STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Horry County
Honorable Robert E. Hood, Circuit Court Judge
Appellate Case No. 2018-000341

THE STATE,

Respondent,

vs.

SHELBY HARPER TAYLOR,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

In April of 2015, Appellant Shelby Harper Taylor was arrested following an investigation that began after a newborn baby was discovered inside a trash bag that had been discarded into a dumpster. In May of 2015, the Horry County Grand Jury indicted Appellant for attempted murder. On February 5, 2018, a jury trial was commenced in the Horry County Court of General Sessions with the Honorable Robert E. Hood, circuit court judge, presiding. At the conclusion of the four-day trial, the jury convicted Appellant as indicted. Following the verdict, the trial judge deferred the sentencing proceedings. Subsequently, on February 15, 2018, a sentencing hearing was conducted, and the trial judge sentenced Appellant to a term of imprisonment of twenty-five years. Appellant then timely filed a notice of appeal.

STATEMENT OF FACTS

In the early morning hours of April 9, 2015, Appellant Shelby Harper Taylor quietly gave birth to a child in the bathroom of an apartment she shared with her husband and sixteen-month-old daughter while those two were asleep. (R. p. 272; p. 274; pp. 279-281). Up to that point, Appellant had known she was pregnant with the child, but she had been actively concealing the pregnancy from her husband and other family members. (R. p. 272; p. 299; p. 301). Once the baby was born, Appellant, who was fully aware she had given birth, placed the newborn infant into a plastic trash bag filled with garbage, tied the bag shut, exited her second-floor apartment, headed down the stairs, and threw the trash bag with the newborn infant inside into the apartment complex's dumpster. (R. p. 165; p. 280). She then returned to her apartment but did not wake up her sleeping husband or call anyone for help at that time. (R. p. 280). Instead, she took steps to clean up the residence to prevent anyone from finding out about the birth. (R. p. 283). Then, she took a nap. (R. p. 285). Thereafter, around 1:00 p.m., Appellant headed out to take her daughter to a doctor's appointment while leaving the helpless baby behind in the dumpster. (R. p. 284; State's Ex. # 3 (Recording of Interview)).

Roughly an hour or so later, two boys went to take household trash to the apartment complex's dumpster at their mother's request. (R. p. 164; p. 169; p. 174). As they were disposing of the trash, the boys heard a strange noise coming from inside the dumpster that sounded like a cat, so they climbed inside and began searching around for the source of the noise. (R. p. 164). During their search, they came across a white plastic trash bag that had been tied shut and saw a baby's face pressed up against the side of the bag from the inside. (R. pp. 164-165). At that point, the boys quickly removed the bag from the dumpster, tore it open, and found Appellant's newborn baby covered in trash inside. (R. pp. 165-166; pp. 172-173; pp. 223-

224). Miraculously, the baby was still alive. (R. p. 173; p. 188). The boys then hurried to alert their mother of what they had found, and the authorities were quickly notified of the boys' shocking discovery. (R. pp. 169-170).

In response, law enforcement officers and other emergency personnel rapidly rushed to the scene. (R. pp. 170-172; p. 187; pp. 200-202). When they arrived, they approached the dumpster and found the baby covered in trash inside the plastic trash bag on the ground. (R. p. 187). At that point, the baby's umbilical cord was still attached to the placenta. (R. pp. 172-173; pp. 187-188). Upon finding the baby in that condition, Captain Keith Drabick, a paramedic with the Horry County Fire and Rescue Team, cut the umbilical cord, began providing medical treatment, and quickly transported the baby to the hospital. (R. p. 171; pp. 173-174; p. 189). Through that prompt attention, he and the others who responded to the scene were able to save the life of the baby, who was in need of emergency care in order to survive. (R. p. 178; pp. 181-182; p. 188).

Once the baby had been transported from the scene, officers from the Horry County Police Department began investigating, and, during the investigation, Detective Jeremy Neely found a receipt from a local restaurant amongst the other trash present inside the bag in which the baby had been discarded. (R. p. 187; pp. 189-191; pp. 200-202). Based on the information contained in the receipt, officers obtained surveillance footage from the restaurant, and the footage depicted Appellant leaving that location on the day before the baby was found. (R. p. 53; p. 192; pp. 202-204). Detective Jeff Cauble then released several images taken from the footage to the media for dissemination in effort to locate Appellant, whose identity was still unknown to law enforcement at that time. (R. p. 54; pp. 204-207).

Once the images were disseminated, Appellant was alerted by multiple family members her photograph had been broadcast by the media, and she responded by going to a police station that evening along with several family members to purportedly find out what was going on. (R. pp. 54-56; p. 92; pp. 207-208; p. 285; State's Ex. # 3). At the police station, Detective Cauble interviewed Appellant along with another officer, and Appellant repeatedly—and calmly—denied having anything to do with or knowing anything about the baby found in the dumpster. (R. pp. 57-58; p. 86; p. 208; p. 285; State's Ex. # 3). Additionally, Appellant continuously asserted she would never do something as "awful" as what had occurred, and she stated—with a laugh—she would adopt the baby if only she could afford to do so. (R. p. 104; p. 302; State's Ex. # 3). Furthermore, Appellant claimed she personally would have taken the baby to the hospital, and she indicated she would never do anything like what had happened to any baby. (State's Ex. # 3).

At the conclusion of the interview with Appellant, Detective Cauble spoke with Appellant's husband, Patrick Taylor. (R. p. 59; Court's Ex. # 1 (Recording of Interview)). During that conversation, Taylor noted Appellant had gained some weight recently and had been avoiding cuddling with him for the preceding three months. (Court's Ex. # 1). He further indicated he had a "gut feeling" Appellant had been lying to him and believed she may have been responsible for what had occurred. (R. p. 64; Court's Ex. # 1). Detective Cauble then asked Appellant to return to the interview room, and, shortly after she did, she finally admitted she had given birth to the baby before discarding it in the dumpster.[1] (R. pp. 60-61; Court's Ex. # 1). At that point, Appellant was arrested for the baby's attempted murder. (R. p. 286; Court's Ex. # 1).

[1] Throughout her later interview, Appellant repeatedly expressed personal concern about being in trouble and going to jail. (Court's Ex. # 1).

Following her arrest, Appellant was transported to the hospital for treatment, and she was examined there by Dr. John Burney, an obstetrician and gynecologist. (R. pp. 230-231; p. 236). Through the examination, Dr. Burney confirmed Appellant had given birth within the preceding day or so. (R. pp. 232-233). However, he found no signs suggesting Appellant had experienced any abnormal trauma as a result of the birth. (R. p. 234). Following that examination, Appellant was referred to a psychologist and a social worker, and, when speaking with the psychologist, she admitted she had been actively hiding the pregnancy from her husband and other family members. (R. pp. 235-236; p. 295). She then remained at the hospital for two days before she was released and transported to jail. (R. p. 236; p. 287).

Meanwhile, Detective Cauble continued the investigation into the incident and conducted a consent-based search of Appellant's apartment. (R. pp. 215-217; Court's Ex. # 1). During the search, the detective located a few spots of blood on the carpet inside the residence. (R. p. 220). Furthermore, he found cleaned items in the washing machine, including the mats from the bathroom, and discovered the bathroom had been cleaned. (R. pp. 221-222). Beyond that, Detective Cauble submitted DNA samples for analysis to determine the identity of the baby's parents, and that testing confirmed Appellant was the baby's mother while her husband was the baby's father. (R. pp. 223-224).

Subsequently, Appellant was indicted for attempted murder, and she proceeded forward to trial. (R. pp. 10-12). At the conclusion of trial, the jury convicted her as indicted, and the trial judge ultimately sentenced her to a twenty-five-year term of imprisonment. (R. pp. 517-519; p. 571).

ARGUMENT

The trial judge committed no conceivable error when instructing the jury on attempted murder because his jury instructions as presented conveyed to the jurors all the necessary elements of that offense and ensured they understood they could not convict Appellant unless they expressly found she had a specific intent to kill her victim when she put the newborn infant into a plastic trash bag, tied the bag shut, tossed the bag into a garbage dumpster, and left it there.

Appellant contends the trial judge committed reversible error through the manner in which he instructed the jury on attempted murder. In support of that contention, Appellant maintains the trial judge's jury instructions were purportedly erroneous because the charge as presented instructed the jurors they could infer malice and intent in a variety of different ways, which Appellant suggests was somehow improper in light of the fact a finding of a specific intent to kill was necessary for the offense of attempted murder to be established. Critically though, the trial judge's jury instructions as presented clearly conveyed to the jurors they could *only* convict Appellant of attempted murder if they found she acted with the *specific intent to kill* her victim. Moreover, while the charge on the law did convey to the jurors they could infer malice and intent from the circumstances of the crime, such a statement of law was entirely correct and in no way permitted the jurors to convict Appellant of the indicted offense without expressly finding the required specific intent to kill. Under such circumstances, the trial judge's jury charge accurately instructed the jury on the relevant and applicable law related to attempted murder and could not have resulted in any improper prejudice to Appellant. Appellant's conviction should be affirmed.

Relevant Facts

During the course of trial, the evidence and testimony presented—including from Appellant herself—established Appellant placed her newborn infant into a plastic trash bag filled with garbage just after the baby was born, tied the bag shut, discarded the bag in a dumpster, and

left it there. (R. pp. 171-173; pp. 187-188; pp. 223-224; pp. 232-233; State's Ex. # 23 (Photograph); State's Ex. # 26 (Photograph)). Additionally, evidence and testimony was presented establishing Appellant intentionally concealed the pregnancy from her family members and husband prior to that point. (R. p. 272; p. 299; p. 301). Similarly, testimony and evidence was presented demonstrating Appellant took active steps to prevent anyone from finding out about the birth after it occurred by thoroughly cleaning her apartment before her husband woke up and by calmly making a number of untruthful statements to detectives in an effort to mislead their investigation into the incident. (R. pp. 207-211; pp. 220-222; State's Ex. # 3). Furthermore, the evidence and testimony presented established the life of the baby, who—as would be expected of a newborn infant abandoned for hours inside a plastic trash bag that had been tossed into a dumpster—was in need of emergency medical care, was only fortuitously saved because two curious boys decided to climb into the dumpster to look for what they believed was a cat at a point in time at least an hour *after* Appellant had driven away from the apartment complex to run errands. (R. pp. 164-166; p. 178; State's Ex. # 3).

In addition to that testimony and evidence, Appellant testified in her own defense, claimed she was not thinking when she discarded the baby inside into the dumpster, and asserted she did not understand why she did what she did. (R. p. 280; p. 291). She further expressed regret and sorrow for her actions. (R. pp. 290-291). However, Appellant admitted she was aware she had given birth, conceded she was acting under her own power when she placed the baby into the plastic trash bag and then tossed the bag into the dumpster, and confirmed she cleaned up after the crime to conceal evidence of the birth. (R. pp. 280-283). Furthermore, Appellant indicated she did not believe she was financially capable of caring for another child at the time the victim was born, and she acknowledged she had received criticism from her family

in the past in connection to the first pregnancy and had also believed she would receive more "lecturing" from her family members if they found out about the second one.[2] [3] (R. p. 290; p. 300).

Beyond Appellant's testimony, Dr. Robert McCarthy, the executive director of a private mental health practice, testified on Appellant's behalf as an expert in clinical forensic evaluations and counseling. (R. pp. 357-358; pp. 386-387). During his testimony, Dr. McCarthy asserted he conducted a clinical forensic evaluation of Appellant that included standardized testing with validity scales he characterized as "basically paper-and-pencil lie detectors."[4] (R. pp. 387-395). He further indicated Appellant reported during the evaluation experiencing "rejection" from family members, pressure from negative comments, abuse, and financial struggles. (R. pp. 406-408). Based on that, Dr. McCarthy contended Appellant was suffering from peripartum depression and, in his expert opinion, experienced the "very rare" condition of transient peripartum psychosis, which he asserted could lead to an individual becoming "disoriented," "illogical," and "irrational." (R. pp. 400-401; p. 403; pp. 406-408; p. 413; p. 415). However, he conceded the psychiatrist who examined Appellant at the hospital on the date of the incident

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[2] Following Appellant's testimony, Appellant's mother confirmed she and other family members had previously expressed disappointment and made negative comments to Appellant about her life choices. (R. pp. 307-310).

[3] During her testimony, Appellant also claimed her husband was abusive to her throughout their marriage. (R. pp. 270-271). However, Appellant conceded her claims of spousal abuse were first raised over a year after her arrest to a psychiatrist retained for her defense. (R. p. 297; p. 299; pp. 305-306). Furthermore, she acknowledged she had previously informed the detectives and medical personnel she encountered after the incident her husband was not abusive to her. (R. pp. 242-243; pp. 293-295; p. 299).

[4] As part of his evaluation, Dr. McCarthy also interviewed Appellant's family members but *not* her husband. (R. p. 389; p. 420).

noted Appellant had good concentration and attention and appeared to be cognitively intact at that time. (R. pp. 424-425).

Once all that evidence and testimony had been introduced, the trial judge began going over his intended jury instructions with the parties. (R. p. 439). During the ensuing discussion, the trial judge indicated he had reviewed the Supreme Court's decision in State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017), and noted the Supreme Court had indicated in that decision one cannot attempt to achieve an unintended result, which he noted could potentially impact how the jury should be instructed on implied malice as part of the attempted murder charge. (R. pp. 451-452). The trial judge then invited the parties to offer any suggestions as to how he should instruct the jury on malice. (R. pp. 452-453). In response, the solicitor asserted he believed the "standard" instruction on express and implied malice would be proper so long as the portion dealing with recklessness was excised. (R. pp. 453-455). Meanwhile, defense counsel indicated he objected to any instruction on implied or inferred malice in light of the King decision. (R. p. 457; p. 459). After listening to the parties' suggestions, the trial judge indicated he would work on crafting a proper malice instruction after giving the matter further consideration. (R. p. 461). However, the trial judge indicated he would ensure the malice charge did not contain language permitting a finding of guilt based on recklessness or something similar since an unintended result had been recognized as being inconsistent with an attempt crime. (R. p. 462). Thereafter, upon considering the matter overnight, the trial judge explained he intended to leave the statutory "express or implied" language in his jury instructions on attempted murder since that language was a part of the statutory offense created by the legislature. (R. p. 476). In response, defense counsel objected to the inclusion of that language despite the fact it was contained in the attempted murder statute while candidly conceding it was "odd" to object to an instruction

simply conveying the statute's language. (R. pp. 476-477). At that point, the trial judge affirmed he spent "hours upon hours" attempting to craft a proper jury instruction that would comply with the King decision, and he noted his intended instructions expressly required a finding of a specific intent to kill while further omitting any reference to unintentional behavior, recklessness, or negligence. (R. p. 478).

Following that discussion, the trial proceeded forward, and the parties presented their closing arguments to the jury.[5] (R. pp. 483-501). During the State's closing argument, the solicitor readily acknowledged a specific intent to kill had to be proven in order for Appellant to be convicted of attempted murder but contended Appellant's intent was, in fact, to end her baby's life. (R. p. 492; p. 501). Furthermore, the solicitor argued—without objection—Appellant's deceit, efforts to conceal the crime, and act of putting the baby in the plastic trash bag and tying it shut constituted evidence of malice.[6] [7] (R. p. 486; pp. 490-492; p. 500). Conversely, during the defense's closing argument, defense counsel maintained Appellant had

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[5] Both before and after the parties' closing arguments, the trial judge instructed the jurors the arguments of counsel were not evidence. (R. pp. 141-142; p. 505). Likewise, the trial judge explained to the jurors they were required to solely apply the law as he personally instructed it to them. (R. p. 143; p. 503).

[6] Notably, the solicitor's argument in that regard was fully consistent with established South Carolina law. See State v. Ballington, 346 S.C. 262, 273, 551 S.E.2d 280, 286 (Ct. App. 2001) (instructing Ballington's attempts to cover up a killing and mislead others about what occurred constituted evidence he acted with malice at the time of the killing), overruled on other grounds by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009); see also State v. Arnold, 309 S.C. 157, 169, 420 S.E.2d 834, 840 (1992) (finding efforts to mislead police about a killing constituted evidence the killing was committed with malice).

[7] Because no objection was raised to those remarks, any issue Appellant may have had with them was not properly preserved for appellate review and cannot now be validly raised on appeal. See State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005) ("The rule is well established that if asserted errors are not presented to the lower Court, the question cannot be raised for the first time on appeal."); see also State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial.").

no hatred or ill will towards her baby and merely acted in a delusional and non-malicious manner based on a psychological disorder. (R. pp. 494-497). Moreover, defense counsel suggested Appellant's actions were not malicious because they were not part of "some grand plan."[8] (R. p. 496).

At the conclusion of the closing arguments, the trial judge instructed the jury on the applicable law. (R. pp. 502-516). In doing so, the trial judge instructed the jury on criminal intent—without objection—as follows:

> [I]n order to establish criminal liability, criminal intent is required. For example, these are examples: The mental state required to be proven by the [S]tate for a particular crime could be purpose, intent, knowledge, recklessness, or criminal negligence. Criminal intent must be proven by the [S]tate 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.

(R. pp. 509-510; 516). Likewise, the trial judge instructed the jury on attempted murder—and the accompanying element of malice—as follows:

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[8] Significantly, notwithstanding the fact Appellant's intentional concealment of the pregnancy for months coupled with the actions she took after the baby was born were consistent with a planned course of action, evidence of a "grand plan" was in no way required in order for the jury to find Appellant acted with malice aforethought under South Carolina law. See State v. Wilds, 355 S.C. 269, 277, 584 S.E.2d 138, 142 (Ct. App. 2003) ("Although malice must be aforethought, there is no requirement that it must exist for any appreciable length of time before the commission of the act. It may be conceived at the very moment the assault occurs.").

[Appellant] is charged with attempted murder. What does the [S]tate have to prove? In order to prove this crime, the [S]tate must prove that the defendant attempted to kill another person with malice aforethought either expressed 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 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 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.[9] [10]

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[9] After the trial judge finished instructing the jury on the applicable law, defense counsel indicated he did not have any additional objections beyond those he had previously raised. (R. p. 516).

[10] In addition to attempted murder, the trial judge also instructed the jury on the lesser-included offense of first-degree assault and battery. (R. pp. 511-512).

(R. pp. 510-511).

Subsequently, the case was submitted to the jury, and the jurors began their deliberations. (R. p. 517). Thereafter, at the conclusion of those deliberations, the jurors unanimously convicted Appellant of the indicted offense of attempted murder. (R. pp. 517-519).

Standard of Review

In a criminal case, the appellate court sits solely to review errors of law. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). When reviewing an issue involving a trial judge's jury charge, the appellate court must view the charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009); see Todd v. State, 355 S.C. 396, 402, 585 S.E.2d 305, 308 (2003) ("[J]ury charges should be examined in their entirety and not in isolation in analyzing whether the defendant's due process rights have been violated."). The appropriate test for reviewing the charge involves determining what a reasonable juror would have understood the charge to mean. Sheppard v. State, 357 S.C. 646, 664, 594 S.E.2d 462, 474 (2004). So long as the jury instructions presented are substantially correct and cover the applicable law, reversal is not warranted. See State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996) ("A jury charge which is substantially correct and covers the law does not require reversal."); see also State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007) ("A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied."). Moreover, an appellate court will only reverse a trial judge's decision regarding jury instructions when that decision constitutes a prejudicial abuse of discretion. See Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) ("An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion."); Rauch v. Zayas, 284 S.C. 594,

597, 327 S.E.2d 377, 378 (Ct. App. 1985) ("[A]n alleged error in a portion of the charge must be prejudicial to the appellant to warrant a new trial."); see also State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005) ("Error without prejudice does not warrant reversal.").

Analysis

The purpose of a trial judge's jury instructions is "to enlighten the jury and to aid it in arriving at a correct verdict." State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). To carry out that purpose, a trial judge is required to charge the jury on the current and correct South Carolina law applicable to the case based on the evidence presented. State v. Taylor, 356 S.C. 227, 231, 589 S.E.2d 1, 2 (2003); see State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (explaining a trial judge is required to instruct the jury on sound principles of law that are applicable to the case based on the evidence presented). In doing so, the trial judge is only required to instruct the jury on the substance of the law and does *not* have to use any particular verbiage. State v. Burkhart, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002); see Brandt, 393 S.C. at 549, 713 S.E.2d at 603 ("The substance of the law is what must be charged to the jury, not any particular verbiage."). Importantly, so long as the trial judge's jury instructions are substantially correct and adequately cover the applicable law, those instructions are considered to be appropriate and not erroneous. State v. Foust, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996); see State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 464 (Ct. App. 2003) ("A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.").

In the case sub judice, the issue on appeal centers on the propriety of the trial judge's jury instructions on the indicted offense of attempted murder. Relatively recently, that particular offense was enacted through our legislature's passage of the Omnibus Crime Reduction and

Sentencing Reform Act of 2010, which abolished all prior statutory and common law assault and battery offenses and replaced them with a number of new offenses. See Act No. 273, § 6.A, 2010 S.C. Acts & Joint Resolutions (adding the statutory offense of attempted murder to the South Carolina Code of Laws); see also State v. Middleton, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014) ("Though the passage of the Act, the legislature abolished all common law assault and battery offenses and all prior statutory assault and battery offenses."). Pursuant to South Carolina's attempted murder statute, the offense of attempted murder is committed when a person "with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied[.]" S.C. Code Ann. § 16-3-29. Thus, based on the plain language of the statute, the statutorily-delineated elements of the offense include: (1) an attempt to kill another person; (2) with intent to kill; and (3) with malice aforethought, either express or implied. Id.; see State v. White, 338 S.C. 56, 58, 525 S.E.2d 261, 263 (Ct. App. 1999) ("We, of course, *must take the statute as we find it*, giving effect to the legislative intent as expressed in its language." (emphasis added)).

Significantly, in State v. King, 422 S.C. 47, 64, 810 S.E.2d 18, 27 (2017), our Supreme Court recently addressed an appellate challenge to a trial judge's jury instructions on attempted murder subsequent to the enactment of the offense. In that case, King was charged with attempted murder, and, as part of his jury instructions on the offense, the trial judge explained to the jury over defense counsel's objection a specific intent to kill is *not* an element of attempted murder and the offense could be committed with only a general intent to commit serious bodily harm. Id. at 54, 810 S.E.2d at 21. At the conclusion of the trial, the jury convicted King of attempted murder along with several other offenses, and he appealed. Id. On appeal, the Court of Appeals reversed King's attempted murder conviction after finding the legislature "intended

to require the State to prove specific intent to commit murder as an element of attempted murder[.]" State v. King, 412 S.C. 403, 411, 772 S.E.2d 189, 193 (Ct. App. 2015). The State then filed a petition for a writ of certiorari in regard to that particular ruling, and the Supreme Court granted the State's petition.[11] King, 422 S.C. at 50, 810 S.E.2d at 20. Thereafter, on certiorari, the Supreme Court agreed with the Court of Appeals a specific intent to kill was an element of the crime. Id. at 55, 810 S.E.2d at 22. In reaching that conclusion, the Supreme Court found the legislature's use of "intent to kill" and "malice aforethought, either express or implied" evidenced an intention to create an offense requiring a higher level of mens rea than the offense of murder. Id. at 61, 810 S.E.2d at 25. However, the Supreme Court further cautioned implied malice was "arguably" inconsistent with a specific intent crime. Id. at 64, n. 5, 810 S.E.2d at 27, n. 5. As support for that conclusion, the Supreme Court noted the Nevada Supreme Court had previously concluded the offense of attempted murder would be inconsistent with implied malice as one cannot attempt an unintended result, attempt to be negligent, or attempt to be malignantly reckless. Id. at 57, 810 S.E.2d at 23.

Cognizant of our Supreme Court's decision in King and its cautionary language about implied malice, the trial judge in Appellant's case painstakingly strove to craft a jury instruction on attempted murder that gave effect to all of the words of the applicable statute while simultaneously ensuring the jurors understand Appellant could not be convicted of the offense unless they found beyond a reasonable doubt she *intentionally* acted with a *specific intent to kill* her victim. See S.C. Code Ann. § 16-3-29 ("A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder."); see also In re Decker, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995)

[11] King also filed a petition for a writ of certiorari on unrelated grounds, and the Supreme Court granted King's petition as well. King, 422 S.C. at 50, 810 S.E.2d at 20.

(instructing "[a] statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous" (citations and internal quotations omitted)). Critically, based on the attempted murder instructions that were presented to the jury, the trial judge achieved that desired result.

Looking to the relevant language employed in the attempted murder charge as presented, the trial judge: (1) advised the jury of the exact language used by the statute to define the offense; (2) explained the general concept of malice as hatred, ill will, hostility, and the intentional doing of a unjustified and wrongful act; (3) defined the "aforethought" component of the malice as requiring the malice to exist before and at the time of the act; (4) attempted to prevent any misunderstanding about implied malice in the context of attempted murder by equating express and implied malice solely to proof of malice by direct and circumstantial evidence; (5) *expressly indicated a specific intent to kill was a required element of attempted murder*; (6) defined attempted murder as "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;" and (7) explained various ways the required intent could potentially be inferred, including through proof the defendant "voluntarily and willfully commits an act, the natural tendency of which is to destroy another human's life." Significantly, when giving that language its natural meaning and 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. See Sheppard, 357 S.C. at 664, 594 S.E.2d at 474 ("[T]he test is what a reasonable juror would have understood the charge as meaning."); see also Foye v. State, 335 S.C. 586, 590, n. 1, 518 S.E.2d 265, 267, n. 1 (1999) ("The jury was instructed to determine petitioner's guilt based only on the evidence presented in the trial. A jury is presumed to follow

instructions. Therefore, without some showing the jurors disregarded these instructions, this Court declines to presume prejudice." (citations omitted)); State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) ("[J]urors are presumed to follow the law as instructed to them."). Moreover, nothing in the trial judge's attempted murder charge would have permitted the jury to convict Appellant based on a finding she merely engaged in negligent or reckless conduct, and, instead, the charge required the jury to find Appellant had the specific intention to end the newborn infant's life through her actions in order to convict. Cf. United States v. Kwong, 14 F.3d 189, 196 (2nd Cir. 1994) (finding the trial judge reversibly erred when instructing the jury on the requisite elements of attempted murder by including an instruction that indicated "reckless indifference might serve as a substitute for proof of a specific intent to kill"). Under such circumstances, the trial judge's jury instructions properly instructed the jury on the required elements of attempted murder without incorrectly permitting the jurors to convict Appellant for attempting an unintended result, attempting to merely be negligent, or attempting to be reckless, and, therefore, those instructions were not erroneous. See King, 422 S.C. at 63-64, 810 S.E.2d at 26-27 (holding the offense of attempted murder includes specific intent to kill as an element); see also Rye, 375 S.C. at 123, 651 S.E.2d at 323 (recognizing a trial judge's decisions regarding jury instructions will not be reversed when the instructions properly charged the applicable law when considered in their entirety); cf. State v. Jackson, 297 S.C. 523, 527, 377 S.E.2d 570, 572 (1989) ("It is unlikely that a reasonable juror would have singled out this portion of the charge and interpreted it as an opinion on the facts of this case or an instruction as to the weight to be given the evidence.").

In arguing to the contrary, Appellant contends the trial judge's jury instructions on attempted murder were somehow improper because those instructions informed the jury "both

malice *and* a specific intent to kill [could] be inferred." Critically though, absent a candid and truthful admission of intent from a defendant, a defendant's intent—including specific intent to kill—must *necessarily* be inferred from the circumstances. See State v. Sutton, 340 S.C. 393, 397, n. 5, 532 S.E.2d 283, 285, n. 5 (2000) ("A *specific intent to kill* may be, and normally is, inferred from the surrounding circumstances, such as the character of the attack, the use of a deadly weapon, and the nature and extent of the victim's injuries." (emphasis added)); see also State v. Tuckness, 257 S.C. 295, 299, 185 S.E.2d 607, 608 (1971) ("The intent with which an act is done denotes a state of mind, and can be proved only by expressions or conduct, considered in the light of the given circumstances. Intent is seldom susceptible to proof by direct evidence and must ordinarily be proven by circumstantial evidence, that is, by facts and circumstances from which intent may be inferred." (citation omitted)); State v. Haney, 257 S.C. 89, 91, 184 S.E.2d 344, 345 (1971) ("Absent an admission by the defendant, proof of intent necessarily rests on inference from conduct."); State v. Land, 419 S.C. 191, 202, 797 S.E.2d 48, 54 (Ct. App. 2016) ("[W]ithout an actual statement of intent by the actor, proof of intent must be determined by inferences from conduct."). In fact, the Nevada Supreme Court, whom our Supreme Court looked to for guidance in interpreting our attempted murder statute, has *expressly* found a jury instruction indicating the specific intent to kill necessary to prove attempted murder may be inferred from a defendant's actions to be entirely proper, and the Nevada Supreme Court's determination in that regard is consistent with the decisions of numerous other appellate courts, including courts in South Carolina. See Sharma v. State, 56 P.3d 868, 875 (Nev. 2002) (finding a jury instruction "directing the jury that a specific intent to kill may be inferred from an external circumstance, i.e., the intentional use of a deadly weapon upon the person of another at a vital part" to be proper in an attempted murder case); see also Williams v. Maggio, 695 F.2d 119, 122

(5th Cir. 1983) (recognizing the specific intent to kill necessary to prove an offense "may be inferred from the accused's entire conduct"); People v. Hill, 658 N.E.2d 1294, 1298 (Ill. App. Ct. 1995) ("Proof of a specific intent to kill is an indispensable element of attempt first degree murder. . . . The necessary specific intent to kill may be shown by surrounding circumstances, including the character of the assault and the use of a deadly weapon. Such intent may be inferred if one willfully does an act, the direct and natural tendency of which is to destroy another's life." (citations omitted)); Sutton, 340 S.C. at 397, n. 5, 532 S.E.2d at 285, n. 5 (instructing specific intent to kill can be inferred); State v. Williams, 422 S.C. 525, 542, 812 S.E.2d 917, 926 (Ct. App. 2018) (instructing "the specific intent to kill [for attempted murder] can be inferred by the surrounding circumstances of the case, including the use of a deadly weapon and the character of the attack"). As a result, the trial judge's use of language on inferring intent and malice—which in no way permitted an attempted murder conviction absent proof of a specific intent to kill—did not render the trial judge's jury instructions incorrect or erroneous. See Kwong, 14 F.3d at 194 ("By necessity, intent must usually be proven by circumstantial evidence."); cf. State v. Raglin, 699 N.E.2d 482, 492 (Ohio 1998) ("Appellant contends that the trial court's instructions to the jury in the guilt phase that defined 'causation' in terms of foreseeability permitted a conviction for aggravated murder without proof of purpose to kill. Appellant makes a similar argument with respect to the trial court's instruction to the jury that '[i]f a wound is inflicted upon a person with a deadly weapon in a manner calculated to destroy life, the purpose to cause the death may be inferred from the use of the weapon.' Appellant's arguments are not persuasive. The trial court's instructions to the jury, viewed as a whole, made it clear that a finding of purpose (and specific intent) to kill was necessary in order to convict appellant on the charge of aggravated murder.").

Accordingly, because the trial judge's jury charge properly and correctly instructed the jury on the necessary elements of attempted murder in a manner that would not have permitted the jury to convict Appellant of that offense without finding she acted with the specific intent to kill her victim, the trial judge's jury instructions accurately conveyed the relevant and applicable law to jury and could not have resulted in any improper prejudice to Appellant.[12] See State v. Marin, 415 S.C. 475, 482-483, 783 S.E.2d 808, 812 (2016) (explaining the "inquiry on appellate review is concerned only with the question of whether the jury charge, when viewed as a whole, accurately conveys the applicable law"); cf. State v. Hicks, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998) (concluding no reasonable juror would have understood the trial judge's jury instructions to place the burden of proof of Hicks where "[t]he instructions specified the State had the overall burden of proof"). Appellant's conviction should be affirmed.

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[12] Moreover, even assuming the trial judge's jury instructions were somehow improper, Appellant's acts of placing a defenseless newborn infant into a plastic trash bag, tying the bag shut with a knot, throwing the bag into a dumpster, and leaving it there for hours without doing anything suggesting any intention to ever return could *only* support a conclusion she specifically and maliciously intended the baby to die since those actions are utterly inconsistent with the baby's survival, and, thus, any conceivable error in the trial judge's jury instructions was entirely harmless under the circumstances of Appellant's case. See Middleton, 407 S.C. at 319, 755 S.E.2d at 436 ("[T]he only conclusion established by the evidence is that [Middleton] was guilty of attempted murder, given the facts that [Middleton] deliberately drove up to the passenger window and shot into the vehicle at least five times[.] . . . In our view, there is no other way to construe the evidence in this case but that [Middleton] was attempting to kill [his victims]."); see also State v. Smith, 230 S.C. 164, 168, 94 S.E.2d 886, 887 (1956) ("The burden is upon the appellant to satisfy [the appellate] court that there has been *prejudicial* error." (emphasis added)).

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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April 23, 2019

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Robert E. Hood, Circuit Court Judge
Appellate Case No. 2018-000341

THE STATE,

Respondent,

vs.

SHELBY HARPER TAYLOR,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Shana Montgomery, certify I have served the within Final Brief of Respondent on Appellant by sending two copies of the same to:

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I further certify all parties required by Rule to be served have been served.
This 23rd day of April, 2019.

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