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S.C. SUPREME COURT

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

**State's Reply to Return to
Petition for Writ of Certiorari**

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ATTORNEYS FOR RESPONDENT

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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.

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.

In making its reply to Shands return to the petition for writ of certiorari, the State maintains all prior arguments made in its petition.

In his return, Shands avoids the critical question as to whether any evidence supported an instruction on the lesser offense of ABHAN. The critical question is whether any evidence shows Shands is guilty of the lesser offense to the exclusion of the greater offense. Shands avoids a discussion of the evidence entirely. 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). No evidence supports that Shands was guilty of ABHAN to the exclusion of attempted murder, so the instruction on ABHAN was not warranted by the evidence.

Further, Shands misstates the law as to when an inferred malice instruction is improper, suggesting it is inapplicable in any case the State is required to prove intent, which is any criminal case. 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. State v. Belcher, 385 S.C. 597, 685 S.E.2d 802, 803-04 (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). As in Price, no evidence supported an instruction on the lesser included offense. Therefore, the inferred malice charge was not improper.

Finally, Shands does not provide a viable argument against the application of the harmless error rule. 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 the instant case, Shands admits to the crimes, he stabbed Victim multiple times without provocation after failing to imprison Victim and retrieved a knife in the course of a burglary for the express purpose of attacking Victim again as he chased her out of the burglary victim’s house. Any error is harmless beyond a reasonable doubt. See also 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].”).

Shands further ignores that he committed the stabbings during the commission of a kidnapping. 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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November 5, 2018

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No: 2018-001673

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PRESTON SHANDS, Jr.,

Petitioner/Respondent.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within State's Reply to Return to Petition for Writ of Certiorari on Petitioner/Respondent 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, 404 Main Street, Greenwood, SC 29646.

I further certify that all parties required by Rule to be served have been served.
This 5th day of November, 2018.



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