

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Jan 20 2022

S.C. SUPREME COURT

APPEAL FROM Horry County

Robert E. Hood, Circuit Court Judge

Appellate Case No. 2021-001220

The State of South Carolina,.....Respondent,

v.

Shelby Harper Taylor,.....Petitioner.

**AMICUS CURIAE BRIEF OF THE
SOUTH CAROLINA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS**

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STATEMENT OF INTEREST OF *AMICUS CURIE*

The South Carolina Association of Criminal Defense Lawyers [“SCACDL”] is devoted to protecting the liberty of the citizens of South Carolina by fighting to ensure justice and due process for all persons accused of any criminal act.

We promote excellence and integrity in the practice of criminal law by providing the highest quality criminal law seminars to those who defend the accused.

We speak with a united voice in challenging legislation directed to limiting or eliminating the rights of the individual and we labor for laws that preserve equal access to justice for all.¹

SCACDL has over 700 members whose interests are in the field of criminal law. Membership includes both private criminal defense lawyers and public defenders. SCACDL strives, both in and out of the courtroom, to better South Carolina’s criminal justice system through seminars, public education, and input on pending legislation that will affect the interests of members’ present and future clients. An *amicus curiae* brief from SCACDL is desirable because the identity of the organization implies a purpose to protect the rights of all those accused of crime, and cumulatively, its members have great experience in the representation of a wide range of defendants, whether they are charged with minor or serious crimes, and regardless of whether they can retain the services of a lawyer.

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,

¹ South Carolina Association of Criminal Defense Lawyers Mission Statement found at www.scacdl.org (last visited Jan. 16, 2022).

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 CASE

On May 28, 2015, the Horry County Grand Jury returned a true bill indictment alleging:

That Shelby Harper Taylor did in Horry County on or about April 9, 2015 with intent to kill her newborn child, D.O.B. [redacted], attempt to kill said child with malice aforethought, either express or implied in violation of Section 16-3-29 S.C. Code of Laws, 1976, as amended.

A. 573-74. The indictment did not allege the specific facts of the alleged crime, and the State did not amend the indictment after this Court’s opinion in *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017).

From February 5-7, 2018, the State tried Ms. Taylor before the Honorable Robert E. Hood and a jury. Scott Hixson and Cara Walker, both of the Fifteenth Circuit Solicitor’s Office, represented the State. Greg McCollum and Dean Mureddu represented Ms. Taylor. During both charge conferences, based on *King*, defense counsel objected to the trial court instructing the jurors attempted murder could be proven by “express or implied” malice. A. 438-66, 476-78. The trial court, however, instructed both “express malice” and “implied malice” are applicable to attempted murder. A. 510-12. In addition to attempted murder, the trial court allowed the jurors to consider the lesser-included offense of first-degree assault and battery. A. 511-12. The jurors convicted Ms. Taylor of attempted murder. A. 519. On February 15, 2018, Judge Hood sentenced Ms. Taylor to twenty-five years imprisonment. A. 571.

Ms. Taylor appealed to the South Carolina Court of Appeals. John H. Blume, III and Emily C. Paavola represented Ms. Taylor. Mark R. Farthing represented the State. On September 1, 2021, the Court of Appeals affirmed the conviction and sentence. *State v. Taylor*, 434 S.C. 365, 862 S.E.2d 924 (Ct. App. 2021). On September 28, 2021, the Court of Appeals denied Ms. Taylor’s petition for rehearing.

On November 10, 2021, Ms. Taylor filed a petition for a writ of certiorari. On December 15, 2021, the State filed its return. On December 20, 2021, Mr. Taylor replied. This amicus curiae brief follows.

ARGUMENT

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).

I. An Inferred Malice Charge is Inconsistent with the Specific Intent to Kill Requirement of Attempted Murder.

In *King*, this Court held, “[T]he General Assembly expressly repealed the offense of [assault and battery with intent to kill] and purposefully created the new offense of attempted murder, which includes a ‘specific intent to kill’ as an element.” 422 S.C. at 63-64, 810 S.E.2d at 26-27. In doing so, this Court acknowledged “South Carolina has not been immune from conflicting case law regarding levels of criminal intent,” and, “this confusion appears to have arisen out of the relationship between the crimes of murder and [assault and battery with intent to kill].” *Id.* 422 S.C. at 57, 810 S.E.2d at 23. This Court also recognized *Keys v. State*, 104 Nev. 736, 766 P.2d 270 (1988) “sought to clarify this area of criminal law by distinguishing the crime of attempted murder from murder by

analogizing express malice to a specific intent to kill.” *Id.* In order to bring clarity to our state’s attempted murder statute, this Court recognized “it is necessary to address both parts of section 16-3-29 as it demonstrates that the General Assembly created the offense of attempted murder by purposefully adding the language “with intent to kill” to “malice aforethought, either express or implied”² to require a higher level of *mens rea* for attempted murder than that of murder.”³ *Id.*, 422 S.C. at 61, 810 S.E.2d at 25. This Court further held, “Attempted murder can be committed only when the accused’s acts are accompanied by *express malice*, malice in fact.” *Id.*, 422 S.C. at 57, 810 S.E.2d at 23 (emphasis original) (quoting *Keys*, 104 Nev. at 740, 766 P.2d at 273). In order to fully appreciate why an inferred malice charge is inconsistent with the specific intent to kill requirement of attempted murder, clearly articulating the distinctions of “express malice” verses “implied malice” and a “specific intent to kill” verses a “general intent to kill” is essential.

“Express malice is when there is a deliberate intention to unlawfully take the life of another.” *State v. Wilds*, 355 S.C. 269, 276-77, 584 S.E.2d 138, 142 (Ct. App. 2003) (citing 40 C.J.S. *Homicide* § 34 (1991)). This Court long ago explained, “[A]s where one makes preparation, lies in wait, and [kills] another as the result of premeditation and deliberation, the law says that is expressed malice.” *State v. Thompson*, 76 S.C. 116, 56 S.E. 789, 791 (1907). “Implied malice is when circumstances demonstrate a ‘wanton or reckless disregard for human life’ or ‘a reasonably prudent man would have known that according

² “Implied malice” and “inferred malice” are synonyms.

³ *King* “also acknowledge[d] the ambiguity created by the language in section 16-3-29 as aptly noted by the author of the concurring opinion. However, unlike the concurring opinion, [the majority found] the legislative history, when read in its entirety, supports [its] conclusion.” 422 S.C. at 62, 810 S.E.2d at 25-26.

to common experience there was a plain and strong likelihood that death would follow the contemplated act.” *Id.* *Keys* explained:

The mens rea requirement denoted by the term *express malice* is different from that of *implied malice*. Express malice, called malice in fact, is the deliberate intention to kill; implied malice, called malice in law, does not relate to a deliberate, intentional killing but is rather a mens rea inferred in law from the “circumstances of the killing.” NRS 200.020. Proving express malice means proving a deliberate intention to kill; while proving implied malice means proving only the commission of wrongful acts from which, absent any proof of an actual intent to harm, the archaic but essential “abandoned and malignant heart” can be inferred in law.

104 Nev. at 740, 766 P.2d at 272 (emphasis original).

Proof of “express malice,” without more, is insufficient to sustain a conviction for attempted murder. Under the common law, “the element that distinguish[ed] assault and battery with intent to kill] from [assault and battery of a high and aggravated nature] is not malice but [a general] intent to kill.” *State v. Dennis*, 402 S.C. 627, 638, 742 S.E.2d 21, 27 (Ct. App. 2013); *see also State v. Pilgrim*, 326 S.C. 24, 27, 482 S.E.2d 562, 563 (1997) (“Absence of malice [was] not an element of [common law assault and battery of a high and aggravated nature].”). Thus, as this Court recognized in *King*, the distinction between a “specific intent to kill” verses a “general intent to kill” is essential to understanding the crime of attempted murder.

“At common law, crimes generally were classified as requiring either ‘general intent’ or ‘specific intent.’” *United States v. Bailey*, 444 U.S. 394, 403 (1980). “In the context of an ‘attempt’ crime, specific intent means that the defendant consciously intended the completion of acts comprising the choate offense. In other words, the completion of such acts is the defendant’s purpose.” *State v. Sutton*, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000) (citing *United States v. Calloway*, 116 F.3d 1129 (6th Cir.1997)). Attempted

murder, therefore, requires the prosecution to prove beyond a reasonable doubt that the accused intended to complete the act of killing the intended victim.

In South Carolina, murder is a “general intent” crime. *See, e.g., State v. Foust*, 325 S.C. 12, 15-16, 479 S.E.2d 50, 51-52 (1996) (holding “that, in charging juries the law of [assault and battery with intent to kill], South Carolina trial judges should give a standard ‘intent charge, but need not advise the jury that the defendant must have a **specific** intent to kill before he may be convicted of ABIK.” (emphasis original)). In *State v. Judge*, this Court explained the “implied malice” required to prove murder:

It is a wicked condition of the heart. It is a wicked purpose. It is a performed purpose to do a wrongful act, without sufficient legal provocation; and in this case it would be an indication to do a wrongful act which resulted in the death of this man, without sufficient legal provocation, or just excuse, or legal excuse. In its popular sense, the term ‘malice’ conveys the meaning of hatred, ill-will, or hostility toward another. In its legal sense, however, as it is employed in the description of murder, it does not of necessity import ill-will toward the individual injured, but signifies rather a general malignant recklessness of the lives and safety of others, or a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief; in other words, a malicious killing is where the act is done without legal justification, excuse, or extenuation, and malice has been frequently, substantially so defined as consisting of the intentional doing of a wrongful act toward another without legal justification or excuse.

208 S.C. 497, 505-06, 38 S.E.2d 715, 719-20 (1946) (internal citations and quotations omitted). *See also State v. Mouzon*, 231 S.C. 655, 663, 99 S.E.2d 672, 676 (1957) (“Malice does not necessarily mean an actual intent to take human life. It may be inferential or implied, instead of positive, as when an act which imports danger to another is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life.” (citing *State v. Trott*, 190 N.C. 674, 674 130 S.E. 627, 629 (1925)); *State v. Davis*, 50 S.C. 405, 27 S.E. 905, 911 (1897) (“the law will imply malice from any wanton, thoughtless, cruel, or depraved act,—any act going to show an intention on the part of the party which

shows a heart devoid of all social instincts and fatally bent on mischief.”). Addressing “implied malice,” Judge Moylan of Maryland said, “As an evidentiary matter, the proof of an intent to commit grievous bodily harm can serve, and almost universally does serve, as a legally sufficient predicate to support the inference of the necessary intent to kill.” *Glenn v. State*, 68 Md.App. 379, ___, 511 A.2d 1110, 1116 (1986). Thus, in a grievous bodily injury case, “implied malice” is used to supply the “general intent to kill” even if it could not be proven. The same inference arising from an intent to commit grievous bodily harm, under this Court’s decision in *King*, cannot be used to supply the specific intent to kill required to establish the express malice that is an element of attempted murder.

Indeed, the evolution of our state’s attempted murder jurisprudence consistently considers the distinction between a “specific intent to kill” and a “general intent to kill.” In *State v. Smith*, an attempted murder prosecution, this Court held “trial courts may no longer give an implied malice charge when there has been evidence presented that the defendant acted in self-defense,” because “[i]n claiming self-defense, *Smith admitted he had an express intent to kill*, but argued his intent to kill was legally justified due to an imminent threat to his life from the rival group.” 430 S.C. 226, 230-33, 845 S.E.2d 495, 496-98 (2020) (emphasis original). On two occasions, the Court of Appeals held the doctrine of transferred intent did not apply to attempted murder because attempted murder is a specific intent crime. *State v. Williams*, No. 2017-001601, 2021 WL 2944778, at *6 (S.C. Ct. App. July 14, 2021) (“We find the doctrine of transferred intent inapplicable to this charge of attempted murder. The circuit court erred in denying Williams’s directed verdict motion because § 16-3-29 requires proof of a specific intent to kill. The jury acquitted Williams of the attempted murder of Myers, and no evidence in the record suggests Williams possessed

any intent to kill Ashley R.”); *State v. Geter*, 434 S.C. 557, 568, 864 S.E.2d 569, 575 (Ct. App. 2021) (“So long as attempted murder is a specific intent crime, transferring the intent to kill does not satisfy the necessary mens rea to convict a defendant of the attempted murder of an unintended victim.”). Although not addressing the applicability of the doctrine of transferred intent to an attempted murder charge, this Court observed, “It is well-settled in South Carolina that the doctrine of transferred intent applies to general-intent crimes.” *State v. Williams*, 427 S.C. 148, 157, 829 S.E.2d 702, 707 (2019) (citing *State v. Fennell*, 340 S.C. 266, 271-73, 275-76, 531 S.E.2d 512, 515-16, 517 (2000) and *State v. Heyward*, 197 S.C. 371, 376-77, 15 S.E.2d 669, 672 (1941)). In *Smith*, which involved gunshot wounds to an unintended victim, this Court again declined to address whether “the doctrine of transferred intent applied to attempted murder because it is a specific-intent crime,” but it also observed:

Nonetheless, we note the State indicated that—were the Court to reverse Smith’s convictions—it intended to charge Smith with three counts of attempted murder for shooting at the rival group, and one count of assault and battery of a high and aggravated nature (ABHAN) for shooting the victim. ABHAN is a general-intent crime, and, thus, there would be no question on remand as to the applicability of the doctrine of transferred intent.

430 S.C. at 234, n. 9, 845 S.E.2d at 499, n. 9 (citing *Williams*, 427 S.C. at 157, 829 S.E.2d at 707).

Thus, a clear understanding of the distinctions between “express malice” verses “implied malice” and a “specific intent to kill” verses a “general intent to kill” is essential for any attempted murder prosecution. “While it may seem counterintuitive for the attempt of a crime to require a higher level of *mens rea* than that of the completed crime, this is the majority rule and a rule that our appellate courts and General Assembly have followed.”

King, 422 S.C. at 56, 810 S.E.2d at 22. “Consequently, [this Court held] that a specific intent to kill is an element of attempted murder as codified in section 16-3-29,” and “[o]ne cannot be guilty of attempted murder by implied malice because implied malice does not encompass the essential specific intent to kill.” *Id.*, 422 S.C. at 57, 810 S.E.2d at 23. For the reasons discussed below, neither the trial court nor the Court of Appeals properly applied these legal principles.

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

“The law to be charged to the jury is determined by the evidence presented at trial. *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). “The purpose of a jury instruction is to enlighten the jury and to aid it in arriving at a correct verdict.” *State v. Blurton*, 352 S.C. 203, 207-08, 573 S.E.2d 802, 804 (2002). “A jury charge is no place for purposeful ambiguity.” *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009), *holding modified and extended by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019). The jury instructions in Shelby Taylor’s case were improper for three reasons. First, although instructing a specific intent to kill is an element of attempted murder, the trial court improperly equated “implied malice” with a “specific intent to kill.” Second, the trial court’s instructions involving inferences constituted “an improper court-sponsored emphasis of a fact in evidence.” *Burdette*, 427 S.C. at 503, 832 S.E.2d at 582. Third, the trial court unnecessarily instructed the jurors about other types of mens rea that have no applicability to this prosecution.

A. Although instructing a specific intent to kill is an element of attempted murder, the trial court improperly equated “implied malice” with a “specific intent to kill.”

The trial court instructed Shelby Taylor’s jurors, “In order to prove [attempted murder], the state must prove that the defendant attempted to kill another person with malice aforethought, either express or implied.” A. 510. The trial court explained

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 the intent to inflict injury under circumstances that the law will *infer* an evil intent.

Id. (emphasis added). After explaining the meaning of “malice aforethought,” the trial court instructed both “express malice” and “implied malice”:

[M]alice aforethought may be express or inferred. These terms express and inferred do not mean different kinds of malice but merely the manner in which 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 an person prepared beforehand to do the act which is later accomplished. Malice may be inferred from conduct that shows a total disregard for human life. If facts are proven – are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would simply be 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.

Id., at 510-11.

Against this backdrop, the trial court instructed the jurors about attempted murder and first-degree assault and battery. After instructing “a specific intent to kill is an element of attempted murder,” the trial court properly instructed, “Attempted murder is the performance of an act or acts which tend but fail to kill a human being when such acts are done with the deliberate intention to unlawfully to kill.” *Id.*, at 511; *see King*, 422 S.C. at 57, 810 S.E.2d at 23 (“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 express malice, namely, with the deliberate intention unlawfully to kill.” (quoting *Keys*, 104 Nev. at 740, 766 P.2d at

273)). The same paragraph, however, included a general intent instruction and, thus, improperly equated a specific intent to kill with implied malice:

Intent may be shown by acts and conduct of the defendant from which you may naturally and reasonably infer intent. Intent 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.

A. 511. The trial court next provided the statutory definition of first-degree assault and battery, but it did not explain the mens rea required to prove this offense.

With the clear understanding of the distinctions between “express malice” verses “implied malice” and a “specific intent to kill” verses a “general intent to kill,” discussed in Section I above, the errors in the trial court’s jury instruction become apparent. As discussed, expressed malice can be proven by either words of the defendant or evidence of pre-planning. Proof by the State of a plan to kill can be evidence of expressed malice even without using the words of the defendant. *Thompson, supra*. When a defendant in an attempted murder case expressly states “I am going to kill you,” that is evidence of express malice. When a defendant makes extensive plans, the logical consequence of which is to murder a person, the courts also treat that as expressed malice even if no incriminating statements are made. The problem with instructing “inferred malice” or “implied malice” is that historically implied malice has been used to establish the crime of murder when there is no specific intent to kill, but a person has been killed under circumstance in which a jury could infer the required malice. *Mouzon, Judge, supra*.

In the present case, the only level of “intent” the trial judge instructed to the jurors was the level of “intent” required for attempted murder. Therefore, when the trial court instructed the jurors as to “intent,” the jurors had to interpret it as a specific intent to kill. The problem in this case is that the jury was instructed they may infer malice and the

specific intent to kill, as charged by the judge, “[Malice] 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 and evil intent.” App. at 510, ll 14-17. The trial court further stated, “Malice may be inferred from conduct that shows a total disregard for human life.” App. at 511, ll 6-7. The trial court further lessened the State’s burden of proof when it stated, “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 life.” App. at 511, ll 19-22. None of these inferences are sufficient to prove a specific intent to kill as required by *King*. The charge told the jury they could infer the specific intent to kill from acts, such as “with intent to inflict an injury,” that do not require a specific intent to kill. The only intent discussed in the charge is the specific intent to kill. A reasonable juror would conclude from this charge that they may infer a specific intent to kill from the facts described by the trial judge. The inferences stated by the trial judge are sufficient inferences to sustain a conviction for murder under the implied malice aspect of a murder conviction, which is a general intent instruction. To avoid this confusion is the reason this Court in *King* held implied malice is inconsistent with a specific intent to kill. *King*, 422 S.C. at 57, 810 S.E.2d at 23 (“One cannot be guilty of attempted murder by implied malice because implied malice does not encompass the essential specific intent to kill.”).

Granted eliminating any implied malice in a jury charge in an attempted murder case makes obtaining a conviction more difficult in an attempted murder case. The beyond a reasonable doubt standard makes obtaining of a conviction more difficult for the State. Likewise, at the same time the General Assembly created the offense of attempted murder, it created a hierarchy of offenses that are lesser-included offenses of attempted murder and

each other requiring a lesser mens rea. S.C. Code. Ann. §16-3-600. Each of these lesser-included offenses could be committed with either “express malice” or “implied malice.” None of the lesser-included offenses require the “specific intent to kill.” This Court should not lessen that standard in an attempted murder case. In most such cases, as in this case, there are lesser-included offenses that often are more appropriate. *See, e.g., King*, 422 S.C. at 64, n. 5, 810 S.E.2d at 27, n. 5 (“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.”). The State can still secure a conviction. The conviction will simply be on a more appropriate charge.

The State argued, “A jury is presumed to follow instructions.” *Return*, at 19. This is, of course, a correct statement of the law. Therefore, the presumption is the jury inferred malice from acts that are less than the specific intent to kill. If they followed the jury’s instructions, this is precisely what they did because the judge told them they could do that.

The Illinois Supreme Court in addressing the intent required for attempted murder stated:

Although this instruction follows the language of section 9-1(a)(1) rather than that of section 9-1(a)(2), as in *Trinkle*, it is subject to the same objection that it permits the jury to return a verdict of guilty upon evidence that the defendant intended only to cause great bodily harm short of death. An instruction must make it clear that to convict for attempted murder nothing less than a criminal intent to kill must be shown.

The part of the holding in *Muir* that an instruction was not erroneous which charged that proof only that a defendant knowingly and intentionally created a strong probability of death or great bodily harm to another person satisfies the intent element required for attempted murder was error and is hereby overruled.

People v. Harris, 72 Ill. 2d 16, 27, 377 N.E.2d 28, 33 (1978). As this Court recognized in

King, the Nevada Supreme Court has taken a very similar position, holding, “One cannot be guilty of attempted murder by implied malice because implied malice does not encompass the essential specific intent to kill.” *Keys*, 104 Nev. at 740, 766 P.2d at 273.

This error is exactly what happened in this case. Disregarding the spirit, if not the clear holding of *King*, the trial court permitted the jury to convict Ms. Taylor with an inferred malice charge that may be proper in a murder case, but not in an attempted murder case. The jury was told they could infer the specific intent to kill from actions of Ms. Taylor that could be described as extremely reckless without finding that she had the specific intent to kill. The trial judge, accordingly, charged the jury they could convict Ms. Taylor of attempted murder, as if the child had died and Ms. Taylor would be guilty of murder. This standard has long been rejected. Again, as Judge Moylan said, “There may, of course, be unintended murder without the intent to kill. It is for that reason that an unintended murder (actual or hypothetical) does not establish an anterior assault with intent to murder.” *Glenn*, at ___, 511 A.2d at 1115. Had Ms. Taylor’s child died, the State could easily have proven the case as an unintended murder. The State would have been entitled to the inferences as to unintended murder they sought in this case. The State should not be entitled to use these inferences in this case to prove the specific intent to kill they otherwise could not prove.

B. The trial court’s instructions involving inferences constituted “an improper court-sponsored emphasis of a fact in evidence.”

Over the years this Court retreated from jury instructions involving inferences that constitute “an improper court-sponsored emphasis of a fact in evidence.” *Burdette*, 427 S.C. at 503, 832 S.E.2d at 582. In *State v. Grant*, 275 S.C. 404, 272 S.E.2d 169 (1980) this Court completely abolished the previously judicially recognized charge that a jury may

infer guilt from flight. In *State v. Cooper*, 279 S.C. 301, 306 S.E.2d 598 (1983) the South Carolina Supreme Court retreated from the previous position concerning a presumption or reputable inference that a person in possession of recently stolen goods is the thief. In *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), in overturning numerous cases, held telling a jury they may infer malice from the use of a deadly weapon is improper. In *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019) inferred malice from the use of a deadly weapon is always improper. As seen, this Court in *Smith* abolished an “implied malice” instruction when the accused presents evidence of self-defense. “This is a slightly different holding than the one [this Court] reached in *Burdette*, where [it] found an implied malice charge based on the use of a deadly weapon could never be given.” *Smith*, 430 S.C. at 230, n.3, 845 S.E.2d at 497, n. 3 (emphasis original). Most recently, in *State v. Stewart*, 433 S.C. 382, 858 S.E.2d 808 (2021), this Court held the use of an inference as to knowledge and possession of drugs from control of the property is improper. Thus, this Court established that instructing a jury as to an inference they may draw from the proof of certain facts is misleading to the jury and improper. Additionally, in *Burdette*, this Court said:

We have held in other settings that it is improper to give examples of conduct the jury may consider when determining whether the State has proven an element of a crime or when determining whether certain other facts have been proven or disproven.

Id. at 502, 832 S.E.2d at 582. See also *State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016) (instructing the jury on statute, providing that testimony of the victim need not be corroborated in prosecutions for criminal sexual conduct, was an impermissible charge on the facts); *State v. Hughey*, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000) (charging specific examples of voluntary manslaughter is “a direct charge on the facts” because it

“elevates the specific facts of the case”) *overruled on other grounds by Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009).

Now is the time for this Court to make the same ruling as to any inference charge in an attempted murder case. As noted above, the inference charges as to attempted murder are confusing to the jury at best and probably misleading. Such charges enable the State to prove a specific intent to kill through inferences to be drawn from specific facts and not from all the facts taken together.

As the inference charge brings to the attention of the jury specific facts and not the totality of the facts, the charge is an improper comment on the facts in violation of Article V, § 21 of the Constitution of the State of South Carolina. *See Yarborough v. Southern Ry.*, 78 S.C. 103, 58 S.E. 936 (1907) and *Finch v. Atlanta and C Airline Ry.*, 87 S.C. 190, 69 S.E. 208 (1907). As to this constitutional provision, this Court said a judge “should carefully avoid expressing any opinion which he may have formed from the facts, leaving it for the jury to draw their own conclusions unbiased by any impressions which the testimony may have made upon the mind of the judge.” *State v. White*, 15 S.C. 381, 392 (1881). To tell the jury to infer a specific intent to kill from an act that “shows total disregard for human life” or when a defendant does an act “the natural tendency of which is to destroy another life,” the judge is commenting on the specific facts of this case. Such statements are improper.

C. The trial court unnecessarily instructed the jurors about other types of mens rea that have no applicability to this prosecution.

The trial court instructed Shelby Taylor’s jurors:

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 miasmatic certainty. There is no way 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 the 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 conscious wrongdoing. It is up to you to determine what the defendant intended to do based upon the circumstances shown to have existed.

A. 509-10.⁴

Although a correct statement of the law, this instruction is purposefully ambiguous for three reasons. *Belcher*, 385 S.C. at 611, 685 S.E.2d at 809. First, it implies the jurors may return a conviction for attempted murder based on a mens rea less than a specific intent to kill. Second, it fails to distinguish the different level of mens rea required to prove attempted murder and first-degree assault and battery. Third, it lists as examples various types of mens rea that have no application to this prosecution.

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

Just as the trial court misapprehended this Court's holding in *King*, the Court of Appeals misapplied this Court's precedent and the legal concepts discussed in this brief when it framed the issue on appeal:

The question in this case is whether “inferred malice”—the concept that a jury may deduce malice from a defendant's actions—is inconsistent with the specific intent to kill required for attempted murder. We hold it is not. After all, actions can speak louder than words.

⁴ This instruction is substantively identical to the criminal intent instruction contained in General Sessions Instructions, 2015, at 46-48, formally available on the Judicial Branch Website and presumably still available to the circuit court judges.

Taylor, 434 S.C. at 367, 862 S.E.2d at 925. The Court below improperly reasoned, “The jury was charged that it could not convict [Ms. Taylor] unless it found she intended to kill the baby and that the difference between ‘express’ and ‘implied’ malice related to whether malice was proved by words, preparation, or by inferring malice from other facts.” *Id.* The Court of Appeals thus conflated “express malice” and “implied malice,” contrary to this Court’s holding in *King*. Framing the issue in this manner is contrary to *King*’s holding, “One cannot be guilty of attempted murder by implied malice because implied malice does not encompass the essential specific intent to kill.” *King*, 422 S.C. at 57, 810 S.E.2d at 23 (citing *Keys*, 104 Nev. at 740, 766 P.2d at 273).

The *Taylor* court also said, “[N]othing in *Keys*, *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*, at 370, 862 S.E.2d at 927. Had the jury charge been given in such a generic manner, perhaps the statement might have some merit.⁵ But here, the trial judge, as discussed above, instructed the jurors they may infer the specific intent to kill from acts that fall short of having a specific intent to kill. The trial judge should not have told the jurors to infer malice, including the absence of mitigation, from an inference charge that properly belongs in an actual murder case. *See, e.g., State v. Stanko*, 402 S.C. 252, 260, 741 S.E.2d 708, 712 (2013) (“trial court erred by instructing the jury that it could infer malice from the use of a deadly weapon where Appellant presented an insanity defense”) *overruled on other*

⁵ Another problem with even the generic charge is that it is one sided. The jury is told to presume the defendant to be innocent, but then told they can infer guilt. The lack of a corresponding charge that the jury may also infer a lack of malice from the actions of the defendant should be troubling to the court. A suggest jury instruction is discussed later.

grounds by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019); *Belcher*, 385 S.C. at 600, 685 S.E.2d at 804 (“instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide.”).

Although the Court of Appeals correctly stated, “The sole issue in court was Taylor's mental state and her intent,” *Taylor*, 434 S.C. at 368, 862 S.E.2d at 926, both her mental state and her intent related to facts the law requires the State to prove in order to establish express malice under the statute. The mental state of Ms. Taylor goes to the aspect of “express malice” by which the State must prove the absence of mitigation. *See, e.g., Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975) (“the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case”). The State, accordingly, has to disprove anything the accused contends eliminates, mitigates, or reduces the offense charged. Reasonable jurors could conclude Ms. Taylor suffering from postpartum depression would prevent the State from proving the absence of mitigation, had the jury been properly instructed. Unfortunately, when the judge instructed the jurors to infer malice from her actions, then the judge also told the jurors jury to infer, based upon her actions, there was an absence of mitigation. This was also an improper statement of the law. *See, e.g., Stanko and Belcher*. In essence, the trial court instructed the jurors to disregard Ms. Taylor’s mental health evidence that mitigated or reduced the offense to first-degree assault and battery.

Finally, the Court of Appeals erroneously believed, “[W]e understand ‘implied malice’ as prohibited in *King* to mean malice implied by the law, not malice found by the

jury based on the circumstances.” *Taylor*, 434 S.C. at 372, 862 S.E.2d at 928 (citing *Burdette*, *Belcher*, and *State v. Shands*, 424 S.C. 106, 817 S.E.2d 524 (Ct. App. 2018)). This belief is erroneous for two reasons. First, this belief fails to understand the distinction between “malice in fact” and “malice in law,” which, as discussed above, is the distinction between “express malice” and “implied malice.” *Keys*, 104 Nev. at 740, 766 P.2d at 272. *See also State v. Smith*, 44 S.C.L. 341, 344 (S.C. App. L. 1857) (“Express malice is where a purpose is deliberately formed to take the life of anyone; implied malice is a deduction of law from circumstances.”). Second, any time a trial court instructs an inference, it “is an improper court-sponsored emphasis of a fact in evidence.” *Burdette*, 427 S.C. at 503, 832 S.E.2d at 582.

IV. This Court Should Provide Guidance Regarding the Proper Jury Instructions for Attempted Murder.

Given the amount of confusion in this area of the law, the bench and bar would benefit from this Court’s guidance regarding the proper jury instructions in an attempted murder case. This guidance should include not only what a trial court should instruct jurors but also what a trial court should avoid instructing jurors.

In a case where the trial court instructs attempted murder and one or more lesser-included general intent offenses, as occurred in the case at bar, the instructions should include clearly articulated definitions of “express malice,” “implied malice,” a “specific intent to kill” and a “general intent to kill.” The jury instructions should clearly specify the mens rea that applies to each criminal offense the trial court allows the jurors to consider. The jury instructions should avoid references to types of mens rea that are not relevant to the criminal offenses to be considered by the jurors.

Using Shelby Taylor’s case as an example, where the trial court instructed the lesser-included offense of first-degree assault and battery, future trial courts should instruct the jurors:

To prove an accused guilty of a crime, the state must prove to you beyond a reasonable doubt that the accused acted with criminal intent. Criminal intent is a mental state. The state has to establish the necessary criminal intent beyond a reasonable doubt in order for the accused to be convicted of a crime charged.

Regarding the offense of attempted murder, future trial courts should instruct attempted murder has three elements the State has the burden of proving beyond a reasonable doubt. First, the State must prove the accused performed “an act or acts which tend, but fail, to kill a human being.” *King*, 422 S.C. at 57, 810 S.E.2d at 23. Second, the State must prove “such acts [were] done with express malice.” *Id.* Third, the State must prove such acts were done with the “specific intent to kill.” Specific intent requires proof beyond a reasonable doubt that the accused had the “specific intent to kill” unlawfully and without justification or mitigation. Specific intent means the accused consciously intended the completion of the act of killing with express malice aforethought. Although it seems odd not to charge the exact language of the statute, *King’s* holding that “implied malice” is inconsistent with a “specific intent to kill” mandates this result. *King*, 422 S.C. at 57, 810 S.E.2d at 23 (“One cannot be guilty of attempted murder by implied malice because implied malice does not encompass the essential specific intent to kill.”). This Court, while “acknowledge[ing] the ambiguity created by the language in section 16-3-29,” already reached this result. *King*, 422 S.C. at 62, 810 S.E.2d at 25-26.

After instructing the statutory definition of first-degree assault and battery, future trial courts should instruct:

The criminal intent required for first-degree assault and battery is the accused must have acted knowingly to commit those crimes. To act knowingly means to act with knowledge, to act consciously, not accidentally. It is an intentional act, a willful act. Establishing that an act was done knowingly may be shown by acts and conduct of an accused and circumstances from which you may naturally and reasonably infer intent.

Future trial courts should stress the degree of intent required for attempted murder is higher than the criminal intent necessary for first-degree assault and battery because first-degree assault and battery is a general intent crime, which may involve either “express malice” or “implied malice.”

CONCLUSION

For the reasons set forth in Ms. Taylor’s petition for a writ of *certiorari* and this *amicus curie* brief, this Court should grant the writ and consider the questions. This Court’s guidance is needed regarding the proper jury instructions for criminal intent in an attempted murder.

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January 20, 2022.