RECEIVED
Sep 14 2021
SC Court of Appeals

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.

PETITION FOR REHEARING

Appellant, Shelby Harper Taylor, requests rehearing pursuant to Rule 221(a), SCACR, regarding this Court's Opinion filed September 1, 2021.

Months before Taylor's trial, the South Carolina Supreme Court held in *State v. King*, that "a specific intent to kill is an element of attempted murder." 422 S.C. 47, 56, 810 S.E.2d 18, 22 (2017). The Court expressly rejected the notion that "a general intent will suffice" for a conviction of attempted murder. *Id*. at 55, 810 S.E.2d at 22; *see also*, *id*. at 56, 810 S.E.2d at 23 ("'prosecutions are generally not maintainable for attempts to commit general intent crimes, such as criminal recklessness'"); *id*. at 57, 810 S.E.2d at 23 ("'one cannot *attempt* to kill another with implied malice'") (citations omitted).

Despite defense counsel's objections based on *King*, the jury instructions in this case failed to properly convey that a specific intent to kill was required to convict Taylor of attempting to kill

her newborn daughter.[1] The panel errs in its claim that the jurors were "repeatedly" told that they "could not convict Taylor without finding she specifically intended to kill the child." Panel Opinion at 5. On the contrary, the jury instructions did not clearly explain that a specific intent to kill the baby was required. Instead, the charge conveyed, in relevant part:

- "[I]n order to establish criminal liability, criminal intent is required. For example, these are examples: the mental state required to be proven by the State for a particular crime could be purpose, intent, knowledge, recklessness, or criminal negligence." R. p.509, ll.11-15.

- "[T]he law says that criminal intent may be inferred from the circumstances shown to have existed. This is how you make a determination of whether or not the element that requires intent was present. It is not necessary to establish intent by direct and positive evidence, but intent may be established by inference in the same way as any other fact by taking into consideration the acts of the parties and all the facts and circumstances of the case." R. p.509, ll.21-24.

- "So, Ms. Taylor is charged with attempted murder. So, what does the State have to prove? In order to prove this crime, the State must prove that the defendant attempted to kill another person with malice aforethought either express or implied." R. p.510, ll.8-12.

- "[M]alice is hatred, ill will, or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under circumstances that the law will infer an evil intent." R. p.510, ll.13-17.

- "Malice may be inferred from conduct that shows a total disregard for human life." R. p.511, ll.6-7.

- "Attempted murder – excuse me, a specific intent to kill is an element of attempted murder. Attempted murder is the performance of an act or acts which tend but fail to kill a human being when such acts are done with the deliberate intention unlawfully to kill. Intent may be shown by acts and conduct of the defendant from which you may naturally and reasonably infer intent. Intent may also be inferred when it is demonstrated that the defendant voluntarily and willfully commits an act, the natural tendency of which is to destroy another human's life." R. p.511, ll.13-22.

[1] As set forth in Appellant's Final Brief and Reply, Taylor gave birth in the bathroom of the one-bedroom apartment she shared with her husband and sixteen-month-old daughter. The newborn was recovered from a dumpster outside the apartment complex shortly thereafter and suffered no injuries.

The trial court mentioned a specific intent to kill only once in the entire jury charge, without further elaboration (R. p.511, ll.13-17), but consistently and repeatedly emphasized that the State could establish the element of intent by inference – i.e., malice is the intentional doing of a wrongful act "under circumstances that the law will infer an evil intent," R. p.510, l.16-17; "[m]alice may be inferred from conduct that shows a total disregard for human life," R. p.511, ll.6-7; intent may be inferred when "the defendant voluntarily and willfully commits an act, the natural tendency of which is to destroy another human's life." R. p.511 ll.19-22. These are general intent instructions. They are not consistent with the Supreme Court's holding in *King* that attempted murder requires a specific intent to kill – a mental state that the Court acknowledged was "a higher level of *mens rea* than that of the completed crime." 422 S.C. at 56, 810 S.E.2d at 22.

Based on a fair reading of the charge as a whole, a reasonable juror could have convicted Taylor of attempted murder while simultaneously believing her mental state to be something less than a specific intent to kill her baby. According to the instructions, a mental state of recklessness, criminal negligence, or a disregard for human life would have been sufficient to support the guilty verdict. A defense expert witness testified that Taylor suffered from a medical condition that left her "disoriented," "illogical," "irrational," "overwhelmed," and "[in] chaos and confusion on a cognitive level," during the events of her unaccompanied delivery. R. p.400, ll.16-20. The jurors could easily have believed this testimony and nevertheless viewed the element of intent as satisfied. Indeed, there was little incentive for the jurors to consider whether Taylor possessed a specific intent at all. Based on the trial court's instructions, the jurors could have determined that the State had met its burden simply because Taylor "willfully" committed the act of placing the newborn in a dumpster. Thus, the jury instructions improperly reduced the State's burden of proof, undermined Taylor's defense by reducing its relevancy, and created the potential for confusion.

The panel also errs in its assertion that *King* and this Court's subsequent decision in *State v. Shands*, 424 S.C. 106, 817 S.E.2d (Ct. App. 2018), addressed only the narrow issue of intent implied "by operation of law" rather than "the jury's ability to infer malice based on its view of certain facts." Panel Opinion at 4. Whatever the distinction between these two categories may be in the panel's view, neither *King* nor *Shands* said anything about it. Indeed, the charge in *King* involved some of the same language at issue here – "[m]alice may be inferred from conduct showing a total disregard for human life." 422 S.C. at 54, 810 S.E.2d at 21. Likewise, this Court's discussion in *Shands* was not narrowly focused on the *Belcher*[2] instruction issue, as the panel suggests. Specifically, this Court stated:

> In light of our supreme court's discussion in *King*, we find 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.

424 S.C. at 131, 817 S.E.2d at 537 (emphasis in original).

The panel's opinion conflicts with the decisions of this Court and the South Carolina Supreme Court, and rehearing should be granted.

Respectfully Submitted,

s/Emily C. Paavola
Emily C. Paavola #77855
900 Elmwood Ave., Suite 200
Columbia, SC 29201
Emily@justice360sc.org

John H. Blume #743
Cornell Law School
159 Hughes Hall
Ithaca, NY 14853
Jb94@cornell.edu

September 14, 2021

[2] *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), *holding extended by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019).

RECEIVED
Sep 14 2021
SC Court of Appeals

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.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Appellant's Petition for Rehearing was served by electronic mail to mfarthing@scag.gov, this 14th day of September, 2021, upon the following:

Mark R. Farthing, Esquire
SC Attorney General's Office
PO Box 11549
Columbia, SC 29211
mfarthing@scag.gov

s/Emily C. Paavola