

RECEIVED

Dec 20 2021

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. 2021-001220

SHELBY HARPER TAYLOR PETITIONER,

V.

THE STATE RESPONDENT.

PETITIONER'S REPLY BRIEF

Emily C. Paavola #77855
900 Elmwood Ave., Suite 200
Columbia, SC 29201
(803)765-1044
Emily@justice360sc.org

John H. Blume #743
Cornell Law School
159 Hughes Hall
Ithaca, NY 14853
(607)255-1030
John@blumelaw.com

ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

ARGUMENT IN REPLY 1

 I. The Trial Court’s Instructions Were Inadequate 1

 II. The Instructional Error Was Not Harmless 3

CONCLUSION..... 4

TABLE OF AUTHORITIES

State Cases

Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834 (1992).....3

State v. Buckner, 341 S.C. 241, 534 S.E.2d 15 (Ct. App. 2000).....2, 3

State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017).....1, 3, 4

State v. Shands, 424 S.C. 106, 817 S.E.2d 524 (Ct. App. 2018)2

Other

S.C. Code Ann. §16-3-29.....1

ARGUMENT IN REPLY

I. THE TRIAL COURT'S INSTRUCTIONS WERE INADEQUATE.

Respondent argues that the trial court's instructions in this case "ensur[ed] the jurors understood Taylor could not be convicted of the offense unless they found beyond a reasonable doubt she *intentionally* acted with a *specific intent to kill* her victim." Return at 17 (emphasis in original). Respondent is mistaken. Had the trial court actually given the instruction respondent suggests (*i.e.*, you may not convict Shelby Taylor of attempted murder unless you find beyond a reasonable doubt that she intentionally acted with a specific intent to kill the victim), the situation might be different, but that is not what happened here. Instead, a reasonable juror attempting to make sense of the charge as a whole would most likely have understood it to mean that a conviction of attempted murder required only a general intent of malice, which the jury could find by selecting one of the many inference options offered to them by the trial court's erroneous instructions.

Attempted murder is defined as occurring when "[a] person who, *with intent to kill*, attempts to kill another person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-29 (emphasis added). The legislature's purposeful inclusion of the phrase "with intent to kill" is critical. As this Court held in *State v. King*, it indicates that § 16-3-29 requires a specific intent to kill, which is "a higher level of *mens rea*" than the general malice required for a murder conviction. 422 S.C. 47, 61, 810 S.E.2d 18, 25 (2017). Thus, petitioner agrees with respondent's assertion that "based on the plain language of the statute, the statutorily-delineated elements of the offense include: (1) an attempt to kill another person; (2) *with intent to kill*; and (3) with malice aforethought, either express or implied." Return at 16 (emphasis added). But the trial court did not "advise the jury of the exact language used by the statute." *Id.* at 18. The instruction at issue excised the second element, telling the jury that "[i]n order to prove this crime, the state must prove

that the defendant attempted to kill another person with malice aforethought either express or implied.” App. 510, 11.9-12. The trial court then gave a lengthy charge on malice and a variety of ways in which it could be inferred. App. 509 – 511.

At the conclusion of the charge, the trial court briefly noted that “a specific intent to kill is an element of attempted murder,” App. 511, but offered no further instruction to help the jurors understand that a specific intent to kill is a different, and higher, level of *mens rea* than the general malice the court had discussed at length. Without this critical information, the charge inaccurately suggested that the lesser intent of malice (and the various methods by which the court stated malice could be inferred) was equivalent to a finding of a specific intent to kill. That is not a correct statement of the law on attempted murder in South Carolina, and the instructions were therefore fatally flawed. *See State v. Buckner*, 341 S.C. 241, 247, 534 S.E.2d 15, 18 (Ct. App. 2000) (“Where the charge contains both the correct and incorrect law, an appellate court must assume the jury followed the incorrect charge).

In addition, after mentioning a specific intent to kill, the trial court concluded by stating “[i]ntent may 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.” *Id.* This strongly suggested that the jury could find Shelby guilty of attempted murder based solely on a finding that she “willfully” committed the *actus reas* of the crime, which she admitted. The trial court’s instructions did not clearly explain that jurors were required to find, beyond a reasonable doubt, that not only did Shelby commit the required acts with malice, but *also* that she possessed a specific intent to kill her newborn child. *See State v. Shands*, 424 S.C. 106, 131, 817 S.E.2d 524, 537 (Ct. App. 2018) (holding a conviction of attempted murder requires the State to prove “express

malice *and* the specific intent to kill”) (emphasis in original) (citing *King*, 422 S.C. at 54-64, 810 S.E.2d at 22-27).

II. THE INSTRUCTIONAL ERROR WAS NOT HARMLESS.

Respondent argues that even if the trial judge’s instructions were improper, any error was harmless because there was evidence from which the jury could have concluded that Shelby “specifically and maliciously intended the baby to die.” Return at 23, n.11. The question, however, is not whether the jury could have done so, but rather whether Respondent can satisfy its burden of demonstrating “beyond a reasonable doubt that 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); *see also, Buckner*, 341 S.C. at 247, 534 S.E.2d at 18 (“In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered.”). Respondent cannot meet this rigorous requirement. The trial court’s erroneous instructions reduced the State’s burden to prove each element of the charged offense, undermined Shelby’s defense that she did not possess the requisite intent and reduced the likelihood that the jury would fairly consider the lesser included offense.

Respondent likewise misunderstands the role of the solicitor’s closing argument in this analysis. The solicitor argued that the jury could conclude that the State proved the requisite criminal intent because Shelby initially denied any knowledge of the crime.¹ App. 486. Respondent argues that the solicitor’s argument was “in no way improper,” and relies on two cases

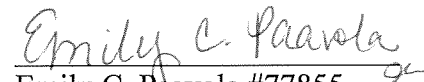
¹ Although, as discussed in the Petition, within fifteen minutes of her initial interview, Shelby confessed that she placed the baby in the trash and was arrested and transported to the hospital for treatment. The jury as not aware of these details because the State introduced only Shelby’s initial statement and not the second statement during which the State violated her *Miranda* rights.

finding that malice can be shown by efforts to mislead police or cover up a crime. Return at p.20. This argument simply highlights the problem here. A conviction of attempted murder requires *more* than a finding of malice. *King*, 422 S.C. at 56, 810 S.E.2d at 22. The trial court's instruction error was not harmless because, among other things, it gave the jury permission to accept the State's incorrect and misleading argument.

CONCLUSION

For these reasons, and the reasons stated in the Petition for Writ of Certiorari, this Court should grant the petition and reverse.

Respectfully Submitted,


Emily C. Paavola #77855
900 Elmwood Ave., Suite 200
Columbia, SC 29201
(803)765-1044
Emily@justice360sc.org

John H. Blume #743
Cornell Law School
159 Hughes Hall
Ithaca, NY 14853
(607)255-1030
John@blumelaw.com

December 20, 2021