STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Barnwell County
The Honorable Edgar W. Dickson, Circuit Court Judge
Appellate Case No. 2011-202947

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

DEXTER BERNARD BROWN, II,

APPELLANT.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. **Trial judge properly denied Appellant's directed verdict motion on charges of attempted murder and possession of a firearm during commission of a violent crime where the evidence reflected that Appellant repeatedly shot an automatic weapon described as a "machine gun" into a vehicle occupied by the victims.**

II. **Appellant's jury charge issue is not preserved for appellate review because Appellant did not raise any objection to the charge below. In any event, the trial judge's implied malice charge was proper under Belcher because there were no circumstances that would have reduced, mitigated, excused, or justified Appellant's actions, and even assuming error with respect to the jury charge, it was harmless where the evidence of malice was overwhelming.**

STATEMENT OF THE CASE

Appellant was indicted in Barnwell County in April 2011 for two counts of attempted murder and one count of possession of a firearm during commission of a violent crime. On May 11-12, 2011, Appellant proceeded to trial before the Honorable Edgar W. Dickson and a jury. The jury found Appellant guilty as indicted, and following trial Judge Dickson sentenced Appellant to thirty years on each attempted murder charge, with the sentences to run concurrently, and five years, consecutive, for the firearm charge. However, following the pronouncement of sentence, Appellant had an outburst in the courtroom wherein he used a curse word and issued a threat to one of the victims, and subsequently made comments to the sheriff that were interpreted as a threat. (See R. p. 216-221). Judge Dickson then modified the sentence by making all of the sentences consecutive. (R. p. 221-22). However, after defense counsel filed a motion for reconsideration, Judge Dickson reinstated the original sentence by order filed November 15, 2011. A timely notice of appeal was served and filed.

ARGUMENT

I. Trial judge properly denied Appellant's directed verdict motion on charges of attempted murder and possession of a firearm during commission of a violent crime where the evidence reflected that Appellant repeatedly shot an automatic weapon described as a "machine gun" into a vehicle occupied by the victims.

Relevant Facts

On October 15, 2010, Appellant and his cohort, Kendrick Jacobs, began following victims Brandon Parker and Roger Benjamin after they stopped at a store called Harry's in Barnwell County. (See R. p. 85-86). Appellant was driving a blue Mercury Grand Marquis that belonged to his girlfriend's father, and the victims were in a burgundy Blazer that belonged to Parker's mother. (R. p. 87; p. 104; p. 116; p. 130). The victims noticed the blue Mercury behind them and tried to take an alternate route home to avoid it. (R. p. 86, lines 3-8). However, Appellant and Jacobs were able to follow the victims, and a "high-speed chase" ensued. (R. p. 86; p. 99, lines 21-22). Appellant and Jacobs began shooting at the victims as soon as the Blazer turned off into Benjamin's grandmother's driveway.[1] (R. p. 86, lines 9-10). Benjamin and the other occupants jumped out of the Blazer, and Benjamin ran and hid behind the house and then turned around to see who was shooting at them.[2] (R. p. 86, lines 12-13). At that point Benjamin saw that the shooters were Appellant and Kendrick Jacobs, who were both shooting automatic weapons that witnesses described as "machine guns." (R. p. 59, lines 59-64; p. 86, lines 15-17; p. 99-100; p. 135-37). Benjamin had known Appellant since he was eleven or twelve years old, and Kendrick Jacobs was Benjamin's cousin. (R. p. 90).

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[1] Parker turned into the driveway so fast that he struck something and damaged the front end of the vehicle. (R. p. 105, lines 17-22).

[2] Roger Benjamin testified that a man he knew only as "T" was a backseat passenger. (R. p. 91, lines 8-15). "T" had asked Brandon Parker to give him ride to a "little club" down the road from the victims. (R. p. 97, lines 4-12).

Benjamin observed that Jacobs was sitting in the passenger-side window, shooting across the roof of the car, while Appellant was shooting out of the driver's side window. (R. p. 88). Appellant and Jacobs went up the road past Benjamin's grandmother's house but then turned around, came back, and stopped in the driveway. (R. p. 88-89; p. 135-38; p. 143-44). At that point, although the occupants of the Blazer had already fled, Appellant and Jacobs continued to shoot at the Blazer. (R. p. 135-37; p. 150).

Meanwhile, Alice Thompson, Benjamin's grandmother, observed part of the incident from her front porch. (See R. p. 134-47). She came out onto the porch as Appellant and Jacobs were heading up to the store to turn around and come back.[3] (R. p. 147, lines 21-23). She immediately recognized Appellant and Jacobs as the shooters and she cried out, asking what they were doing. Appellant and Jacobs continued shooting at the Blazer and then left when Ms. Thompson told them she was calling the police. (R. p. 134-35; p. 144, lines 13-15; p. 149, lines 12-15). Ms. Thompson subsequently called 911 and told the dispatcher what has happening and specifically mentioned Appellant as one of the shooters. (R. p. 138-43). Ms. Thompson was relieved that none of the neighborhood children, including her granddaughter, had been playing outside that day, because if they had been, "there'd a been a lot of dead peoples out there." (R. p. 138, lines 20-25).

Officer Trottie arrived on the scene within a few minutes, and he encountered Brandon Parker, who kept repeating that "somebody tried to kill me." (R. p. 47-48). Investigator Chavis arrived shortly thereafter and collected the numerous shell casings located on the property. (R. p. 57-66). Investigator Chavis determined where the bullets hit the Blazer and noted that one bullet hit the driver's side headrest. (R. p. 62-66).

[3] Because Ms. Thompson came out onto the porch after the victims had already exited the Blazer, she never saw Appellant's gun being pointed at anyone. (See R. p. 134-50).

Investigator Chavis also determined that automatic weapons were used by the shooters. (See R. p. 59-64). Investigator Chavis found no indication that a gun had been fired out of the victims' Blazer.[4] (R. p. 74).

Appellant was not located on the day of the incident, but was apprehended later following further investigation and after the police received anonymous tips. (R. p. 119-20). After receiving one particular tip about Appellant's location, police arrived at that location and were permitted entry to search for Appellant. (R. p. 119-23). Police found Kendrick Jacobs in one of the rooms and found Appellant hiding in the closet of another room. (R. p. 122-23). At some point police also located the blue Mercury Appellant had been driving on the day of the incident, but the car had obviously been cleaned out. (R. p. 126-27). Police were never able to locate the weapons involved in the shooting. (R. p. 128, lines 6-7).

Discussion

Appellant asserts that the trial judge erred in denying his directed verdict motion. Specifically, as to the charge of attempted murder, Appellant argues that there was no evidence presented that he aimed or fired a gun at either of the alleged victims and that the evidence established only that he "discharged a firearm into an empty vehicle."[5] (Brief of Appellant, p. 9-11). As to the possession of a firearm during the commission of a violent crime charge, Appellant argues that there was no evidence that a "violent crime" was committed since Appellant was only shooting at a vehicle. (Brief of Appellant, p.

[4] In fact, a gunshot residue test was performed on Brandon Parker and the results were negative. (R. p. 69; p. 77-81). Investigator Chavis explained that he was not able to perform a gunshot residue test on Roger Benjamin because the only test he had left was unusable because the necessary fluid had evaporated. (R. p. 72-73). However, Benjamin testified that he did not have a gun on the day of the incident. (R. p. 97, lines 20-24).

[5] Notably, although on appeal Appellant asserts that because there was no evidence he aimed the gun at any individual, the State failed to present sufficient evidence of intent to kill (see Brief of Appellant, p. 10), Appellant never made this specific argument below. (See R. p. 151, line 24 – p. 154, line 10).

10-11). Appellant's arguments are without merit. As discussed above, there was evidence presented that Appellant and Jacobs followed the victims home and, after a high-speed chase, *repeatedly* fired automatic weapons described as a "machine guns" into the victims' vehicle while they were inside of it. (See R. p. 48, lines 19-20; p. 59, lines 21-22; p. 86; p. 95; p. 99-100; p. 137, lines 19-20). See In re Walter M., 386 S.C. 387, 391-92, 688 S.E.2d 133, 135 (Ct. App. 2009) (in a murder case, the evidence was sufficient to overcome the directed verdict motion where the finder of fact could infer malice from minor's use of a deadly weapon or from evidence that the discharge of the weapon was likely not accidental); State v. Wilds, 355 S.C. 269, 584 S.E.2d 138 (Ct. App. 2003) (directed verdict was properly denied in ABWIK case where the jury could infer malice from the circumstances); State v. Glenn, 328 S.C. 300, 310-12, 492 S.E.2d 393, 398-99 (Ct. App. 1997) (upholding the denial of the defendant's directed verdict motion and pointing out that intent to kill can be inferred from the surrounding circumstances, including acts of gross recklessness); cf. In re Tracy B., 391 S.C. 51, 69, 704 S.E.2d 71, 80 (Ct. App. 2010) (the family court properly adjudicated the minor delinquent for murder where the minor ran toward an occupied vehicle and shot a gun one time in the direction of the vehicle, killing one of the passengers; this Court stated that "this was sufficient evidence of reckless conduct and wanton disregard for human life from which the family court could infer malice"). While it is true that Appellant and Jacobs continued to shoot even after the victims fled from the vehicle, this does not mitigate the fact that Appellant and Jacobs tried to murder the victims while they were still inside the vehicle.

Accordingly, since there was evidence presented to sustain the attempted murder charge - and therefore evidence to sustain the possession of a firearm during commission

of a violent crime charge - the trial judge properly denied Appellant's motion for directed verdict.[6] (R. p. 151, line 24 – p. 154, line 11). See S.C. Code § 16-3-29 ("A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder."); S.C. Code § 16-23-490 (prohibiting possession of a firearm during the attempt to commit a violent crime); S.C. Code § 16-1-60 (listing "attempted murder" as a "violent crime"); see State v. Weston, 367 S.C. 279, 292-93, 625 S.E.2d 641, 648 (2006) ("If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury.").

II. Appellant's jury charge issue is not preserved for appellate review because Appellant did not raise any objection to the charge below. In any event, the trial judge's implied malice charge was proper under Belcher because there were no circumstances that would have reduced, mitigated, excused, or justified Appellant's actions, and even assuming error with respect to the jury charge, it was harmless where the evidence of malice was overwhelming.

Issue Preservation

Appellant argues that the trial judge erred in charging the jury that malice could be inferred from the use of a deadly weapon. (See R. p. 195, lines 15-16). However, at trial, Appellant raised no objection to this charge in any form or fashion. (See R. p. 151-64; p. 185-200; see specifically p. 200, lines 7-8). See State v. Stone, 285 S.C. 386, 387, 330 S.E.2d 286, 287 (1985) (in order to preserve an objection to a jury charge, a defendant must object to the charge as given or request an additional charge when afforded the opportunity to do so); State v. Williams, 266 S.C. 325, 335, 223 S.E.2d 38,

[6] Appellant argues that the trial judge's comment, made while ruling on the directed verdict motion, that "there were people in the van at one time" could "conceivably have influenced the jury's ultimate finding of fact regarding whether the alleged victims were in the vehicle at the time of shooting." (Brief of Appellant, p. 11). However, this argument is without merit because the judge's statement was made outside the presence of the jury. (See R. p. 151, line 15 – p. 161, line 15).

43 (1976) ("The rule in this State is firmly established that failure to object to a charge, or failure to request an additional charge when the opportunity is afforded, constitutes a waiver of any right to complain on appeal of an alleged error in the charge."); State v. Todd, 264 S.C. 136, 139, 213 S.E.2d 99, 100 (1975) ("In cases too numerous to cite, . . . it has been held that the failure of a defendant to object to the charge as made or to request additional instructions, when the opportunity to do so is afforded, constitutes a waiver of any right to complain of errors in the charge.") (citations omitted); see also Rule 20(b), SCRCrimP ("Notwithstanding any request for legal instructions, the parties shall be given the opportunity to object to the giving or failure to give an instruction before the jury retires. Any objection shall state distinctly the matter objected to and the grounds for objection. Failure to object in accordance with this rule shall constitute a waiver of objection."). Because Appellant failed to object, the issue is not preserved for appellate review.

Even if the issue had been preserved, the judge's implied malice charge was proper. In State v. Belcher, the South Carolina Supreme Court held as follows:

> Today we return to the rationale underlying Hopkins, Levelle and Jackson and hold that where evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon. The permissive inference charge concerning the use of a deadly weapon remains a correct statement of the law where the only issue presented to the jury is whether the defendant has committed murder (or assault and battery with intent to kill).

State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810 (2009). The State agrees with Appellant's contention that the rationale of Belcher should apply in attempted murder cases, especially since the Belcher court specifically made reference to assault and

battery with intent to kill, the predecessor of attempted murder. See S.C. Code § 16-3-29 (creating the offense of attempted murder effective June 2, 2010).

However, initially, it appears that Appellant's Belcher argument - which is premised upon his assertion that there was a dearth of evidence that he "pointed a gun and fired it at any person" - is misplaced because this argument focuses on the *actus reus* element of the offense rather than the *mens rea* element. In other words, Appellant asserts he did not commit *the act* required by the attempted murder statute, but his argument does not actually dispute the *mens rea* element. In that vein, it is incorrect to say that a failure of the State to prove the *actus reus* would "excuse" a charge of attempted murder; instead, this would render Appellant not guilty of the offense. See Belcher, 385 S.C. 597, 685 S.E.2d 802 (evidence of justification and/or reduction of the offense because it appeared the defendant may have been acting in self-defense or in the heat of passion); State v. Miller, 397 S.C. 630, 725 S.E.2d 724 (Ct. App. 2012) (evidence of mitigation existed because it appeared the gun may have discharged accidentally or that the shooting may have constituted involuntary manslaughter); State v. Stanko, 402 S.C. 252, 741 S.E.2d 708 (2013) (there was evidence that the offense might be excused under the insanity defense); cf. State v. Price, 400 S.C. 110, 114-15, 732 S.E.2d 652, 654 (Ct. App. 2012) (testimony indicating that the victim and his brother were drug-dealing gang members and that victim's shooting may have been part of a drug deal gone wrong was not evidence that would "reduce, mitigate, excuse, or justify the crime"). The common theme of Belcher and its progeny is that, if there is evidence that would negate the "malice" element despite the fact that a deadly weapon is used, the charge regarding inferring malice from use of a deadly weapon is inappropriate. Since Appellant does not

point to any evidence that would negate the malice element - other than his assertion that the defendant *did not commit the crime at all* - his Belcher argument is misplaced.

In any event, the State disagrees with Appellant's contention that the judge's implied malice charge impermissibly shifted the burden of proof on the element of malice and therefore violated his rights under the Due Process Clause,[7] and also disagrees with Appellant's contention that there was evidence indicating he did not aim a gun at any person. (See Brief of Appellant, p. 12). To the contrary, as discussed above, the evidence reflected that Appellant and Jacobs began repeatedly shooting at the victims while they were inside the vehicle, well before the victims fled from the vehicle on foot. (See R. p. 48, lines 19-20; p. 59, lines 21-22; p. 86; p. 95; p. 99-100; p. 137, lines 19-20). There was no evidence that would "reduce, mitigate, excuse, or justify" Appellant's conduct. Significantly, no lesser-included offense charges were requested by Appellant or charged to the jury. (See R. p. 151-222). Furthermore, Appellant did not argue self-defense, accident, insanity, or that the offense constituted a lesser offense; instead he argued there was no physical or forensic evidence linking him to the crime. (See R. p. 178-85; see also p. 220, line 25 – p. 221, line 6). Accordingly, Appellant's argument that the implied malice charge was improper under Belcher is without merit. See Belcher at 612, 685 S.E.2d at 810 ("The permissive inference charge concerning the use of a deadly weapon remains a correct statement of the law where the only issue presented to the jury is whether the defendant has committed murder (or assault and battery with intent to kill)."); see also State v. Price, 400 S.C. at 115, 732 S.E.2d at 654 ("*Belcher* does not prohibit the trial court from instructing the jury that it may infer malice from the use of a

[7] The trial judge did not charge a "mandatory presumption" (see Brief of Appellant, p. 12); instead, the judge told the jury that "inferred malice may also arise when the deed is done with a deadly weapon." (R. p. 195, lines 15-16).

deadly weapon where the only jury question created by the evidence is whether the defendant is the person who committed [the crime]").

Furthermore, notwithstanding any alleged error in the jury instructions, the evidence of malice was so overwhelming that any error with respect to the implied malice charge was harmless. Again, the evidence reflected that Appellant and Jacobs followed the victims home and, after a high-speed chase, *repeatedly* fired automatic weapons described as a "machine guns" into the victims' vehicle while they were inside of it. (See R. p. 48, lines 19-20; p. 59, lines 21-22; p. 86; p. 95; p. 99-100; p. 137, lines 19-20). Then, even *after* the victims fled from the vehicle, Appellant and Jacobs turned back around and continued to shoot the victim's vehicle until Ms. Thompson told them she was calling the police. (R. p. 134-35; p. 144, lines 13-15; p. 149, lines 12-15). The only conclusion to be drawn from these facts was that Appellant acted with malice. See State v. Kinard, 373 S.C. 500, 503-504, 646 S.E.2d 168, 169 (Ct. App. 2007) ("'Malice aforethought' is defined as 'the requisite mental state for common-law murder' and it utilizes four possible mental states to encompass both specific and general intent to commit the crime. These four possibilities are intent to kill, intent to inflict grievous bodily harm, extremely reckless indifference to the value of human life (abandoned and malignant heart), and intent to commit a felony (felony murder rule).") (citations omitted); State v. Stanko, 402 S.C. 252, 264-65, 741 S.E.2d 708, 714 (2013) (error in giving the implied malice charge was harmless where evidence of malice was overwhelming and the evidence of malice was not limited to Appellant's use of a deadly weapon). Therefore, even if the trial judge erred by instructing the jury that an inference of malice may arise from use of a deadly weapon, this error was harmless beyond a reasonable doubt. See State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991)

(appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result); State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008) (error is harmless beyond a reasonable doubt if it does not contribute to the verdict).

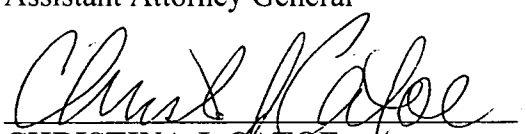
CONCLUSION

For the reasons discussed above, Respondent requests that this Court affirm Appellant's convictions and sentences.

Respectfully submitted,

ALAN WILSON
Attorney General

CHRISTINA J. CATOE
Assistant Attorney General



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ATTORNEYS FOR RESPONDENT

October 31, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Barnwell County
The Honorable Edgar W. Dickson, Circuit Court Judge
Appellate Case No. 2011-202947

THE STATE OF SOUTH CAROLINA,

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v.

DEXTER BERNARD BROWN, II,

APPELLANT.

DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

The Respondent submits that the following should be included in the Record on Appeal:

(1) Trial Transcript p. 40-222;
(2) True-billed indictments; and
(3) Order Granting Motion to Reconsider Sentence, filed 11/15/11.

ALL DOCUMENTS DESIGNATED SHOULD BE REDACTED IN ACCORDANCE WITH THE SOUTH CAROLINA SUPREME COURT ORDER ON PERSONAL DATA IDENTIFIERS.

The undersigned hereby certifies this Designation contains no matter that is irrelevant to this appeal.

CHRISTINA J. CATOE

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October 31, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Barnwell County
The Honorable Edgar W. Dickson, Circuit Court Judge
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THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

DEXTER BERNARD BROWN, II,

APPELLANT.

AFFIDAVIT OF SERVICE

The undersigned attorney hereby certifies that the **Initial Brief of Respondent** and **Designation of Matter** in the above-referenced case has been served upon **Tommy A. Thomas**, Post Office Box 88, Irmo, South Carolina 29063, this **31st** day of **October, 2013.**

CHRISTINA J. CATOE
Assistant Attorney General

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SWORN to before me this 31st day of October, 2013.

Notary Public for South Carolina.
My Commission Expires: 5/11/2014

ALAN WILSON
ATTORNEY GENERAL

October 31, 2013

VIA HAND-DELIVERY

The Honorable Jenny A. Kitchings
Clerk of Court, S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: State of South Carolina v. Dexter Bernard Brown, II
Appellate Case No. 2011-202947

Dear Ms. Kitchings:

Enclosed please find the **Initial Brief of Respondent,** along with the **Designation of Matter** and **Affidavit of Service,** in the above-referenced appeal, which I am serving on opposing counsel today.

Thank you for your attention to this matter, and please do not hesitate to contact me at (803) 734-3713 should there be any questions or concerns.

Sincerely,

Christina J. Catoe
Assistant Attorney General
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CJC/

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