THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of General Sessions

Craig Brown, Circuit Court Judge

No. 12-GS-21-1483

STATE OF SOUTH CAROLINA ..... Respondent,

v.

WILLIAM JAMELL THOMAS, JR. ..... Appellant

APPELLANT'S INITIAL BRIEF

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II. The trial court judge erred by admitting evidence of a prior physical altercation between William Thomas and Brittany Singletary because that evidence was not established by a preponderance of the evidence

III. The trial court abused his discretion when he did not allow the testimony of Coty Heneghan to be admitted when Heneghan's testimony was relevant because it showed that Brittany Singletary had a motive to lie and otherwise corroborated appellant's alibi defense. Appellant was denied his right to present a defense

STATEMENT OF THE CASE

William Jamell Thomas, Jr. was indicted by the Florence County grand jury of Attempted Murder and possession of a pistol by a person with a prior conviction for a crime of violence, 2012-GS-21-1483. He was tried before the Honorable D. Craig Brown and a jury on June 24-26, 2013. He was convicted and sentenced to 5 years for the pistol charge, and 25 years for Attempted Murder. He was represented by Ralph Wilson, Sr. and John Etheridge. The state was represented by John Jepertinger.

This appeal timely follows.

STATEMENT OF FACTS

On the night of September 11, 2011, Brittany Singletary was shot. The critical issue at trial was the identity of the person who shot her. Singletary gave conflicting accounts of the events, initially informing law enforcement that she had been shot during a drive-by shooting. Once she was placed into the EMS ambulance upon its arrival, she changed her story and claimed that William Thomas shot her. Thomas's sister, Renea, was present with Singletary, and remained with her, while EMS was summoned. Singletary's 911 phone call, made immediately after the shooting occurred, was destroyed prior to trial. The jury requested during its deliberations to hear it. Tr. 612, l. 19- Tr. 615, l. 25. It appears that Singletary and Thomas dated for less than a month when these events happened. Tr. 140, ll. 20-25. Singletary admitted, during her testimony, that she was "hiding" this relationship from her family. Tr. 143, l. 23- 144, l. 10.

Defense witnesses presented a starkly different picture of the events that night. Linda Mack, Thomas's mother, testified that Singletary and her boyfriend "Joe" came to the house that night. Tr. 479, ll. 6-14. It was "too late for them to be coming" to the house. Tr. 480, ll. 1-2. Mack's daughter, Renae and Mack's then-boyfriend, Johnny Smith were also at the house. Tr.

480, ll. 5-14. Joe barged into the house looking for Thomas. Tr. 480, l. 19- 483, l. 9. Thomas was not there. Brittany and Joe then had an argument regarding Brittany and Thomas's relationship. Tr. 483, ll. 11- 17. According to Mack, Joe shot Brittany while they were in Thomas's bedroom, and then Joe fled. Brittany did not want anyone to know that she had been at the house. When police arrived, Mack tried to speak to them but they pushed her back, and told her to "stay back." Law enforcement never interviewed Mack, Renae or Johnny in connection with these events. Tr. 483, l. 18- 486, l. 11. Renae also testified at trial, and corroborated her mother's testimony. Tr. 504, l. 14- 509, l. 10. Zolandria Brown testified that she was with Thomas on September 11, 2011, and that he spent the night with her. She recalls the date because she keeps a diary. Tr. 517, l. 9- 522, l. 19.

The State never argued that Thomas intended to kill Brittany. In its opening argument, it merely claimed that he deliberately pointed the gun at her and pulled the trigger. Tr. 99, ll. 1-5. "The essence of this case is you have a man that determined in his mind that it was going to be a good night for him, bad night for her." Tr. 100, ll. 18-20. After this shot, according to the State's theory, Thomas left the house and then was not arrested until 8 months later. Tr. 99, ll. 13-15.

At the end of the state's case, defense counsel moved for a directed verdict on attempted murder on the grounds that the evidence was insufficient to send it to a jury. Tr. 468, l. 25- 469, l. 18. At the end of all testimony, counsel renewed these objections. Tr. 545, ll. 13-19.

ARGUMENT

I. The trial court judge erred when he charged an inaccurate jury instruction on the definition of attempted murder to the jury, which lessened the burden the State had to prove in order to convict, and Thomas was denied his right to due process. Because the judge had an inaccurate understanding of the law of attempted murder, he erred when he did not grant appellant's motion for a directed verdict.

The trial court judge instructed the jury, as to the attempted murder charge, as follows:

"Now, the defendant, ladies and gentlemen, is charged with attempted murder. In order to prove this crime, the State must prove the defendant attempted to kill another person or persons with malice aforethought, either express or implied . . .

A specific intent to kill is not an element of attempted murder, but there must be a general intent to commit a serious bodily injury. Intent means intending the result which actually occurs; not accidentally or involuntarily."

Tr. 600, p. 20- 602, l. 9 (emphasis added).

The trial court judge erred when he gave the jury this instruction because it is not an accurate statement of the law.

In 2010, the South Carolina legislature adopted S.C. Code Ann. § 16-3-29, South Carolina's new attempted murder statute.

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. A person who violates this section is guilty of a felony, and, upon conviction, must be imprisoned for not more than thirty years. A sentence imposed pursuant to this section may not be suspended nor may probation be granted (emphasis added).

This new statute is different than South Carolina's previous crime of assault and battery with intent to kill. The definition of ABIK was an unlawful action of violent nature to the person of another with malice aforethought, either express or implied. S.C. Code Ann. §16-3-620. *See State v. Foust*, 325 S.C. 12, 479 S.E.2d 50 (1996).

In *State v. Sutton*, 340 S.C. 393, 532 S.E.2d 283 (2000), the South Carolina Supreme Court addressed the distinctions between ABIK and attempted murder. The South Carolina Supreme Court carefully articulated the general principles of attempted murder:

"In general, "[a]ttempt is a specific intent crime." 21 Am. Jur. 2d Criminal Law §176 (1998). "The act constituting the attempt must be done with the intent to commit that particular crime." *Id.* See also Wharton's Criminal Law Attempt §§694-695 (1996) ("To constitute an attempt, there must be an intent to commit a particular crime . . . Although a murder may be committed without an intent to kill, an attempt to commit murder requires a specific intent to kill.") In the context of

> an "attempt" crime, specific intent means that the defendant consciously intended the completion of acts comprising the choate offense. In other words, the completion of such acts is the defendant's purpose. *United States v. Calloway*, 116 F.3d 1129 (6th Cir. 1997). Attempted murder would require the specific intent to kill and conduct towards that end."

Id. at 397, 285.

The Sutton opinion comports with the law in other states. *See Harris v. Warden, Louisiana State Penitentiary*, 152 F.3d 430 (5th Cir. 1998) (to constitute an attempt to murder, there must be a specific intent to kill); *Henley v. State*, 881 N.E.2d 639 (Ind. 2008) (A conviction for attempted murder requires proof of specific intent to kill); *State v. Hailey*, 953 So. 2d 979 (La. Ct. App. 2d Cir. 2007) (To be guilty of attempted murder, a defendant must have a specific intent to kill; the mere intent to inflict great bodily harm is insufficient to convict a defendant of attempted first or second degree murder); *People v. Cunningham*, 314 Ill. Dec. 849, 875 N.E.2d 1136 (App. Ct. 1st Dist. 2007) (Conviction for attempted murder requires proof of the specific intent to kill someone; mere intent to do great bodily harm, or even knowledge that one's acts may result in great bodily harm or death, is insufficient); *State v. Coble*, 351 N.C. 448, 527 S.E.2d 45 (2000) (The crime of attempted murder can be committed only when a person acts with the specific intent to commit first-degree murder); *Wells v. State*, 768 So. 2d 412 (Ala. Crim. App. 1999) (An attempt to commit murder requires the perpetrator to act with the specific intent to commit murder; a general felonious intent is not sufficient).

In reviewing jury charges for error, appellate courts consider the trial court's jury charge as a whole and in light of the evidence and issues presented at trial. *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 604 (2011). A trial judge is required to charge the correct and current law of South Carolina. *State v. Buckner*, 341 S.C. 241, 246, 534 S.E.2d 15, 18 (Ct.App.2000). The substance of the law is what must be communicated to the jury, not any particular words. *State v.*

Hughey, 339 S.C. 439, 450, 529 S.E.2d 721, 727 (2000). Erroneous jury instructions are subject to a harmless error analysis. *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009).

The trial court judge's erroneous instruction lessened the burden of proof that the State had to meet in order to secure its conviction. Such infirmity cannot be considered harmless. Attempted murder requires a very specific *mens rea*—an actual intent to kill—which the judge did not charge to the jury in this case. William Thomas was denied his right to due process by the judge's instructing the jury on this lower burden. *In re Winship*, 397 U.S. 358 (1970). The trial court judge erred by not granting defense counsel's motion for a directed verdict because the state failed to present evidence sufficient to prove the offense of attempted murder. Respectfully, Thomas asks this Court to reverse his conviction.

II. The trial court judge erred by admitting evidence of a prior physical altercation between William Thomas and Brittany Singletary because that evidence was not established by a preponderance of the evidence. [1]

At a pre-trial hearing, the state proffered the testimony of Brittany Singletary. She testified that she met Thomas in August 2011 through Facebook. On Labor Day, she took a trip with family to Garden City, South Carolina. A "person she used to know" was also at the beach. Tr. 58, ll. 7-11. She returned to Florence on Monday, September 5, 2011 which was Labor Day. Tr. 58, ll. 21-23. That following Tuesday, according to her testimony, she and Thomas got into an argument. She said that he hit her. Tr. 59, l. 15. She testified that she fought back. Tr. 59, l. 18. Despite this, that Friday she went to see him at his house. Tr. 60, l. 1. They purportedly had another argument regarding "another guy." Tr. 60, ll. 9-10. They went to his grandmother's house in

[1] Trial counsel did not specifically object on the basis of inadmissibility under SCRE 404 or 403 which should, if relief is not granted on another basis, be raised during post-conviction relief.

Coward, SC. Tr. 60, ll. 17-21. She said he had an "attitude" and when they got to his grandmother's house, he pistol-whipped her. Tr. 61, ll. 7-10. According to her, he hit her "all over" including her knees and her face. Tr. 61, l. 22- 62, l. 3. On Saturday, she cut her phone off and did not speak to him until 11:00pm that night. Tr. 63, ll. 4-7.

Brittany did not call the police. Tr. 63, ll. 15-18. The state did not call anyone from the hospital to testify that she had marks on her from this purported beating when she was admitted into the hospital, less than 24 hours later with a gunshot wound.

On cross-examination, Brittany testified that Thomas's sister was also with them as they drove to Thomas's grandmother's house. Tr. 67, ll. 15-25. Once they got to grandmother's house, she said they did not go into the house. Tr. 68, ll. 17-20. The sister got out of the car. Tr. 69, ll. 3-4. Brittany claimed she could not escape Thomas's violence because there was a bulldog outside of the car. Tr. 69, ll. 19-24. The bulldog was restrained to a tree. Tr. 70, ll. 10-11. According to her testimony, Thomas "tormented her for hours." Tr. 70, l. 17. He eventually took her home, where she lives with her mother. Tr. 70, l. 19. She did not tell her mother what happened. Tr. 71, ll. 21-23.

The state then called former deputy Adam Moore. He performed the evidence collection kit at the hospital. Tr. 77, ll. 11-15. He observed the victim and stated that she had abrasions on her head and a gunshot wound to her body. Tr. 78, ll. 15-16. He testified he saw "the beginnings" of bruising. Tr. 79, l.5. He also testified that the bruising could have started with the incident that led to the shooting. Tr. 81, ll. 4-9.

Based on this testimony, the trial court judge found that the earlier incident was relevant to motive and intent. "It is conduct between the very same defendant and the very same victim, and

the Court does believe that it is relevant to this defendant's motive and intent to harm the victim." Tr. 82, ll. 7-17.

The trial court judge erred when he found this testimony admissible because it was not shown to be true by clear and convincing evidence.

Under Rule 404(b), South Carolina Rules of Evidence ("SCRE"), evidence of other crimes, wrongs, or acts is generally not admissible to prove the defendant's guilt for the crime. Such evidence is, however, admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. *State v. Pagan*, 369 S.C. 201, 631 S.E.2d 262 (2006); *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing. *Id.*; *State v. Beck*, 342 S.C. 129, 135-36, 536 S.E.2d 679, 682-83 (2000). Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. Such proof is immediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal. *State v. Fletcher*, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008); *Peeler v. Spartan Radiocasting, Inc.*, 324 S.C. 261, 478 S.E.2d 282, 283 n. 4 (1996).

Brittany's testimony, standing virtually alone, and which was highly improbable, did not carry the burden of proving this highly inflammatory testimony to a degree of clear and convincing. Though the State attempted to buttress Brittany's testimony by calling a former deputy who saw her at the hospital, he was unable to provide any probative evidence to show that the abrasions on her body were from the previous incident. And the incident itself, which Brittany testified to, was highly improbable. With the amount of beating she allegedly received, her injuries should have

been more substantial. But also, if she was beaten so brutally, it strains credulity that she did not inform either her mother or the police.

The state used this improper evidence as evidence that Thomas was the one who shot Brittany during its closing argument:

> "Bruising on her head, the bruising that mama could have seen that she didn't tell her mother about, but it's there if you care to look and see it. The bruising that the mother could never see on the legs where he hit her over and over again with a pistol. The bruising on the knee that was there that the mother could have never seen.
>
> And I know when Brittany came and testified before you on Monday afternoon, she told you it seemed like hours. It probably wasn't hours, but it probably felt like hours. And the incident that happened on Friday is so interlinked with what happened on that Sunday morning because it shows motive on William Jamell Thomas's part of why he did that. It was jealousy."

Tr. 579, l. 14- 580, l. 1.

Additionally, the admission of this evidence was not harmless. Thomas put up an alibi witness, and additional witnesses presented a version of events diametrically at odds with the State's theory. The jury even asked for additional, 911 phone call evidence to be presented to them during their deliberations (which the court, of course, had to deny). This was not a case of overwhelming guilt, and it is quite likely that had the State not introduced his inflammatory and prejudicial improper character evidence, the State would not have secured its conviction. Under these circumstances, the admission of this evidence prejudiced Thomas, and he was denied a fair trial. *Fletcher*, *supra*.

III. The trial court abused his discretion when he did not allow the testimony of Coty Heneghan to be admitted when Heneghan's testimony was relevant because it showed that Brittany Singletary had a motive to lie and otherwise corroborated appellant's alibi defense. Appellant was denied his right to present a defense.

Defense counsel proffered the testimony of Coty Heneghan to the court. Tr. 528, ll. 1-7. Heneghan testified to threats made against Thomas's family that he received from "Joe." Tr. 530, ll. 2-23. Heneghan said that Joe and Brittany were "talking." Tr. 531, l. 8.

The state objected to the testimony on the basis that it was irrelevant and that the threats, which were communicated through Facebook postings, constituted hearsay. Tr. 532, ll. 12-17. Defense counsel argued that it was relevant, that it shows a motive to lie and corroborates her relationship with someone named "Joe." Tr. 532, l. 18- 533, l. 6.

The judge did not allow the testimony finding it irrelevant. He also stated:

> "I've looked at Rule 602, Rule 404. This is evidence of other crimes, wrongs or acts directed at a third party. And in the Court's opinion, this evidence of other crimes, wrongs or acts is being put up in an effort to show the actions of Joe or the alleged actions of Joe on September the 11th, if the jury believes that, because of his prior wrong act, his actions on September 11th were the same types of actions.
>
> Furthermore, the statement given by Mr. Heneghan were actions directed at him—at him, not Ms. Singletary. According to Mr. Heneghan's statement, these actions by Joe were directed at him and not Mr. Heneghan.
>
> What is in this statement and has already been testified to by Ms. Singletary is that there was a prior relationship with Joe and that it was a physical relationship. By that, I mean somewhat of an abusive relationship. She testified to that and to that effect.
>
> Therefore, I am going to respectfully deny defense's motion to—or request to allow him to testify."

Tr. 535, l. 13- 536, l. 9.

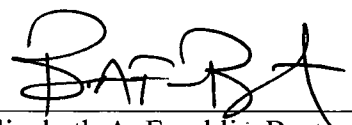
The trial court judge abused his discretion by not allowing the testimony because it was relevant to the case because it tended to show that Brittany had a relationship with a person named "Joe" who appellant argued was the shooter. Rule 401, SCRE. See *State v. Alexander*, 303 S.C. 377, 401 S.E.2d 146 (1991); *State v. Schmidt*, 288 S.C. 301, 342 S.E.2d 401 (1986). Additionally, appellant was entitled to present his evidence because it was critical to his mounting a vigorous

defense to the charges. This testimony would have corroborated his witness's testimonies that Joe was the shooter who entered appellant's house while he was absent. *Wardius v. Oregon*, 412 U.S. 470 (1973); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Cool v. United States*, 409 U.S. 100 (1972); *Webb v. Texas*, 409 (1972). Appellant respectfully asks this Court to reverse his convictions and remand his case for a new trial.

CONCLUSION

For these reasons, Appellant William Jamell Thomas asks this Court to reverse his convictions.

Respectfully submitted,



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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of General Sessions

The Honorable D. Craig Brown, Circuit Court Judge

Trial Court Case No. 2012GS2101483

William Jamell Thomas, Jr. — Appellant,

The State of South Carolina — Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Appellant's Initial Brief was served by first class United States mail, postage prepaid, this 18th day of June, 2014, upon the following:

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June 18, 2014

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Re: *William Jamell Thomas v. The State of South Carolina*

Dear Ms. Kitchings:

Please find enclosed for filing, along with certificate of service, the original and one copy each of Appellant's Initial Brief, Designation of Matter to be Included in the Record on Appeal, and Motion to Certify Appellant's Case for Review by the South Carolina Supreme Court. If you could please clock in the copies and return them to be in the enclosed self-addressed stamped envelope.

If you should have any questions, please do not hesitate to contact our office.

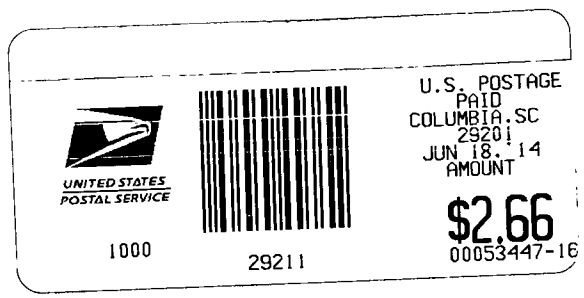
Sincerely,

Jill A. Rider

Jill A. Rider
Paralegal

Enclosure

cc: Salley Elliott, Esq.
The Honorable Daniel E. Shearouse
William Jamell Thomas



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