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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of General Sessions

Robert E. Hood, Circuit Court Judge

Appellate Case No. 2018-000341

SHELBY HARPER TAYLOR ..... PETITIONER,

V.

THE STATE ..... RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that a Petition for Rehearing was filed and finally ruled on by the Court of Appeals on September 28, 2021. On October 26, 2021, this Court granted petitioner a fifteen-day extension of time in which to file the Petition for Writ of Certiorari and Appendix.

QUESTION PRESENTED

Whether, in light of this Court's holding that "a specific intent to kill is an element of attempted murder," the trial court erred by repeatedly instructing the jury that criminal intent may be inferred by a variety of different means. *State v. King*, 422 S.C. 47, 56-57, 810 S.E.2d 18, 22-23 (2017) ("[o]ne cannot be guilty of attempted murder by implied malice because implied malice does not encompass the essential specific intent to kill") (citation omitted).

STATEMENT OF THE CASE

I. Introduction.

On April 9, 2015, petitioner, Shelby Harper Taylor, was 23 years old and lived in a one-bedroom apartment with her new husband and sixteen-month-old daughter (hereafter "Baby S"). Early in the morning, Shelby went into labor – although she later testified that she did not realize she was in labor at the time – and gave birth to a second infant (hereafter "Baby T") alone in the bathroom. App. 278, l.3-17. She then placed the newborn girl in a dumpster at her apartment complex. App. 282, l.3-4. Later that same day, Baby T was discovered by two teenaged boys. App. 164, l.3-4. She suffered no injuries. App. 479, l.1-11. Shelby was arrested and indicted on charges of attempted murder after she confessed to police that evening. Baby T and Baby S were both placed in the custody of their paternal grandmother. Neither has had contact with Shelby since the day of her arrest. App. 287, l.16-25.

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. App. 47, l.1-4; 288, l.12-21. The trial judge allowed Shelby to remain on bond and return home each evening during trial and repeatedly lauded her exemplary behavior. App. 129, l.12-14; 136, l.23-25; 137, l.12-18; 198, l.15-19; 332, l.5-23; 467, l.19-22. At the conclusion of the trial, the jury returned a verdict of guilty on the attempted murder count, and the trial judge subsequently sentenced Shelby to twenty-five years imprisonment without the possibility of parole.

II. Trial Evidence.

On October 25, 2017, this 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.[1] 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

[1] Section 16-3-29 provides, "[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."

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, at age nineteen and shortly thereafter became pregnant. App. 307, l.7-22. She became estranged from her family during her pregnancy because her mother did not approve of her relationship with Patrick; Shelby and Patrick could not afford to live independently at the time, and Shelby's parents felt her pregnancy "was [a] complete disappointment." App. 308, l.2 – 309, l.16; 354, l.18-20. Shelby and Patrick married at a small ceremony to which her parents were not invited. App. 270, l.7-9; 354, l.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. App. 355, l.6-7.

After Baby S's birth, Shelby and her family reconciled. App. 355, l.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. App. 272, l.11-16. Around 5:00 a.m. on April 9, 2015, Shelby gave birth to Baby T at home in her bathroom. App. 280, l.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. App. 281, l.15-16. Inside the bag, the police found a receipt from a local café dated the previous day. App. 190, l.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. App. 203, l.15 – 204, l.7; 205, l.15-18. Shelby's family saw her photograph on the news and, later that

evening, her parents brought her to the south precinct of the Horry County police station. App. 206, l.3 – 207, l.5. Patrick Taylor arrived as well. App. 207, l.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. App. 233, l.12-21.

At trial, Shelby testified that Patrick was abusive and controlling. App. 271, l.9-23. She stated that they had financial difficulties and he did not want them to have another baby at that

time. App. 273, l.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. App. 278, l.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.[2] App. 304, l.9 – 305, l.11. Shelby stated that she did so "because I was protecting my husband." App. 305, l.11. Shelby's mother, Angie Harper, testified that she "wasn't pleased with the way Patrick treated [Shelby]," App. 308, l.16-17, but that Shelby "loved him so much that she just excused, you know, the way he acted." App. 311, l.24 – 312, l.1. She stated that Shelby was a good mother to Baby S, and she was never abusive or neglectful to her child.[3] App. 320, l.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." App. 397, l.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." App. 400, l.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." App. 430, l.4-16. Dr. McCarthy

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[2] 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. App. 241, l.17-22. Shelby then spoke to a male psychologist, Dr. Adedapo Oduwole, and denied any history of abuse, mental illness or physical illness.

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

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. App. 404, l.6 – 408, l.16. Dr. McCarthy opined that all of these risk factors were present in Shelby's case. App. 408, l.17-18.

III. Charge Conference.

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 on the day of her arrest. App. 299, l.1-11. Hixson conceded Shelby was not properly *Mirandized* and did not seek to introduce her second, incriminating statement to police. App. 67, l.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." App. 94, l.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." App. 462, l.25 – 463, l.2.

McCollum objected to an inferred malice charge, App. 459, l.14-16, and argued that this Court's 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." App. 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. App. 476, l.16 – 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. App. 477, l.7 – 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. App. 485, l.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." App. 486, l.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." App. 501, l.6-8.

Defense counsel Mureddu told the jury that all of the risk factors for Transient Peripartum Psychosis were present in Shelby's life. App. 494, l.17-23. He argued there was no evidence that Shelby had a "grand plan" to commit a "premeditated act" and stated "[t]he charge of attempted murder was a bogus charge, was the wrong charge from day one." App. 496, l.1-14. 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." App. 496, l.14-16.

The trial judge instructed the jury as follows:

> So, in 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***. Criminal intent must be proven by the state beyond a reasonable doubt. Criminal intent is always a matter that must be determined by the jury from the circumstances surrounding the situation. There is no way to prove intent to a mathematical certainty. There is no way that medical science can dissect a person's brain and determine what the person had in mind. So, the 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. Criminal intent is a mental state. It is a conscious wrongdoing. It is up to you to determine what the defendant intended to do based upon the circumstances shown to have existed.

All right. 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 expressed or implied.***

So, what is malice? So, malice 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.***

Now, what is malice aforethought? Malice aforethought does not require that the malice exist for any particular time before the act is committed. The malice must exist in the mind of the defendant just before and at the time the act is committed. Therefore, there must be a combination of previous evil intent and the act. Now, malice aforethought may be expressed or inferred. These terms express and inferred do not mean different kinds of malice but merely the manner in which the malice may be shown to exist. That is either by direct evidence or inference from the 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. ***Malice may be inferred from conduct that shows a total disregard for human life.*** If facts are proven – are proven 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 along with the other evidence in the case and you may give it the weight that you decide it should receive.

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 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.***

App. 509, l.11 – 511, l.22. The trial court also instructed the jury on the lesser included offense of assault and battery in the first degree. App. 511, l.23 – 512, l.14.

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." App. 569, l.11-15. Before passing sentence, the court noted that Shelby had been convicted of a "no-parole" offense. App. 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. . . ." App. 570, l.9-17. In the court's view, "none of that is present in this case in any way, shape, or form." App. 570, l.16-17. The trial judge nevertheless sentenced Shelby to twenty-five years in prison and ordered her to have no contact with her children.

IV. Post-trial Proceedings.

Petitioner appealed to the South Carolina Court of Appeals, arguing that the trial court's instructions were erroneous. The Court of Appeals denied relief, holding that "inferred malice" is not "inconsistent with the specific intent to kill required for attempted murder." App. 641.

ARGUMENT

I. An Inferred Malice Charge is Inconsistent with the Specific Intent to Kill Required for a Conviction of Attempted Murder.

"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 "expressly repealed" the offense of assault and battery with intent to kill (ABWIK) and "purposefully created the new offense of attempted murder, which includes a 'specific intent to kill' as an element." *King*, 422 S.C. at 63-64, 810 S.E. 2d at 26-27. S.C. Code Ann. § 16-3-29 now provides:

> 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.

Id. (emphasis added).

In *King*, the defendant was charged with the attempted murder and armed robbery of a cab driver, among other things. The trial court's instructions included, in part, statements that: "[i]ntent may be shown by acts and conduct of the defendant in other circumstances from which you may naturally and reasonably infer intent"; "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"; and, "[a] specific intent to kill is not an element of Attempted Murder but it must be a general intent to commit serious bodily harm." *Id.* at 53-54, 810 S.E. 2d at 21. This Court affirmed the Court of Appeals' conclusion that the trial court erred by charging the jury that attempted murder is a general intent crime but found it "necessary to expand on the analysis" to address potential confusion about the implications of the new statute's phrase "malice aforethought, either express or implied." *Id.* at 56, 810 S.E.2d at 22.

After noting that "the majority of courts in other jurisdictions have concluded that attempted murder requires a specific intent to kill," the Court recounted prior South Carolina caselaw that supports the same conclusion. *Id.* at 56-61, 810 S.E.2d at 23-25. The Court described

a history of ambiguity and confusion regarding the required mental states for murder and ABWIK. *State v. Foust* addressed this confusion by clarifying that ABWIK was a general intent crime that required a showing of malice, but not a specific intent to kill. 325 S.C. 12, 15, 479 S.E.2d 50, 51 (1996) (for a conviction of ABWIK, "it is sufficient if there is shown some general intent, such as that heretofore applied in cases of murder"); *see also*, *State v. Sutton*, 340 S.C. 393, 396, 532 S.E.2d 283, 285 (2000) ("a specific intent is not required to commit [ABWIK]"). The General Assembly was aware of this jurisprudence when it purposefully added the language "with intent to kill" to the newly codified offense of attempted murder, thus indicating that § 16-3-29 was intended "to require a higher level of *mens rea* for attempted murder than that of murder." *King*, 422 S.C. at 61, 810 S.E.2d at 25; *see also*, *id.* ("Because our case law, particularly *Foust*, establishes 'malice aforethought' as the required mental state for ABWIK, the additional language of 'with intent to kill' clearly elevates the required mental state above a general-intent crime.").[4]

The majority in *King* noted that "the inclusion of the word 'implied' in section 16-3-29 is arguably inconsistent with a specific-intent crime," and instructed that "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." *Id.* at 64 n.5, 810 S.E.2d at 27 n.5. Although Justice Kittredge disagreed with the majority's interpretation of the new statute, he warned trial courts:

> I would caution against any implied malice instruction in a future prosecution under section 16-3-29. For the reasons pointed out by the majority, it seems to me that the concept of implied malice has no place in a prosecution for a specific intent crime.

Id. at 74 n.13, 810 S.E.2d at 32 n.13.

[4] The Court also found that "the legislative history, when read in its entirety, supports our conclusion." 422 S.C. at 62, 810 S.E.2d at 26.

In *State v. Shands*, the Court of Appeals applied this Court's guidance in *King* to address a defendant's claim that the trial judge erred by giving an inferred malice instruction regarding his attempted murder charge. 424 S.C. 106, 817 S.E.2d 524 (Ct. App. 2018). The State alleged that Shands prevented his wife from leaving their house by pulling her back inside by her hair and then stabbing her multiple times with a barbecue fork. Shands admitted that he committed the alleged acts but claimed he did not have any memory of the incident because he drank homemade moonshine that "took [him] slap clean out of [his] mind." *Id.* at 116, 817 S.E.2d at 529. The trial judge instructed the jury that malice could be inferred from the use of a deadly weapon. The jury found Shands guilty of attempted murder.

The Court of Appeals reversed Shands's conviction, noting that this Court "indicated its belief in a footnote that malice can never be implied in an attempted murder case." *Id.* at 130, 817 S.E.2d at 536. The court explained that "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." *Id.* at 131, 817 S.E.2d at 537. "Despite 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.* Because there was evidence to reduce the attempted murder charge, it was improper for the trial court to instruct the jury that malice could be inferred from the use of a deadly weapon. Relying on *King*, the court concluded,

> 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 (emphasis in original).

II. The Jury Instructions in Petitioner's Case Were Improper.

The trial court's instructions in this case were inconsistent with *King* and *Shands*. This error was not harmless, and respondent cannot meet its burden of demonstrating "'beyond a reasonable doubt 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).

The only disputed issue at trial was whether Shelby possessed the requisite *mens rea* to have committed attempted murder. Despite this Court's instruction 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,'" 422 S.C. at 57, 810 S.E.2d at 23 (quoting *Keys v. State*, 766 P.2d at 273), the trial judge in this case repeatedly instructed the jury that criminal intent may be inferred in a number of ways. Specifically, the trial judge instructed the jury that criminal intent could be inferred: (1) "from the circumstances shown to have existed;" (2) by "the acts of the parties and all the facts and circumstances of the case;" (3) "under circumstances that the law will infer an evil intent"; (4) from "conduct that shows a total disregard for human life;" (5) by "the acts and conduct of the defendant from which you may naturally and reasonably infer intent;" or, (6) "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." App. 509, l.11 – 511, l.22. These are all general intent instructions. They are not consistent with *King's* holding that attempted murder requires a specific intent to kill – a mental state that this Court acknowledged is "a higher level of *mens rea* than that of the completed crime." 422 S.C. at 56, 810 S.E.2d at 22.

Although the trial judge did, on one occasion, note that "a specific intent to kill is an element of attempted murder," he then immediately undermined the specific intent requirement by instructing:

> 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.

App. 511, l.17-22. The trial court also separated his statement regarding specific intent from the general definition of attempted murder. App. 510, l.8-12 (defining attempted murder as "the State must prove that the defendant attempted to kill another person with malice aforethought either express or implied."). Reasonable jurors attempting to make sense of these instructions could have understood them to mean that so long as Shelby voluntarily and willfully placed Baby T in the dumpster, they could infer that the necessary specific intent to kill had been proven beyond a reasonable doubt.

As in *Shands*, Shelby did not dispute that she committed the acts as the State alleged. Her defense was based on evidence from which a reasonable juror could conclude that Shelby did not have a specific intent to kill. At the time of the crime, Shelby was a relatively young, new mother with no prior criminal history. The trial witnesses testified that she was a good mother to Baby S, and there was no evidence that she had ever abused or neglected her daughter. A defense expert witness testified that Shelby 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. App. 400, l.16-20. Consistent with this conclusion, Shelby testified that she was "in denial" during the birth and did not initially realize

she was in labor, in part because her first labor was artificially induced. App. 285, l.24; 278, l.3-17.

The jurors could easily have believed Shelby's defense and nevertheless viewed the element of specific intent to kill as satisfied. Indeed, there was little incentive for the jurors to consider whether Shelby 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 Shelby admitted that she "willfully" committed the acts of the crime. Moreover, Solicitor Hixson argued that the jury could find the intent element satisfied based solely on the fact that Shelby did not confess immediately upon initial police questioning. Emphasizing the same language that the trial court would later charge – "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," – Hixson asserted that criminal intent could be inferred because Shelby denied knowledge of the crime in her initial interview with police. App. 501, l.6-8. 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] App. 486, l.17-20.

Because of the trial judge's improper instructions, the State was not required to prove every element of the charged offense beyond a reasonable doubt. The improper charges also undermined Shelby's defense by reducing its relevancy, and they reduced the likelihood that the jury would give fair consideration to the lesser included offense.

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[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.

III. The Court of Appeals Erred in Rejecting this Claim.

The South Carolina Court of Appeals affirmed the conviction based on its conclusion that there is nothing legally wrong with a jury inferring malice "from a defendant's actions." App. 641-42 ("Sometimes the jury is left with nothing to consider except the defendant's actions."). This conclusion fails to address the full statutory definition of attempted murder. S.C. Code Ann. § 16-3-29. That a jury may be permitted to find malice (i.e., a general intent) by inference does not speak to the question of how the jury should be instructed under circumstances in which the jury is required to find both "express malice *and* the specific intent to kill." *Shands*, 424 S.C. at 131, 817 S.E.2d at 537 (citing *King*, 422 S.C. at 54-64, 810 S.E.2d at 22-27). In addition, there is a distinction between whether jurors may draw inferences from the evidence and whether (and to what extent) they should be specifically instructed to do so. *See Pantovich v. State*, 427 S.C. 555, 562, 832 S.E.2d 596, 562 (2019) ("The modern trend . . . has cast doubt upon the validity of charges instructing juries on how to interpret and use evidence.").

The Court of Appeals also concluded that "the jury charges repeatedly emphasized that the jury could not convict [Shelby] without finding she specifically intended to kill the child." App. 645. This is incorrect. The trial court opened its charge on criminal intent by telling the jury that "to establish criminal liability, criminal intent is required." App. 509, l.11-12. The court listed examples – none of which included a specific intent to kill but instead highlighted "knowledge, recklessness, or criminal negligence." App. 509, l.12-15. The court then gave multiple charges regarding the ways in which criminal intent generally may be inferred, followed by a definition of attempted murder that *did not specify* a specific intent to kill, and a discussion of malice and the variety of ways in which malice could be inferred. App. 509, l.15 – 511, l.12. Finally, the court stated "[a]ttempted murder – excuse me, a specific intent to kill is an element of attempted murder.

Attempted murder is the performance of acts which tend but fail to kill a human being when such acts are done with the deliberate intention unlawfully to kill." App. 511, l.13-17. Immediately thereafter, the court gave two additional instructions about ways in which the jury could infer intent, including "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." App. 511, l.17-22. "Nothing in these specific sentences or in the charge as a whole makes clear to the jury that one of these contradictory instructions carries more weight than the other." *Francis v. Franklin*, 471 U.S. 307, 322 (1985).

Thus, the trial court mentioned a specific intent to kill only briefly in two sentences buried within an overall charge that contained far more descriptions of inferred malice than specific intent. The charge offered no explanation to the jury about the distinction between general malice and the higher *mens rea* of a specific intent to kill. At a minimum, the charge was confusing and misleading. *See Lowry v. State*, 376 S.C. 499, 506, 657 S.E.2d 760, 764 (2008) ("'Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity.'") (quoting *Francis*, 471 U.S. at 322); *State v. Rothell*, 301 S.C. 168, 169-70, 391 S.E.2d 228, 229 (1990) ("It is error to give instructions which may confuse or mislead the jury."). The jurors could have understood the charge to mean that a general finding of malice would suffice and that they could make that finding by selecting one of the many options for inference offered by the trial court's instructions. The charge also permitted the jury to accept the State's argument – that the criminal intent element could be deemed satisfied simply because Shelby initially denied knowledge of the crime. These types of inferences are not consistent with the statutory language requiring the State to prove (and a jury to find) a specific intent to kill beyond a reasonable doubt as an element of attempted murder. It is not possible to conclude that

the trial judge's improper instructions were harmless beyond a reasonable doubt, and the conviction must be reversed.

CONCLUSION

For all of the reasons stated above, this Court should grant certiorari to address confusion in the lower courts about what constitutes a proper jury instruction in an attempted murder case, and – ultimately – reverse Shelby Taylor's conviction for attempted murder.

Respectfully Submitted,

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