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**Jan 14 2022**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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THE STATE,

RESPONDENT,

V.

MONTRELLE LAMONT CAMPBELL,

APPELLANT.

APPELLATE CASE NO. 2018-000115

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Appeal from Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

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Opinion No. 5885 (Filed December 22, 2021)

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RETURN TO  
PETITION FOR REHEARING

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On December 22, 2021, this Court reversed Appellant’s convictions for murder and attempted murder in a published opinion. State v. Campbell, Op. No. 5885 (S.C. Ct. App. filed December 22, 2021) (Howard Adv. Sh. No. 45 at 39). Pursuant to Rule 221(a), SCACR, the state filed a petition for rehearing on January 6, 2022, alleging this Court “misapprehended certain factual and legal matters in arriving at its holdings.” Pet. for Reh’g at 1. On January 7, 2022, this Court requested Appellant file a return to the petition for rehearing. This return follows.

The state asserted it was unclear whether this Court’s “consideration and reversal” of the trial judge’s instruction that the jury could infer malice from the use of deadly weapon applies strictly to Appellant’s attempted murder convictions, or to both his attempted murder and murder convictions. Pet. for Reh’g at 1. However, it is apparent that this Court’s consideration of the erroneous jury charge applied to both Appellant’s murder and attempted murder convictions based on the Court’s analysis of State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), which held a trial court should never instruct a jury that it may infer malice from the use of a deadly weapon regardless of the evidence presented at trial, and State v. Brooks, 428 S.C. 618, 837 S.E.2d 236 (Ct. App. 2019), *cert. denied*, S.C. Sup. Ct. Order dated Aug. 10, 2020. Malice is a critical element of both attempted murder and murder. Therefore, it is obvious that this Court’s holding applied to both offenses. No clarification is needed.

Additionally, after emphasizing that this Court “agreed” with Appellant that attempted murder “requires both express malice and a specific intent to kill,” the state claimed “[t]his Court’s application of law for attempted murder is in contradiction with its recent decision reached four months ago in State v. Taylor, 434 S.C. 365, 370, 862 S.E.2d 924, 927 (Ct. App. 2021), reh’g denied (Sept. 28, 2021).” Pet. for Reh’g at 1; See Campbell, Op. No. 5885 (S.C. Ct. App. filed December 22, 2021) (Howard Adv. Sh. No. 45 at 44). The state quoted the following language from Taylor in support of its argument: “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.” Pet. for Reh’g at 1 (citing Taylor, 434 S.C. at 370, 862 S.E.2d at 927); See State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017).

It appears the state misapprehended this Court’s holding in Taylor, which is consistent with the Court’s decision in this case. In Taylor, the appellant was convicted of attempted

murder after she hid her pregnancy, gave birth to a baby girl in the bathroom of her apartment, placed the newborn inside a trash bag, put the bag in the apartment's shared trash dumpster, and then proceeded with her day as though nothing had happened. Taylor, 434 S.C. at 367, 862 S.E.2d at 926. At trial, the state argued the only logical inference from the evidence was that Taylor intended to kill the child. Id. at 369, 862 S.E.2d at 926. Taylor maintained she did not intend to kill the newborn. Id. at 368, 862 S.E.2d at 926. She presented evidence that the event occurred during a state of Transient Peripartum Psychosis, meaning it happened while she was temporarily delusional. Id. On appeal, Taylor claimed the trial judge erred by instructing the jury on inferred malice given our Supreme Court's holding in King that attempted murder is a specific intent crime, and that implied malice is arguably inconsistent with a specific intent crime.

This Court determined that nothing in King or any other case prevents a jury from being charged that it can look at a defendant's actions and imply or infer from those actions that the defendant in fact had the specific intent to kill. Taylor, 434 S.C. at 370, 862 S.E.2d at 927. The trial judge in Taylor "charged the jury that malice could be expressed or inferred—but that those terms referred to whether malice was proven by direct evidence or by the jury's inferences from other facts." Id. at 371, 862 S.E.2d at 927. This Court emphasized that "there were no charges regarding the circumstances under which *the law* may imply malice." Id. at 371, 862 S.E.2d at 928 (emphasis in original). The Court reiterated that it understood "implied malice as prohibited in King to mean malice *implied by the law*, not malice found by the jury based on the circumstances." Id. at 372, 862 S.E.2d at 928 (emphasis added).

Unlike in Taylor, in this case, the trial judge charged the jury that it could infer malice from the use of a deadly weapon *as a matter of law* in violation of the Supreme Court's holding

in King. Consequently, this Court's holdings in Taylor and Campbell are consistent, not contradictory as claimed by the state.

The state further claimed this Court "misapplied the standard for express malice and undercut the presence of express malice set forth within the record " in reaching its conclusion that the error in giving the inferred malice instruction was not harmless. Pet. for Reh'g at 2. However, this Court properly cited the standard used to determine whether an erroneous jury instruction is harmless: "When considering whether an error with respect to a jury instruction was harmless, [the Court] must 'determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.'" Burdette, 427 S.C. at 496, 832 S.E.2d at 578 (quoting State v. Middleton, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014)); See Campbell, Op. No. 5885 (S.C. Ct. App. filed December 22, 2021) (Howard Adv. Sh. No. 45 at 45). This Court then correctly determined that the jury may have found malice based solely on the use of a weapon and, therefore, the error in giving the inferred malice instruction was not harmless.

There was no evidence of express malice in this case. There was no evidence the shooting was premeditated or planned in advance as the state claimed. See Pet. for Reh'g at 3. The alleged "evidence of preparation" outlined by the state is simply not supported by the record. Even if there was some evidence of express malice, the standard for determining harmless error is not merely the "existence or nonexistence" of evidence as the state suggests. See Pet. for Reh'g at 4. The state's claim that "a charge on inferred malice cannot be said to have contributed to the verdict when the record has been said to include evidence of express malice" is wholly incorrect. Pet. for Reh'g at 4. Notably, the state failed to cite to any authority for this proposition and no authority supports such a bright line rule. The standard for determining harmless error when an inferred malice instruction is erroneously given is not merely the

“existence or nonexistence” of evidence of express malice. The standard is whether *beyond a reasonable doubt* the erroneous instruction did not contribute to the verdict. As this Court held, the jury could have reasonably found malice partially or solely based on the use of a weapon. See Campbell, Op. No. 5885 (S.C. Ct. App. filed December 22, 2021) (Howard Adv. Sh. No. 45 at 46). Consequently, the error cannot be said to have been harmless.

Moreover, this Court properly held the trial judge erred by instructing the jury on the hand of one is the hand of all theory of accomplice liability because no evidence supported the charge. In its petition for rehearing, the state claimed there was “equivocal” evidence that Richardson was the shooter because the identity of the man carrying the rifle captured on surveillance footage is unclear. However, while the identity of the man carrying the rifle may have been disputed, there was absolutely no evidence that this individual was Richardson. Richardson was identified by multiple state witnesses as the man wearing a white shirt, blue jeans, and a baseball hat. R. 284, ll. 8-17; R. 338, l. 1 – 340, l. 22; R. 346, ll. 9-20. The man carrying the rifle seen on the surveillance footage was wearing “an Italia shirt with numbers on it,” also described as a blue polo shirt with 115 on the back, and shorts. R. 285, ll. 1-20; R. 346, ll. 15-20.

Lastly, the state suggests there was circumstantial evidence of an accomplice relationship between Appellant and the individual seen by Ms. Blake sufficient to support the trial judge’s decision to charge accomplice liability. Pet. for Reh’g at 6. The evidence cited by the state in support of this assertion is merely the timing of when Ms. Blake saw the armed individual flee the scene. The state claimed the man seen on the surveillance camera carrying a rifle “*could* have been working together” with the individual seen by Blake because both individuals were seen around the same time. This is simply not evidence that the two individuals had joined

together in a common plan or scheme to carry out the shooting. This Court correctly held there was no evidence of an accomplice relationship between Appellant and the man seen by Blake. Campbell, Op. No. 5885 (S.C. Ct. App. filed December 22, 2021) (Howard Adv. Sh. No. 45 at 48-49).

Based upon the above arguments, Appellant respectfully requests this Court deny the state's petition for rehearing. This Court correctly held the trial judge erred by charging the jury that malice may be inferred by the use of a deadly weapon in light of our Supreme Court's decisions in State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019), and State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017), and that the error was not harmless. The Court also correctly held that the trial judge erred by instructing the jury on the hand of one is the hand of all theory of accomplice liability because no evidence supported the charge.

Respectfully Submitted,

s/ Lara M. Caudy \_\_\_\_\_  
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ATTORNEYS FOR APPELLANT

This 14th day of January, 2022.

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CERTIFICATE OF SERVICE

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Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies that a true copy of the Return to Petition for Rehearing in the above referenced case has been served upon William Joseph Maye, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and Montrelle Lamont Campbell, #276819, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 14th day of January, 2022.

s/ Lara M. Caudy

Lara M. Caudy  
Appellate Defender

ATTORNEY FOR APPELLANT