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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM NEWBERRY COUNTY
The Honorable Benjamin H. Culbertson, Circuit Court Judge

THE STATE,……RESPONDENT

v.

XZAVIER SHARIF DAVIS,……APPELLANT

FINAL BRIEF OF RESPONDENT

Appellate Case No. 2021-000982

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STATEMENT OF THE CASE

On April 20, 2019, the Appellant Xzavier Sharif Davis (Appellant) returned home in the early morning hours from a fish fry held by his father. (R. p. 189 l. 15-18). Appellant arrived home to find his back door locked. He knocked on the door and he received no answer. Appellant then walked to the front door to also find it locked. Appellant knocked on that door, and also, no one answered. The Appellant then proceeded to break glass near the door, reach in and unlock the door. (R. p. 192 l. 9-12).

Once inside he proceeded to the bedroom where his wife Indigo Penny (Indigo) was asleep. Appellant inquired as to why she did not open the door. Indigo informed him that she was sleeping, and due to her taking Benadryl she did not hear the door. (R. p. 192 l. 23-25). An argument quickly ensued, Indigo then told the Appellant that she did not wish to argue. (R. p. 193 l. 7-14). She woke their three children, the victim Iven, who was seven years old, Penelope who was three and Xzavier Jr. who was nine months, to take them away from the house. (R. p. 182 l. 6 – p. 183 l. 3; p. 194 l. 25 – p. 195 l. 4). At the time of this event Indigo was also pregnant with their fourth child, the Appellant was aware of this pregnancy. (R. p. 187 l. 6-8; p. 187 l. 18-21)

As she left the back door with the children the Appellant grabbed a .22 caliber revolver and shot into the air eight times. (R. p. 204 l. 1-5; p. 407 l. 10-14). Afraid, Indigo quickly gathered the children and rushed them inside her Toyota Camry. As they were leaving the Appellant grabbed another handgun, a 9mm, and shot at the vehicle eight times. Two of the shots hit the ground, one hit the car's front hood, another hit the wheel well, another entered the passenger door and stuck Indigo in the leg just above the ankle, another hit just above the side mirror, another in the front drivers side quarter panel, and another hit behind the driver's side back door. The bullet that hit

behind the driver side back door penetrated the vehicle and struck seven-year-old Iven in the head. (R. p. 435 l. 15 – p. 436 l. 5; p. 319 l. 21 – p. 333 l. 9).

Indigo was not aware that Iven was injured until Penelope complained that Iven would not get off her. At that time Indigo checked in the rear seat and noticed that Iven was struck. She rushed them to Newberry Memorial hospital. (R. p. 209 l. 7-11). In the meantime, Indigo's mother Ms. Vinnie Ray Hunter, after having heard the gun shots, woke up her husband Wallace and asked him to call over to Indigo's house to find out what occurred. (R. p.113 l. 5-17). Appellant answered the phone angry, and told Wallace, "Mr. Bo. I ain't no fucking chap. I ain't; nothing to be played with," Appellant then hung up the phone. (R. p. 119 l. 17-20). Wallace called once again and the Appellant told him, "Like I said Mr. Bo, I ain't no fucking chap. I ain't no chap. Ain't going play with me," Appellant hung up again.[1] (R. p. 120 l. 23 – p. 121 l. 2).

Newberry County Sheriff Lee Foster heard on the radio that two individuals arrived at Newberry hospital with gunshot wounds. (R. p. 85 l. 14-17). Sheriff Foster immediately went to the hospital, once he arrived he received a briefing from two deputies and head nurse Ms. Phifer Suber. Ms. Suber informed Sheriff Foster that one of the victim's was a seven-year-old child who was in grave condition after being shot in the left side of the head. (R. p. 87 l. 23 – p. 88 l. 2). Investigator Ryan Dickert of the Newberry Sheriff's Department also responded to the hospital. (R. p. 306 l. 17-18). Once he arrived he noticed the Toyota Camry in the parking lot with a bullet hole in the center of the front hood. (R. p. 309 l. 10-12). Investigator Dickert entered the emergency room and spoke to Indigo. She appeared to have a gunshot wound to the left leg just above the ankle in which the bullet went all the way through. (R. p. 312 l. 19-20). During this interview Indigo identified the Appellant as the person who shot her. (R. p. 313 l. 13-15). Indigo also told

[1] "Mr. Bo" was a nickname that the Appellant called Wallace Hunter.

him that the Appellant stated, "If I'm going to jail tonight, ain't nobody staying here." (R. p. 194 l. 8-15). She informed Investigator Dickert of the positioning of the children inside the vehicle. Indigo stated that each of the children were in the back seat. None of them were in car seats, Penelope and Xzaiver Jr. were seated behind the driver's seat, Iven seated in the middle. (R. p. 334 l. 15-20). After Investigator Dickert gathered this information he obtained a search warrant and informed deputies at the crime scene to place the Appellant into custody. The Appellant was arrested that morning at 4:06 a.m. (R. p. 314 l. 8-9). On April 22 Investigator Dickert received a phone call informing him that Iven was deceased. (R. p. 355 l. 6-8).

After a search warrant was obtained, Investigator Dickert, Sergeant Ran Henderson, Sergeant Rusty Fulmer, and Deputy Odell Schumpert of the Newberry County Sheriff's Department conducted a search of the crime scene. (R. p. 280 l. 2-3). Sheriff Foster also contacted the South Carolina Law Enforcement Division (SLED) for additional support in collecting evidence. (R. p. 89 l. 21-24). The SLED crime unit arrived that morning. (R. p. 280 l. 1-3). During this search Deputy Schumpert found in a crate located near the back door, a .22 caliber eight shot revolver. (R. p. 288 l. 18-19). Within that crate he also found a paper bag containing a box of ammunition. Deputy Schumpert then searched the master bedroom. He turned over the mattress and found a semi-automatic 9mm pistol. (R. p. 293 l. 5-10). Deputy Schumpert observed one of the dresser drawers slightly open. He looked inside that drawer and found several unspent rounds of ammunition. (R. p. 296 l. 20-23). It was later discovered that there were twenty-six (26) rounds of ammunition in that bedroom dresser drawer. (R. p. 408 l. 15-19; p. 409 l. 12-13).

The Appellant was later indicted by the Newberry County Grand Jury for the offense of murder, three counts of attempted murder and possession of a weapon during the commission of a violent crime. [2]

On August 23, 2021, this case was called for trial before Circuit Court Judge, the Honorable Benjamin H. Culbertson. Present before the trial court was the Appellant with his counsel Stephen D. Geoly. Representing the State of South Carolina was Solicitor David M. Stumbo and Assistant Solicitor Taylor W. Daniel of the Eighth Circuit Solicitor's Office.

During trial SLED agent Michelle Eichenmiller testified. Agent Eichenmiller was accepted by the trial court as an expert in the field of firearm identification. (R. p. 395 l. 5-6). During her testimony Agent Eichenmiller testified that she examined a Ruger LCR .22 caliber long rifle with a laser sight attached. (R. p. 396 l. 6-9; p. 396 l. 13). This revolver held eight rounds and the shell casings were still in the cylinder of the .22 caliber weapon. (R. p. 396 l. 17-18; R. p. 407 l. 21-25).

Agent Eichenmiller also examined a Taurus model 709 slim 9mm Luger. (R. p. 397 l. 1-2). She testified that the bullet found lodged in the back seat of the Camry, two fired bullets found at the scene, and the bullet removed from the head of the victim all were consistent with a 9mm. (R. p. 398 l. 23-25; p. 400 l. 13-15; p. 404 l. 11-12). She was also given eight shell casings that were found at the crime scene. She testified that each of these shell casings matched the Taurus 9mm pistol. (R. p. 402 l. 20-24). Agent Eichenmiller also testified that the twenty-six rounds of ammunition found in the bedroom dresser drawer was for a 9mm Luger. (R. p. 408 l. 15-19).

SLED Agent Jaclynn McKay also testified. Agent McKay was the crime scene investigator who examined Indigo's Toyota Camry. (R. p. 417 l. 18-19). Agent McKay found that the vehicle

[2] The two counts of attempted murder regarding the other minor children were eventually dismissed. (R. p. 18 l. 12-13).

had six bullet "deficits." (R. p. 425 l. 12-14). She was also the person who collected the 9mm found under the mattress in the master bedroom by Deputy Shumpert. When she recovered the 9mm pistol it was fully loaded. (R. p. 443 l. 19-23).

Forensic pathologist Kelly Rose also testified. Trial court accepted her as an expert in the field of pathology and forensic pathology. (R. p. 470 l. 4-5). On April 23, 2019, Dr. Rose performed an autopsy on the victim. (R. p. 471 l. 19). She determined that the victim's cause of death was a pulpification of brain subarachnoid and subdural hemorrhage. (R. p. 472 l. 15-18). This was due to a gunshot wound to the head. (R. p. 473 l. 3-4). Dr. Rose ruled the manner of death a homicide. (R. p. 473 l. 5-6). She testified that the bullet entered right above the left ear, traveled through the skull, through the brain, and back out of the skull and was found in a big bulge under the skin. (R. p. 477 l. 13-17).

After four days of testimony, a jury of his peers found the Appellant guilty of murder, ABHAN, and possession of a weapon during the commission of a violent crime. (R. p. 673 l. 17 – p. 674 l. 5). After the reading of the verdicts Appellant appeared before the trial court for sentencing. The trial court sentenced the Appellant to a thirty-five (35) year period of incarceration for the offense of murder; twenty (20) years for ABHAN and five (5) years for possession of a weapon during the commission of a violent crime. The trial court ordered that the Appellant would serve these sentences concurrently. (R. p. 685 l. 21 – p. 686 l. 10).

During his incarceration the Appellant filed a timely notice of appeal before this court. Within this appeal the Appellant argued that the trial court erred in failing to instruct the jury on the crime of involuntary manslaughter; that the trial court gave an improper definition of malice and a confusing explanation of intent when the jury expressed confusion over the meaning of the

total disregard of human life; and the trial court erred in failing to quash the indictment for attempted murder.

The Respondent will argue that there was no evidence presented revealing that the Appellant committed the offense of involuntary manslaughter; therefore, the trial court was not obligated to instruct the jury on that offense. The trial court gave adequate jury instruction that followed the law. The Respondent will also argue that the Appellant's trial counsel failed to make a motion to quash prior to the swearing of the jury; therefore, he was not entitled to a quashing of this indictment. And this issue is moot due to the Appellant eventually being found guilty of ABHAN. The Respondent's brief supporting these arguments follows.

ARGUMENTS

1. **Based on the facts presented the actions of the Appellant did not apply to the elements of involuntary manslaughter, therefore, he was not entitled to jury instruction for involuntary manslaughter. The trial court did not err in denying the request of the Appellant for a jury charge for involuntary manslaughter.**

Relevant Facts

Upon conclusion of the State's case in chief, and the denial of the directed verdict motion, the trial court instructed the parties to make a request for which charges that they wished for him to give to the jury. One of the charges requested by the Appellant was that the jury be charged the law for involuntary manslaughter. (R. p. 500 l. 2-6). The Appellant's position was that he could have been found to be committing the misdemeanor offense of malicious injury to personal property; therefore, giving rise to a charge for involuntary manslaughter. Appellant's counsel also argued that since their claim was that he was shooting at the tires on his property, he was doing a lawful act that resulted in death which equates to a charge of involuntary manslaughter. (R. p. 520 l. 13-17).

The trial court decided to deny the Appellant's request for a charge for involuntary manslaughter. The trial court decided that due to the Appellant shooting a firearm whether it be in the air or at someone constitutes something that tends to cause death or bodily harm. (R. p. 530 l. 11-13).

Standard of Review

In criminal cases the appellate court sits to review errors of law only. *State v. Wilson,* 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). On appeal, the trial court ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law. *State v. Smicklevich,* 268 S.C. 411, 234 S.E.2d 230 (1977). An abuse of discretion occurs when the trial court's ruling is based on an error of law, or when grounded in factual conclusions that are without evidentiary support. *State v. Pittman,* 373 S.C. 527, 570, 647 S.E.2d 144, 167 (2007). Trial court may and should refuse a charge on a lesser included offense where there is no evidence that defendant committed the lesser rather than greater offense. *Casey v. State,* 305 S.C. 445, 409 S.E.2d 391 (1991). 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). When the victim is killed by a gunshot, and no evidence is presented showing the defendant fired the gun unintentionally, the defendant is not entitled to a charge of involuntary manslaughter. *Douglas v. State,* 332 S.C. 67, 74-75, 504 S.E.2d 307, 310-11 (1998).

Discussion

Appellant claims that the trial judge erred in not deciding to give the jury charge for involuntary manslaughter. The Respondent will argue that since there was no evidence revealing that the Appellant committed involuntary manslaughter the trial court made the proper decision in refusing to charge the jury on the law of involuntary manslaughter.

Involuntary manslaughter is defined as an unintentional killing of another without malice while engaged in: (1) an unlawful activity not naturally tending to cause death or great bodily harm; or (2) a lawful activity with reckless disregard for the safety of others. *State v. Smith,* 391 S.C. 408, 414, 706 S.E.2d 12, 15 (2011). When looking at the definition of involuntary manslaughter, and the unlawful act committed by the Appellant, there are two things the court looks for, was there any malice, and whether the activity tends to cause death or great bodily injury. In looking at the present case, the Appellant passes neither prong for a jury to be allowed to consider the crime of involuntary manslaughter.

In *State v. Mouzon,* the South Carolina Supreme Court defined malice an essential element of murder. In *Mouzon,* the Supreme Court decided,

> Malice is an essential ingredient of murder, and it does not necessarily 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."

State v. Mouzon, 231 S.C. 655, 662, 99 S.E.2d 672, 675-676 (1957), *quoting, State v. Heyward,* 197 S.C. 371, 15 S.E.2d 669, 671 (1941).

In the present case there is no dispute that the Appellant took eight shots at a vehicle carrying his then pregnant wife and their three minor children. Their argument was that he had no intentions in shooting anyone, he was shooting at the tires. Pursuant to *Mouzon* that does not matter. There is no need for the intent to kill. If there is a reckless disregard for human life, malice exists. In *Mouzon* the Supreme Court decided,

> Although it may be fairly assumed there was no actual intent to kill or injure another, there is evidence of such recklessness and wantonness as to indicate a depravity of mind and disregard of human life, from which a jury could infer malice.

Id.

There exists no doubt that the Appellant had a total disregard for any life when he decided to shoot at a vehicle eight times. This act alone reveals malice therefore denying the Appellant a charge of involuntary manslaughter.

The second prong that exists is an act not naturally tending to cause death or great bodily harm. Although malice cannot be inferred just by the use of a deadly weapon. *See, State v. Burdette,* 427 S.C. 490, 832 S.E.2d 575 (2019). The use of a handgun is something that will naturally cause death of great bodily harm. Once the Appellant decided to shoot a car occupied by a pregnant women and children, the oldest being seven, the obvious result could be that someone could be killed or seriously injured, which both occurred. Petitioner's actions do not fall into the first category, as he fired a gun which naturally tends to cause death or bodily harm. *Bozeman v. State,* 307 S.C. 172, 177, 414 S.E.2d 144, 147 (1992). In *State v. Craig,* 267 S.C. 262, 227 S.E.2d 306 (1976), the South Carolina Supreme Court decided that the trial court made the correct decision in not charging the jury the law regarding involuntary manslaughter when the defendant admitted intentionally firing a shotgun but claimed he only meant to shoot over the victim's head. The courts tend to rule that the killing of another must be unintentional in order to receive an involuntary manslaughter charge. Unintentional does not mean intentionally shooting at a person and hitting them when you did not mean to. Unintentional means using a weapon in a reckless manner, then a defendant deserves a jury charge for involuntary manslaughter. However, a defendant that intentionally shoots at a person, that is not an unintentional act, so the defendant does not warrant an involuntary manslaughter jury charge. *See, Bozman v. State,* 307 S.C. 172, 414 S.E.2d 144 (1992)(Defendant however intended to shoot the gun. So, there is no evidence to support an allegation of mere criminal negligence in the use of dangerous instrumentality. The evidence in the record does not support a charge of involuntary manslaughter.), *State v. Smith,* 315

S.C. 547, 446 S.E.2d 411 (1994)(Whether the defendant intended to hurt the victim is irrelevant. The stabbing is clearly not a lawful act, and the intentional use of a dangerous instrumentality does not support the allegation of mere criminal negligence.)

2. **The jury charge given by the trial court fully explained the proper definition of malice as a total disregard of human life and intent to inflict bodily injury. There exists no confusion by the explanation given by the trial court while answering the jury's question.**

Relevant Facts

During jury deliberations the jury came back with a question, "Does total disregard for human life supersede the intent to inflict injury?" (R. p. 651 l. 22-23). At the time the question was read the trial court believed that the jury was deciding between attempted murder or ABHAN. The trial court wished to inform the jury that they had to find the defendant not guilty of the higher offense before they can consider if he committed the lesser included offense. Once the jury was brought out the jury foreman explained to the trial court that within the instructions it read, "that malice aforethought requires a showing of an intent to do harm. However, further down it says it can be inferred by reckless disregard for a human life." (R. p. 668 l. 8-12). The court responded, that "deals with the way the state proves malice." (R. p. 668 l. 13-14). The trial court further informed the jury that, "there is no distinction whether they prove it by a disregard for human life or whether they prove it by the intent to inflict injury." (R. p. 668 l. 16-18). The trial court fully explained to the jury, "before you can find defendant guilty of attempted murder in this case, you have to show he specifically intended to murder Indigo Davis."(R. p. 669 l. 20-22). "Whereas murder and the lesser included charges of attempted murder just require a general intent." (R. p. 669 l. 24 – p. 670 l. 1). A juror responded, "Again under murder, we don't need to show a specific intent if we have the implied inference?" (R. p. 670 l. 2-4). The court informed the jury, for murder you do not have to show specific intent." (R. p. 670 l. 5-6).

Standard of Review

A jury charge is correct if when the charge is read as a whole, it contains the correct definition and adequately covers the law. *State v. Adkins,* 353 S.C. 312, 318, 577 S.E.2d 460, 464 (CR. App. 2003). A jury charge which is substantially correct and covers the law does not require reversal. *State v. Hoffman,* 312 S.C. 386, 395, 440 S.E.2d 869, 874 (1994), *citing, State v. Rabon,* 275 S.C. 459, 272 S.E.2d 634 (1980).

Discussion

The Appellant argues that the trial court erred in not informing the jury concerning the "total" disregard of human life, and informing the jury that intent is not necessary to find a person guilty of murder. It is obvious the court was differentiating between specific intent and general intent. Appellant argues within his brief that the Court stated to the jury that intent only applies to attempted murder. If this Court looks at the record the trial court stated, "Specific –" (R. p. 669 l. 12) and then was interrupted by the juror. The trial court completed his sentence stating, "intent only applies to the charge of attempted murder." (R. p. 669 l. 14-15). So, when observing the sentence of the trial court as a whole, he stated, "Specific intent only applies to the charge of attempted murder," which correctly follows South Carolina law. Specific intent is required for attempted murder and Murder and ABHAN are general intent crimes.[3] It is obvious that the trial court did not mistake or give wrong instructions when he addressed the jury regarding their questions.

[3] "General intent" is defined as "the state of mind required for the commission of certain common law crimes not requiring specific intent." *State v. Kinard,* 373 S.C. 500, 504, 646 S.E.2d 168, 169 (2007), *overruled on other grounds, State v. Burdette,* 427 S.C. 490, 832 S.E.2d 575 (2019), *quoting,* Black's Law Dictionary 813 (7ed. 1999).

At time of his explanation, it is obvious the trial court was discussing specific intent as only applying to attempted murder. The trial court stated that specific intent only applied to attempted murder, while the other crimes such as murder and ABHAN are general intent crimes.

The Appellant also argues that the trial court erred when he told the jury that the State only needed to prove a disregard for human life and not a "total" disregard for human life. The written jury instructions that were given to the jury had the instruction which stated, "total" disregard for human life. It is obvious that the jury understood that it was a "total" disregard for human life, that is because it was stated that way within their question. The Appellant is getting into semantics in making this argument. It is obvious the trial court and jury knew that it included the word "total."

Jury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error. *State v. Aleksey,* 343 S.C. 20, 27, 538 S.E.2d 248, 251 (2000). Appellant raised no objections as to the written instructions that were given to the jury, just to some confusion during this question, which answers were given that applied to South Carolina law. The Appellant is making a big deal about the judge saying that intent only applied to attempted murder which he did not say, and the written instructions definitely stated, "specific" intent. The trial court instruction stated, "criminal intent must be proven by the state beyond a reasonable doubt." (R. p. 635 l. 1-2.). The trial court's written instructions also stated, " the defendant's is also charged with attempted murder" . . . "now unlike the crime of murder attempted murder requires a specific intent to kill not general intent." (R. p. 637 l. 18; l. 21-23). The trial court within its instructions also stated "criminal intent is a mental state, a conscious wrongdoing. You must determine what the defendant intended to do, based on the circumstances shown to have existed." (R. p. 635 l. 17-20). Within his instructions the court

also stated, "malice may be inferred from conduct showing a **total** disregard for human life." (R. p. 637 l. 3-4).

There is nothing confusing about how the jury charges were given by the trial court. They followed the law, and no objections were raised by trial counsel when asked if there were any objections to the jury charges. (R. p. 645 l. 23). There was no prejudice raised by the instructions given, so there is no reversable error. In order to warrant reversal, the jury instruction must have been prejudicial. *State v. Fripp.* 397 S.C. 455, 459, 725 S.E.2d 136, 139 (2012).

3. Appellant never made a motion to quash the indictment prior to the selection of the jury therefore, losing the ability to persuade the trial court to quash the indictment. Since it was not raised before the trial court the Appellant has waived the ability to raise this issue during an appeal.

Relevant Facts

The indictment for attempted murder stated the words "expressed or implied malice." The State moved not to have the indictment amended removing the words implied, in order not to confuse the jury when the court gave their jury instructions. (R. p. 13 l. 20-24). Because due to the South Carolina Supreme Court decision of *State v. King,* for an attempted murder to occur, malice must be expressed. At that time, Appellant's counsel objected to any removal of the word "implied" from the indictment. It was Appellant's counsel's position that everything within the indictment must be proven, and the State should not be allowed to remove any elements from the indictment. The court noted the Appellant's objections however, the trial court decided to leave the indictment as it was and not remove any language. (R. p. 19 l. 21).

Standard of Review

Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury be sworn and not afterwards. S.C. Code Ann. §17-19-90 (1976). If an indictment is challenged as insufficient or defective, the

defendant must raise that issue before the jury is sworn and not afterwards. *State v. Gentry,* 363 S.C. 93, 101, 610 S.E.2d 494, 499 (2005)

Discussion

The Appellant argues that the trial court erred in not quashing the indictment as to attempted murder because the indictment contained improper language of implied malice. The Respondent will argue that the indictment was lawful on its face and the trial court did the proper thing by not quashing the indictment.

Pursuant to *State v. King,* the South Carolina Supreme Court did rule that, "one cannot be guilty of attempted murder by implied malice because implied malice does not encompass the essential specific intent to kill. *State v. King,* 422 S.C. 47, 57, 810 S.E.2d 18, 23 (2017). The indictment stated either "expressed or implied" which the State wished to remove implied. This request was denied by the trial court. Therefore, it was the obligation of the State to prove that attempted murder can be conducted through implied malice. Since that was not part of the jury charges that attempt failed and the Appellant was eventually convicted of ABHAN, which can occur through implied malice.

The Appellant argues that the indictment should have been quashed due to the word "implied malice" found on the indictment. However, the elements of the crime, the allegations, and the charges were also on the indictment. If they are on the indictment, that indictment is lawful, so the court did the proper thing not to quash the indictment but allow it to proceed as it was. This challenged the State to prove these allegations beyond a reasonable doubt. In *Gentry,* the South Carolina Supreme Court established what must be considered by the Court in order to quash an indictment. *Gentry* specifically states:

> The indictment is a notice document, challenge to the indictment on the ground of insufficiency must be made before the jury is sworn as provided by §17-19-90. If

> the objection is timely made, the circuit court should judge the sufficiency of the indictment by determining whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that it intended to be charged.

Gentry, 363 S.C. at 102-103, 610 S.E.2d at 500.

The indictment clearly raised the charges against the Appellant, and allegations. The court had knowledge of what the Appellant was accused of, and it gave the Appellant the opportunity to either accept the allegations or go through with a trial.

Within his brief the Appellant argued that the trial court denied the Appellant's motion to quash. However, no such motion was ever made by the Appellant before the jury was sworn. When the State made a motion to amend the indictment, the Appellant just objected to that motion. There was never a motion raised by the Appellant to have the indictment quashed. (R. p. 19 l. 14-23). Since that motion was never made, the Appellant does not now have the ability to request that this court decide if the trial court erred in not quashing said indictment. In *Gentry,* the Supreme Court also stated,

> The indictment is the charge of the state against the defendant, the pleading by which he is informed of the fact, and the nature and scope of the accusation. When that indictment is presented, that accusation made, that pleading filed, the accused has two courses of procedure open to him. He may question the propriety of the accusation, the manner in which it has been presented, the source from which it proceeds, and have these matters promptly and properly determined; or, waiving them, he may put in issue the truth of the accusation, and demand the judgment of his peers on the merits of the charge. If he omits the former, and chooses the latter, he ought not, when defeated on the latter - when found guilty of the crime charged, - to be permitted to go back to the former and inquire as to the manner and means by which the charge was presented.

Id., 363 S.C. at 102, 610 S.E.2d at 499-500.

There was never a mention by the Appellant that the court should quash the indictment. It was the intention of the State to prove that the Appellant specifically intended to murder Indigo. This is

proven by the dismissal of the other two indictments accusing the Appellant of attempting to murder the other two children in the vehicle. This indictment was never wrong on its face. The State just wished that one word be removed in order not to cause confusion between the indictment and the jury charges that were given by the trial court. However, since an indictment is never evidence, no prejudice ever occurred due to the fact the jury decided that the State did not prove there was a specific intent to kill. They decided to find the Appellant guilty of ABHAN.

The State will also argue that since there was never a motion to quash made by the Appellant before the trial court, that argument was never preserved and cannot be brought before this Court. In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal. *State v. Dunbar,* 356 S.C. 138, 139, 587 S.E.2d 691, 693 (2003). The Appellant argues that the indictment should have been quashed, however, there was never a motion raised by the Appellant to have the trial court consider a quashing of the indictment. It would be unfair of this court to make a ruling that the trial court was in error when the trial court never had an opportunity to decide the legality of the indictment and whether it should be quashed. Since that issue was never raised before the trial court, it is waived and should not be allowed to be considered by this court. An issue that was not preserved for review should not be addressed by the Court of Appeals. *Id.,* 587 S.E.2d at 694.

During trial the Appellant argued that the indictment should not be amended. The reason was because they felt the State could not prove the allegations as listed on the indictment, therefore, possibly getting the trial court to honor a motion for directed verdict. Trial counsel never requested that the trial court quash this indictment. Now the Appellant presents a different argument on appeal. The argument cannot be made one way before the trial court and then another total new

argument be made on appeal. A party may not argue one ground at trial and an alternate ground on appeal. *State v. Prioleau,* 345 S.C. 404, 411, 548 S.E.2d 213, 217 (2001).

The indictment on its face was proper, so the trial court made the proper decision in not amending it and allowing the allegations to go forward before the jury. The trial court committed no errors in not quashing this indictment. This issue was also not preserved by the Appellant's trial counsel; therefore, since it was not preserved, it should not be addressed by this court.

The State also argues that this allegation is moot due to the fact the Appellant was convicted of ABHAN and not attempted murder. An offense which the State presented sufficient evidence in proving Appellant committed beyond a reasonable doubt.

South Carolina law defines ABHAN as,

> An unlawful act of violent injury to another accompanied by circumstances of aggravation. Circumstances of aggravation include the use of a deadly weapon, the intent to commit a felony, infliction of serious bodily injury, great disparity in the ages or physical conditions of the parties, a difference in gender, the purposeful infliction of shame and disgrace, taking indecent liberties or familiarities with a female, and resistance to lawful authority.

State v. Fennell, 340 S.C. 266, 274, 531 S.E.2d 512, 516-517 (2000).

The Appellant shot into the car occupied with his pregnant wife, hitting her in the ankle. The Appellant's act caused great bodily injury and it was done by means that could produce death or great bodily injury. There was never any denial that the Appellant shot into the vehicle which caused an injury to the leg of Indigo, therefore, he was guilty of ABHAN.

Since the Appellant was convicted of ABHAN and not attempted murder this argument becomes moot. A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy. This is true when some event occurs making it impossible for the reviewing court to grant effectual relief. *Mathis v. South Carolina State Highway Dept.,* 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). If this court decides that the trial court erred by not

quashing the indictment the Appellant would be indicted for the lessor included offense of ABHAN.[4] Since the Appellant was convicted of the offense of ABHAN and is currently serving a sentence for that conviction, the court will bring no remedy to the Appellant in ruling that the trial court erred in not quashing this indictment. Therefore, this issue should be considered moot.

[4] ABHAN is a lesser-included offense of attempted murder. *State v. Shands,* 424 S.C. 106, 130, 817 S.E.2d 524, 537 (2018), *quoting, State v. Middleton,* 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014).

CONCLUSION

The trial court made the proper decisions regarding this matter the State respectfully request this court to affirm the decisions of the trial court.

Respectfully submitted,

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February 7, 2023

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM NEWBERRY COUNTY
The Honorable Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2021-000982

THE STATE,

Respondent,

v.

XZAVIER SHARIF DAVIS,

Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This 7th day of February 2023.

s/Tommy Evans, Jr.
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