

ORIGINAL

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Charleston County
Honorable Deadra L. Jefferson, Circuit Court Judge

RECEIVED

AUG 16 2019

SC Court of Appeals

THE STATE

RESPONDENT,

V.

MONTRELLE LAMONT CAMPBELL,

APPELLANT,

APPELLATE CASE NO. 2018-000115

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

W. JOSEPH MAYE
Assistant Attorney General
S.C. Bar No. 100851
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

SCARLETT A. WILSON
Ninth Judicial Circuit Solicitor
101 Meeting St., Ste. 400
Charleston, SC 29401

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIESii

APPELLANT'S STATEMENT OF ISSUES ON APPEAL.....1

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL.....1

BRIEF ARGUMENT2

STATEMENT OF THE CASE.....3

STANDARD OF REVIEW.....3

STATEMENT OF FACTS4

ISSUES AS THEY WERE PRESENTED AT TRIAL14

ARGUMENT.....20

 I. The trial court did not err in charging the jury that malice may be inferred from the use of a deadly weapon for the crime of attempted murder, wherein the statutory definition of attempted murder under § 16-3-29 explicitly denotes that the requisite malice aforethought may be established via either express or implied malice, and where no South Carolina court has ruled that such an instruction is in error20

 II. If the trial court did err in instructing the jury as to inferred malice from the use of a deadly weapon, such error was harmless given the fact that the circumstances of this case, including Appellant's use of a deadly weapon, all demonstrate express malice without the need for inference by the jury.....25

 III. The trial court did not err in instructing the jury as to the hand-of-one is the hand-of-all theory of accomplice liability because the facts of the case demonstrate that that both Appellant and co-defendant Richardson were involved in the crime, and the Appellant's case-in-chief introduced evidence of a different gunman, dressed in different clothing, leaving in a different vehicle than that demonstrated in the State's case-in-chief.....29

CONCLUSION.....32

DESIGNATION OF MATTER

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Durham v. United Cos. Fin. Corp.</i> , 331 S.C. 600, 503 S.E.2d 465 (1998).....	22
<i>Field v. Gregory</i> , 230 S.C. 39, 94 S.E.2d 15 (1956).....	22, 25
<i>Gibson v. State</i> , 416 S.C. 260, 786 S.E.2d 121 (2016).....	25, 27
<i>Scholtec v. Estate of Reeves</i> , 327 S.C. 551, 490 S.E.2d 603 (Ct. App. 1997).....	22
<i>State v. Adkins</i> , 353 S.C. 312, 577 S.E.2d 460 (Ct. App. 2003).....	4
<i>State v. Belcher</i> , 385 S.C. 597, 685 S.E.2d 802 (2009).....	5, 23, 27, 33
<i>State v. Brandt</i> , 393 S.C. 526, 713 S.E.2d 591 (2011).....	5, 30
<i>State v. Elmore</i> , 279 S.C. 417, 308 S.E.2d 781 (1983).....	25
<i>State v. Foust</i> , 325 S.C. 12, 479 S.E.2d 50 (1996).....	5, 30
<i>State v. Jones</i> , 113 S.C. 134, 101 S.E. 647 (1919).....	29
<i>State v. King</i> , 422 S.C. 47, 810 S.E.2d 18 (2017).....	2, 24, 25
<i>State v. Knoten</i> , 347 S.C. 296, 555 S.E.2d 391 (2001).....	5, 30
<i>State v. Leopard</i> , 349 S.C. 467, 563 S.E.2d 342 (Ct. App. 2002).....	22
<i>State v. McIntosh</i> , 40 S.C. 349, 18 S.E. 1033 (1894).....	29
<i>State v. Santiago</i> , 370 S.C. 153, 634 S.E.2d 23 (Ct. App. 2006).....	4
<i>State v. Sweat</i> , 379 S.C. 367, 665 S.E.2d 645 (Ct. App. 2008).....	21
<i>State v. Wharton</i> , 381 S.C. 209, 672 S.E.2d 786 (2009).....	4
<i>State v. Williams</i> , 367 S.C. 192, 624 S.E.2d 443 (Ct. App. 2005).....	5, 30
 Statutes	
S.C. Code Ann. § 16-3-29 (2010).....	22, 25
 Other Authorities	
75A Am. Jur. 2d Trial § 908.....	22, 25

APPELLANT'S STATEMENT OF ISSUES ON APPEAL

- I. Did the trial judge err by instructing the jury that malice may be inferred from the use of a deadly weapon as to the offense of attempted murder, a specific intent crime, where implied malice is inconsistent with a specific intent crime and, as our Supreme Court held in *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017), there must be evidence that one charged with attempted murder had both express malice and specific intent to kill?
- II. Did the trial judge err by instructing the jury on the hand of one is the hand of all theory of accomplice liability when there was no evidence to support the charge, specifically there was no evidence Appellant was acting with another during the shooting or that the murder was committed pursuant to a common design or plan, particularly where the state's theory of the case was that Appellant was the shooter and acted alone?

RESPONDENT'S STATEMENT OF THE ISSUES ON APPEAL

- I. Did the trial court err in charging the jury that malice may be inferred from the use of a deadly weapon for the crime of attempted murder, wherein the statutory definition of attempted murder under § 16-3-29 explicitly denotes that the requisite malice aforethought may be established via either express or implied malice, and where no South Carolina court has ruled that such an instruction is in error?
- II. If the trial court did err in instructing the jury as to inferred malice from the use of a deadly weapon, was that error harmless given the fact that the circumstances of this case, including Appellant's use of a deadly weapon, all demonstrate express malice without the need for inference by the jury?
- III. Did the trial court err in instructing the jury as to the hand-of-one is the hand-of-all theory of accomplice liability where the facts of the case demonstrate that both Appellant and

co-defendant Richardson were involved in the crime, and the Appellant's case-in-chief introduced evidence of a different or additional gunman dressed in different clothing leaving in a different vehicle than that demonstrated in the State's case-in-chief?

BRIEF ARGUMENT

The trial court did not err in instructing the jury as to inferred malice from use of a deadly weapon, as the statutory definition for attempted murder explicitly includes the use of inferred malice. As there has never been a decision from South Carolina courts that rules such an instruction in error, there was nothing to instruct the trial court differently. The trial court complied with the statutory definition of attempted murder, and the existing relevant case law.

Even if the inferred malice charge were to be found in error, such error would be harmless because the evidence of the case does not require inference of malice by the jury. The efforts taken by Appellant to complete the shooting were premeditated, prepared in advance, and performed against a woman he had a physical and public confrontation with the evening prior. Appellant brought himself to the confrontation, gave no warning to his anger, used a high caliber automatic or semi-automatic AR-15 rifle, attacked by ambush, fired fourteen bullets into a crowded apartment from the outside window, and then returned to the getaway car he had co-defendant Richardson park and watch for him in his absence. These actions are each elements of express malice, such that no inference need be drawn by the jury. Consequently, the jury charge instruction the jury as to inferred malice constitutes harmless error, to the extent it is error at all.

Lastly, given the presence and involvement of three different individuals under the state's theory of the case, the potential for the jury to not believe co-defendant Richardson's innocent participation in driving away from the scene, and the defense's case-in-chief which sets forth evidence of a separate hooded assailant carrying a sporty rifle, escaping the scene in a different

getaway vehicle, the jury may find that Appellant did not act alone in perpetrating the shooting. A hand-of-one is the hand-of-all charge was appropriate and necessary under the facts presented at trial.

STATEMENT OF THE CASE

Appellant was indicted on April 11, 2016, by a Charleston County Grand Jury for murder and two counts of attempted murder. Appellant proceeded to trial on January 8, 2018, before the Honorable Deadra L. Jefferson, and a jury. (R. p. 1). The State was represented at trial by Assistant Solicitors Chad Simpson and Alex Ginsberg. (R. p. 1). Attorneys Mary Ford and Michael Williams represented Appellant. (R. p. 1). At the conclusion of trial on January 12, 2018, the jury found Appellant guilty as indicted. (R. p. 554, line 9 through p. 555, line 14). Appellant was sentenced to life without parole for murder and to concurrent thirty year sentences for each count of attempted murder. (R. p. 556, lines 7-14). This appeal now follows.

STANDARD OF REVIEW

“An appellate court will not reverse the trial judge's decision regarding jury charges absent an abuse of discretion.” *State v. Santiago*, 370 S.C. 153, 159, 634 S.E.2d 23, 26 (Ct. App. 2006). 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. *State v. Wharton*, 381 S.C. 209, 213, 672 S.E.2d 786, 788 (2009). Generally, the trial judge is required to charge only the current and correct law of South Carolina.” *State v. Adkins*, 353 S.C. 312, 317, 577 S.E.2d 460, 463 (Ct. App. 2003). “In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial.” *Id.* “A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.” *Id.* “A jury charge which is substantially correct and covers the law does not require reversal.” *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (citing *State v. Foust*, 325 S.C. 12, 479

S.E.2d 50 (1996)). ‘The law to be charged must be determined from the evidence presented at trial.’ *Brandt*, at 549, 713 S.E.2d at 603 (2011) (citing *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001)). “If there is any evidence to support a charge, the trial court should grant the request.” *Id.* (citing *State v. Williams*, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct. App. 2005)). “Errors, including erroneous jury instructions, are subject to harmless error analysis.” *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009).

FACTS

The Crime

At approximately 6:30am, Katrina Brown (hereinafter “Katrina”) was hosting numerous friends at her home located at *-* Norman Street, an area known as Gadsden Green in downtown Charleston. (R. p. 98, line 25 through p. 99, line 2). They were listening to music, playing cards, and enjoying each other’s company. One such friend was victim Antwan Frost, (aka “Brother Dusty”, herein after referred to as Victim). Without warning, Katrina, along with her guests, were shot at from the backdoor window by a high caliber assault rifle. A total of 14 rounds were fired into the home. (R. p. 137-138). Kerri Brown, and her cousin, Tierra Brown were injured in the attack. (R. p. 43-44; p. 46). Victim was struck by multiple pieces of shrapnel from fragmented bullets. Both women survived the attack, but the fragmented bullet that struck Victim pierced his heart and caused him to bleed internally. (R. p. 194). He died shortly after the attack.

The evidence and testimony presented at trial demonstrated the following facts:

Investigation and Forensics

Crime scene investigator Sarah Gladwell testified that she began her investigation and processing of evidence on the outside of the home, as police were still in the process of acquiring a search warrant for the home itself. She recovered a total of fourteen (14) fired shell casings

from the rear porch and courtyard area. (R. 122, line 20 through p. 123, line 9). Though she was confident that the ammunition was fired from a rifle, Investigator Gladwell could not identify the caliber of the round, as it was a large-caliber bullet that she had not encountered despite her extensive prior experience with murder scenes. (R. p. 133, line 13 through p. 134, line 4). She likewise uncovered what she believed to be 14 bullet holes in the walls of the home. (R. p. 137-138). She concluded that the bullets entered from the back and went through to the front of the apartment. (R. p. 140, lines 1-19; p. 142, lines 1-24; p. 144-145).

Security camera footage was taken from numerous different sources in the case. (R. p. 465, lines 3-5). These sources included city maintained cameras, private residences, and local businesses. (R. p. 167-169; p. 174-175; p. 186-188; p. 206-208). The footage from a nearby restaurant called Lee Lee's Hot Kitchen provided some of the most useful footage. Officer Rebecca Gregg testified that in review of the video footage, they noticed two parties of interest who passed directly in front of the cameras shortly before the shooting. *One of these subjects was shown carrying a rifle while walking up President Street toward the restaurant and rounding the corner at Nunan Street.* (R. p. 207, lines 4-14). This footage also showed a second individual driving a vehicle; he appeared to be waiting and discarded a couple of cigarette butts during that time. (R. p. 207, lines 21-25). These were collected by crime scene investigators. (R. p. 208, lines 21-23; 216, line 16 through p. 217, line 10). These individuals were later believed to be identified as Trivell Richardson (hereinafter "co-defendant Richardson") and Appellant. (R. p. 348-349). The videos showed that the vehicle used by the two individuals was a Gold Buick. (R. p. 337, lines 1-17). Police acquired still photographs from the surveillance videos that depicted the license plate of the Buick; they interviewed its owner, Tomeka President, who confirmed that the gold Buick was her vehicle. (R. p. 233, lines 12-15). She also testified that Appellant was a

love interest of hers who had stayed with her the night before the shooting. (R. p. 237, lines 3-14).

Detective Tuttle acquired the cell phone numbers associated to both Appellant and co-defendant Richardson and obtained a search warrant for both numbers, which provided authorities with various information including incoming calls, outgoing calls, text messages, and tower/sector data. (R. p. 356, line 2 through p. 357, line 1; p. 381, line 15 through 382, line 8; p. 384, lines 5-13). FBI Special Agent Clayton Simmonds testified that these two phones contacted each other just prior to the time of the murder. (R. p. 390, lines 7-25; p. 412, lines 15-21). Agent Simmonds testimony also demonstrates that the tower/sector usage history from these phones is consistent with the phones being located in the downtown area at the time of the murder. (R. p. 408, line 17 through 409, line 23; p. 410, lines 4-20).

Detective Tuttle testified that he spoke with Ms. Peggy Blake, a potential witness, many times over the course of the investigation. (R. p. 454, lines 4-9). He testified that he was aware of the possible involvement of a lime green getaway car. (R. p. 455, lines 9-11). He testified that in his investigative efforts, which included review of all surveillance camera footage, he did not witness any car matching the lime green car description provided by Ms. Blake. (R. p. 456, lines 7-10). He testified that the camera footage clearly refuted the information provided by Ms. Blake. (R. p. 463, lines 1-7).

Testimony of Katrina Brown

In September 2015, Ms. Katrina Brown (hereinafter "Katrina") lived at **-* Norman Street. (R. p. 23, line 7). She testified that she had guests over at her home starting on Thursday night, September 17, 2015, while here kids were at the local school's football game. Those guests included her sister, Kerri, her neighbor, her cousin, and others. (R. p. 27, 14-20; p. 28,

line 10-18). At around 11:30 or midnight her son returned from the game and a friend of her sister's, named Kadeshia, also came over. (R. p. 29, lines 12-25). Katrina testified that soon after, there was a knock at her door. Kadeshia's never made it to the door, but moments later a man introduced to Katrina as "Troll" had entered the home. (R. 30, lines 1-25). Katrina did not know "Troll" and did not know that the man was Kadeshia's brother. (R. 30, lines 5-6; 31, line 5-11)

Ms. Katrina Brown asked the man who he was, and he did not respond, and soon after she asked him to leave her home. He did not respond and did not immediately leave. However, he ultimately left on his own. (R. p. 31, line 1-11). Once "Troll" had exited the home she soon stepped outside her home to smoke a cigarette. While outside her kitchen door "Troll" hit her on the left side of the head and knocked her to the ground. She testified that he was standing over her in way that she feared he was about to hit her again. (R. p. 31, lines 14-23; p. 32, lines 3-4). Katrina identified Appellant in the courtroom as the assailant from that evening. (R. p. 34, line 1-9).

Her sister and friend saw the commotion and intervened, after which Appellant left toward the street. (R. p. 31, line 23-25; p. 72, line 13-16). Katrina, her sister, and her friend all together went to the street to confront Appellant about his actions. However, Katrina testified that he was backing up to his car and that he looked like he was reaching for something. This spurred Katrina to take herself and her friends back into the house without further confrontation. (R. p. 32, line 4-10). Katrina testified that they really did not have much of an argument; it amounted to "What's going on?" and "Why did you just do that?" Neither of these questions provoked a response from Appellant and he then left with his sister Kadeshia. (R. p. 33, line 1-

24). Katrina put up her windows, but did not call the police, noting that calling the police is just not what she learned to do growing up. (R. p. 33, line 5-8; p. 34, line 18 through p. 35, line 16).

Katrina learned the following day that Appellant hitting her in the head had become the local gossip of the area when people at the store spoke to her about “Troll” hitting her. (R. p. 36, lines 15-24). Later that evening, Friday, September 18, 2015, Katrina hosted friends and family at her home again. (R. p. 38, lines 1-23). The gathering progressed into the morning hours and Victim arrived at approximately 6:00am. (R. p. 39, lines 16-25; p. 40, lines 1-16). Victim was a longtime friend of the Brown family. (R. p. 39; p. 73). Katrina was not aware of any social media postings that would have made the gathering public knowledge. (R. p. 50, lines 16-21).

Katrina testified to where people were in the house at that time, and then she described the shooting. She testified that as soon as they heard gunfire everyone just dropped to the floor because there were bullets flying all over the place. (R. p. 41-42). She testified that the gunfire was fast and could tell the shots were coming into the home because they were striking various things in the house. (R. p. 42, lines 17-25). She testified that her sister attempted to hide underneath the chair, and recalls hearing her say that she had been hit. (R. p. 43, lines 7-12). She also heard her cousin Tierra Brown yell that she had been hit. (R. p. 43, line 16 through p. 44, line 5).

Katrina testified that she had lived at the address for five years and did not have any enemies in the neighborhood, and other than what had occurred with Appellant, she was not aware of a conflict she had with anyone. (R. p. 46, lines 7-11). On cross examination Katrina denied having a conversation where she learned of Appellant’s relationship to Kadeshia prior to forcing Appellant to leave her home. (R. p. 53, lines 7-10). She further denied apologizing to Kadeshia, and denied knowing Appellant’s relationship to Kadeshia prior to the assault. (R. p.

52, line 24 through p. 53, line 17). However, she did admit to having an argument with Kadeshia prior to leaving the home to smoke a cigarette. (R. p. 54, lines 3-15).

Testimony of Kerri Brown

Kerri Brown is Katrina's sister. (R. p. 64, 21-23). Kerri testified that Appellant came to the door and just walked into the home. (R. p. 67, lines 16-23). She did not know who Appellant was, and that her sister's friend likewise did not know Appellant when he walked into the house. (R. 67, line 24 through p. 68, line 7). However, on cross-examination she testified that Appellant arrived and asked to speak to Kadeshia, claiming to be her brother. She testified however that she did not know him. (R. p. 82, lines 9-21). Kerri testified that her sister Katrina asked Appellant to leave, and commented that he ultimately did leave. She testified that her sister "said a few words" to Kadeshia and asked her to leave. (R. p. 69, lines 5-11).

Kerri testified that she could not see Appellant hit her sister, but that she saw her sister go to the ground through the window. When she went outside Appellant was standing over Katrina like he was going to hit her. (R. p. 69, line 16 through p. 70, line 9). She came to her sister's aid and asked why Appellant did that. He never responded and was backing away. She testified that her sister noticed he seemed to be reaching for something, and her sister told her and others to let it go and go back inside. (R. p. 70, lines 17 through p. 71, line 9). Kerri identified Appellant as the man responsible for hitting Katrina that evening. (R. p. 79, line 22, through p. 80, line 6). She characterized Appellant as appearing arrogant as he stood over Katrina, having just hit her. (R. p. 90, lines 9-20).

Kerri testified that she was good friends with victim, and recalled that Victim arrived around 5:00 or 5:30 that morning. (R. p. 73, lines 11-25). She testified that everyone was in the house, when out of the blue she started hearing gunshots. She testified that everyone tried to get

undercover in reaction. (R. p. 75, 2-12). She testified further that she was trying to protect her son and nephew during the shooting and that she was shot in the head in the process. (R. p. 76, line 16 through p. 78, line 3). She testified that she did not have any enemies in the neighborhood. (R. p. 79, lines 22-24).

During cross-examination, she admitted that she never saw anyone with a gun during the shooting. (R. p. 80, lines 20-22). On cross-examination Kerri testified that Kadeshia apologized for her brother hitting Katrina the night before. (R. p. 85, lines 5-10).

Testimony of Tierra Brown

Tierra Brown is Katrina's cousin. (R. p. 64, line 24 through p. 65, line 1). Tierra testified that she was shot in the arm during the shooting. (R. p. 95, lines 11-17). She could not recall how many shots were fired, but testified that there was a lot of gunshots fired in rapid succession. (R. p. 96, lines 5-9). She did not see who was shooting into the home. (R. p. 99, lines 10-11).

Officer Timothy O'Leary

Officer O'Leary testified that he was a regular patrol officer working the overnight shift on September 19, 2015. (R. p. 103, lines 23-24). He responded to the shooting at 6:37am. (R. p. p. 105 through 106, line 17). He was first to find Victim and attempted to render aid to Victim.

Testimony of Tomeka President

Ms. President identified Appellant at trial and testified that his nickname is "Troll". (R. p. 229, lines 1-7). She testified that she came to know Appellant through her brother and another individual named "Vell", full name "Trivell Richardson" (co-defendant Richardson). (R. p. 229, lines 8-15; p. 247). For a short time, Ms. President was Appellant's romantic partner. (R. p. 230, lines 11-24). She testified that co-defendant Richardson used to cut her son's hair. He was familiar with her, knew her car at the time, and she testified that she was driving a Goldish Buick

Century in September, 2015. (R. p. 231, line 12 through p. 232, line 16). Ms. President testified that she recognized exhibits as photos of her car and license plate from 2015. (R. p. 232, line 19 through p. 233, line 15). In September of 2015, Ms. President was living in apartment complex on Austin Avenue.

She testified that she recalled the police coming to talk to her in October of 2015 regarding incidents involving the car. (R. p. 233, line 16 through p. 234, line 2). She was taken to an interview room for the interview and was later taken to a computer in order to show her video footage of her vehicle. At the time she confirmed that the car was consistent with her car. (R. p. 235, line 3 through p. 236, line 20). She testified that she told police around that time that Appellant stayed with her on that Friday night and Saturday morning. (R. p. 237, lines 3-14). She also explained that she worked that night, had to be back at work on Saturday by 7am to open the cash registers, and usually drove to work using her gold Buick. (R. p. 237, line 15 through p. 239, line 7). Ms. President testified that she was late to work Saturday because she was waiting on a taxi-cab because her car was not in the parking lot. She was angry because the car was not where she had left it the night before. (R. p. 240, line 4-24). She also testified that Appellant was at her home when she went to bed, but he was gone when she woke up that morning before work. (R. p. 241, lines 4-10).

Ms. President called the cab for work, as the cab was picking her up, she saw her car parked in a different space than where she had left it, and the keys were in the driver seat. (R. 242, line 2 through p. 243, line 9). She testified that the fact her car had been used and returned that morning made her nervous, so she took the cab out of concern despite having found her car. She also expressed that she was nervous about discussing her car with police because getting mixed up with things can have consequences, and she had kids to think about and care for. (R. p.

243, line 2 through p. 244, line 17). As she was beginning to date Appellant, Ms. President had his cell phone number. Following her interview, she provided to police officer's Appellant's phone number that he was using back in September of 2015. (R. p. 244, line 18 through p. 245, line 12).

On cross-examination Ms. President testified that Appellant stayed with her just that one night and that he did not have access to her home. (R. p. 246, lines 13-25). She testified that she never saw Appellant or co-defendant Richardson that morning. (R. p. 247, lines 10-13). She testified on cross-examination that she did all she could to cooperate.

Testimony of Trivell Richardson

Co-defendant Richardson testified that he is incarcerated due to his involvement in the case at issue and is facing one count of murder, and two counts of attempted murder as a result of involvement with Appellant. (R. p. 254, lines 19-25). He confirmed that his nickname is "Vell" and identified Appellant as "Troll". (R. p. 255, lines 18-20; p. 258, lines 6-16). He also testified that he knows Tomeka President, and had on prior occasions ridden in her Buick. (R. p. 257, lines 11-25).

Co-defendant Richardson testified that on the night of September 18, 2015, he went to a party for a friend who had been killed and then went to a strip club. He testified that he left the strip club at about 4:00am, and was then dropped off by a friend. (R. p. 260, line 1 through p. 262, line 14). He then walked toward his house located in Austin Lakes; he testified that Austin Lakes was near Austin Avenue, where Ms. President lived. (R. p. 261, line 18; p. 230, line 1-10).

Before getting home he was approached by Appellant, whom he was friends with. (R. p. 263, lines 1-9). His conversation with Appellant suggested they would go get cigarettes from the store, but co-defendant Richardson testified that they ultimately never made it there. He testified

that Appellant took him to a car to go get cigarettes, and testified that he recognized the car as Ms. President's Buick. (R. p. 262, line 15 through p. 264, line 17). Once in the car Appellant drove past the Kangaroo gas station where co-defendant Richardson anticipated they would stop for cigarettes, and instead went downtown. Co-defendant Richardson testified that he asked where they were going; Appellant told him to "chill" and told him that "it'll be all right." (R. p. 264, line 18 through p. 265, line 3).

Co-defendant Richardson testified that Appellant drove to the corner of Kennedy Street and President Street in downtown; Appellant then parked the car on Nunan Street with co-defendant Richardson still riding as a passenger. (R. p. 266, line 18 through p. 268, line 16). Co-defendant Richardson then explained that Appellant exited the vehicle and instructed him to park the car on Nunan Street. Co-defendant Richardson did as instructed by sliding across to the driver seat. (R. p. 270, line 2 through p. 271, line 4). He testified that once he and Appellant arrived they were met by a third individual whom he knew from growing up, named Andrew Rivers (aka Ace). Co-defendant Richardson testified that he told Ace to get in the car and ride with him. (R. p. 269, line 1 through p. 271, line 2). Co-defendant Richardson did not see where exactly Appellant went, but agreed that he walked back toward "Green", also called Gadsden Green, which was a government housing community in the area. (R. p. 271, line 5-10; p. 88, lines 15-17; 98-99; p. 106, line 24-25). He testified that there was a restaurant "something Kitchen" where he parked, and confirmed that he was the individual depicted in the video flicking a cigarette butt out of the driver's side of the Buick. (R. p. 271, line 21 through p. 272, line 24). Co-defendant Richardson then testified that he and Ace got out of the car and walked toward the Gadsden Green projects. (R. p. 273, line 20 through p. 274, line 11). He testified that he tried to call Appellant and ask where to leave the keys, as he was leaving the car. (R. p. 279,

line 20 through p. 281, line 2). He testified on cross-examination that he got out of the car and wanted to leave the keys for Appellant because he had issues with a couple of people in the area, and did not want to be around that area. (R. p. 304, line 1-11). Soon after his phone call, co-defendant Richardson heard multiple gunshots. He testified that Ace ran away and he ran back to the car. (R. p. 273, line 20 through p. 276, line 5). He tried to start the car using the spare key on the keychain, but it would not start. By the time he switched to the other car key to start the vehicle Appellant had returned and gotten into the vehicle. Mr. Richardson testified that Appellant was in possession of an AR-15 rifle that was still smoking. (R. p. 277, line 18 through p. 278, line 15).

Co-defendant Richardson testified that Appellant instructed him to drive away and back to the Austin Lake apartments. (R. p. 278, line 24 through p. 279, line 9). He testified that he voluntarily went to the police when he learned they wanted to speak with him about the shooting. (R. p. 281, line 16 through p. 282, line 1). At first he claimed he was not at the scene, but confirmed that it was him sitting in the car as demonstrated in the State's photo and video evidence. (R. p. 282, lines 2-23). He identifies himself and Ace in State's exhibit 97. (R. p. 284, lines 8-19). In State's exhibit 106 & 115 he identified Appellant holding the gun that he saw Appellant in possession of soon after hearing the gunshots. (R. p. 285, lines 14-25). In State's exhibit 116, he identifies himself running back to the car after hearing gunshots. (R. p. 286, lines 11-15). Co-defendant Richardson testified that he provided his cell phone number, and confirmed that he had Appellant's number in the phone as well. (R. p. 288, lines 5-25).

Appellant's cross-examination focused on impeachment of his credibility based on prior record and bias to not be truthful given his pending charges. (R. p. 289-292). Co-defendant Richardson confirmed that he did not tell the State the whole truth of events until 2017, a long

time after his arrest. (R. p. 292, lines 1-6). He was also cross-examined on the fact that he initially denied that the photo evidence depicting him on Nunan Street. In his communications to police *before* confessing involvement, co-defendant Richardson told police he was not there; he then stated he was there, but just walking through; he then told police he had alibi witnesses who could attest to his whereabouts. (R. p. 294-301). Mr. Richardson confirmed that he did not inform authorities of the testimony he provided at trial until after being in jail for approximately a year and a half. (R. p. 301, line 22 through p. 302, line 3).

Testimony of Peggy Blake

Appellant called Katrina Brown's neighbor, Peggy Blake, as his sole witness for the defense's case-in-chief. (R. p. 432, lines 1-5). She testified that she was at home and had just laid down to rest when she was disturbed by a noise that she stated "sounded like a bomb." (R. p. 433, line 3-6). She testified that she peaked out between her blinds to see what was causing the commotion. In doing so she testified that she saw a man "about five-eight or eleven. I'm not really good with measurements." (R. p. 433, lines 10-12). She noted that it was kind of dark, but testified that the man was dressed in all black and was wearing a hoodie, and could not see him well enough to identify him because he was hiding. (R. p. 433, lines 12-15; p. 434, lines 8-10). She further testified that she saw this hooded individual approach from the projects and leave after the shooting in a lime green car that drove off slowly, as if "nobody saw anything." (R. p. 434, lines 2-5). Ms. Blake testified that the individual was an African American with dark skin tone, and appeared to be carrying what she described as a "sporty rifle". (R. p. 434, line 11-18).

She called 911 to report the shooting. No written or recorded statement was given of Ms. Blake's eye-witness accounts, as she testified that she "didn't really want to be involved." (R. p. 436, lines 1-17). On cross-examination, Ms. Blake was adamant that she told the 911 operator all

of the information she gathered from what she had witnessed. (R. p. 443, line 1 through p. 445, line 24). However, the 911 phone recording was played, Ms. Blake agreed that it was her voice on the call, and then changed her testimony that she provided the information to “crime scene personnel.” (R. p. 447, line 12 through p. 448, line 12).

ISSUES AS THEY WERE PRESENTED AT TRIAL

The trial court provided a summary of his intended charges to the jury, including the elements relating to murder and attempted murder. (R. p. 469). For murder the trial court informed the parties that he would instruct on the inference of malice from the use of a deadly weapon. (R. p. 469). She then informed the parties that pursuant to the statutory definition provided in § 16-3-29, she would instruct the jury as to the elements of attempted murder. She commented that the inference of malice would likewise be applicable as there had been no mitigation presented during trial. (R. p. 469, line 25 through p. 470, line 3).

The trial court then informed the parties that she would instruct on criminal intent pursuant to *State v. King*. The trial court stated:

In conjunction with that, though, I will likewise instruct that the intent means intending the result which actually occurs not accidentally or involuntarily. Intent may be shown by acts and conduct of the defendant and other circumstances from which you may naturally and reasonably infer intent – for intent. Evidence of the character of the acts, the character of the instrument used, the manner in which it was used, the purpose to be accomplished, and the resulting wounds or injuries may be considered in determining the intent of which the act was committed. Intent may also be inferred when it is demonstrated that the defendant voluntarily and willfully commits an act, an natural tendency of which is to destroy another’s life. I will then instruct a criminal intent is a mental state; a consciousness of wrongdoing. It is up to you determine what the defendant intended to do based on the circumstances shown to have existed. To find the defendant guilty of attempted murder, the

State must prove beyond a reasonable doubt that the defendant had an intent to kill the victim.

The trial court then informed the parties that she would instruct the jury regarding accomplice liability theory that the hand-of-one is the hand-of-all. (R. p. 471, lines 13-14).

After the trial court completed her review of the intended charges, Defense counsel raised objection to accomplice liability, arguing that co-defendant Richardson's testimony demonstrated that he had no involvement and did not know of Appellant's intentions beforehand. Defense counsel also argued that there was "no suggestion that a second party was involved." (R. p. 473, lines 1-2). Next, Defense counsel argued under *Belcher* that the inference of malice would be improper in this case. The Court immediately commented that *Belcher* would have no application to the case at hand, as there had been no demonstration of mitigation. (R. p. 473, lines 11-20). Defense counsel maintained her objection, adding that such a charge is counter to the higher burden required for attempted murder. (R. p. 473, line 21 through p. 474, line 1).

The State responded to the objection by pointing out to the court the hand-of-one is the hand-of-all charge is not married to one particular theory of the case. It is based on an "any evidence" standard, and that a reasonable juror could infer multiple participants from the evidence presented by both the State and the defense. (R. p. 474, lines 6-12). Particularly, Assistant Solicitor Simpson noted that the facts involved three different individuals, Appellant, co-defendant Richardson, and Mr. Rivers. (R. p. 474, lines 6-14). The Solicitor commented that she certainly believed there was substantial evidence to prove Appellant was the shooter, but no one saw Appellant fire the gun. In addition the arguments of the defense attempt to put into question Appellant's participation and introduce alleged evidence of a completely different person, a "hooded person carrying a sporty rifle away from the scene" who fled the scene separate from Appellant. (R. p. 474, line 16 through p. 475, line 10). These matters all make

reasonable the hand-of-one charge. (R. p. 475, lines 14-21). In response to the objection to inferred malice and *Belcher* arguments, the Solicitor had nothing further to add, noting that the Court was correct in its analysis of the charge. (R. p. 475, lines 22-24).

The trial court found that the hand-of-one charge was factually supported based on the case presented to the jury, and specifically noted that jury is under no obligation to believe the testimony of co-defendant Richardson, and that the truth may lie somewhere in the middle that both he and Appellant participated in the crime. (R. p. 476, lines 1-9). The trial court likewise, found that if the defense's theory is believed, then the charge is inapplicable anyway. (R. p. 476, lines 21-23). The trial court likewise reaffirmed its interpretation of *Belcher*, and noted specifically that she was not aware of any case law, including *King*, that renders inferred malice as an inappropriate charge. (R. p. 476, line 24 through p. 477, line 10).

At the conclusion of closing arguments, the trial court delivered its jury charges. Pertinent to the issues raised on appeal, the charges were given as follows:

The defendant is charged with attempted murder. In order to prove this crime the State must prove the defendant attempted to kill another person with malice aforethought either express or implied. Malice is hatred ill will or hostility towards another person. It is the intentional doing of a wrongful act hat just cause or excuse and with an intent to inflict an injury or under circumstances that the law ill infer an evil intent. Malice aforethought does not require that malice exist for any take (sic) your time before the act is committed. That 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 the pervious evil intent and the act. Malice aforethought may be expressed or inferred by as I've explained. These terms express and inferred do not mean different kinds of malice. But merely the manner in which malice may be shown to exist. That is either by direct evidence or by inference from the facts and circumstances which are proven. 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. For example lying in wait for person or any other acts of preparation going to show that the deed

was within the defendant's mind would be expressed malice. Malice may be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon.

If the facts are proven beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction this inference would simply – would simply be an evidentiary fact to be considered by you and the jury along with the other evidence in the case. And you may give it the weight, value, and effect if any you decided it should receive.

Intent means intending the result which actually occurs, not accidentally or involuntarily. Intent may be shown by acts and conduct of the defendant of the circumstances from which you may naturally and reasonable infer intent. Evidence of the character of the act, character of the instrument used, the manner in which it was used, the purpose to be accomplished, and the resulting wounds or injuries may be considered in determining the intent for which the act was committed. Intent may also be inferred when it is demonstrated that the defendant voluntarily and willfully commits an act that natural tendency of which is to destroy another's life.

I further instructed that an attempt is an effort to accomplish a crime which does not succeed. And attempt includes a specific intent to do a particular criminal act along with an act falling short of the act intended. The State must show more than mere preparation and intent. There must be some overt act committed in the effort to commit the crime. Intent means intending the result which actually occurs, not accidentally or involuntarily. Intent may be shown by acts and conduct of the defendant and other circumstances in which you may naturally and reasonable infer intent.

I further instruct, ladies and gentlemen, that criminal intent is a mental state, a consciousness of wrongdoing. It is up to you the jury to determine what the defendant intended to do based on the circumstances shown to have existed. I further instruct you to find the defendant guilty of attempted murder, the State prove beyond a reasonable doubt that the defendant had an intent to kill the alleged victim.

(R. p. 535, line 25 through p. 538, line 22; errors in original). The court then instructed the jury as to the theory of transferred intent. Lastly, the trial court instructed the jury that:

[I]f a crime is committed by two or more people who are acting together and committing a crime, the act of one is the act of all. A

person who joins with another to commit an unlawful act is criminally responsible for everything done by the other person which happens as a probable or natural consequence of the act done in carrying out the common plan and purpose. For example, two people can be guilty of killing another person. When only one of the two had a gun, there is only one bullet, and only of the two fired the shot that caused the death. If two or more people are acting together, are together, acting together, assisting each other and committing the offense, the act of one is the act of all. Or it is sometimes said, the hand of one is the hand of all.

ARGUMENT

- I. The trial court did not err in charging the jury that malice may be inferred from the use of a deadly weapon for the crime of attempted murder, wherein the statutory definition of attempted murder under § 16-3-29 explicitly denotes that the requisite malice aforethought may be established via either express or implied malice, and where no South Carolina court has ruled that such an instruction is in error.**

The trial court did not commit error in instructing the jury as to inferred malice from the use of a deadly weapon for the charge of attempted murder. The trial court abided by the statutory language set forth in § 16-3-29, and it likewise explicitly instructed the jury that attempted murder requires the State to prove specific intent to kill so as to comply with the holding of *State v. King*. There is no basis in which to find error in the court's charge to the jury regarding inferred malice, as it contravened neither statute nor existing precedent.

The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction. *State v. Sweat*, 379 S.C. 367, 375, 665 S.E.2d 645, 650 (Ct. App. 2008), *aff'd as modified*, 386 S.C. 339, 688 S.E.2d 569 (2010) (citing *Durham v. United Cos. Fin. Corp.*, 331 S.C. 600, 604, 503 S.E.2d 465, 468 (1998)). The plain language of the statute cannot be contravened. *State v. Leopard*, 349 S.C. 467, 473, 563 S.E.2d 342, 345 (Ct. App. 2002) (citing *Scholtec v. Estate of Reeves*, 327 S.C. 551, 560, 490 S.E.2d 603, 607 (Ct. App. 1997)). Moreover, our Supreme Court has cited with approval that 'As a general rule where the law governing a case is expressed in a statute, the court in its charge not only may, but should,

use the language of the statute, and may, indeed, be guilty of error if it employs language which constitutes a departure in an essential respect from the statute. However, it is not error to qualify the wording of the statute so as to conform it to construction given by the reviewing courts.’ *Field v. Gregory*, 230 S.C. 39, 47–48, 94 S.E.2d 15, 20 (1956) (citing 53 Am. Jur. Trial, para. 542, at page 433); (See 75A Am. Jur. 2d Trial § 908).

In the case at hand, Appellant was indicted for attempted murder, codified by South Carolina Code of Laws § 16-3-29. The statute reads in pertinent part: “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.” S.C. Code Ann. § 16-3-29 (2010). Of particular import is that the statute explicitly states that the requisite malice aforethought may be satisfied by either express or implied malice.

At the conclusion of evidence the trial court informed the parties that it would charge the jury on the law of attempted murder so as to conform to the established statutory language. (R. p. 469, line 25 through p. 470, line 2). This included a charge on the inference of malice from the use of deadly weapon. (R. p. 470, line 2). The charge for inferred malice from the use of deadly weapon drew objection from the defense. (R. p. 472, line 13 through p. 474, line 1). The defense first argued under *Belcher* that such a charge should not be given.

As was correctly concluded by trial court, *Belcher* has no applicability to the case at hand. In *Belcher*, our Supreme Court took the opportunity to carve out exceptions to the universal instruction that inference of malice may be found from the use of a deadly weapon. *State v. Belcher*, 385 S.C. 597, 600, 685 S.E.2d 802, 804 (2009). Therein the Supreme Court in *Belcher* was confronted with conflicting versions of the facts. The prosecution argued that Belcher obtained a firearm and without justification or excuse fatally shot victim. The defense

theory of the case argued that victim confronted Belcher with a gun; Belcher fled to a nearby truck and retrieved an acquaintance's gun. Belcher argued that he fired and killed victim as victim was approaching him, gun in hand. *Id.* at 804. Under the disputed facts, the *Belcher* court found that the "use of a deadly weapon" implied malice instruction has no place in a murder (or ABWIK) prosecution "where evidence is presented that would reduce, mitigate, excuse, or justify" the killing or assault. *Id.* at 809.

As the trial court noted, there is absolutely no evidence of mitigation that would bring Appellant's case into the realm that *Belcher* sought to make exception for. The evidence at trial was clear, Appellant open fired on an apartment full of people with an AR-15, and discharged fourteen rounds of ammunition. There are no facts which reduce, mitigate, excuse, or justify such an action. As such, an inference of malice from the use of a deadly weapon is not improper under *Belcher*.

In response, Defense counsel maintained her objection and argued alternatively that the inference of malice charge for use of a deadly weapon was inappropriate in light of the "higher burden" associated with attempted murder. Counsel's argument addressed the recent holding that attempted murder constitutes a "specific intent crime". Prior to the charge conference between the parties, a discussion between the court and the parties occurred and the Court acknowledged that attempted murder was a specific intent crime, and should be charged as such as a factual consideration for the jury. (R. p. 430, lines 1-15; p. 470, lines 3-7).

The recognition of attempted murder as a specific intent crime by the court is an acknowledgment of the holding from the South Carolina Supreme Court decision in *State v. King*. *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017), reh'g denied (Mar. 9, 2018). Therein the Court took extensive efforts to investigate the legislative intent behind the codification of

attempted murder, and whether such a crime should constitute a general intent crime, same as murder, or if it should be considered a specific intent crime. *Id.* at 22. Our Court found that the legislative intent demonstrates that attempted murder be considered a specific intent crime; this conclusion was reached in recognition that the addition of language requiring “intent to kill” to the “malice aforethought, either express or implied” language rendered the statute more than just a codification of ABWIK and elevated the level of *mens rea* needed in comparison to that of murder. *Id.* at 25-27. *The conclusive ruling of the Court was that the trial court erred in charging the jury that a specific intent to kill is not an element of attempted murder. Id.* at 27. This was charged here. This is not at issue.

Appellant argues that *State v. King* also establishes South Carolina precedent that a trial court errs in charging inferred malice for the crime of attempted murder. This is a misapplication of the *King* decision, as the ruling did not extend so far as to rule on the question of inferred malice. Respondent acknowledges that the Court referenced other jurisdiction’s discussions of the potential incongruence of a specific intent crime proven via inferred malice. However, the *State v. King* decision did not reach this issue for discussion, did not make an accompanied ruling on the issue, and in fact explicitly stated that it declined to reach the issue, having affirmed the decision of the Court of Appeals on other grounds. *State v. King*, 422 S.C. 47, 64, 810 S.E.2d 18, 27 (2017), reh'g denied (Mar. 9, 2018) (Footnote 5 recognized Appellant’s additional sustaining argument, but declined to reach the argument having already affirmed the decision of the Court of Appeals).

Absent an actual ruling on the question of law, the trial court was correct in concluding that there is no precedent, *King* or otherwise, that would render inferred malice charge in an attempted murder case as an error. As our case law and rules of statutory construction

demonstrate, a court cannot disregard a statutory directive absent a clear precedent to do so. *Field v. Gregory*, 230 S.C. 39, 47–48, 94 S.E.2d 15, 20 (1956) (citing 53 Am. Jur. Trial, para. 542, at page 433); (See 75A Am. Jur. 2d Trial § 908).

In further argument that the trial court was correct to give the inferred malice instructions, South Carolina precedent demonstrates that it is particularly perilous to omit those charges. In *Gibson v. State*, 416 S.C. 260, 264, 786 S.E.2d 121, 123 (2016), our Supreme Court made clear that permissive inference language set forth in *State v. Elmore* is mandatory to avoid reversible error, and only slight deviation from the provided charging language would be tolerated. *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983), overruled on other grounds by *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). In reference to the *Elmore* language, wherein the trial court omitted the permissive inference charge, the defendant was awarded a new trial on the basis of counsel's failure to object during trial. *Id.*

In the case at hand, the trial court explicitly instructed the jury that finding guilt for attempted murder requires specific intent to kill; in doing so it satisfied *State v. King*. (R. p. 538, lines 4-22). The trial court explicitly charged inferred malice; in doing so it satisfied the clear statutory language set forth in § 16-3-29. (R. p. 536, line 23 through p. 537, line 16). Moreover, in so charging the jury, the trial court satisfied both *Elmore* and *Gibson*. To hold that the trial court erred to instruct the jury as it did would be to hold an impossible standard where the judge must disregard precedent and statutory case law on the subject. As such no error exists, and Appellant's convictions should be affirmed.

II. If the trial court did err in instructing the jury as to inferred malice from the use of a deadly weapon, such error was harmless given the fact that the circumstances of this case, including Appellant's use of a deadly weapon, all demonstrate express malice without the need for inference by the jury.

If the jury charge for inferred malice is to be found in error, *which Respondent argues would be improper*, the circumstances of this case demonstrate that such error is harmless. The circumstances of the case present substantial evidence of express malice, such that the jury need not rely upon inferred malice to satisfy the elements of attempted murder. Moreover, the nature of Appellant's use of a deadly weapon in this case specifically constitutes an example of express malice. There is no need for inference. Any reference to inferred malice from the use of a deadly weapon is harmless in light of the undisputed evidence of express malice demonstrated in the State's case-in-chief.

Express malice is commonly said to exist "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." A common example is where a defendant lies in wait for his victim. This was the explanation provided by the trial court in Appellant's case. Moreover, the use of a deadly weapon is not strictly a basis for only inferred malice. The circumstances in which a deadly weapon is utilized can easily constitute express malice. Just as "lying in wait" outwardly demonstrates evil intent, the type of weapon, the number of times it is fired, the manner in which it is fired, and the circumstances existing before being fired all can constitute express malice, and in this case all of these factors do constitute express malice.

"Errors, including erroneous jury instructions, are subject to harmless error analysis." *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009). Specific to the issue at hand, our Supreme Court has also ruled that in circumstances involving improper "presumption" of malice instruction, such erroneous instruction must be weighed against the other evidence of malice to determine whether prejudice resulted from the erroneous charge. *Gibson v. State*, 416 S.C. 260, 265, 786 S.E.2d 121, 124 (2016).

The evidence presented in the State's case-in-chief provided numerous examples of express malice of Appellant. The evidence presented at trial demonstrated the following:

- Without provocation and without warning, Appellant physically struck the intended victim, Katrina Brown, in the head while standing outside her home on the evening prior to the murder. Although not verbal, this action demonstrates a recent *expression of ill-will and hostility* against the intended victim;
- Appellant took his love interest's vehicle without her knowledge at approximately 4am and drove to downtown Charleston to commit the murder. This is a clear demonstration of preparation and intent to commit the murder, as the facts show that the shooting was the only purpose for driving into downtown Charleston on the morning of September 19, 2015;
- Appellant convinced his friend Trivell Richardson to accompany him into downtown to watch the car and serve as a getaway driver. This action also demonstrates clear preparation for the murder;
- Appellant acquired in advance an AR-15 assault rifle to accomplish the murder. This demonstrates a clear preparation for the murder, as well as the intent to commit murder, given the nature of the gun itself. The nature of a high caliber assault rifle demonstrates an intent to kill more so than other types of firearms.
- Appellant instructed co-defendant Richardson to park the car on Nunan Street, while he then consciously walked with his assault rifle to the home of Katrina Brown. This further demonstrates preparation for the intended murder, as it allows him a getaway vehicle that would not be seen by any of the victims in the apartment, or by any neighbors of the victims.

- Appellant gave no warning of his anger, gave no confrontation, and gave no warning of his presence prior to shooting, effectively committing an ambush.
- Appellant chose to fire an assault rifle from a window into the crowded home of Katrina Brown. The nature of this crime speaks volumes as to the express malice of Appellant. Appellant arrived in the early morning hours of a Saturday morning, gave no indication of his presence, and then fired his assault rifle into a crowded apartment of the women he physically punched a day earlier.
- Appellant did not fire once or twice, but instead fired fourteen rounds of ammunition into the apartment. Again, the nature of the shooting itself demonstrates express malice. Shooting fourteen rounds of ammunition into a closed space with numerous occupants can demonstrate no other intent but the intent to kill. It is the very definition of express malice.
- Appellant then ran away from the scene, without concern for the wellbeing of the apartment's occupants. Petitioner's fleeing the scene without concern for the wellbeing of the numerous people in the home he just fired into demonstrates an intent to kill;
- Appellant jumped back into the car he stole from his girlfriend and instructed co-defendant Richardson to drive back to the area where he that he stolen the car. This demonstrates the last portion of planning to perpetuate the murder. Petitioner had a getaway car and getaway driver located away from the scene of the crime ready for his return in order to flee the area.

Express malice was satisfied the moment Appellant drove himself across town to Katrina Brown's home with an AR-15. Our Supreme Court has in the past upheld with approval instruction as to express malice, wherein the trial court explained: "If the lives of two men had

been threatened, each by the other, and one man went where he knew another was going to be, and he went there with the intent and purpose in his heart to do harm or injury to the other, then there would be express malice in his very act of going there. . .” *State v. Jones*, 113 S.C. 134, 101 S.E. 647, 647 (1919). There is little distinction here, as a prior physical confrontation existed between Katrina Brown and Appellant, and Appellant went to where he knew Katrina would be while armed with an AR-15. Moreover, our Supreme Court has reviewed favorably the recognition that shooting at an individual on the basis of a grudge or hatred, and doing so in the form of an ambush are both demonstrations of express malice. “‘Malice’ is a technical term. Ordinarily we use the term as if it was a grudge or hatred. If there was any grudge or hatred, and the killing is upon that grudge or hatred, that is express malice; and that express malice is evidenced by certain deliberation,-by such deliberation as lying in wait and shooting from ambush. That would be a very great evidence of express malice.” *State v. McIntosh*, 40 S.C. 349, 18 S.E. 1033, 1034, 1039 (1894), overruled on other grounds by *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009) (noting that the court could find no error in the instruction of the trial court for the charge of murder).

There is little distinction here, and frankly the actions of Appellant are far more egregious expressions of malice. Every aspect of planning and execution of this crime demonstrates that this crime was precisely that: an execution. When an individual fires a high powered rifle into a crowded apartment fourteen times there is only one reasonable intent, and that is the intent to kill. As such, the charge of inferred malice from use of a deadly weapon did not prejudice Appellant, as the facts presented to the jury satisfied the express malice requirement, many times over. Appellant’s conviction should therefore be affirmed.

III. The trial court did not err in instructing the jury as to the hand-of-one is the hand-of-all theory of accomplice liability because the facts of the case demonstrate that that both Appellant and co-defendant Richardson were involved in the crime, and the Appellant's case-in-chief introduced evidence of a different gunman, dressed in different clothing, leaving in a different vehicle than that demonstrated in the State's case-in-chief, such that multiple participants was a reasonable conclusion of the jury.

The trial court did not err in giving a "hand-of-one is the hand-of-all" instruction the jury in light of the evidence presented at trial. As there was evidence to support the possibility that two individuals participated in the shooting, an accomplice liability charge was proper.

A jury charge which is substantially correct and covers the law does not require reversal." *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (citing *State v. Foust*, 325 S.C. 12, 479 S.E.2d 50 (1996)). 'The law to be charged must be determined from the evidence presented at trial.' *Brandt*, at 549, 713 S.E.2d at 603 (2011) (citing *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001)). "If there is any evidence to support a charge, the trial court should grant the request." *Id.* (citing *State v. Williams*, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct. App. 2005)).

Appellant's argument suggests that while the hand-of-one charge to the jury was technically accurate, it should not have been given due to lack of supporting evidence presented at trial. The testimony and evidence at trial more than satisfied the "any evidence" standard necessary to merit instruction on accomplice liability. As was argued by the Assistant Solicitor at trial, the standard is satisfied, both by evidence presented during the State's case-in-chief, as well as by the defense's case-in-chief.

The State's theory of the case demonstrated that three separate individuals were present in the gold Buick leading up to the murder: Appellant, co-defendant Richardson, and Mr. Rivers. The State argued that co-defendant Richardson ultimately stayed with the car while

Appellant took the rifle and committed the murder, and that co-defendant Richardson then served as a getaway driver. While this is the State's theory of the case, the jury is not bound to believe the testimony in full and could conclude that there is a possibility that identities and roles within the crime are reversed. Moreover, as there is no video or eye-witness to the actual shooting, the jury should be informed that if two or more people are acting together toward committing a crime, both are criminally liable.

The bottom line is that the evidence demonstrates, at a minimum, that two different individuals arrived together in a gold Buick, and both individuals knew the Buick did not belong to either of them. One individual stays with the car while the other walks down the road and around the corner carrying a rifle. Soon after and briefly before the shooting, a phone call is shared between the two phones of these individuals. The individual who had stayed with the car then gets out of the car and walks in the same direction that the man carrying the rifle had headed. When gunshots are heard, the man who had initially stayed in the car runs back to the car, cranks it up, and drives away, but only after the second individual returns carrying the rifle. If the jury does not fully believe co-defendant Richardson's explanation for his involvement, the facts clearly demonstrate two individuals acting in concert together in the presence of an AR-15, at approximately 6:30am. Such is sufficient to inform the jury that criminal liability of one, is the criminal liability of all when acting together.

Moreover, the defense's case-in-chief makes the charge all the more necessary, as it introduced the possibility of a second and separate individual, carrying a rifle, leaving the scene of the shooting. The State's theory demonstrated the actions of Appellant and co-defendant Richardson. The defense's sole witness, Peggy Blake, testified that she lived in view of Katrina Brown's home and was at home when the shooting occurred. She testified that she saw from her

window a “hooded man” carrying a “sporty rifle” leaving the scene of the shooting, and getting into a slow moving “lime green” car to getaway. Outside of Ms. Blake’s own testimony, there was nothing to support her version of events, and her testimony certainly does not match the participants and details set forth by the State which demonstrated Appellant’s guilt for the crime.

However, her testimony does put into the mind of the jurors the possibility that there was *another* individual, armed with a rifle, potentially involved in the shooting. While the surveillance video did not capture a “lime green” getaway car, it is possible for the jury to conclude that both the State’s theory of the case is accurate, so as to put Appellant at the scene with an AR-15 rifle, *and* that the defense’s theory of the case is also accurate, such that a “hooded man” with a sporty rifle was also at the scene of the shooting. It is not implausible that the jury might believe the unidentified hooded man was an unknown accomplice of Appellant, either backing him up or otherwise participating in the shooting. As such, the hand of one instruction would again be necessitated and proper under the low “any evidence” standard.

These are the two arguments made by the Assistant Solicitor Simpson during the charge conference in response to defense counsel’s objection. (R. p. 474, line 6 through p. 475, line 21). Likewise, the trial court agreed and found that the charge was factually supported. (R. p. 476, lines 1-23). In light of the evidence from both parties presented at trial, the “any evidence” standard was more than satisfied regarding accomplice liability. Additionally, if the jury were to not accept the theory of the case from the State, and believed the defense’s theory, the charge would ultimately be inapplicable, and arguably harmless. As “erroneous jury instructions, are subject to harmless error analysis,” the same would be applicable in in the instant case if the reasonable doubt still existed as to the State proving identity. *State v. Belcher*, 385 S.C. 597,

611, 685 S.E.2d 802, 809 (2009). The trial court set forth the same conclusion in her final discussion of the charge conference. (R. p. 476, lines 21-23).

There was no error in the trial court instructing the jury as to hand-of-one is the hand-of-all. Appellant's convictions should be affirmed.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgments, convictions, and sentences of the trial court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

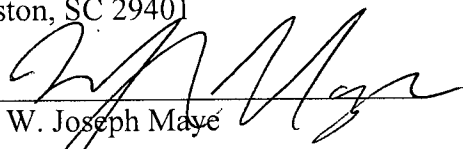
W. JEFFREY YOUNG
Chief Deputy Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

W. JOSEPH MAYE
Assistant Attorney General

SCARLETT A. WILSON
Ninth Judicial Circuit Solicitor
101 Meeting St., Ste. 400
Charleston, SC 29401

BY: 
W. Joseph Maye

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

August 16, 2019.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable Deadra L. Jefferson, Circuit Court Judge

RECEIVED

AUG 16 2019

SC Court of Appeals

THE STATE

RESPONDENT,

V.

MONTRELLE LAMONT CAMPBELL,

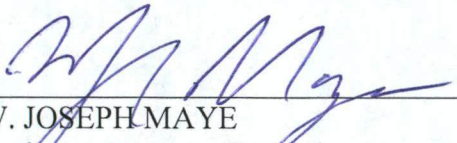
APPELLANT,

APPELLATE CASE NO. 2018-000115

CERTIFICATE OF COMPLIANCE

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

This 16th day of August, 2019.



W. JOSEPH MAYE
Assistant Attorney General

ATTORNEY FOR RESPONDENT