STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Lexington County

Honorable Walton J. McLeod, IV, Circuit Court Judge

BILAL S. HAYNESWORTH,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-001249

BRIEF OF PETITIONER

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ISSUE PRESENTED

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, the trial judge instructed the jury on the law of assault and battery first degree and prejudice resulted from the implied malice charge?

STATEMENT

In August of 2013, the Lexington County Grand Jury indicted Petitioner, Bilal S. Haynesworth, for attempted murder, possession of a weapon during the commission of a violent crime and conspiracy, indictments #2013-GS-32-2373, 2374, 2375. (App. pp. 407-412). On May 19, 2014, Petitioner proceeded, with his co-defendant and brother, Lywone Shatete Capers, to jury trial before the Honorable Thomas A. Russo. David M. Mauldin represented Petitioner at trial. The jury found both guilty as charged. Judge Russo sentenced them both to twelve (12) years for attempted murder, five (5) years concurrent for the weapon charge and five (5) years concurrent for conspiracy. A timely notice of intent to appeal was filed and the direct appeal perfected. The South Carolina Court of Appeals affirmed the conviction and sentence. State v. Haynesworth, Op. No. 2016-UP-119 (S.C.Ct.App. filed March 2, 2016). Petitioner filed a petition for rehearing that was denied on April 21, 2016. Petitioner then filed a petition for writ in the South Carolina Supreme Court. The petition was denied on March 8, 2017.

On February 2, 2018, Petitioner filed an application for post-conviction relief [PCR]. The State filed a return on May 9, 2018. On April 5, 2019, an evidentiary hearing was held before the Honorable Walton J. McLeod, IV. Arthur K. Aiken represented Petitioner at the PCR hearing. Johnny E. James, Jr. represented the State. In a written order filed June 27, 2019, Judge McLeod denied relief and dismissed the application. A timely notice of intent to appeal was served on July 25, 2019. The petition for writ of certiorari was filed on March 9, 2020. The return was filed on August 19, 2020. On September 1, 2020, pursuant to Rule 243(1), SCACR, the South Carolina Supreme Court transferred the case to the South Carolina Court of Appeals. On September 22, 2021, this Court granted the petition for writ of certiorari. This brief of petitioner follows.

STANDARD OF REVIEW

"Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018), (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016), and Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). "We review questions of law de novo, with no deference to trial courts." Id. at 180-81, 810 S.E.2d at 839-40 (citing Sellner, 416 S.C. at 610, 787 S.E.2d at 527, and Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)). "[W]e will reverse the PCR court's decision when it is controlled by an error of law." Sellner, 416 S.C. at 610, 787 S.E.2d at 527.

ARGUMENT

In this trial for attempted murder, the PCR judge erred 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, the trial judge instructed the jury on the law of assault and battery first degree and prejudice resulted from the implied malice charge.

The jury found Petitioner guilty of shooting into a house where JayQuan Bell lived on January 3, 2013. No one was injured during the shooting. There was an ongoing argument between Petitioner and Bell that involved the mother of Bell's child. (App. p. 159, line 25 – p. 160, lines 1-5). The argument included threats on Facebook, text messages and phone calls dating back to December of 2012. (App. pp. 286-289, pp. 167-170). Petitioner testified that, because of threats made against him by Bell and his friends, on the morning of January 3, 2013, his mother, Tammy Coleman, followed him in her Mercedes truck as Petitioner drove a green Camaro to Swansea Highschool and parked in a nearby apartment complex. (App. p. 290, line 1 – p. 291, lines 1-19). Petitioner's brother, Lywone Shatete Capers, and family friend, Nehemiah Dixon, were also in the car with Petitioner's mother. (App. p. 291, lines 14-15). After Petitioner parked the car at the apartment complex, he went to the Exxon station to get breakfast and then his mother drove him the rest of the way to school. (App. p. 291, line 291, line 20 – p. 292, lines 1-9). Petitioner's mother returned to school and checked her son out at the end of first period. (App. p. 292, lines 10-25).

Petitioner's mother testified that she followed her son to school on the morning of January 3, 2013, because of threats made against him. (App. p. 309, line 2 – p. 310, lines 1-9). She testified that after she dropped Petitioner off at school, she received more threats. (App. p. 310, lines 12 – 20). Petitioner's mother testified, "That - - during that time, I received more

calls saying they was going to kill Bilal and he signed his own death warrant." (App. p. 310, lines 18-20). As a result of the continued threats, she drove back to Swansea Highschool and withdrew Petitioner from school. (App. p. 310, line 21 – p. 311, lines 1-15). The mother testified that on the way to the school office to withdraw Petitioner she saw JayQuan Bell and a lady. (App. p. 311, lines 15-20).

Petitioner testified that after he left school his mother, along with his brother and Dixon, took him to the apartment complex where the green Camaro was parked. Petitioner then drove the Camaro to the Exxon to get gas. (App. p. 293, lines 3 – 16). Petitioner testified that he saw Bell and his aunt or grandmother at the Exxon. (App. p. 293, lines 18-20). Petitioner testified that Bell cursed at him so he cursed back and gave him the middle finger. (App. p. 293, line 24 – p. 294, lines 1-3). Petitioner testified that his mother and brother were also at the Exxon in the Mercedes truck and Dixon was there in a Nissan. (App. p. 294, lines 4-13).

Bell testified that he saw Petitioner's mother and brother at the school and the brother, who he knew as Sonny, threatened Bell and his grandmother. (App. p. 141, line 6 – p. 142, line 1). Bell did not testify that he saw Petitioner at this time. According to Bell, later on the same morning there was a confrontation between Petitioner and Bell in the parking lot of the Exxon. (App. p. 145, line 5 – p. 146, 147, 148, lines 1-10).

According to Bell, five minutes after leaving the gas station and returning home he heard engines and opened a side door when he saw Petitioner drive by in his green Camaro with a gun his hand. (App. p. 149, line 10 – p. 150, lines 1-6). Bell testified he shut the door and then heard two shots. (App. p. 150, lines 7-12). Then, according to Bell, he opened the side door again and saw the brother, Capers, hanging over the top of the Mercedes with a gun in his hand. (App. p. 150, lines 13-20). Bell testified that Dixon was driving the Mercedes and Capers fired three

shots. (App. p. 150, line 14 – p. 151, lines 1-13; p. 155, lines 1-3). Bell also testified that he saw a third car, a tan Nissan, but did not identify a driver. (App. p. 151, lines 15-23).

Petitioner denied driving to Bell's house and denied shooting into the house. (App. p. 296, line 20 – p. 297, lines 1-4). Instead, Petitioner testified that after leaving the gas station, he drove to the alternative school to pick up a friend but once he realized he was too early, he returned home. (App. p. 294, line 22 – p. 295, lines 1-23). Petitioner testified that his mother and brother, Capers, followed him to the alternative school and then followed him home. (App. p. 295, line 24 – p. 296, lines 1-11). Petitioner's mother testified that she and Petitioner's brother followed Petitioner to the alternative school and then back home. (App. p. 313, line 4 – p. 314, 315, lines 1-13).

During the charge conference Petitioner requested an instruction on the lesser included offense of assault and battery first degree. (App. p. 324, line 9 – p. 325, 326, lines 1-23). The State objected. The State argued that Petitioner was not entitled to the lesser included offense because he presented an alibi defense. (App. p. 324, line 18 – p. 325, line 1). The State then argued, "Your Honor, the only thing that I would further add is under the State v. Belcher case and the State v. Miller case – State v. Belcher is 385 S.C. 597, and State v. Miller is 397 S.C. 630 – that the inference of malice can be used in this case because there's no indication of mitigation evidence in this case. Whereas there's no self-defense argument or anything like that. So I would say that malice could be inferred in that act, and I would also argue that charge would come in, in your jury charge." (App. p. 326, lines 9-18).

The trial judge agreed to charge the lesser included offense of assault and battery first degree and stated, "Okay. Well, I'm going to note that objection. But I think the evidence in the case, the way the case has been presented, the evidence that's before the jury, there is evidence

which would completely support a conviction of Assault and Battery First Degree as evidence that I think would completely support a conviction for Attempted Murder, depending on how the jury views the evidence, or an outright acquittal – depending on how the jury views the evidence. So I'm going to grant the motion and note the objection." (App. p. 327, lines 13-22). The implied malice charge was not discussed.

When instructing the jury with the law of attempted murder the judge correctly instructed the jury that a specific intent to kill is an element of attempted murder. (App. p. 375, lines 7-8). The judge did not instruct the jury that attempted murder required express malice. Instead, the judge instructed the jury that:

> 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 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 the case. And you may give it whatever weight you decide it should receive.

(App. p. 374, line 16 – p. 375, lines 1-6). Trial counsel failed to object to the implied malice charge. (App. p. 382, lines 6-8).

In the second amendment to the PCR application Petitioner alleged that. "The trial court erred in giving a jury instruction that '[I]nferred malice may arise when the deed is done with a deadly weapon.' (Tr. p. 374 ll. 16-17) State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). Trial counsel rendered deficient representation to Haynesworth at trial when he failed to object to the trial court's jury instruction permitting the jury to infer malice from the use of a deadly weapon. Haynesworth was prejudiced by the failure." (App. p. 444).

During the PCR hearing trial counsel admitted that he did not consider objecting to the implied malice charge. (App. p. 486, lines 19-20). When asked why not, trial counsel answered:

> Well, my interpretation of Belcher, I guess at that time, was that the evidence of reducing, excusing, and mitigate would be something along the lines that it was evidence that it would be something in self-defense or an accident or something of that nature.
>
> The fact that I requested and was allowed a lesser included, I did not contemplate that as such a thing to object to by charge. Basically, our defense was alibi and not that he was shot at and he shot back or that he was waving a gun out of a car and it accidently went off or anything like that. The thrust of the defense was, basically, that he had this alibi-type thing where they had left the gas station and had gone home.

(App. p. 486, line 22 – p. 487, lines 1-13). The fact that Petitioner presented an alibi defense does not relieve counsel of the obligation to object to an incorrect instruction on implied malice in an attempted murder case.

In the order of dismissal the PCR judge wrote:

> The court finds Belcher was distinguishable from the present case. Notwithstanding the trial court's cautious concession to Applicant to charge the jury on the lesser-included offense of assault and battery, first degree, no evidence was presented at trial to reduce, excuse, mitigate, or justify the acts committed. Applicant shot into a house in which the victims were known to reside. Applicant did not advance any facts to show self-defense, accident that his intent was something other than the death of the victims, or that his actions were compelled by the sudden heat of passion. Applicant's defense was that he was not there and did not commit the acts alleged. Counsel incorrectly narrows the applicability of Belcher to only cases of self-defense but is correct in his belief that the instruction of a lesser included offense *alone* does not trigger Belcher's prohibition, especially where the lesser-included was instructed based solely on the jury's ability to reject the State's evidence in part and accept it in part. Geiger[1], supra; see also State v. Price, 400 S.C. 110, 114-15, 732 S.E.2d 652, 653-54 (Ct.App. 2012) ("Belcher does not prohibit the trial court from instructing the jury that it may infer malice from the use of a deadly weapon where the only question created by the evidence is whether the defendant is the person who committed ABWIK[,]" where the trial court also charged ABHAN.).

(App. p. 510).

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[1] State v. Geiger, 370 S.C. 600, 635 S.E.2d 669 (Ct.App. 2006).

The PCR judge erred. As discussed below, the lesser instructed was not based solely on the jury's ability to reject the State's evidence in part, and accept it in part. There was evidence presented from which the jury could find that Petitioner committed the lesser included offense of assault and battery first degree. The PCR judge erred in finding there was no evidence presented at trial that would reduce, excuse, mitigate or justify the acts committed.

The PCR judge found that State v. Shands, 424 S.C. 106, 817 S.E.2d 524 (Ct. App. 2018) was not applicable because the decision in Shands became final after Petitioner's 2014 trial. (App. pp. 510-511). The PCR judge also distinguished the present case from Shands, again finding no facts to reduce, excuse, mitigate or justify shooting into the house. (App. p. 511). While Shands was decided after the trial of Petitioner, as discussed below, the analysis in Shands is helpful in demonstrating prejudice in the present case. Finally, the PCR judge found no prejudice because the State did not argue that malice could be inferred from the use of a deadly weapon in closing and because there was overwhelming evidence of malice. (App. pp. 511-512). The PCR judge erred.

In State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009), overruled by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), the South Carolina Supreme Court wrote:

> Today we return to the rationale underlying *Hopkins, Levelle* and *Jackson* and hold that where evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon.[9] The permissive inference charge concerning the use of a deadly weapon remains a correct statement of the law where the only issue presented to the jury is whether the defendant has committed murder (or assault and battery with intent to kill).

In State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), the South Carolina Supreme Court held that regardless of the evidence presented at trial, trial courts shall not instruct the jury that the element of malice may be inferred when the deed is done with a deadly weapon.

Pursuant to Burdette, the implied malice charge in the present case was error. Belcher, however, was the law at the time of Petitioner's trial. Pursuant to Belcher, in the present case the trial judge erred in instructing the jury that malice could be inferred from the use of a deadly weapon because there were facts presented that would reduce the shooting into a house from attempted murder to assault and battery first degree. Belcher is not limited to self-defense or accident as trial counsel erroneously believed. The fact that Petitioner presented an alibi defense, alone, does not preclude a lesser included offense. In the present case, unlike in State v. Rucker, 319 S.C. 95, 98, 459 S.E.2d 858, 860 (Ct. App. 1995), while Petitioner presented an alibi defense, there was also evidence presented from which the jury could find that Petitioner committed the lesser included offense of assault and battery first degree. Trial counsel was ineffective in failing to object to the inference of malice charge.

S.C. Code §16-3-29 Provides, "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 §16-3-600(C)(emphasis added) provides:

> (1) A person commits the offense of assault and battery in the first degree if the person unlawfully:
> (a) injures another person, and the act:
> (i) involves nonconsensual touching of the private parts of a person, either under or above clothing, with lewd and lascivious intent; or
> (ii) occurred during the commission of a robbery, burglary, kidnapping, or theft; or
> **(b) offers or attempts to injure another person with the present ability to do so, and the act:**
> **(i) is accomplished by means likely to produce death or great bodily injury; or**
> (ii) occurred during the commission of a robbery, burglary, kidnapping, or theft.
>
> (2) A person who violates this subsection is guilty of a felony, and, upon conviction, must be imprisoned for not more than ten years.

(3) Assault and battery in the first degree is a lesser-included offense of assault and battery of a high and aggravated nature, as defined in subsection (B)(1), and **attempted murder, as defined in Section 16-3-29.**

Based on the facts presented by the State, there is evidence from which the jury could find that Petitioner committed assault and battery first degree, a lesser included offense of attempted murder. Shooting into an occupied house is an offer or attempt to injure another with the present ability to do so and the act of shooting into an occupied house is likely to produce death or great bodily injury. It was up to the jury to decide if this act was done with express malice and a specific intent to kill as required for attempted murder. "Where there is evidence from which the jury could infer that the defendant committed a lesser offense, the trial judge must submit the lesser-included offense to the jury. State v. Brown, 360 S.C. 581, 602 S.E.2d 392 (2004); State v. Hill, 315 S.C. 260, 433 S.E.2d 848 (1993)." State v. Rivera, 389 S.C. 399, 404, 699 S.E.2d 157, 159 (2010). Again, the fact that Petitioner presented an alibi defense does not preclude a charge on the lesser included offense. The trial judge would have erred if he had failed to charge the lesser included offense. The PCR judge erred in finding there were no facts presented that would reduce the shooting into a house from attempted murder to assault and battery first degree.

The present case is easily distinguished from State v. Geiger and State v. Price cited in the order of dismissal. In both cases there was no evidence to show that the defendant was guilty only of the lesser included offense. In State v. Geiger, 370 S.C. 600, 635 S.E.2d 669 (Ct.App. 2006), the Court of Appeals found that the evidence did not warrant an instruction on assault and battery of a high and aggravated nature as a lesser included offense of assault with intent to commit sexual conduct in light of the victim's undisputed testimony that defendant put

a gun to her head, put his penis in her mouth and attempted to force her legs apart to have sexual intercourse.

In State v. Price, 400 S.C. 110, 114, 732 S.E.2d 652, 654 (Ct. App. 2012), overruled by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), the Court of Appeals found no error in the judge instructing the jury that malice could be inferred from the use of a deadly weapon because there was no evidence that could reduce, mitigate, excuse or justify the assault and battery with intent to kill, although the trial judge instructed the jury on the law of the lesser included offense of ABHAN. In Price the Court of Appeals wrote:

> On appeal, Price points to testimony indicating that Deon and Deverol were drug-dealing gang members and that Deon's shooting may have been part of a drug deal gone wrong. We disagree that these facts would reduce, mitigate, excuse, or justify the crime. It is undisputed that someone shot Deon in the neck, causing him serious injury. The shooter raised the gun, pointed it at Deon, approached him, and shot him at close range as he stood with his hands up. There was no evidence to the contrary. There may have been conflicting evidence as to who did these things, but it is not possible to interpret the evidence to support any conclusion other than that the person who shot Deon committed ABWIK. Therefore, if the jury believed Price is the person who shot Deon, Price is necessarily guilty of ABWIK. See State v. Coleman, 342 S.C. 172, 177, 536 S.E.2d 387, 389–90 (Ct.App.2000) (affirming trial court's decision to not charge ABHAN as lesser-included offense of ABWIK, where "Coleman's manner in using the weapon—pointing the gun at Victim and then deliberately raising the gun to aim at Victim's head just before he fired—could have only been reasonably calculated to kill or cause great bodily harm to Victim. Moreover, the resulting wound was near-fatal." (footnote omitted)).

400 S.C. at 114–15, 732 S.E.2d at 654. The present case is factually distinct from Price. There was no evidence Petitioner pointed the gun an anyone at close range while their hands were up. The State's evidence that Petitioner shot into a house two times, unlike the acts in Geiger and Price, could show that Petitioner was guilty only of the lesser included offense of assault and battery first degree. The trial judge correctly instructed the jury on the lesser included offense of assault and battery first degree. The PCR judge erred in finding there was no evidence presented at trial that would reduce, excuse, mitigate or justify the acts committed.

The present case is factually distinct from State v. Williams, 427 S.C. 148, 829 S.E.2d 702 (2019), where the South Carolina Supreme Court, on direct appeal, found no error in the trial judge's failure to charge the lesser included offense of assault and battery first degree. The Court summarized the facts and wrote:

> According to the State's witnesses, shortly after midnight, Young and two of his roommates—a married couple named Ycedra Williams[1] and Joseph Wrighton—saw two men walking down the driveway. Young told Williams to turn off the lights while Wrighton went to the door and tried to identify the men. The door contained a large glass panel through which at least the silhouette of an individual would be visible from the outside. As soon as Wrighton appeared in the door, the men began shooting, both directly at him and all along the side of the mobile home.

Williams, 427 S.C. at 150–51, 829 S.E.2d at 703. Quoting testimony from the trial, the Court wrote, "Charley asserted Petitioner nonetheless shot at Young and/or the mobile home repeatedly, agreeing with the State that, given the number of bullet holes in the mobile home's door and siding, Petitioner 'tore that house up from one end to the other with his [gun] and emptied' the magazine." Williams, 427 S.C. at 152–53, 829 S.E.2d at 704.

In contrast in the present case, Bell testified that he heard car engines, opened a side door, saw Petitioner drive by in his green Camaro with a gun his hand, closed the side door and then heard two shots. (App. p. 149, line 10 – p. 150, lines 1-12). There is no evidence of aiming at a silhouette or aiming at anyone in particular. The shots fired in the present case are far different than the emptied magazine that "tore that house up from one end to the other." On direct appeal, the judge would have erred if he had refused to charge the lesser included offense of assault and battery first degree. The trial judge correctly charged the lesser included offense. Pursuant to Belcher, counsel was ineffective in failing to object to the implied malice charge. Petitioner was prejudiced by the deficient performance. The facts of the case do not support the PCR judge's finding that there was overwhelming evidence of malice.

Additionally. the fact that the trial judge also correctly instructed the jury that a specific intent to kill is an element of attempted murder, (App. p. 375, lines 7-8), does not cure the prejudice from the improper implied malice charge. State v. King, 422 S.C. 47, 810 S.E.2d 18, (2017), clarified that attempted murder requires a specific intent to kill, a higher level of *mens rea* than is required for murder. Although Petitioner's trial took place before the decision in King, both the language of the attempted murder statute and State v. Sutton, 340 S.C. 393, 532 S.E.2d 283, (2000), support the later decision in King that attempted murder requires a specific intent to kill. In footnote #5 in King the South Carolina Supreme Court wrote:

> In an argument related to the State's attempted murder charge issue, King posits, as an additional sustaining ground, the Court of Appeals erred in summarily affirming the trial judge's decision to instruct the jury that malice may be inferred from the use of deadly weapon. Because we affirm the decision of the Court of Appeals regarding the requisite *mens rea* for attempted murder, we decline to address King's additional sustaining ground. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (citing Rule 220(c), SCACR and stating, "The appellate court *may* review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment" (emphasis added)).
>
> While we find it unnecessary to address King's additional sustaining ground, we 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. See Keys v. State, 104 Nev. 736, 766 P.2d 270, 273 (1988) (stating, "[o]ne cannot *attempt* to kill another with implied malice because there is no such criminal offense as an attempt to achieve an unintended result" (citation and internal quotation marks omitted)). Moreover, if there is no evidence that one charged with attempted murder had express malice and a specific intent to kill, we believe the crime would involve a lower level of intent and, thus, would fall within the lesser degrees of the assault and battery offenses codified in section 16-3-600. *See* S.C. Code Ann. § 16-3-600 (2015 & Supp. 2016) (identifying levels and degrees of assault and battery offenses).

King, 422 S.C. at 64, 810 S.E.2d at 27. The note reflects that attempted murder requires both a specific intent to kill and express malice. Implied malice, as instructed by the judge in this case,

is not sufficient for attempted murder. The implied malice charge diluted the State's burden of proving both a specific intent to kill **and** express malice. Once the jury was instructed that malice could be inferred from the use of a deadly weapon, the State was relieved of the burden of proving express malice. The implied malice charge precluded the jury from properly considering the lesser included offense of assault and battery first degree. The fact that the jury returned a verdict on attempted murder does not render the implied malice charge harmless when the State is required to prove both a specific intent to kill and express malice for attempted murder.

In further support that attempted murder requires both a specific intent to kill and express malice the South Carolina Court of Appeals in State v. Shands, 424 S.C. 106, 131, 817 S.E.2d 524, 537 (Ct. App. 2018), wrote, "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. See King, 422 S.C. at 54–64, 810 S.E.2d at 22–27. Therefore, we question whether an implied malice instruction is proper in any attempted murder trial." In Shands the Court of Appeals found that the trial judge erred in instructing the jury that malice can be inferred from the use of a deadly weapon and reversed the attempted murder charge. As in Shands, the trial judge in the present case erred in instructing the jury that malice can be inferred from the use of a deadly weapon. Trial counsel was ineffective in failing to object to the charge. Petitioner was prejudiced by the deficient performance.

The present case is distinguished from State v. Taylor, No. 2018-000341, 2021 WL 3889977, at *3 (S.C. Ct. App. Sept. 1, 2021), reh'g denied (Sept. 28, 2021), because Taylor did not involve an instruction that malice could be inferred from the use of a deadly weapon. In, Taylor the South Carolina Court of Appeals discussed Shands and wrote:

> Taylor contends State v. Shands supports her argument that implied malice instructions do not belong in an attempted murder case. 424 S.C. 106, 817 S.E.2d

524 (Ct. App. 2018). There, the relevant issue was whether the trial court erred in instructing the jury that malice could be inferred from the use of a deadly weapon. Id. at 128, 817 S.E.2d at 535–36. This court wrote "malice can never be implied in an attempted murder case," and that attempted murder requires the State to prove the defendant "acted with express malice *and* the specific intent to kill." Id. at 130–31, 817 S.E.2d at 536–37.

Discussing the malice instruction in Taylor that did not include an instruction that malice could be inferred from the use of a deadly weapon the Court of Appeals wrote:

> Taylor's argument about implied or inferred malice is drawn from a footnote in King. In footnote five, King suggested the General Assembly re-evaluate the statute's language because "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. Taylor argues this language makes implied malice out-of-bounds. We disagree.
>
> When our supreme court spoke of implied malice in King, it was speaking of malice implied by operation of law, not of the jury's ability to infer malice based on its view of certain facts.

State v. Taylor, No. 2018-000341, 2021 WL 3889977, at *2 (S.C. Ct. App. Sept. 1, 2021), reh'g denied (Sept. 28, 2021).

The challenge in Taylor was to the general malice instruction. The Court of Appeals found no error in the trial judge's instruction on malice in Taylor. The challenge in the present case is not to the general malice instruction but to the specific instruction that malice could be inferred from the use of a deadly weapon. As a result of the erroneous implied malice instruction in the present case, the State was not required to prove express malice, an element of attempted murder. Once the jury improperly implied malice, an element of only the higher charge of attempted murder, the jury was unable to properly consider the lesser included offense of assault and battery first degree and could have found guilt on attempted murder based solely on the implied malice without regard to specific intent. This is especially true in light of the sparse specific intent instruction given in the present case. The judge instructed the jury that, "A

specific intent to kill is an element of Attempted Murder." (App. p. 375, lines 7-8). The judge then generally defined intent. (App. p. 375, lines 8-20). In contrast, in Taylor "Here, the jury charges repeatedly emphasized that the jury could not convict Taylor without finding she specifically intended to kill the child." State v. Taylor, No. 2018-000341, 2021 WL 3889977, at *3 (S.C. Ct. App. Sept. 1, 2021), reh'g denied (Sept. 28, 2021). The instruction in the present case failed to emphasize that the jury could not convict Petitioner without finding he specifically intended to kill another person.

The proper, although sparse, instruction that attempted murder requires a specific intent to kill does not cure the improper implied malice instruction in the present case. Trial counsel was ineffective in failing to object to the charge. Petitioner was prejudiced by the deficient performance. The erroneous implied malice charge diluted the State's burden of proving both a specific intent to kill and express malice required for attempted murder. The implied malice charge precluded the jury from properly considering the lesser included offense of assault and battery first degree. The jury could have found that Petitioner's act of shooting into the mobile home twice was merely reckless or negligent. In Shands, the Court of Appeals wrote:

> As Shands and the State recognized at trial, if the jury did not believe Shands had the specific intent to kill, he would have been guilty of the lesser-included offense of ABHAN. Despite the number of times Shands stabbed Sharon 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. See State v. Kinard, 373 S.C. 500, 504, 646 S.E.2d 168, 169 (Ct. App. 2007) (" 'General 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.' " (quoting BLACK'S LAW DICTIONARY (7th ed. 1999))); Nesbitt, 346 S.C. at 231, 550 S.E.2d at 866 ("[S]pecific intent means that the defendant consciously intended the completion of acts comprising the [completed] offense." (quoting Sutton, 340 S.C. at 397, 532 S.E.2d at 285)). Therefore, because there was evidence to reduce Shands's charge, the trial court erred in instructing the jury that malice could be inferred from the use of a deadly weapon. See Belcher, 385 S.C. at 610, 685 S.E.2d at 809 (holding the use of a

deadly weapon inferred malice instruction is not proper when there was evidence to reduce the crime).

424 S.C. at 131–32, 817 S.E.2d at 537–38. (Ct. App. 2018).

The trial judge erred in instructing the jury that malice could be inferred from the use of a deadly weapon because there was evidence to reduce the charge. Trial counsel was ineffective in failing to object to the charge. Petitioner was prejudiced by the deficient performance.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Trial counsel was deficient for failing to object to the inferred malice charge pursuant to Belcher. Petitioner was prejudiced by the deficient performance. The erroneous implied malice charge diluted the State's burden of proving both a specific intent to kill and express malice required for attempted murder. The improper implied malice charge prevented the jury from

properly considering the lesser included offense of assault and battery first degree. There is a reasonable probability that, but for counsel's failure to object to the implied malice instruction, the result of the proceeding would have been different.

CONCLUSION

Based on the above argument this Court should reverse the conviction for attempted murder and remand the case for a new trial.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of October, 2021.