STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

Robert E. Hood, Circuit Court Judge

Appellate Case No. 2018-000341

THE STATE ..... RESPONDENT.

V.

SHELBY HARPER TAYLOR ..... APPELLANT.

INITIAL REPLY

In her opening brief, Appellant, Shelby Harper Taylor, set forth why her conviction (and the resulting twenty-five year sentence) for the attempted murder of her newborn child should be reversed. In its brief, Respondent has, on one factual point (whether Appellant's baby needed emergency medical care) mischaracterized the record evidence. Furthermore, Respondent's harmless error argument turns a blind-eye to the actual language used by the trial judge and – more importantly – how that language would have been understood by a reasonable juror to relieve the prosecution of its burden of proving that Appellant acted with the specific intent to kill. Both points will be responded to briefly below.

1. There is no evidence Baby T needed emergency care.

Respondent asserts at p. 4 and p. 8 of its brief that Appellant's newborn child (referred to in the record as Baby T), required emergency medical care in order to survive. The record does not directly, or indirectly, support this statement. Respondent bases this assertion on the mere fact

that Baby T was transported to the hospital (Tr. pp.181-82, 188), as would naturally be expected under the circumstances, and the testimony of the responding paramedic who stated it would be "purely speculation" for him to comment on the baby's oxygen levels, but he nonetheless "felt" she was in need of emergency care. Tr. p.178. Baby T was transported to Tidelands Health Waccamaw, where she weighed 8 pounds, 4.6 ounces which was "a suitable weight for a full-term infant." Tr. p.249-50. No other evidence regarding Baby T's medical condition at the time of her birth was entered into the record. During the charge conference, the trial judge stated there was "obviously no evidence" of injury to Baby T (Tr. p.447), and during the sentencing proceeding, the judge confirmed that Baby T was, at that time, "healthy, functioning and doing all the things that three-year-olds do, playing and laughing, starting to speak and have conversations and communication and all that good stuff." Feb. 8 Tr. p.41. Baby T suffered neither immediate nor long-term injuries. At the time of the trial, she and her sister lived in the care of their paternal grandparents, and the department of social services had no concerns about her care or development. Feb. 8 Tr. p.41.

2. The instructional error was not harmless.

Respondent argues that even if the trial judge's instructions were improper, any error was harmless because there was evidence from which the jury could properly have concluded that Appellant "specifically and maliciously intended the baby to die." Initial Brief of Respondent p.22, n.12. Even assuming the truth of that statement, it reveals a fundamental misunderstanding of the legal standard for assessing whether an error was harmless. Respondent bears the burden of demonstrating "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Arnold v. State/Plath v. State*, 309 S.C. 157, 165, 420 S.E.2d 834, 838 (1992) (quoting *Chapman v. California*, 386 U.S. 18 (1967)). This Respondent cannot do, because the

trial judge repeatedly instructed the jury that criminal intent could be inferred and implied. Feb. 8 Tr. pp.40-42. The prosecution seized upon these instructions and likewise encouraged the jury to find malice by inference, including the argument that malice and intent could be found from the mere fact that Appellant initially denied her involvement in the crime (although she shortly thereafter confessed). Feb. 8 Tr. p.17. Respondent asserts, "viewing the charge as a whole, the jury could have *only* convicted Appellant if they found she committed an *intentional* act with the *specific intent to kill* her victim with an unlawful and malicious purpose." Initial Brief of Respondent pp.18-19 (emphasis in original). But this simply does not square with a plain reading of the charge. The trial judge told the jury:

> So, in order to establish criminal liability, criminal intent is required. For example, these are examples: The mental state required to be proven by the State for a particular crime could be purpose, intent, knowledge, ***recklessness***, or ***criminal negligence***. Criminal intent must be proven by the State beyond a reasonable doubt. Criminal intent is always a matter that must be determined by the jury from the circumstances that surround the situation. There is no way to prove intent to a mathematical certainty. There is no way that medical science can dissect a person's brain and determine what the person had in mind. So, the law says that criminal intent may be inferred from the circumstances shown to have existed. This is how you make a determination of whether or not the element that requires intent was present. It is not necessary to establish 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 parties and all the facts and circumstances of the case. Criminal intent is a mental state. It is a conscious wrongdoing. It is up to you to determine what the defendant intended to do based upon the circumstances shown to have existed.
>
> All right. So, Ms. Taylor is charged with attempted murder. So, what does the State have to prove? In order to prove this crime, the State must prove that the defendant attempted to kill another person with malice aforethought ***either express or implied***.
>
> So, what is malice? So, malice is hatred, ill will, or hostility towards another person. It is the intentional doing of a wrongful act without

> just cause or excuse and with an intent to inflict an injury ***or under circumstances that the law will infer an evil intent.***
>
> Now, what is malice aforethought? Malice aforethought does not require that the malice exist for any particular time before the act is committed. The malice must exist in the mind of the defendant just before and at the time the act is committed. Therefore, there must be a combination of previous evil intent and the act. Now, ***malice aforethought may be expressed or inferred.*** These terms express and inferred do not mean different kinds of malice but merely the manner in which the malice may be shown to exist. That is either by direct evidence ***or inference from the facts and circumstances which are proved.*** Express malice is shown when a person speaks words which express hatred or ill will for another or when the person prepared beforehand to do the act which was later accomplished. ***Malice may be inferred from conduct that shows a total disregard for human life.*** If facts are proven – are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be considered by you along with the other evidence in the case and you may give it the weight that you decide it should receive.
>
> ***Attempted murder – excuse me, a specific intent to kill is an element of attempted murder.*** 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 deliberate intention unlawfully to kill. ***Intent may be shown by acts and conduct of the defendant from which you may naturally and reasonably infer intent. Intent may also be inferred when it is demonstrated that the defendant voluntarily and willfully commits an act, the natural tendency of which is to destroy another human's life.***

Feb. 8 Tr. pp.40-42.

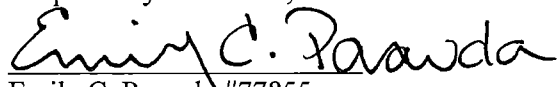
In *State v. King*, the South Carolina Supreme Court specifically and unambiguously held that: "[o]ne cannot be guilty of attempted murder by implied malice because implied malice does not encompass the essential specific intent to kill." 422 S.C. 47, 57, 810 S.E.2d 18, 23 (2017). Contrary to these instructions, the trial judge in this case repeatedly told the jury that they could find Shelby Taylor guilty by implied malice. The instruction likewise clearly contravenes this Court's consistent ruling in *State v. Shands*, --- S.E.2d ----, 2018 WL 2944992 (Ct. App. 2018),

which Respondent does not even attempt to address. The trial judge only briefly noted, almost as an aside, that "specific intent to kill is an element of attempted murder" — but then gave no further definition or instructions to the jury regarding specific intent apart from the court's repeated assertions that this element could be established by inference. By contrast, the trial judge listed "recklessness" and "criminal negligence" as examples of criminal intent, and then peppered the charge with multiple statements that malice, criminal intent and specific intent could all be established through inference in a variety of ways. Under these circumstances, the jury very well could have believed Appellant's state of mind to be something less than "specific intent to kill," and – as in *King* and *Shands* – this error was not harmless.

CONCLUSION

For these reasons, and the reasons stated in Appellant's Opening Brief, This Court must reverse.

Respectfully Submitted,



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April 8, 2019

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Appellant's Initial Reply was served by first class United States mail, postage prepaid, this 8th day of April, 2019, upon the following:

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April 8, 2019

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: *State v. Shelby Harper Taylor*
2018-000341

Dear Ms. Kitchings:

Please find enclosed for filing, along with certificate of service, the original and one copy each of Appellant's Initial Reply in the above captioned case. Please clock-in the extra copy and return them to me in the enclosed self-addressed stamped envelope.

If you should have any questions, please do not hesitate to contact this office.

Sincerely,

Jill B. Abernethy
Paralegal

Enclosure

cc: Mark R. Farthing, Esquire
Shelby Taylor

JUSTICE 360 ADVANCING EQUALITY IN THE CRIMINAL JUSTICE SYSTEM

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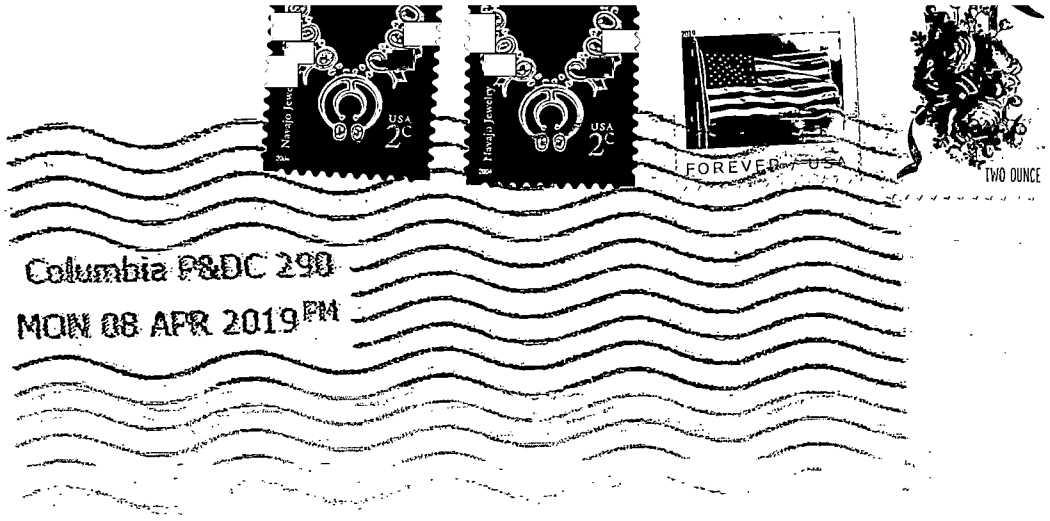

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