petition for writ of *certiorari*, at 2-3, served on September 24, 2018. Also on September 24, 2018, the State served its petition for writ of *certiorari* ("State's Petition"). This return follows.

STATEMENT OF FACTS

Mr. Shand's statement of facts is set forth in his petition for writ of *certiorari*, at 3-5, served on September 24, 2018.

ARGUMENT

Relying on *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), the Court of Appeals correctly found the trial judge erred by instructing the jurors they could infer malice from the use of a deadly weapon. This Court additionally should deny the State's petition for writ of *certiorari* because the State conflates the separate elements of a specific intent to kill and malice aforethought required to prove the offense of attempted murder.

"[W]here evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon." *State v. Belcher*, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009). Since this Court's opinion in *Belcher*, our General Assembly abrogated the common law assault and battery offenses and created a new statutory scheme.[1] This statutory scheme includes the crimes of attempted murder (S.C. Code Ann. § 16-3-29), assault and battery of a high and aggravated nature (S.C. Code Ann. § 16-3-600(B)), and three degrees of lesser-included assault and battery offenses (S.C. Code Ann. § 16-3-600(C)-(E)).

For a person to be guilty of attempted murder, the State must prove beyond a reasonable doubt the accused (1) had the specific intent to kill[2] and (2) an attempt to kill

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[1] 2010 Act 273, Section 7(B) provides:

> The common law offenses of assault and battery with intent to kill, assault with intent to kill, assault and battery of a high and aggravated nature, simple assault and battery, assault of a high and aggravated nature, aggravated assault, and simple assault are abolished for offenses occurring on or after the effective date of this act.

[2] Initially, the trial judge incorrectly instructed Mr. Shands' jurors, "A specific intent to kill is not an element of attempted murder but there must be a general intent to commit serious bodily injury." R. 245. Mr. Shands objected based on the Court of Appeals holding in *State v. King*, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), *affirmed as modified, State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017). R. 256-58; The trial judge re-instructed the jurors. R. 259-60.

another person with malice aforethought. S.C. Code Ann. § 16-3-29; *see also State v. King*, 422 S.C. 47, 61 810 S.E.2d 18, 25 (2017) ("Because our case law, particularly *Foust*,[3] establishes 'malice aforethought' as the required mental state for ABWIK, the additional language of 'with intent to kill' clearly elevates the required mental state above a general-intent crime." (footnote added)). In *King*, this Court traced the evolution of our state's jurisprudence regarding the common law crimes of assault and battery with intent to kill ("ABWIK" or "AWIK") and assault and battery of a high and aggravated nature ("ABHAN"). As seen, *Belcher* expressly held "juries shall not be charged that malice may be inferred from the use of a deadly weapon," in prosecutions for ABWIK. 385 S.C. at 612, 685 S.E.2d at 810. Based on the discussions in *Belcher* and *King,* it is difficult to imagine this Court abandoning that rule.[4]

Additionally, the State's Petition conflates—or at least attempts to blur the distinction between—the separate elements of attempted murder. Attempted murder can be mitigated to a lesser-included offense by either the lack of specific intent to kill or the absence of malice.[5] Thus, properly instructed jurors would have considered two paths to reduce the attempted murder charge to a lesser-included offense—lack of malice ***or*** lack

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[3] *State v. Foust*, 325 S.C. 12, 479 S.E.2d 50 (1996).

[4] Ironically, the State contends "section 16-3-29 is the codification of the common law offense of" ABWIK. State's Petition at 13. Assuming *arguendo* the State is correct, then the State's Petition must fail because of the express holding in *Belcher*.

[5] Mr. Shands, in fact, argued, ""[O]ne of the differences between attempted murder and assault and battery of a high and aggravated nature is the difference between the general and specific intent where attempted murder requires specific intent and ABHAN does not." R. 255.

of specific intent to kill.[6] The Court of Appeals recognized the distinction between these two elements when it held:

> As Shands and the State recognized at trial, if the jury did not believe Shands had the specific intent to kill, he would have been guilty of the lesser-included offense of ABHAN. 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. 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.

State v. Shands, 424 S.C. 106, 131-32, 817 S.E.2d 524, 537 (2018). Instructing jurors they can infer malice from the use of a deadly weapon guides them towards convicting an accused of the only charge that expressly requires malice as one of the elements—attempted murder. Thus, the instruction given in this case renews a question left undecided by this Court in *Belcher*, to wit: whether "the permissive inference charge violates our common law and our constitutional prohibition against charging juries on the facts."[7] 385 S.C. at 602, 685 S.E.2d at 804.

Finally, *Belcher* applies anytime criminal intent is an issue for the jurors to decide, such as cases where the accused presents an insanity defense. *See, e.g., State v. Stanko*, 402 S.C. 252, 265 741 S.E.2d 708, 714 (2013) ("The trial court charged the jury that they could return verdicts of not guilty, not guilty by reason of insanity, guilty but

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[6] Given the multiple paths to reduce the attempted murder charge to a lesser-included offense, this Court must reject the State's contention the evidence forecloses and instruction on the lesser included offense." State's Petition at 11.

[7] *See* S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."). Mr. Shands argued giving examples of deadly weapons is a "comment on the facts" and cited *State v. Hughey*, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000) ("The requested examples [of sufficient provocation for voluntary manslaughter] constitute a direct charge on the facts.") *overruled on other grounds by Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009). R. 257.

mentally ill, and guilty."). Here, Mr. Shands argued he did not have the requisite criminal intent and the trial judge instructed:

> [I]n order to establish criminal liability, criminal intent is required. And Criminal intent must me proven by the State beyond a reasonable doubt. Criminal intent is always a matter that must be determined by you, the jury, from the circumstances surrounding the situation. Criminal intent may be inferred from the circumstances shown to have existed. It is not necessary to establish criminal intent by direct and positive evidence but intent may be established by inference in the same way as any other fact by taking into consideration the acts of the party and all of the facts and circumstances of the case. Criminal intent is a mental state, a conscious wrongdoing. It is up to you to determine beyond a reasonable doubt whether the Defendant possessed criminal intent based on the circumstances shown to have existed.

R. 232-43. *See also* R. 257-58 (Mr. Shands argued *Belcher* controls "any time that criminal intent is an issue.").

Because properly instructed jurors could have convicted Mr. Shands of a lesser-included offense (or even acquitted him), this Court must reject the State's invitation to invoke the harmless error rule. *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) ("Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained.").

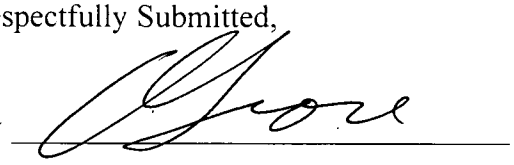
CONCLUSION

This Court should deny the State's petition for a writ of *certiorari*. Relying on *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), the Court of Appeals correctly found the trial judge erred by instructing the jurors they could infer malice from the use of a deadly weapon. The error was not harmless beyond a reasonable doubt.

In the alternative, if this Court grants the State's Petition, then this Court should also consider the question left undecided by this Court in *Belcher*, to wit: whether "the

permissive inference charge violates our common law and our constitutional prohibition against charging juries on the facts."

Respectfully Submitted,

By 

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PROOF OF SERVICE

I certify that I have served Mr. Shands' Return to State's Petition for Writ of *Certiorari* on the State of South Carolina, by placing a copy in the United States Mail, postage prepaid, on the date reflected below, addressed as follows:

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October 24, 2018
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