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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas
The Honorable Walton J. McLeod, IV, PCR Judge

Appellate Case No. 2019–001249

BILAL S. HAYNESWORTH,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF ISSUE ON CERTIORARI

In this trial for attempted murder, did the PCR judge err in refusing to find trial counsel ineffective for failing to object to the implied malice charge when the trial judge found there was evidence to support the lesser included offense of assault and battery first degree and the trial judge instructed the jury on the law of assault and battery first degree?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON CERTIORARI

The PCR court correctly concluded Petitioner was not prejudiced by trial counsel's failure to object to the trial court's instruction that malice may be inferred from the use of a deadly weapon because the jury was required to find specific intent to kill—i.e. express malice—in order to convict him of attempted murder and where nothing precluded the jury from convicting Petitioner of the lesser-included offense of first-degree assault and battery even if they inferred malice from the use of a deadly weapon.

STATEMENT OF THE CASE

On January 3, 2013, Bilal S. Haynesworth (Petitioner) and his brother, Lywone Capers, fired into JayQuan Bell's house during a drive-by shooting as retribution for a series of disrespectful communications between Bell and Petitioner. Fortunately, no one was hurt.

In August 2013, the Lexington County Grand Jury indicted Petitioner for attempted murder, possession of a weapon during the commission of a violent crime, and conspiracy. (App. 407–12). On May 19, 2014, Petitioner proceeded to a jury trial before the Honorable Thomas A. Russo. Assistant Public Defender David M. Mauldin (Counsel) represented Petitioner. Assistant Solicitors Kate W. Usry and Gil Bell of the Eleventh Circuit Solicitor's Office prosecuted the case.

A. Summary of Evidence Adduced at Trial

On January 3, 2013, Clara Williams, Bell's grandmother, picked up Bell from his aunt's house to enroll at Swansea High School. Williams drove him to school in her Ford Focus. They were unable to complete the enrollment without Bell's mother, so they headed back to the car. Williams testified that two young men and a woman approximately in her thirties approached and threatened them. Williams did not know any of these people. Williams testified she felt threatened. Bell told Williams they should just go back to the car and leave, which they did. Williams and Bell drove back to the aunt's house briefly and then to the Exxon station to fill the car up with gas. (App. 95–99).

While pumping gas, a Camaro pulled into the station, and the man who cursed at them exited the Camaro and started to point at Bell and Williams. Bell said, "Let's go." They left and returned to the aunt's house. Williams was in the bathroom when she heard gunshots. Williams went into the laundry room and bent down. She heard "lots" of shots. She confirmed that a total of five people were in the house when the shots were fired. (App. 102–03).

Jennie Childs, the aunt, testified she let Bell live with her while Bell went to school at Swansea. Williams picked Bell up to enroll him at school and was going to also take him grocery shopping. When Bell returned, Childs noticed he was upset. Then she heard gunshots. Everyone got down on the floor. She confirmed that one of the shots entered her daughter's room. (App. 109–15).

Bell explained he was raised by Williams but was living with his aunt, Childs, for residency purposes because he wanted to enroll for his last semester of high school in Swansea, where he originally started high school. While trying to enroll in the school, Bell and Williams were approached by Petitioner, Capers, and their mother, Princess. Capers threatened them. Capers said, "All you niggas are dead" and looked at Williams and told her, "Bitch, you dead." (App. 133–41).

Bell and Williams left the school and returned to Childs' house briefly before they went to the Exxon station. While at Exxon, he saw Princess' Mercedes-Benz truck and Petitioner's green Camaro. Petitioner came out of the Camaro and began gesturing for Bell to turn around as Williams and Bell pulled away. Capers exited the truck and made gestures too. App. 141-147.

Bell and Williams went back to the house again, and while inside the house, Bell heard engines outside. He opened the door and saw Petitioner with his arm hanging out of the window holding a gun. Bell told everyone to get down and then two shots were fired. (App. 149–50).

Bell looked out the door and saw Nehemiah Dixon (who he also had seen at the school) and Capers, who was holding a gun, in the Mercedes-Benz truck. More shots were fired. Bell also saw a muddy tan Nissan. (App. 150–51).

The motive apparently was an argument between Bell and Petitioner over the mother of Bell's child. However, according to Bell, the argument was over. On cross-examination, defense counsel elicited testimony about threatening Facebook messages that suggested an active dispute

and helped prove the defendants' motive for the drive-by shooting. This evidence included threats Bell made to Petitioner over Christmas break. (App. 160, 167–70, 180–81). No evidence suggesting self-defense was presented to the jury. After the shooting, Bell sent Petitioner a message complaining they should have fought instead of Petitioner bringing guns into the dispute. (App. 181). Bell testified he does not own a gun. (App. 194).

Nehemiah Dixon was obviously a reluctant witness for the State. Dixon dates Petitioner's sister, and he was with them on January 3, 2013. Dixon, Princess, and Capers took Petitioner to school and dropped him off. They received a text that he was not comfortable there, so they went back to sign him out. Dixon testified he did not see Bell at the school because he stayed in the truck. Dixon admitted he overheard Capers say something about settling some things. They left Princess at the school, perhaps to complete paperwork, and Petitioner, Capers, and Dixon went back to the house. Dixon did not recall how they ended up in separate cars, but Dixon recalls he drove the Nissan to Exxon. Petitioner was in the Camaro. Capers in the Mercedes-Benz truck. Princess was also with them. They saw Bell there with a lady. Bell left the station and Dixon followed him. (App. 198–208).

Dixon testified that he lost sight of Bell's car. Dixon drove back to the Exxon. The others were still there. Dixon claimed more memory problems in describing whether he spoke with the defendants at the gas station. Dixon claimed he pulled away from the gas station and then heard two shots while driving down the road, followed by two more shots. (App. 208–10).

Dixon was impeached by the State with his prior statement provided on January 7, 2013. (App. 215–16). Dixon's statement stated, in part, the following: "I drove back to the Exxon and drove back to the bottom looking for a car, spotted the car and then two shots were fired and two more shots and we drove home." (App. 219).

Clifton Hayes, the Swansea Chief of Police, testified he responded to the scene of the shooting. Bell was in an excited state. (App. 234–35). Chief Hayes recovered a freshly discharged shell casing in the driveway. (App. 238). He found a bullet hole in the glass of a window, the bullet went through the walls and rested in the bathroom. (App. 241). No firearm was recovered. (App. 242).

Petitioner testified on his own behalf. Helping prove an apparent motive for his actions, Petitioner testified about a nasty, threatening Facebook communication sent to him by Bell. App. (287–89). He confirmed that he, Princess, Dixon, and Capers went to Swansea High School. He confirmed that Princess took him out of school. They went to the Exxon station where, Petitioner maintained, Bell yelled at him. (App. 290–93). Petitioner claimed they then went to pick up his friend from an alternative school. (App. 295). Petitioner's "alibi" fell apart with this testimony, because Petitioner was claiming he picked up his friend from alternative school at the extremely early hour of 9:00 a.m. – 9:30 a.m. (App. 302).

Tammy "Princess" Coleman nonetheless joined in this absurd story, testifying that when they arrived at the alternative school, Petitioner blew his horn, and when the friend did not come out, Petitioner told Princess, "Mom, it's too early to get [Petitioner's friend]." (App. 314). When asked by defense counsel if she realized it was too early to pick up the friend, Princess testified, "No. With everything that was going on, I didn't even pay it no mind. He used to picking [the friend] up every day." (App. 314).

During closing argument, Assistant Solicitor Usry pointed out the absurdity that they accidently forgot it was only 9 A.M. and school was not over when they went to pick up this friend. (App. 358).

B. Verdict & Subsequent Proceedings

On May 21, 2014, the jury convicted Petitioner as indicted. (App. 418–19). Judge Russo sentenced Petitioner to concurrent terms of twelve years' imprisonment for attempted murder, five years for possession of a weapon during the commission of a violent crime, and five years for conspiracy. (415–17). Petitioner appealed.

Appellate Defender Robert M. Pachak represented Petitioner on appeal, raising the following issue:

> Whether the trial court erred in instructing the jury in part of its opening remarks that a trial "is a search for the truth in an effort to make sure that justice is done between the parties that appear before the Court," because such a remark could alter the jury's perception of the burden of proof and deprive [Petitioner] of a fair trial?

(Supp. App. 1–27). Following briefing, the Court of Appeals affirmed Petitioner's convictions and sentences in an unpublished opinion on March 2, 2016. *State v. Haynesworth*, Op. No. 2016-UP-119 (S.C. Ct. App. filed March 2, 2016). (Supp. App. 28–29). Petitioner's subsequent petition for rehearing and for writ of certiorari to this Court were denied. (Supp. App. 33, 62). The case was remitted back to the circuit court on March 17, 2017.

Petitioner timely commenced the underlying PCR action on February 2, 2018. (App. 418–28). The State submitted its return requesting an evidentiary hearing on May 9, 2018. (App. 429–41). An evidentiary hearing convened on April 5, 2019, before the Honorable Walton J. McLeod, IV. (App. 448–99). Petitioner was present and represented by Arthur Aiken, Esquire. Assistant Attorney General Johnny Ellis James, Jr. represented the State. On July 27, 2019, the PCR court issued an order denying relief and dismissing the action with prejudice. (App. 500–15). This appeal follows.

STANDARD OF REVIEW

In PCR matters, the standard of review depends on the specific issue involved. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). Appellate courts will uphold a PCR court's findings of fact if there is any probative evidence in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

To establish ineffective assistance of counsel, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989); *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)). "The test for effective assistance of counsel is whether the representation was within the range of competence demanded of attorneys in criminal cases." *Watson v. State*, 287 S.C. 356, 357, 338 S.E.2d 636, 637 (1985). To prove prejudice, the applicant must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 694). A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

ARGUMENT

The PCR court correctly concluded Petitioner was not prejudiced by trial counsel's failure to object to the trial court's instruction that malice may be inferred from the use of a deadly weapon because the jury was required to find specific intent to kill—i.e. express malice—in order to convict him of attempted murder and where nothing precluded the jury from convicting Petitioner of the lesser-included offense of first-degree assault and battery even if they inferred malice from the use of a deadly weapon

Petitioner contends trial counsel was constitutionally ineffective for failing to object to the trial court's instruction that malice may be inferred from the use of a deadly weapon. Even assuming the jury did infer malice from the use of a deadly weapon, however, the PCR court properly found that Petitioner could not have been prejudiced within the meaning of *Strickland* because the requirement for a finding of specific intent to kill was the dispositive element that determined whether or not the jury convicted Petitioner of the greater or lesser offense. Stated differently, the jury still could have convicted Petitioner of first-degree assault and battery even if they inferred malice from the use of a deadly weapon because inferring malice would not have resolved or impacted the issue of whether Petitioner acted with a specific intent to kill. As these findings are supported by probative evidence and do not constitute an error of law, certiorari should be denied.

To prevail on his ineffective assistance claim, Petitioner must demonstrate a reasonable probability that, but for Counsel's failure to object to the inferred malice instruction "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. When evaluating this probability, a reviewing court "should consider the specific impact counsel's error had on the outcome of the trial" coupled with "the strength of the State's case in light of . . . . the [totality of the] evidence presented to the jury." *Smalls*, 422 S.C. at 188, 810 S.E.2d at 843; *cf. Gibson v. State*,

416 S.C. 260, 265, 786 S.E.2d 121, 124 (2016) (explaining that, in evaluating prejudice, the "court must decide whether the erroneous malice instruction contributed to the verdict based on all the evidence presented to the jury") (citing *Rose v. Clark*, 478 U.S. 570 (1986))), *overruled by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019)

Petitioner specifically contends he was prejudiced within the context of *Belcher* because "the implied malice charge prevented the jury from properly considering the lesser-included offense of assault and battery first degree." (Pet. 10). In *State v. Belcher*, this Court addressed the confusion and contradiction of instructing a jury that malice may be inferred by the use of a deadly weapon where evidence is presented that would reduce, mitigate, justify, or excuse the killing or attempted killing. 385 S.C. 597, 685 S.E.2d 802 (2009).[1] Although Belcher presented evidence of self-defense—i.e., evidence tending to justify the use of a handgun—the inferred malice charge essentially precluded the jury from considering the lesser-included offense of voluntary manslaughter. This Court therefore held that the permissive inference charge concerning the use of a deadly weapon has "no place in a murder [or attempted murder] prosecution "where evidence is presented that would reduce, mitigate, excuse, or justify" the killing or [attempted killing]. *Id.* at 610, 685 S.E.2d at 809; *Gibson*, 416 S.C. at 266, 786 S.E.2d at 124 ("Because there was little evidence of malice aside from the use of a gun, the PCR judge erred in finding petitioner was not prejudiced by trial counsel's failure to object to the charge on the inference of malice from the use of a deadly weapon."), *overruled by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019).

As an initial matter, the challenged instruction must be examined in the context of the trial court's entire charge to the jury and not in isolation. *Lowry v. State*, 376 S.C. 499, 505, 657 S.E.2d

[1] Although *Belcher* has since been overruled by *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019), *Belcher* was the law at the time of Petitioner's trial.

760, 763 (2008) (citing *Francis v. Franklin*, 471 U.S. 307, 315, (1985)). In Petitioner's case, the trial court stated, in relevant part, the following:

> [T]he defendants are charged with [a]ttempted [m]urder. In order to prove this crime, the State must prove the defendants attempted to kill another person with malice aforethought, either express or implied. Malice is hatred, ill will, or hostility toward another person. It is the intentional doing of a wrongful act without just cause or excuse and with the intent to inflict an injury or under circumstances that the law will infer an evil intent.
>
> Malice aforethought does not require that malice exist for any particular time before the act is committed, but malice must exist in the mind of the defendant just before and at the time that the act is committed. Therefore, there must be a combination of the previous evil intent and the act.
>
> Malice aforethought may be express or inferred. 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 facts and circumstances which are proved. Express malice is shown when a person speaks words which express hatred or ill will for another, or when the person prepared beforehand to do the act which was later accomplished. For example, lying in wait for a person or any other acts of preparation going to show that the deed was within the defendant's mind would be express 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. A deadly weapon is any article, instrument, or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon depends on the facts and the circumstances of each case. The following are examples of instruments which may be deadly weapons: A pistol, a shotgun, a rifle, a dagger, a knife, a slingshot, metal knuckles, a razor, gasoline, or a firebomb. A gun may be a deadly weapon even if it's not operating.
>
> If facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be considered by you, the jury, along with other evidence in this case. And you may give it whatever weight evidence in the case you decide it should receive.
>
> **A specific intent to kill is an element of [a]ttempted [m]urder**. Intent means intending the result which actually occurs. Not accidentally or involuntarily. Intent

> may be shown by acts and conduct of the defendants and other circumstances from which you may naturally and reasonably infer intent. Evidence of the character of the act, 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 with which the act was committed.
>
> 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's life.

(App. 273–75).

Despite Petitioner's trial predating this Court's opinion in *King*, the trial judge's jury instructions clearly conveyed to the jurors they could *only* convict Petitioner of attempted murder if they found he acted with the *specific intent to kill* the victim—i.e., express malice. In *State v. King*, this Court held that attempted murder requires the specific intent to commit murder, which is a higher level of *mens rea* than is required for murder.[2] 422 S.C. 47, 61, 810 S.E.2d 18, 25 (2017). In reaching that conclusion, this Court explained attempted murder was not a mere codification of ABWIK, a general intent crime, based on the legislature's use of the phrases "intent to kill" and "malice aforethought, either express or implied" in the attempted murder statute. *Id.*

Particularly relevant to Petitioner's case is *Keys v. State*, a Nevada case this Court cited in *King*, which explained the crime of attempted murder from murder by analogizing express malice to a specific intent to kill. *King*, 422 S.C. at 57, 810 S.E.2d at 23. The *Keys* court first distinguished express malice from implied malice, stating:

> The *mens rea* requirement denoted by the term *express malice* is different from that of *implied malice*. Express malice, called malice

[2] The Omnibus Crime Reduction and Sentencing Reform Act of 2010 abolished all prior statutory and common law assault and battery offenses and replaced them with a number of new offenses. *See* Act No. 273, § 6.A, 2010 S.C. Acts & Joint Resolutions (adding the statutory offense of attempted murder to the South Carolina Code of Laws); *see also State v. Middleton*, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014) ("Though the passage of the Act, the legislature abolished all common law assault and battery offenses and all prior statutory assault and battery offenses.").

> in fact, is the deliberate intention to kill; implied malice, called malice in law, does not relate to a deliberate, intentional killing but is rather a *mens rea* inferred in law from the "circumstances of the killing." Proving express malice means proving a deliberate intention to kill; while proving implied malice means proving only the commission of wrongful acts from which, absent any proof of an actual intent to harm, the archaic but essential "abandoned and malignant harm" can be inferred in law.

104 Nev. 736, 740, 766 P.2d 270, 272 (1988) (citations omitted). The Court went on to apply the concepts of express and implied malice to the level of intent required for attempted murder:

> Attempted 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." An attempt, by nature, is a failure to accomplish what one *intended* to do. Attempt means to try; it means an effort to bring about a desired result. **Thus one cannot *attempt* to be negligent or *attempt* to have the general malignant recklessness contemplated by the legal concept, "implied malice."** One cannot be guilty of attempted murder by implied malice because implied malice does not encompass the essential specific intent to kill.
>
> An attempt to kill with express malice is, on the other hand, completely consistent with the specific intent requirement of the crime of attempt. Express malice is the "deliberate intention unlawfully" to kill a human. Attempted murder, then, is the attempt to kill a person with express malice, or more completely defined: 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. at 740–41, 766 P.2d at 273 (emphasis in bold added) (citations omitted).

Petitioner correctly points out that it was up to the jury to determine whether Petitioner's act of shooting into Bell's house was done with malice as required for attempted murder. (Pet. 8). However, the requirement for a finding of specific intent to kill was the dispositive element that determined whether or not the jury convicted the defendant of the greater or lesser offense. Since the jury inferring malice from the use of a deadly weapon would not preclude them from convicting

the defendant of first-degree assault and battery *unless* they found an independent element of specific intent to kill, Petitioner's case did not hinge on whether the jury inferred malice from the use of a deadly weapon in any way. Therefore, Petitioner could not possibly have met his burden of establishing a substantial likelihood of a different outcome had counsel objected to the inferred malice instruction.

Additionally, Petitioner's defense was not that he lacked the requisite intent, but that he did not commit the act at all. Essentially, Petitioner was not challenging the fact that *someone* fired into the victim's house with the specific intent to kill the victim, only that *he* was not that someone. The fact that Petitioner was claiming no involvement whatsoever further reduced the possibility he was prejudiced by the inferred malice instruction—if the jury believed Petitioner's story, it would have acquitted him, not found him guilty of a lesser-included offense.

Ultimately, the PCR court correctly concluded Petitioner failed to demonstrate that trial counsel's failure to object to the inferred malice charge "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. *See also Harrington v. Richter*, 562 U.S. 86, 105 (2011) ("[W]hile in some instances even an isolated error can support an ineffective assistance claim if it is sufficiently egregious and prejudicial, it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." (citation omitted)). Viewing the jury instruction in the context of the entire case confirms the PCR court's conclusion that Petitioner was not prejudiced by Counsel's failure to object to the inferred malice charge. *See Fitzgerald v. Thompson*, 943 F.2d 463, 469 (4th Cir. 1991) (explaining that, in evaluating whether actual prejudice flowed from an attorney's failure to object to the instruction, "[i]t is important . . . to consider the challenged instruction in light of other jury instructions" and in the context of the

entire case) (citing *Boyde v. California*, 494 U.S. 370 (1990))). Accordingly, the PCR court did not err and certiorari should be denied.

CONCLUSION

Based on the foregoing argument, this Court should deny certiorari and affirm the PCR court's dismissal of Petitioner's PCR application. Should this Court grant the petition, the State seeks permission to more fully brief the issues discussed above.

Respectfully submitted,

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