STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of General Sessions

Robert E. Hood, Circuit Court Judge

Appellate Case No. 2018-000341

THE STATE ..... RESPONDENT.

V.

SHELBY HARPER TAYLOR ..... APPELLANT.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err by instructing the jury that malice may be inferred by a variety of different means, where appellant was charged with attempted murder (which requires the State to prove beyond a reasonable doubt a specific intent to kill with malice aforethought) and where the State argued malice could be inferred by the mere fact that appellant initially denied committing the crime?

STATEMENT OF THE CASE

Appellant, Shelby Harper Taylor, was arrested and indicted on charges of attempted murder after she confessed to police that she gave birth alone in the bathroom of the apartment she shared with her husband and sixteen-month-old daughter (hereafter "Baby S") and then placed the newborn girl in a dumpster at her apartment complex in Myrtle Beach in the early morning hours of April 9, 2015. The infant – later named "Baby T" – was recovered by two teenage boys who were taking out their trash. Baby T suffered no injuries.[1]

The trial began on February 5, 2018, before the Honorable Robert E. Hood. Greg McCollum and Dean Mureddu represented Shelby; Assistant Solicitors Scott Hixon and Cara Walker represented the State. In the three years between her arrest and trial, Shelby remained out on bond and lived with her parents without incident. She worked, attended counseling sessions, and checked in with her bondsman once a week. R. p.47, ll.1-4; p.288, ll.12-21. The trial judge allowed Shelby to remain on bond and return home each evening during trial and repeatedly lauded her exemplary behavior. R. p.129, ll.12-14; p.136, ll.23-25; p.137, ll.12-18; p.198, ll.15-19; p.332,

[1]She and her sister were placed in the custody of Shelby's mother-in-law. They were approximately three and four years old at the time of trial and neither has had contact with Shelby since the day of her arrest. R. p.287, l.16 – p.288, l.2.

ll.5-23; p.467, ll.19-22. At the conclusion of the trial, the jury returned a verdict of attempted murder. On February 15, 2018, the trial judge sentenced Shelby to twenty-five years imprisonment without the possibility parole. The notice of appeal was filed on February 23, 2018.

ARGUMENT

I. THE TRIAL JUDGE ERRED BY INSTRUCTING THE JURY ON INFERRED MALICE.

A. Relevant Facts.

On October 25, 2017, the South Carolina Supreme Court held, in *State v. King*, that "a specific intent to kill is an element of attempted murder as codified in section 16-3-29" of the South Carolina Code.[2] 422 S.C. 47, 56, 810 S.E.2d 18, 22 (2017). The court explained:

> 'The highest possible mental state for criminal attempt, specific intent, is necessary because criminal attempt focuses on the dangerousness of the actor, not the act.' Thus, '[a]s the crime is commonly regarded as a specific intent crime and as it is logically impossible to attempt an unintended result, prosecutions are generally not maintainable for attempts to commit general intent crimes, such as criminal recklessness, attempted felony murder, or attempted manslaughter.'

Id. at 56, 810 S.E.2d at 22-23 (quoting 22 C.J.S. Criminal Law: Substantive Principles § 156, at 221-22 (2016)). In a footnote, the Court noted that although it was not necessary to address King's additional sustaining ground, the Court "would respectfully suggest to the General Assembly to re-evaluate the language following 'malice aforethought' as the inclusion of the word 'implied' in section 16-3-29 is arguably inconsistent with a specific-intent crime." *Id.* at 64, n.5, 810 S.E.2d at 27, n.5.

At Shelby's trial, which occurred less than four months after *King*, the basic facts were largely undisputed except for the question of her intent. Shelby met her husband, Patrick Taylor,

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[2] Section 16-3-29 provides, "[a] person who, with intent to kill another person with malice aforethought, either express or implied, commits the offense of attempted murder."

at age nineteen and shortly thereafter became pregnant. R. p.307, ll.7-22. She became estranged from her family during her pregnancy. R. p.354, ll.18-20. Shelby and Patrick married at a small ceremony to which her parents were not invited. R. p.270, ll.7-9; p.354, ll.21-25. At a routine checkup near the end of her pregnancy, Shelby's doctor decided to induce labor because of her high blood pressure, broke her water, and administered an epidural. Court's Exhibit #1. Baby S was born without complication in December of 2013. R. p.355, ll.6-7. After the baby's birth, Shelby and her family reconciled. R. p.355, ll.12-16. Six months later, Shelby became pregnant again. She did not disclose her second pregnancy to her family and friends, nor did she obtain prenatal care. R. p.272, ll.11-16. Around 5:00 a.m. on April 9, 2015, Shelby gave birth to Baby T at home in her bathroom. R. p.280, ll.4-14. She placed the baby in a trash bag and put the bag in the dumpster outside her apartment complex, where Baby T was later discovered. R. p.281, ll.15-16. Inside the bag, the police found a receipt from a local café dated the previous day. R. p.190, ll.18-21. They used the receipt to obtain photographs of Shelby with Baby S buying food at the restaurant counter and published them via various media sources. R. p.203, l.15 – p.204, l.7; p.205, ll.15-18. Shelby's family saw her photograph on the news and, later that evening, Shelby arrived with her parents at the south precinct of the Horry County police station. R. p.206, l.3 – p.207, l.5. Patrick Taylor arrived as well. R. p.207, ll.6-9.

In an initial interview with police investigators, Shelby stated that she did not know anything about the crime and denied she had recently been pregnant. State's Exhibit #3. She consented to give a buccal swab for DNA testing, which the officers collected. *Id.* She also agreed to go to a hospital for a physical exam. *Id.* The police then spoke separately with Patrick for approximately fifteen minutes. Court's Exhibit #1. Patrick told police he believed "she did it" and described Shelby as "not smart." *Id.* He stated "she's one of those ones where you wonder

how she made it to where she is. She is not clever. She gets taken advantage of because she's not intelligent." *Id.* Patrick denied knowing Shelby was pregnant and offered to give police permission to search their apartment. *Id.* The officers then recruited Patrick to assist them in their efforts to "get to the bottom of this." *Id.* They told Patrick they wanted to question Shelby while Patrick was present and gave him instructions about how to talk to her. *Id.* Shelby returned to the interview room, admitted that she put her newborn baby in the trash, and repeatedly expressed remorse. *Id.* The officers then administered *Miranda* warnings, asked Patrick to leave, and questioned Shelby further. Shelby stated that she "got scared" and "freaked out" and "didn't know what to do." *Id.* She explained that she did not initially know she was in labor because she never had labor pains with Baby S, so she did not know what kind of pain it was. *Id.* She cried and told the officers, "I'm so sorry," "I feel horrible," "I feel so bad," "I'm so sorry." *Id.* Shelby was then arrested and transported to the hospital where she was treated for retained blood clots within the womb, a tear and hemorrhaging. R. p.233, ll.12-21.

At trial, Shelby testified that Patrick was abusive and controlling. R. p.271, ll.9-23. She stated that they had financial difficulties and he did not want them to have another baby at that time. R. p.273, ll.17-21. On the morning of Baby T's birth, Shelby testified she had pains in her stomach, but she did not know she was in labor and she did not wake Patrick up to tell him because she was scared of him. R. p.278, ll.1-17. She acknowledged that she told police Patrick was a good husband and that she denied being the victim of abuse when questioned by staff at the hospital following her arrest.[3] R. p.304, l.9 – p.305, l.11. Shelby stated that she did so "because I was

[3] Shelby was interviewed briefly by a female social worker at the hospital who told Shelby that the information she shared with her would not be confidential. R. p.241, ll.17-22. Shelby then spoke to a male psychologist, Dr. Adedapo Oduwole, and denied any history of abuse, mental illness or physical illness.

protecting my husband." R. p.305, l.11. Shelby's mother, Angie Harper, testified that she "wasn't pleased with the way Patrick treated [Shelby]," R. p.308, ll.16-17, but that Shelby "loved him so much that she just excused, you know, the way he acted." R. p.311, l.24 – p.312, l.1. She stated that Shelby was a good mother to Baby S, and she was never abusive or neglectful to her child.[4] R. p.320, ll.4-16.

Dr. Robert McCarthy diagnosed Shelby with Transcient Peripartum Psychosis, which stems from a major depression "that significantly intensifies during the month prior to delivery." R. p. 397, ll.5-7. Dr. McCarthy explained that major depression combined with hormonal issues during pregnancy can sometimes produce psychosis involving "chaos and confusion on a cognitive level" such that a woman suffering from the condition becomes "disoriented," "illogical," "irrational," and "can engage in behaviors that [she] ordinarily wouldn't do." R. p.400, ll.16-20. Throughout her life, Shelby "suffered from what's called persistent depressive disorder. . . . [S]he's had a low-grade depression most of her life . . . that then exacerbated into a major depression which predisposed her to being overwhelmed during this delivery." R. p.430, ll.4-16. Dr. McCarthy described a variety of risk factors that can contribute to this condition, including: unplanned pregnancy; perceived negative pressure regarding the pregnancy; feelings of isolation and overwhelming responsibility; financial difficulties; abuse; fear of rejection or abandonment; and, a history of depression. R. p.404, l.6 – p.408, l.16. Dr. McCarthy opined that all of these risk factors were present in Shelby's case. R. p.408, ll.17-18.

Solicitor Hixson disputed Shelby's claims of abuse and argued they were not credible because Shelby never called the police during her relationship with Patrick and she denied abuse

[4] The parties stipulated that DNA results established Shelby and Patrick Taylor were the parents of Baby T. R. p.223, l.20 – p.225, l.2.

on the day of her arrest. R. p.299, ll.1-11. Hixson conceded Shelby was not properly *Mirandized* and did not seek to introduce her second, incriminating statement to police. R. p.67, ll.17-22. Instead, the State offered only Shelby's initial recorded interview in which she denied knowledge of the crime. Hixson asserted that his purpose in offering Shelby's initial statement was related to "an absolute denial and the existence of malice" because "overt attempts to cover up a crime can be circumstantial evidence of malice." R. p.94, ll.22-25. He reiterated this argument at the charge conference, during which he requested an inferred malice charge and stated "malice may be inferred from efforts by the defendant to lie to police to cover up the crime." R. p.462, l.25 – p.463, ll.2. McCollum objected to an inferred malice charge, R. p.459, ll.14-16, and argued that the South Carolina Supreme Court's recent decision in *King* "repudiate[d] implied malice" and held "[o]ne cannot be guilty of attempted murder by implied malice because implied malice does not encompass the essential specific intent to kill." R. p.256, l.12, *see also*, *King*, 422 S.C. at 57, 810 S.E.2d at 23 (quoting *Keys v. State*, 766 P.2d 270, 273 (Nev. 1988)). The defense objected again the following day, immediately before the trial court instructed the jury. R. p.476, l.16 – p.477, l.6. The trial judge noted the objection and stated he had taken *King* into consideration, but he nonetheless planned to give an inferred malice charge. R. p.477, l.7 – p.478, l.15.

Hixson then argued to the jury that Shelby concealed her pregnancy for nine months and never sought prenatal care because she planned to kill her baby. R. p.485, ll.8-17. He asked jurors to listen again to Shelby's initial recorded interview with police and to pay "particular attention" to it because her denials were "intentional deceit" from which the jury could conclude that the State had proven malice beyond a reasonable doubt. He argued, "[y]ou can infer malice by an effort to cover up a crime. You can infer an intentional wrongful act by saying I didn't commit the wrongful act in the face of all kinds of evidence that you did." R. p.486, ll.7-20. He further

told the jury that "[m]alice may be inferred from conduct showing a total disregard for human life. You can infer an ill will if you have total disregard for human life." R. p.501, ll.6-8.

Defense counsel Mureddu told the jury that all of the risk factors for Transient Peripartum Psychosis were present in Shelby's life. R. p.494, ll.17-23. He argued "the element of malice is not present in this case," and stated there was no evidence that Shelby had a "grand plan" from which the jury could conclude that malice was established. R. p.495, l.23 – p.496, l.9. Mureddu described Shelby's thinking as "denial," "delusional," and "childlike reasoning" – "if I just ignore it, it'll go away. It's not some grand plan and it's not evidence of malice." R. p.496, ll.14-16.

But the trial judge instructed the jury that evidence of malice could, indeed, be inferred in a variety of ways. He explained "in order to establish criminal liability, criminal intent is required," but that "criminal intent may be inferred from the circumstances shown to have existed. . . . 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." R. p.509, l.11 – p.510, l.4. Next, the trial judge explained that Shelby was charged with attempted murder, which he said required the State to prove that she "attempted to kill another person with malice aforethought either express or implied." R. p.510, ll.8-12. He stated "malice aforethought may be expressed or inferred." R. p.510, ll.23-24. He repeated that malice could be shown by "inference" and added:

> 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 simply be 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.

R. p.511, ll.2-12. Finally, the trial judge explained that attempted murder requires a specific intent to kill, but he instructed that a specific intent may be inferred as well:

> 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.

R. p.511, ll.17-22.

The jury deliberated for approximately one hour before returning a guilty verdict of attempted murder. At a subsequent sentencing hearing, the trial judge was informed by DSS that Shelby's daughter was "healthy, functioning and doing all the things that three-year-olds do, playing and laughing, starting to speak and have conversations and communication and all that good stuff." R. p.569, ll.11-15. Before passing sentence, the court noted that Shelby had been convicted of a "no-parole" offense. R. p.569, l.22. He also noted that she has "no prior criminal history," "absolutely no history of violence," and "no history with the Department of Social Service. . . ." R. p.570, ll.9-17. In the court's view, "none of that is present in this case in any way, shape, or form." R. p.570, ll.16-17. The trial judge nevertheless sentenced Shelby to twenty-five years in prison and ordered her to have no contact with her children.

B. DISCUSSION.

"Criminal liability normally is based upon the concurrence of two factors: the defendant's criminal intent and the actual, physical act constituting the offense." *State v. Fennell*, 340 S.C. 266, 271, 531 S.E.2d 512, 515 (2000). "A defendant may not be convicted of a criminal offense unless the state proves beyond a reasonable doubt that he acted with the criminal intent, or mental state, required for that particular offense." *Id.*

In 2010, the South Carolina General Assembly created the crime of attempted murder. Lawmakers defined the offense as: "A person who, *with intent to kill*, attempts to kill another person with malice aforethought, either express or implied, commits the offense of attempted

murder." S.C. Code Ann. § 16-3-29 (emphasis added). In its first, and only, case interpreting the statutory offense, the South Carolina Supreme Court held the Legislature intended to require the State to prove the defendant had a specific intent to commit murder as an element of attempted murder. *State v. King*, 422 S.C. 47, 55, 810 S.E.2d 18, 22 (2017).

In *King*, the Court addressed the "implications of the phrase 'malice aforethought, either express or implied'" as used in the statute. *Id.* at 56, 810 S.E.2d at 22. The Court explained that "'[a]ttempted murder can be committed only when the accused's acts are accompanied by express malice, malice in fact. One cannot attempt to kill another with implied malice because there is no such criminal offense as an attempt to achieve an unintended result.'" *Id.* at 57, 810 S.E.2d at 23 (quoting *Keys v. State*, 766 P.2d 270, 273 (1988)). Further, the Court explained that "one cannot . . . attempt to have the general malignant recklessness contemplated by the legal concept, 'implied malice.'" *Id.* (internal quotation omitted). In short, "[o]ne cannot be guilty of attempted murder by implied malice because implied malice does not encompass the essential specific intent to kill." *Id.* However, "[a]n attempt to kill with express malice is completely consistent with the specific intent requirement of the crime of attempt." *Id.* "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 express malice, namely, with the deliberate intention unlawfully to kill." *Id.* (internal quotation omitted).

The Court explained that assault and battery with intent to kill (ABWIK), which was supplanted by the codification of attempted murder, required "the same general intent as murder." *Id.* at 59, 810 S.E.2d at 24. After recounting prior law interpreting ABWIK, the Court noted that South Carolina's appellate courts had interpreted malice aforethought and general intent to kill, as required under ABWIK, as the equivalent of each other. *Id.* at 60-61, 810 S.E.2d at 25. In sharp contrast, statutory attempted murder requires "intent to kill" *and* "malice aforethought," which the

Court interpreted to mean the Legislature intended to "elevate[] the required mental state above a general-intent crime." *Id.* at 61, 810 S.E.2d at 25.

In *State v. Shands*, --- S.E.2d ----, 2018 WL 2944992 (Ct. App. 2018), this Court held that the trial judge erred by giving an inferred malice instruction where the defendant prevented his wife from leaving the house by pulling her back inside by her hair and then stabbing her multiple times with a barbecue fork. Relying on *King*, this Court concluded that "the State needed to prove Shands acted with express malice and the specific intent to kill in order to be found guilty of attempted murder. Therefore, we question whether an implied malice instruction is proper in any attempted murder trial." *Id.* at *10 (internal citation omitted); *see also*, *id.* at *9 (stating the majority in *King* "indicated its belief in a footnote that malice can never be implied in an attempted murder case) (citing *King*, 422 S.C. at 64 n.5, 810 S.E.2d at 27 n.5)). This Court stated that "[d]espite the number of times Shands stabbed [the victim] and the nature of the attack, a jury could have found Shands only had a general intent to kill instead of the higher *mens rea* of specific intent to kill." *Id.* at *10. A specific intent "means that the defendant consciously intended the completion of the acts comprising the [completed] offense." *State v. Nesbitt*, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001) (quotation omitted)). By contrast, "'[g]eneral intent' is defined as 'the state of mind required for the commission of certain common law crimes not requiring specific intent' and it 'usually takes the form of recklessness . . . or negligence.'" *State v. Kinard*, 373 S.C. 500, 504, 646 S.E.2d 168, 169 (Ct. App. 2007) (quoting BLACK'S LAW DICTIONARY (7th ed. 1999)). This Court held that the instruction error required reversal of Shands's conviction for attempted murder. *Shands*, 2018 WL 2944992 at *10.

As in *King* and *Shands*, the instruction error in this case was not harmless, and respondent cannot meet its burden of demonstrating "'beyond a reasonable doubt that the error complained of

did not contribute to the verdict obtained.'" *Arnold v. State/Plath v. State*, 309 S.C. 157, 165, 420 S.E.2d 834, 838 (1992), (quoting *Chapman v. California*, 386 U.S. 18 (1967)); *see also*, *Yates v. Evatt*, 500 U.S. 391, 403 (1991) (holding the court must "find that error unimportant in relation to everything else the jury considered on the issue in question as revealed in the record"). The only disputed issue at trial was whether Shelby Taylor possessed the requisite *mens rea* to have committed attempted murder. Despite the South Carolina Supreme Court's instructions in *King* that "[o]ne cannot attempt to kill another with implied malice" nor can one "attempt to have the general malignant recklessness contemplated by the legal concept, 'implied malice,'" the trial judge in this case repeatedly instructed the jury that both malice *and* a specific intent to kill can be inferred. Specifically, the trial judge instructed the jury that criminal intent could be inferred: "from the circumstances shown to have existed;" by "the acts of the parties and all the facts and circumstances of the case;" from "conduct that shows a total disregard for human life;" by "the acts and conduct of the defendant from which you may naturally and reasonably infer intent;" or "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." R. p.509-511. Although the trial judge did, on one occasion, note that "a specific intent to kill is an element of attempted murder," he gave the jury no definition of specific intent or any further instructions on this element apart from his references to the ways in which it could be inferred. R. p.511, ll.13-14.

Solicitor Hixson likewise told the jury "malice may be inferred from conduct showing a total disregard for human life. You can infer an ill will if you have total disregard for human life." R. p.501, ll.6-8. Hixson went so far as to argue that malice could be inferred from the mere fact that Shelby denied knowledge of the crime in her initial interview with police. He asked the jury to pay "particular attention" to Shelby's initial statement because "you can infer malice by an effort

to cover up a crime. You can infer an intentional wrongful act by saying I didn't commit the wrongful act in the face of all kinds of evidence that you did."[5] R. p.486, ll.17-20.

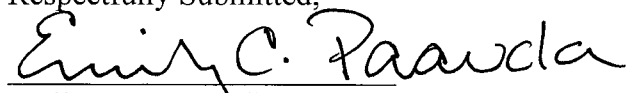
Because of the trial judge's improper inferred malice instructions, the State was not required to prove every element of the charged offense beyond a reasonable doubt. On the contrary, the jury could have believed that Shelby's state of mind constituted only "recklessness," "negligence" or a "general ill will" and found that sufficient for a conviction of attempted murder. Indeed, according to Solicitor Hixson, the mere fact that Shelby did not confess immediately upon initial police questioning was enough to prove malice. This error contravenes the instructions set forth in *King* (and reiterated in *Shands*) that the State must prove a defendant "acted with express malice *and* the specific intent to kill in order to be found guilty of attempted murder." *Shands*, 2018 WL 2944992 at *10 (citing *King*, 422 S.C. at 54-64, 810 S.E.2d at 22-27)). It is not possible to conclude that the trial judge's improper inferred malice instruction was harmless beyond a reasonable doubt, and the conviction must be reversed.

[5] This argument was particularly unfair under the circumstances, given that the solicitor offered only Shelby's initial statement to police but did not tell the jury that Shelby confessed to the crime and expressed remorse approximately fifteen minutes later under questioning which the State conceded was in violation of her *Miranda* rights.

CONCLUSION

For all of the reasons stated above, this Court should reverse Shelby Taylor's conviction for attempted murder based on the trial judge's erroneous instructions regarding inferred malice and remand for a new trial.

Respectfully Submitted,



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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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