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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Writ of Certiorari to Lexington County
Court of Common Pleas
The Honorable Walton J. McLeod, IV, Circuit Court Judge

Appellate Case No. 2019–001249

BILAL S. HAYNESWORTH,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

BRIEF OF RESPONDENT

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PETITIONER'S STATEMENT OF ISSUE ON CERTIORARI

In this trial for attempted murder, did the PCR judge err in refusing to find trial counsel ineffective for failing to object to the implied malice charge when the trial judge found there was evidence to support the lesser included offense of assault and battery first degree, the trial judge instructed the jury on the law of assault and battery first degree and prejudice resulted from the implied malice charge?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON CERTIORARI

Did the PCR judge correctly determine Haynesworth was not prejudiced by trial counsel's failure to object to the trial judge's instruction that malice may be inferred from the use of a deadly weapon where inferring malice would not have resolved or impacted the dispositive element—specific intent to kill—that determined whether or not the jury convicted Haynesworth of the greater or lesser offense and where the jury necessarily found express malice based on the specific intent to kill such that Haynesworth could not have suffered prejudice from any separate inference that his use of a deadly weapon also gave rise to an inference of malice?

STATEMENT OF THE CASE

On January 3, 2013, Bilal S. Haynesworth (Petitioner) and his brother, Lywone Capers, fired into JayQuan Bell's house during a drive-by shooting. In August 2013, the Lexington County Grand Jury indicted Haynesworth for attempted murder, possession of a weapon during the commission of a violent crime, and conspiracy. On May 19, 2014, Haynesworth proceeded to a jury trial before the Honorable Thomas A. Russo. Assistant Public Defender David M. Mauldin represented Haynesworth. Assistant Solicitors Kate W. Usry and Gil Bell of the Eleventh Circuit Solicitor's Office prosecuted the case.

A. Summary of Evidence Adduced at Trial

On January 3, 2013, Clara Williams, Bell's grandmother, picked up Bell from his aunt's house to enroll at Swansea High School. Williams drove him to school in her Ford Focus. They were unable to complete the enrollment without Bell's mother, so they headed back to the car. Williams testified that two young men and a woman approximately in her thirties approached and cursed at them. Williams did not know any of these people, and that she felt threatened. Bell told Williams they should just go back to the car and leave, which they did. Williams and Bell drove back to his aunt's house briefly and then to the Exxon station to fill the car up with gas. (App'x 95–99).

While pumping gas, a Camaro pulled into the station, and the man who had previously cursed at them exited the Camaro and started to point at Bell and Williams. Bell said, "Let's go." They left and returned to the aunt's house. Williams was in the bathroom when she heard gunshots. Williams went into the laundry room and bent down. She heard "lots" of shots. She confirmed that a total of five people were in the house when the shots were fired. (App'x 102–03).

Jennie Childs, Bell's aunt, testified she let Bell live with her while Bell went to school at Swansea. Williams picked Bell up to enroll him at school and was going to also take him grocery shopping. When Bell returned, Childs noticed he was upset. Then she heard gunshots. Everyone got down on the floor. She confirmed that one of the shots entered her daughter's room. (App'x 109–15).

Bell testified he was raised by Williams but was living with his aunt, Childs, for residency purposes because he wanted to enroll for his last semester of high school in Swansea, where he originally started high school. While trying to enroll in the school, Bell and Williams were approached by Haynesworth, Capers, and their mother, Princess. Capers threatened them. Capers said, "All you niggas are dead" and looked at Williams and told her, "Bitch, you dead." (App'x 133–41).

Bell and Williams left the school and returned to Childs' house briefly before they went to the Exxon station. While at Exxon, he saw Princess' Mercedes-Benz truck and Haynesworth's green Camaro. Haynesworth came out of the Camaro and began gesturing for Bell to turn around as Williams and Bell pulled away. Capers exited the truck and made gestures too. (App'x 141–47).

Bell and Williams then returned to Childs' house. While inside the house, Bell heard engines outside. He opened the door and saw Haynesworth with his arm hanging out of the window holding a gun. Bell told everyone to get down and then two shots were fired. (App'x 149–50). Bell then looked out the door and saw Nehemiah Dixon, who he also had seen at the school, and Capers in the Mercedes-Benz truck. Capers was holding a gun. More shots were fired. Bell also saw a muddy tan Nissan. (App'x 150–51).

The motive apparently was an argument between Bell and Haynesworth over the mother of Bell's child. However, according to Bell, the argument was over. On cross-examination, defense

counsel elicited testimony about threatening Facebook messages that suggested an active dispute and helped prove the defendants' motive for the drive-by shooting. This evidence included threats Bell made to Haynesworth over Christmas break. (App'x 160, 167–70, 180–81).

No evidence suggesting self-defense was presented to the jury. After the shooting, Bell sent Haynesworth a message complaining they should have fought instead of Haynesworth bringing guns into the dispute. (App'x 181). Bell testified he does not own a gun. (App'x 194).

Nehemiah Dixon was obviously a reluctant witness for the State. Dixon dates Haynesworth's sister, and he was with them on January 3, 2013. Dixon, Princess, and Capers took Haynesworth to school and dropped him off. They received a text that he was not comfortable there, so they went back to sign him out. Dixon testified he did not see Bell at the school because he stayed in the truck. Dixon admitted he overheard Capers say something about settling some things. They left Princess at the school, perhaps to complete paperwork, and Haynesworth, Capers, and Dixon went back to the house. Dixon did not recall how they ended up in separate cars, but Dixon recalls he drove the Nissan to Exxon. Haynesworth was in the Camaro. Capers was in the Mercedes-Benz truck. Princess was also with them. They saw Bell there with a lady. Bell left the station and Dixon followed him. (App'x 198–208).

Dixon testified he lost sight of Bell's car, and drove back to the Exxon. The others were still there. Dixon claimed more memory problems in describing whether he spoke with the defendants at the gas station. Dixon claimed he pulled away from the gas station and then heard two shots while driving down the road, followed by two more shots. (App'x 208–10).

Dixon was impeached by the State with his prior statement provided on January 7, 2013. (App'x 215–16). Dixon's statement stated, in part, the following: "I drove back to the Exxon and

drove back to the bottom looking for a car, spotted the car and then two shots were fired and two more shots and we drove home." (App'x 219).

Clifton Hayes, the Swansea Chief of Police, testified he responded to the scene of the shooting. Bell was in an excited state. (App'x 234–35). Chief Hayes recovered a freshly discharged shell casing in the driveway. (App'x 238). He found a bullet hole in the glass of a window, the bullet went through the walls and rested in the bathroom. (App'x 241). No firearm was recovered. (App'x 242).

Haynesworth testified on his own behalf. Helping prove an apparent motive for his actions, Haynesworth testified about a nasty, threatening Facebook communication sent to him by Bell. (App'x 287–89). He confirmed that he, Princess, Dixon, and Capers went to Swansea High School. He confirmed that Princess took him out of school. They went to the Exxon station where Bell allegedly yelled at him. (App'x 290–93). Haynesworth claimed they then went to pick up his friend from an alternative school. (App'x 295). Haynesworth's "alibi" fell apart with this testimony, because Haynesworth was claiming he picked up his friend from alternative school at the extremely early hour of 9:00 a.m. – 9:30 a.m. (App'x 302).

Tammy "Princess" Coleman nonetheless joined in this absurd story, testifying that when they arrived at the alternative school, Haynesworth blew his horn, and when the friend did not come out, Haynesworth told Princess, "Mom, it's too early to get [Haynesworth's friend]." (App'x 314). When asked by defense counsel if she realized it was too early to pick up the friend, Princess testified, "No. With everything that was going on, I didn't even pay it no mind. He used to picking [the friend] up every day." (App'x 314).

During closing argument, Assistant Solicitor Usry pointed out the absurdity that they accidently forgot it was only 9:00 a.m. and school was not over when they went to pick up this friend. (App'x 358).

B. Jury Instructions

Judge Russo instructed the jury, in relevant part, as follows:

> [T]he defendants are charged with [a]ttempted [m]urder. In order to prove this crime, the State must prove the defendants attempted to kill another person with malice aforethought, either express or implied. Malice is hatred, ill will, or hostility toward another person. It is the intentional doing of a wrongful act without just cause or excuse and with the intent to inflict an injury or under circumstances that the law will infer an evil intent.
>
> Malice aforethought does not require that malice exist for any particular time before the act is committed, but malice must exist in the mind of the defendant just before and at the time that the act is committed. Therefore, there must be a combination of the previous evil intent and the act.
>
> Malice 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 by inference from 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. For example, lying in wait for a person or any other acts of preparation going to show that the deed was within the defendant's mind would be express malice.
>
> 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. A deadly weapon is any article, instrument, or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon depends on the facts and the circumstances of each case. The following are examples of instruments which may be deadly weapons: A pistol, a shotgun, a rifle, a dagger, a knife, a slingshot, metal knuckles, a razor, gasoline, or a firebomb. A gun may be a deadly weapon even if it's not operating.

> If facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be considered by you, the jury, along with other evidence in this case. And you may give it whatever weight evidence in the case you decide it should receive.
>
> A specific intent to kill is an element of [a]ttempted [m]urder. Intent means intending the result which actually occurs. Not accidentally or involuntarily. Intent may be shown by acts and conduct of the defendants and other circumstances from which you may naturally and reasonably infer intent. Evidence of the character of the act, the character of the instrument used, the manner in which it was used, the purpose to be accomplished, and the resulting wounds or injuries may be considered in determining the intent with which the act was committed.
>
> 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's life.

(App'x 273–75).

C. Verdict & Subsequent Proceedings

On May 21, 2014, the jury convicted Haynesworth as indicted. (App'x 418–19). Judge Russo sentenced Haynesworth to concurrent terms of twelve years' imprisonment for attempted murder, five years for conspiracy, and five years for possession of a weapon during the commission of a violent crime. (415–17).

Haynesworth filed a timely notice of appeal. Appellate Defender Robert M. Pachak perfected his appeal by filing a brief with this Court on the following issue:

> Whether the trial court erred in instructing the jury in part of its opening remarks that a trial "is a search for the truth in an effort to make sure that justice is done between the parties that appear before the Court," because such a remark could alter the jury's perception of the burden of proof and deprive [Haynesworth] of a fair trial?

(Supp. App'x 1–27). On March 2, 2016, this Court issued an unpublished opinion affirming Haynesworth's convictions and sentences. *State v. Haynesworth*, Op. No. 2016-UP-119 (S.C. Ct.

App. filed March 2, 2016). (Supp. App'x 28–29). Haynesworth then filed a petition for rehearing, which this Court denied by order dated April 21, 2016. (Supp. App'x 33). His subsequent petition for writ of certiorari to the Supreme Court was denied. (Supp. App'x 62). The case was remitted back to the circuit court on March 17, 2017.

Haynesworth timely commenced the underlying PCR action on February 2, 2018. (App'x 418–28). The State submitted its return requesting an evidentiary hearing on May 9, 2018. (App'x 429–41). An evidentiary hearing convened on April 5, 2019, before the Honorable Walton J. McLeod, IV. (App'x 448–99). Haynesworth was present and represented by Arthur Aiken, Esquire. Assistant Attorney General Johnny Ellis James, Jr. represented the State. On July 27, 2019, the PCR court issued an order denying relief and dismissing the action with prejudice. (App'x 500–15).

After initiating his appeal, Haynesworth filed a petition for a writ of certiorari with the Supreme Court, and the Supreme Court transferred the matter to this Court. Subsequently, on September 22, 2021, this Court granted the petition.

<u>STANDARD OF REVIEW</u>

In PCR matters, the standard of review depends on the specific issue involved. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). Appellate courts will uphold a PCR court's findings of fact if there is any probative evidence in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

<u>ARGUMENT</u>

The PCR judge correctly determined Haynesworth was not prejudiced by trial counsel's failure to object to the trial judge's instruction that malice may be inferred from the use of a deadly weapon where inferring malice would not have resolved or impacted the dispositive element—specific intent to kill—that determined whether or not the jury convicted Haynesworth of the greater or lesser offense and where the jury necessarily found express malice based on the specific intent to kill such that Haynesworth could not have suffered prejudice from any separate inference that his use of a deadly weapon also gave rise to an inference of malice.

Haynesworth contends the post-conviction relief judge erred by failing to find defense counsel provided constitutionally ineffective assistance during trial based on his failure to object to the trial judge's erroneous instruction that malice may be inferred from the use of a deadly weapon. In support of that contention, Haynesworth maintains he was prejudiced by the inferred malice charge because there was evidence presented during his trial that could have reduced his actions from attempted murder to first-degree assault and battery. Accordingly, Haynesworth asserts, he was prejudiced because the jury's finding of malice based on the deadly weapon precluded the jury from considering the lesser-included offense of first-degree assault and battery and diluted the State's burden of proving both a specific intent to kill and express malice.

To the contrary, the post-conviction relief judge properly concluded Haynesworth failed to demonstrate that trial counsel's failure to object to the inferred malice charge "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, *Strickland*, 466 U.S. 668, 686 (1984). When viewed as a whole, the trial judge's jury instructions as presented clearly conveyed to the jurors they could *only* convict Haynesworth of attempted murder if they found he acted with the specific intent to kill the victim. Therefore, even assuming the jury did infer malice from the use of a deadly weapon,

Haynesworth could not have been prejudiced because the requirement for a finding of specific intent to kill was the dispositive element that determined whether or not the jury convicted Haynesworth of the greater or lesser offense. Stated differently, nothing precluded the jury from convicting Haynesworth of the lesser-included offense of first-degree assault and battery even if they inferred malice from the use of a deadly weapon because inferring malice would not have resolved or impacted the issue of whether Haynesworth acted with a specific intent to kill. Rather, the jury in Haynesworth's case necessarily found express malice based its finding of a specific intent to kill, rendering any inference of malice from the use of a deadly weapon irrelevant. As these findings are supported by probative evidence and do not constitute an error of law, this Court should affirm the PCR court's denial of relief.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee all criminal defendants the right to "assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland*, 466 U.S. at 685. In a post-conviction relief action, the reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction. *Id.* at 687. To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness; *and* (2) there is a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient performance. *Williams v. State*, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005) (citing *Strickland*, 466 U.S. 668). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the

adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)).

The applicant bears the heavy burden of establishing both prongs of the *Strickland* standard. *Hughes v. State*, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); Rule 71.1(e), SCRCP. To prove deficient performance, the applicant must establish that, in light of all the circumstances, the acts or omissions complained of "fell below an objective standard of reasonableness" as measured by "prevailing professional norms." *Strickland*, 466 U.S. at 688. Reviewing courts should be deferential in this inquiry, and apply "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

With respect to prejudice, the applicant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Id.* When evaluating this probability, the reviewing court "should consider the specific impact counsel's error had on the outcome of the trial" coupled with "the strength of the State's case in light of . . . . the [totality of the] evidence presented to the jury." *Smalls*, 422 S.C. at 188, 810 S.E.2d at 843. Significantly, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Strickland*, 466 U.S. at 696.

Haynesworth first contends trial counsel deficiently failed to object to the jury instruction on inferring malice from the use of a deadly weapon given the trial judge charged the jury on first-degree assault and battery as a lesser-included offense of attempted murder. Specifically, Judge Russo found that "depending how the jury views the evidence," there is evidence which could support a first-degree assault and battery conviction as well as an attempted murder conviction. (App'x 327). *See State v. White*, 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2004) ("A trial judge

must charge a lesser included offense if there is any evidence from which the jury could infer the defendant committed the lesser rather than the greater offense."). The State agrees with Haynesworth that, because the trial judge determined there was evidence to support a charge on the lesser-included offense of first-degree assault and battery, he necessarily found there was evidence that would reduce, mitigate, justify, or excuse the attempted killing such that the charge on inferring malice from the use of a deadly weapon was improper under *Belcher v. State*, 385 S.C. 597, 685 S.E.2d 802 (2009).[1] Therefore, trial counsel should have objected.

Nevertheless, Haynesworth could not have been prejudiced in the context of *Belcher* by the jury inferring malice from the use of a deadly weapon because his case hinged not on the presence of malice, but whether he was acting with the specific intent to kill. Conversely, in *Belcher*, there was no dispute that Belcher shot and intended to kill the victim. In that case, conflicting evidence was presented during Belcher's trial regarding whether Belcher acted with malice when he shot and killed the victim. *Id.* at 601, 685 S.E.2d at 804. Specifically, one view of the evidence suggested Belcher shot the victim without justification or excuse while another view of the evidence suggested Belcher shot the victim only after the victim confronted him with a gun without provocation. *Id.* The trial judge in *Belcher* instructed the jury on murder, the lesser-included offense of voluntary manslaughter, the law of self-defense, and, over Belcher's objection, that malice may be inferred by the use of a deadly weapon. *Id.* On appeal, Belcher asserted the trial judge erred in instructing the jury on the inference of malice in light of the fact the jury was also instructed on the law of self-defense. *Id.*

[1] Although *Belcher* has since been overruled by *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019), *Belcher* was the law at the time of Haynesworth's trial.

The Court agreed, and discusses at length the confusion and contradiction of instructing a jury that malice may be inferred by the use of a deadly weapon where evidence is presented that would reduce, mitigate, justify, or excuse the killing or attempted killing. Citing *Glenn v. State*, 511 A.2d 1110, 1126 (Md. Ct. Spec. App. 1986), which characterized the inference of malice from the use of a deadly weapon as a "half-truth," the Court explained:

> In discussing its meaning behind this observation, *Glenn* notes that malice includes the absence of justification, excuse and mitigation. *Glenn*, 511 A.2d at 1122. When malice is viewed in light of these component parts, it becomes clear that inferring malice from the use of a deadly weapon is indeed only a "half-truth." The absence of justification, excuse or mitigation cannot be inferred from the use of a deadly weapon standing alone. Other facts and evidence (or the absence of other facts and evidence) are required for the fulfillment of these component parts.

Id. at 609–10, 685 S.E.2d at 808–09; *cf. Gibson v. State*, 416 S.C. 260, 265, 786 S.E.2d 121, 124 (2016) ("Because there was little evidence of malice aside from the use of a gun, the PCR judge erred in finding petitioner was not prejudiced by trial counsel's failure to object to the charge on the inference of malice from the use of a deadly weapon."), *overruled by Burdette*, 427 S.C. 490, 832 S.E.2d 575. The Court went on to explain that:

> The use of the term "intentional" is instructive. Say, for example, a homicide occurs by the use of a deadly weapon under circumstances warranting a self-defense instruction. The killing would be intentional, yet under our currently sanctioned charge, the jury would be permitted to find malice merely because "if one intentionally kills another with a deadly weapon, the implication of malice may arise."

Belcher, 385 S.C. at 610, 685 S.E.2d at 809; *see Glenn*, 511 A.2d at 1126–27 ("Although the intent may be inferred from the act itself, it may not be inferred that the intent was unexcused or unjustified or that the intent was unmitigated. A policeman on duty directs a deadly weapon at a

vital part of the human anatomy of a fleeing felon; that does not suggest the absence of justification.").

The Court noted that any error in the giving of the inference of malice charge *could be* harmless where overwhelming evidence of malice was presented apart from the use of a deadly weapon. *Belcher*, 385 S.C. at 611, 685 S.E.2d at 809. However, in Belcher's case, the fact that he presented evidence of self-defense "highlight[ed] the prejudice resulting from the charge . . . because [i]t is entirely conceivable that the only evidence of malice was Belcher's use of a handgun." *Id*. at 612, 685 S.E.2d at 810. Accordingly, the permissive inference charge concerning the use of a deadly weapon has "no place in a murder [or attempted murder] prosecution "where evidence is presented that would reduce, mitigate, excuse, or justify" the killing or [attempted killing] because essentially the inferred malice charge could lead a jury to convict someone of murder who was otherwise acting in self-defense guilty because his use of a deadly weapon demonstrated malice or find someone otherwise acting with a sudden heat of passion based on sufficient legal provocation is nonetheless guilty of murder because his use of a deadly weapon established the killing was a malicious one.[2] *Id*. at 610, 685 S.E.2d at 809.

[2] *Burdette*—which ultimately held the jury instruction that inferred malice from the use of a deadly weapon instruction should *never* be given—illustrates the confusion that can result when the jury instruction is not sufficiently clear on malice in a murder trial. 427 S.C. 490, 832 S.E.2d 575. In *Burdette*, the trial judge charged the jury on murder, voluntary manslaughter, involuntary manslaughter, accident, and the inference of malice from the use of a deadly weapon. *Id.* at 494, 832 S.E.2d at 577. While the trial judge specifically instructed the jury that involuntary manslaughter is the unintentional killing of another *without malice*, he did not mention malice in his instruction on voluntary manslaughter. *Id.* at 494, 832 S.E.2d at 577–78. In overruling *Belcher*, the Court in *Burdette* concluded that "[a] jury instruction that malice may be inferred from the use of a deadly weapon is an improper court-sponsored emphasis of a fact in evidence" and held that "[r]egardless of the evidence presented at trial, trial courts shall not instruct a jury that the element of malice may be inferred when the deed is done with a deadly weapon." *Id.* at 503–05, 832 S.E.2d at 582–83.

Haynesworth likewise contends the implied malice charge precluded the jury from properly considering the lesser-included offense of first-degree assault and battery. However, while malice is an element of attempted murder, the *absence* of malice is *not* an element of first-degree assault and battery. *Cf. State v. Pilgrim*, 320 S.C. 409, 414–15, 465 S.E.2d 108, 111 (Ct. App. 1995) (citing William S. McAninch & W. Gaston Fairey, *The Criminal Law of South Carolina* 149 (2d ed. 1989)) (noting "the difference between manslaughter and murder is the absence of malice in the former and the presence of malice in the latter"), *aff'd as modified*, 326 S.C. 24, 482 S.E.2d 562 (1997); *State v. Foster*, 66 S.C. 469, 45 S.E. 1, 4 (1903) ("Under the theory of the law, 'sudden heat and passion upon sufficient legal provocation' rebuts the implication of malice arising from an intentional homicide, and mitigates the crime from murder to manslaughter, which latter is distinguished from murder by the absence of malice."), *overruled by Belcher*, 385 S.C. 597, 685 S.E.2d 802. Therefore, a defendant may be convicted of first-degree assault and battery regardless of whether malice is present. *Cf.* S.C. Code Ann. § 16-3-600(C)(1)(b)(ii) (providing that a person is guilty of first-degree assault and battery when the "offer or attempt to another person" . . . "occurred during the commission of a robbery, burglary, kidnapping, or theft").

Haynesworth further contends his case is distinguishable from *State v. Price*, a case in which the trial judge instructed the jury on the common law offense of assault and battery with intent to kill (ABWIK), the lesser-included offense of assault and battery of a high and aggravated nature (ABHAN), and that malice may be inferred from the use of a deadly weapon. 400 S.C. 110, 112, 732 S.E.2d 652, 653 (Ct. App. 2012), *overruled by Burdette*, 427 S.C. 490, 832 S.E.2d 575. Price argued the trial judge erroneously gave the inferred malice instruction pursuant to *Belcher* because the evidence he presented at trial—which allegedly suggested the shooting was part of a drug deal gone wrong—could have reduced his actions from ABWIK to ABHAN. *Id.* at 114, 732

S.E.2d at 654. This Court disagreed, finding the inferred malice charge was appropriate because the only conclusion that could be drawn from the undisputed evidence that the shooter pointed the gun at the victim in close range with his hands up was that he acted with malice. *Id.* at 114–15, 732 S.E.2d at 654. In other words, assuming the jury concluded from the evidence that Price was the shooter, there was no evidence from which the jury could conclude Price committed the lesser-included offense of ABHAN. *Id.* at 115, 732 S.E.2d at 654; *see id.* ("*Belcher* does not prohibit the trial court from instructing the jury that it may infer malice from the use of a deadly weapon where the only jury question created by the evidence is whether the defendant is the person who committed ABWIK.").

Haynesworth asserts that, unlike Price, the State's evidence that Haynesworth shot into the house two times could show he acted without malice, and therefore the implied malice charge precluded the jury from properly considering the lesser-included offense of first-degree assault and battery. However, Haynesworth's position presupposes that—as was the case with ABWIK and ABHAN—the only difference between attempted murder and first-degree assault and battery is malice.[3] Further, ABWIK required only a "*general intent to kill*, which the jury *may infer from 'the*

[3] Under the common law, ABWIK was defined as "an unlawful act of a violent nature to the person of another with malice aforethought, either express or implied," and "comprises all the elements of murder except the death of the victim." *State v. Dennis*, 402 S.C. 627, 638, 742 S.E.2d 21, 27 (Ct. App. 2013). Common law "ABHAN, on the other hand, require[d] an unlawful act of violent injury accompanied by circumstances of aggravation." *State v. Coleman*, 342 S.C. 172, 176, 536 S.E.2d 387, 389 (Ct. App. 2000). Such aggravating circumstances "include the use of a deadly weapon, the infliction of serious bodily injury, the intent to commit a felony, great disparity between the ages and physical conditions of the parties involved, and the difference in the sexes." *Id.* "An ABHAN charge is appropriate when the evidence demonstrates the defendant lacked the requisite [general] intent to kill." *Id.* However, as our Supreme Court discussed at length in *King v. State*, conflicting case law regarding the requisite intent to commit the common law offense of ABWIK often led to confusion. *See, e.g.*, *State v. Foust*, 325 S.C. 12, 14–16, 479 S.E.2d 50, 51–52 (1996); 23 S.C. Jur. *Homicide* § 34 (1994) (recognizing ambiguity in case law regarding whether a specific intent to kill is required for the crime of ABWIK); *see also State v. Jefferies*,

use of a dangerous or deadly weapon in a manner reasonably calculated to cause death or great bodily harm.' " *State v. Dennis*, 402 S.C. 627, 638, 742 S.E.2d 21, 27 (Ct. App. 2013) (emphasis added) (quoting *State v. Foust*, 325 S.C. 12, 16 n.4, 479 S.E.2d 50, 52 n.4 (1996)).

Attempted murder was codified as part of the Omnibus Crime Reduction and Sentencing Reform Act of 2010, which abolished all prior statutory and common law assault and battery offenses, including ABWIK. *See* Act No. 273, § 6.A, 2010 S.C. Acts & Joint Resolutions (adding the statutory offense of attempted murder to the South Carolina Code of Laws); *see also State v. Middleton*, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014) ("Though the passage of the Act, the legislature abolished all common law assault and battery offenses and all prior statutory assault and battery offenses."). Pursuant to South Carolina's attempted murder statute, the offense of attempted murder is committed when a person "with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied[.]" S.C. Code Ann. § 16-3-29. Thus, 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. *Id.*; *see State v. White*, 338 S.C. 56, 58, 525 S.E.2d 261, 263 (Ct. App. 1999) ("We, of course, *must take the statute as we find it*, giving effect to the legislative intent as expressed in its language." (emphasis added)).

Significantly, in *State v. King*, 422 S.C. 47, 64, 810 S.E.2d 18, 27 (2017), our Supreme Court recently addressed an appellate challenge to a trial judge's jury instructions on attempted murder subsequent to the enactment of the offense. In that case, King was charged with attempted

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316 S.C. 13, 18, 446 S.E.2d 427, 430 (1994) ("At common law, crimes generally were classified as requiring either 'general intent' or 'specific intent.' This venerable distinction, however, has been the source of a good deal of confusion." (citation omitted)).

murder, and the trial judge instructed the jury, over defense counsel's objection, that a specific intent to kill is *not* an element of attempted murder and the offense could be committed with only a general intent to commit serious bodily harm. *Id.* at 54, 810 S.E.2d at 21. At the conclusion of the trial, the jury convicted King of attempted murder along with several other offenses, and he appealed. *Id.* On appeal, this Court reversed King's attempted murder conviction after finding the legislature "intended to require the State to prove specific intent to commit murder as an element of attempted murder[.]" *State v. King*, 412 S.C. 403, 411, 772 S.E.2d 189, 193 (Ct. App. 2015).

Thereafter, on certiorari, our Supreme Court agreed that specific intent to kill is an element of the crime, finding that attempted murder was not a mere codification of ABWIK, a general intent crime. *King*, 422 S.C. at 55, 810 S.E.2d at 22. Rather, the legislature "expressly repealed the offense of ABWIK and purposefully created the new offense of attempted murder, which includes a 'specific intent kill' as an element." *Id.* at 63–64, 810 S.E.2d at 26–27. In reaching that conclusion, the Court found the legislature's use of "intent to kill" and "malice aforethought, either express or implied" evidenced an intention to create an offense requiring a higher level of *mens rea* than the offense of murder. *Id.* at 61, 810 S.E.2d at 25.

Here, despite Haynesworth's trial predating *King*, the trial judge's jury instructions clearly conveyed to the jurors they could *only* convict Haynesworth of attempted murder if they found he acted with the *specific intent to kill* the victim. Unlike ABWIK and ABHAN, attempted murder and first-degree assault and battery are both specific intent crimes. First-degree assault and battery requires a specific intent to "injure another person . . . by means likely to produce death or great bodily injury." S.C. Code Ann. § 16-3-600 (C)(1)(b)(i). *See generally State v. McGowan*, 430 S.C. 373, 381, 845 S.E.2d 503, 507 (Ct. App. 2020) (finding first-degree assault and battery of child victim conviction was not supported by evidence of specific intent to injure the child when no

evidence was presented McGowan knew the child was in the home when McGowan shot in the direction of the home). Haynesworth therefore could not have suffered prejudice from any separate inference that his use of a deadly weapon also gave rise to an inference of malice because nothing in the trial judge's attempted murder charge would have permitted the jury to convict Haynesworth of attempted murder rather than first-degree assault and battery based solely on a finding of malice from the use of a deadly weapon.

Haynesworth nonetheless contends the trial judge's implied malice charge diluted the State's burden of proving both a specific intent to kill *and* express malice required for attempted murder. Haynesworth specifically references footnote five of the *King* opinion, wherein the Court encouraged the General Assembly "to re-evaluate the language following 'malice aforethought' as the inclusion of the word 'implied' in section 16-3-29 is arguably inconsistent with a specific-intent crime." *King*, 422 S.C. at 64 n.5, 810 S.E.2d at 27 n.5. As support for that conclusion, the Court noted the Nevada Supreme Court had previously concluded *Keys v. State*, 766 P.2d 270 (Nev. 1988), that the offense of attempted murder would be inconsistent with implied malice as one cannot attempt an unintended result, attempt to be negligent, or attempt to be malignantly reckless. *Id.* at 57, 810 S.E.2d at 23. The *Keys* court first distinguished express malice from implied malice, stating:

> 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." 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 harm" can be inferred in law.

Keys, 766 P.2d at 272 (citations omitted). *Keys* went on to apply the concepts of express and implied malice to the level of intent required for attempted murder:

> Attempted murder can be committed only when the accused's acts are accompanied by *express malice*, malice in fact. One cannot *attempt* to kill another with implied malice because there "is no such criminal offense as an attempt to achieve an unintended result." An attempt, by nature, is a failure to accomplish what one *intended* to do. Attempt means to try; it means an effort to bring about a desired result. **Thus one cannot *attempt* to be negligent or *attempt* to have the general malignant recklessness contemplated by the legal concept, "implied malice."** One cannot be guilty of attempted murder by implied malice because implied malice does not encompass the essential specific intent to kill.
>
> An attempt to kill with express malice is, on the other hand, completely consistent with the specific intent requirement of the crime of attempt. Express malice is the "deliberate intention unlawfully" to kill a human. Attempted murder, then, is the attempt to kill a person with express malice, or more completely defined: 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.

Id. at 273 (emphasis in bold added) (citations omitted).

Haynesworth correctly points out that it was up to the jury to determine whether his act of shooting into Bell's house was done with malice as required for attempted murder. However, if implied malice is inconsistent with a specific intent to kill as Haynesworth suggests, the jury in Haynesworth's case *necessarily* found express malice based on a specific intent to kill, rendering any inference of malice from the use of a deadly weapon irrelevant. Since the jury inferring malice from the use of a deadly weapon would not preclude them from convicting him of first-degree assault and battery *unless* they found an independent element of specific intent to kill, Haynesworth's case did not hinge on whether the jury inferred malice from the use of a deadly weapon in any way. Therefore, Haynesworth could not possibly have met his burden of

establishing a substantial likelihood that "the result of the proceeding would have been different" had trial counsel objected to the inferred malice instruction. *Strickland*, 466 U.S. at 694.

Additionally, Haynesworth's defense was not that he lacked the requisite intent, but that he did not commit the act at all. Essentially, Haynesworth was not challenging the fact that *someone* fired into the victim's house with the specific intent to kill the victim, only that *he* was not that someone. The fact that Haynesworth claimed no involvement whatsoever further reduced the possibility he was prejudiced by the inferred malice instruction. If the jury believed Haynesworth's story, it would have acquitted him, not found him guilty of a lesser-included offense. *Cf. Price*, 400 S.C. at 115, S.E.2d at 654 (finding "*Belcher* does not prohibit the trial court from instructing the jury that it may infer malice from the use of a deadly weapon where the only jury question created by the evidence is whether the defendant is the person who committed ABWIK").

Further, to the extent Haynesworth relies on this Court's opinion in *State v. Shands*, 424 S.C. 106, 817 S.E.2d 524 (Ct. App. 2018), the PCR court properly refused to require counsel to be clairvoyant or anticipate changes in the law which were not in existence at time of trial, or even at the time of the evidentiary hearing. *See, e.g.*, *Teamer v. State*, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) (noting that "[t]his Court has previously held that reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law"); *accord. Kornahrens v. Evatt*, 66 F.3d 1350, 1360 (4th Cir. 1995) ("[T]he case law is clear that an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law.").

The requirement that a defendant "show prejudice in effective representation cases arises from the very nature of the specific element of the right to counsel at issue there—*effective* (not mistake-free) representation. Counsel cannot be 'ineffective' unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they have)." *United States v. Gonzalez-Lopez*,

548 U.S. 140, 147 (2006); *see United States v. Fulks*, 683 F.3d 512, 522 (4th Cir. 2012) ("[A PCR applicant] is not entitled to satisfy the prejudice requirement through "rank speculation, defying calculation of a reasonable probability."). Accordingly, "a violation of the Sixth Amendment right to *effective* representation is not "complete" until the defendant is prejudiced." *Gonzalez-Lopez*, 548 U.S. at 147 (citing *Strickland*, 466 U.S. at 685).

In evaluating whether actual prejudice flowed from an attorney's failure to object to a jury instruction, the challenged instruction " 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)); *Fitzgerald v. Thompson*, 943 F.2d 463, 469 (4th Cir. 1991) (citing *Boyde v. California*, 494 U.S. 370 (1990)) (explaining that, in evaluating whether actual prejudice flowed from an attorney's failure to object to the instruction, "[i]t is important . . . to consider the challenged instruction in light of other jury instructions" and in the context of the entire case); *accord. Lowry v. State*, 376 S.C. 499, 505, 657 S.E.2d 760, 763 (2008); *see also Smalls*, 422 S.C. at 188, 810 S.E.2d at 843 (instructing reviewing courts to "consider the specific impact counsel's error had on the outcome of the trial" coupled with "the strength of the State's case in light of . . . . the [totality of the] evidence presented to the jury" in determining whether the applicant has proven prejudice).

Looking to the relevant language employed in the attempted murder charge as presented, the trial judge: (1) advised the jury of the exact language used by the statute to define the offense; (2) explained the general concept of malice as hatred, ill will, hostility, and the intentional doing of a unjustified and wrongful act; (3) defined the "aforethought" component of the malice as requiring the malice to exist before and at the time of the act; (4) attempted to prevent any misunderstanding about implied malice in the context of attempted murder by equating express

and implied malice solely to proof of malice by direct and circumstantial evidence; (5) *expressly indicated a specific intent to kill was a required element of attempted murder*; and (6) explained various ways the required intent could potentially be inferred, including through proof the defendant "voluntarily and willfully commits an act, the natural tendency of which is to destroy another human's life."

Significantly, when giving that language its natural meaning and viewing the charge as a whole, the jury could have *only* convicted Haynesworth if they found he committed an *intentional* act with the *specific intent to kill* his victim with an unlawful and malicious purpose. *See State v. Grovenstein*, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) ("[J]urors are presumed to follow the law as instructed to them."); *Foye v. State*, 335 S.C. 586, 590, n.1, 518 S.E.2d 265, 267, n.1 (1999) ("The jury was instructed to determine petitioner's guilt based only on the evidence presented in the trial. A jury is presumed to follow instructions. Therefore, without some showing the jurors disregarded these instructions, this Court declines to presume prejudice." (citations omitted)); *see also Sheppard v. State*, 357 S.C. 646, 664, 594 S.E.2d 462, 474 (2004) ("[T]he test is what a reasonable juror would have understood the charge as meaning."), *overruled on other grounds by Burdette*, 427 S.C. 490, 832 S.E.2d 575; *State v. Burkhart*, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002) ("A jury charge is correct if it contains the correct definition of the law when read as a whole.").

Ultimately, the PCR court correctly concluded Haynesworth failed to demonstrate that trial counsel's failure to object to the inferred malice charge "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. *See also Harrington v. Richter*, 562 U.S. 86, 105 (2011) ("[W]hile in some instances even an isolated error can support an ineffective assistance claim if it

is sufficiently egregious and prejudicial, it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." (citation omitted)). Here, the trial court gave clear and correct guidance regarding what constitutes specific intent, attempt, and express malice. The trial judge's jury instructions clearly conveyed to the jurors they could only convict Haynesworth of attempted murder if they found he acted with the specific intent to kill the victim. Accordingly, the PCR court correctly found Haynesworth failed to demonstrate a reasonable probability that, but for trial counsel's failure to object to the inferred malice instruction, "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. This Court should affirm.

CONCLUSION

Based on the foregoing argument, it is respectfully submitted the judgment of the lower court be affirmed.

Respectfully submitted,

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Writ of Certiorari to Lexington County
Court of Common Pleas
The Honorable Walton J. McLeod, IV, Circuit Court Judge

Appellate Case No. 2019–001249

BILAL S. HAYNESWORTH,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

Pursuant to Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Brief of Respondent has been served upon opposing counsel, Kathrine H. Hudgins, Esquire, by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

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This 28th day of March, 2022.

s/LillianMeadows
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