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

Appellate Case No. 2013-001445

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

WILLIAM JAMELL THOMAS, JR.,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL..... 1

STATEMENT OF THE CASE 2

ARGUMENT 3

Summary of the Case 3
Issue I 7
Issue II 15
Issue III..... 17

CONCLUSION 27

AUTHORITIES CITED

Cases:

Atl. Coast Builders LLC v. Lewis,398 S.C. 323, 730 S.E.2d 282 (2012) 8

Graves v. State, 782 S.W.2d 5 (Tex. Crim. App. 1989) 14

Grier v. AMISUB of South Carolina, Inc., 397 S.C. 532, 725 S.E.2d 693 (2012) 9, 10

Mendenhall v. State, 963 N.E.2d 553 (Ind. Ct. App. 2012) 13

People v Lopez, 96 A.D.3d 1621, 946 N.Y.S.2d 780 (N.Y. App. Div. 2012) 13

People v. Smith, 37 Cal.4th 733, 124 P.3d 730 (Cal. Ct. App. 2005) 14

Rock v. Arkansas, 483 U.S. 44, (1987) 25

State v. Jordan., 255 S.C. 86, 177 S.E.2d 464 (1970) 11

State v. Aiken, 322 S.C. 177, 470 S.E.2d 404 (Ct. App. 1996) 16

State v. Atchison, 268 S.C. 588, 235 S:E.2d 294 (1977) 26

State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008) 16

State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996) 10

State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001), ... 25

State v. Jefferies, 316 S.C. 13, 446 S.E.2d 427 (1994) 14

State v. Jones, 344 S.C. 48, 543 S.E.2d 541 (2001) 11

State v. Jones, 392 S.C. 647, 709 S.E.2d 696 (Ct. App. 2011) 11

State v. Lyles, 379 S.C. 328, 665 S.E.2d 201 (Ct. App. 2008) 21, 23, 26

State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (2000) 22

State v. Middleton, 407 S.C. 312, 755 S.E.2d 432 (2014) 13, 14

State v. Patterson, 367 S.C. 219, 625 S.E.2d 239 (Ct. App. 2006) 22

State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980) 16

State v. Reid, 393 S.C. 325, 713 S.E.2d 274 (2011) 11

State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001) 22

State v. Sheppard, 391 S.C. 415, 706 S.E.2d 16 (2011) 8

State v. Stone, 285 S.C. 386, 330 S.E.2d 286 (1985) 8

State v. Sutton, 340 S.C. 393, 532 S.E.2d 283 (2000) 10, 11, 13

State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1998) 24

State v. Williams, 266 S.C. 325, 223 S.E.2d 38 (1976) 8

State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001) 15

State v. Zeigler, 364 S.C. 94, 610 S.E.2d 859 (Ct. App. 2005) 9

Statutes:

S.C. Code § 16-3-29 ..... 9, 10, 11

S.C. Code Ann. § 16-3-29 (Supp. 2013) 9

Rules:

Rule 103, SCRE 22

Rule 106, SCRE 24

Rule 20, SCRCrimP 7

Rule 220, SCACR 22

Rule 403, SCRE 24

Rule 404, SCRE 15, 25

Rule 801, SCRE 24

Rule 802, SCRE 24

STATEMENT OF ISSUES ON APPEAL

I. **The issue of whether or not the judge gave an inaccurate jury charge on attempted murder is not preserved for appellate review where Appellant neither requested a particular charge nor objected to the charge as given. In any event, the trial judge's attempted murder instruction was not erroneous where it accurately stated the law. Finally, any error with respect to the "intent" aspect of the attempted murder instruction was harmless where the State's evidence reflected that Appellant deliberately pointed a loaded gun at the victim and pulled the trigger under circumstances clearly reflecting his intent to kill the victim, and where the defense theory was not that Appellant lacked the specific intent to kill but that another individual committed the crime.**

II. **The trial judge properly allowed evidence of a physical altercation between Appellant and the victim where the occurrence of this altercation was established by clear and convincing evidence.**

III. **The trial judge properly excluded testimony proffered by the defense because the proffered testimony was not relevant and would have served only to confuse the issues. However, even assuming the judge erred by excluding the testimony, such error did not prejudice Appellant where Appellant was in fact able to present a complete defense.**

STATEMENT OF THE CASE

Appellant was indicted in Florence County in September 2012 for attempted murder and possession of a pistol by a person with a prior conviction for a crime of violence. On June 24-26, 2013, Appellant was tried before the Honorable D. Craig Brown and a jury. The jury found Appellant guilty as charged, and Judge Brown sentenced Appellant to twenty-five years for attempted murder and five years, concurrent, for the pistol charge. A timely notice of appeal was served and filed.

ARGUMENT

Summary of the Case

The State presented the following evidence at trial. The twenty-four-year-old victim, Brittany Singletary, met Appellant on Facebook in August 2011. She and Appellant subsequently began an intimate relationship. After the victim failed to answer her cell phone while she was on an out-of-town Labor Day trip with her family, Appellant developed a belief that the victim was cheating on him and he became verbally and physically abusive toward her. On Friday, September 9, 2011, Appellant picked up the victim in the late evening hours and they argued back and forth about whether or not the victim was cheating on Appellant. Appellant was physically aggressive with the victim. At some point the victim, Appellant, and Appellant's sister left Appellant's home to go to his grandmother's house. When they arrived, Appellant parked in the yard and, after Appellant's sister went inside, Appellant began beating the victim, hitting her with a pistol, and choking her. The victim tried to tell Appellant that he was beating her for no reason because she was not, in fact, cheating on him, but Appellant refused to listen. The victim did not feel like she could safely leave Appellant's vehicle because Appellant had parked right beside his bulldog and because Appellant threatened to shoot her if she got out of the vehicle. After Appellant finally stopped beating her and took her home, the victim did not call police about the incident because she was scared and did not know what to do. (R. p. 144-62).

The next morning, Appellant called the victim the told her she needed to prove to him that she was not cheating. The victim called the alleged "other man" in a three-way call and allowed Appellant to listen to their conversation in hopes that it would convince

Appellant that she and this other man were not romantically involved. After the other man hung up, the victim told Appellant that after what he did to her the night before, he did not need to call or talk to her anymore. She then cut off her cell phone for the remainder of the day. (R. p. 162-63).

That evening around 11:00 pm, the victim turned her phone back on. Almost immediately, Appellant called and stated he wanted to see the victim to apologize for the other night. The victim looked out of her window and saw Appellant driving up and down the driveway. The victim decided she would let him apologize and then be done with him. However, as soon as the victim got in Appellant's vehicle, he took away her cell phone and sped off down the street. The victim then realized that Appellant had hacked into her voice mail account and listened to her voice mails. As they went down the road, Appellant was "fussing and hollering" at the victim about the voice mails. Appellant subsequently stopped at his grandmother's house and picked up his sister. He then headed toward his own home. By this point in time it was after midnight. (R. p. 163-66).

Although Appellant's mother and her boyfriend also lived in Appellant's home, they were not present when Appellant, his sister, and the victim arrived that night. Appellant's sister apparently left shortly after they arrived. Appellant and the victim proceeded into Appellant's bedroom, where they continued to argue. Appellant called the victim a liar, told her he was giving her a chance to just tell the truth, and said that they were going to have "a good night or we're going to have a bad night." After making that comment, Appellant jumped up and started attacking the victim with a gun in his hand. They fell to the floor, struggling, and Appellant's gun went off. The bullet did not

strike the victim, but she began screaming and tried to crawl away between the bed and the closet. Meanwhile, Appellant stood up, walked to the edge of the room by the door, looked directly at the victim and then pointed the gun at her and pulled the trigger. The bullet entered the victim's stomach, scraped across her vagina, entered her leg, and exited out the back of her leg. (R. p. 167-69; p. 171).

When the victim exclaimed, "you just shot me," Appellant started "going crazy" and saying he did not know what to do. At one point he indicated he might finish the victim off and then kill himself. Eventually Appellant called someone on the phone and said that he did something bad, that he "just shot her," and to get his sister there. Within a short time frame, Appellant's sister arrived and inspected the victim's wounds. The victim pleaded for them to call an ambulance but Appellant kept telling her to "just wait a minute." Appellant still had the victim's cell phone at this point. Appellant and his sister then came up with the idea that the victim should tell the authorities that she was shot in a drive-by shooting as she was walking down the street. The victim agreed to do so in order to get them to allow her to call an ambulance. Subsequently, Appellant had his sister take the victim outside to "plant" her in the middle of the road. Appellant's sister then returned the victim's cell phone to her and told her she could call 911. Appellant had fled the scene at this point. (R. p. 169-74).

The victim then called 911 and police and EMS responded at approximately 2:00 am. She initially told police the story Appellant concocted regarding a drive-by shooting, but as soon as the victim was inside the ambulance and Appellant's sister was out of earshot, she reported that Appellant, the brother of the girl who had been with her outside the ambulance, was the one who shot her. (R. p. 171-74; p. 210-11; p. 215; p. 239-45;

p.259; p. 267-76). A warrant was issued for Appellant regarding this incident, but Appellant could not be located for approximately eight months. Appellant was ultimately arrested in May of 2012, after he was found hiding under a large pile of clothing in a bedroom in his grandmother's house. (R. p. 408-30).

Although Appellant himself elected not to testify, the defense put up three witnesses. Appellant's mother and sister testified that Appellant was not at home the night the victim was shot, and that the victim and her "boyfriend" Joe came to the house late at night looking for Appellant. They testified that Joe pushed his way inside and that he and the victim proceeded to Appellant's room. According to Appellant's witnesses, once inside Appellant's bedroom, Joe and the victim argued and Joe pulled out a gun. Appellant's mother's boyfriend tried to grab the gun and two shots went off, with one of them striking the victim. At that point, Joe ran from the house and left the victim there. Appellant's mother stated that she wanted to call police but failed to do so because the victim said did not want anyone to know she had been there. Appellant's sister then helped the victim outside. Appellant's mother claimed that she and her boyfriend attempted to speak to police officers after they arrived but they refused to let her say "anything at all" and instead told her to "back up." Appellant's mother stated that they moved away the day after the incident, ultimately ending up in North Carolina, and that she was never contacted by police about the incident. (R. p. 508-49). In addition to Appellant's mother and sister, the defense also presented the testimony of Appellant's former girlfriend, who testified that Appellant was with her at her home the entire night of September 10-11, 2011. (R. p. 553-62).

In reply, the State presented testimony refuting Appellant's mother's claim that she was at home on the evening of the shooting. (R. p. 582-86).

After deliberating for approximately two hours, the jury returned guilty verdicts on attempted murder and possession of a pistol by a person convicted of a crime of violence. (R. p. 647-55). After hearing Appellant's prior record, the trial judge sentenced Appellant to twenty-five years for attempted murder and five years, concurrent, for the pistol charge. (R. p. 656-64).

I. The issue of whether or not the judge gave an inaccurate jury charge on attempted murder is not preserved for appellate review where Appellant neither requested a particular charge nor objected to the charge as given. In any event, the trial judge's attempted murder instruction was not erroneous where it accurately stated the law. Finally, any error with respect to the "intent" aspect of the attempted murder instruction was harmless where the State's evidence reflected that Appellant deliberately pointed a loaded gun at the victim and pulled the trigger under circumstances clearly reflecting his intent to kill the victim, and where the defense theory was not that Appellant lacked the specific intent to kill but that another individual committed the crime.

Issue Preservation

Appellant first argues that the trial judge charged an inaccurate jury instruction regarding the definition of attempted murder. Initially, this issue is clearly unpreserved for review. Rule 20 of the South Carolina Rules of Criminal Procedure states as follows:

> **(a) Time for Request.** All requests for legal instructions to the jury shall be submitted at the close of the evidence, or at such earlier time as the trial judge shall reasonably direct. All requests must include accurate citation to authorities relied upon.
>
> **(b) Objections to Charge.** 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, but out of the hearing of the jury. 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.

It is well-established that a defendant must object to a jury charge as given or request an additional charge when afforded the opportunity in order to properly preserve an objection to a particular jury charge. State v. Stone, 285 S.C. 386, 387, 330 S.E.2d 286, 287 (1985). The rule in South Carolina "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. Williams, 266 S.C. 325, 335, 223 S.E.2d 38, 43 (1976). "[T]he right to have the law declared may be waived by the parties and, ordinarily, silence in the face of an omission from, or error in the charge amounts to waiver." Williams, 266 S.C. at 335, 223 S.E.2d at 43.

In this case, Appellant never requested any particular charge on attempted murder and never objected to the charge as given.[1] (See R. p. 249, lines 9-24; p. 552-64; p. 590-610). Accordingly, this Court should dismiss Appellant's jury charge issue on error preservation grounds. See Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012) (stating "we ... resolve the issue on preservation grounds when it clearly is unpreserved"); see also State v. Sheppard, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011) ("This Court ... has routinely held the plain error rule does not apply in South Carolina state courts. Instead, a party must have a contemporaneous and specific objection to preserve an issue for appellate review.").

[1] Appellant also did not argue this specific issue in his directed verdict motion (see R. p. 504, line 25 – p. 506, line 10), but even if he had, such an argument at the directed verdict stage would obviously not preserve a jury charge issue.

Discussion of the Merits

Even if the issue had been properly preserved, the trial judge's charge on attempted murder was not erroneous. "Generally, the trial judge is required to charge only the current and correct law of South Carolina." State v. Zeigler, 364 S.C. 94, 106, 610 S.E.2d 859, 865 (Ct. App. 2005). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Id. Under 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."

Appellant argues that the trial judge erred by instructing the jury that "specific intent to kill is not an element of attempted murder" and that "there must be a general intent to commit a serious bodily injury." (R. p. 638, lines 3-5). To the contrary, the trial judge's instruction was not erroneous.[2] The Legislature is presumed to have been aware of the common law when it enacted the attempted murder statute in 2010. See, e.g., Grier v. AMISUB of South Carolina, Inc., 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012) ("In ascertaining the meaning of language used in a statute, we presume the General Assembly is 'aware of the common law, and where a statute uses a term that has a well-recognized meaning in the law, the presumption is that the General Assembly intended to use the term in that sense.'") (citations omitted). Under the common law, the "intent to kill" aspect of assault and battery with intent to kill - the precursor to statutory attempted

[2] Note that the trial court's attempted murder instruction came from then-current version of the Criminal Charges Bench Book, which the S.C. Judicial Department updates each year and distributes to judges and that is now published on the S.C. Judicial Department's website. http://www.judicial.state.sc.us/juryCharges/GS%20InstructionsJune2013.pdf.

murder - was defined as a general intent to kill rather than a specific intent to kill. See e.g., State v. Foust, 325 S.C. 12, 15-16, 479 S.E.2d 50, 51-52 (1996). There is no reason to believe the Legislature intended to deviate from the well-established definition of "intent to kill" when it enacted the attempted murder statute in 2010, particularly considering that the Legislature has expressly equated the offenses of assault and battery with intent to kill and attempted murder. See Act No. 273, § 7.C, 2010 S.C. Acts & Joint Resolutions (". . . except for references in Section 16-1-60 and Section 17-25-45, *whenever in the 1976 Code reference is made to assault and battery with intent to kill, it means attempted murder as defined in Section 16-3-29.* (emphasis added)). Moreover, the word "specific" does not modify the word "intent" in the attempted murder statute. See Grier v. AMISUB, 397 S.C. at 535-36, 725 S.E.2d at 695 (courts must follow the plain and unambiguous language in a statute and have no right to impose another meaning). Had the Legislature intended to require a "specific" intent to kill, it would have clearly said so. See id. at 536, 725 S.E.2d at 696 (2012) (statutes in derogation of the common law are to be strictly construed; a statute restricting the common law will not be extended beyond the clear intent of the legislature).

In his Brief, Appellant argues that State v. Sutton, 340 S.C. 393, 532 S.E.2d 283 (2000), established that "attempted murder" requires the specific intent to kill. Initially, Sutton was decided prior to the codification of attempted murder in 2010 and therefore could not have made specific intent an element of attempted murder under our statute. Furthermore, Sutton discussed *common law* attempt crimes, i.e., crimes which are

punishable as the principal offense.[3] See Sutton at 397, 532 S.E.2d at 285. Sutton did not contemplate the statutorily-defined "attempted murder" offense that our Legislature codified in 2010. Attempted murder as defined in S.C. Code § 16-3-29 is distinguishable from a common law attempt crime and it is not punishable as for the principal offense of murder; instead, the statute states the penalty for attempted murder is "not more than thirty years." Accordingly, Sutton does not establish that the trial judge's attempted murder charge was erroneous.[4]

In sum, the trial judge's instruction regarding attempted murder was not erroneous where it correctly informed the jury that specific intent to kill was not an element of attempted murder. Appellant is not entitled to reversal of his conviction on this ground.[5]

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[3] At common law, to prove attempt, the State was required to show that the defendant had the specific intent to commit an underlying offense, along with some overt act, beyond mere preparation, in furtherance of the intent. State v. Reid, 393 S.C. 325, 329, 713 S.E.2d 274, 276 (2011).

[4] Appellant cites to several out-of-state cases in support of the notion that attempted murder requires a specific intent to kill. (See Brief of Appellant, p. 4). Note that all of the cases cited by Appellant involve general attempt statutes - which encompass all types of attempt crimes - rather than a specific "attempted murder" statute like the one we now have in South Carolina. See S.C. Code § 16-3-29.

[5] At the end of his argument regarding the allegedly erroneous jury charge on attempted murder, Appellant asserts in a conclusory fashion that the trial judge erred in denying defense counsel's directed verdict motion because "the state failed to present evidence sufficient to prove the offense of attempted murder." (Brief of Appellant, p. 5). This directed verdict argument, which is tacked on to the end of Appellant's jury charge issue, is not preserved for appellate review because Appellant did not make this specific argument below. See, e.g., State v. Jordan. 255 S.C. 86, 93, 177 S.E.2d 464, 468 (1970) (directed verdict argument was not preserved where the defendant raised different arguments below and did not raise the issue argued on appeal). The only argument Appellant made at the directed verdict stage was "the insufficiency of the evidence in the particular case to warrant sending the case to a jury for them to make a decision" because the police investigation was unsatisfactory and the victim gave two different stories to law enforcement. (R. p. 505, lines 1-18; see also p. 581, lines 5-19). Furthermore, the issue is also unpreserved and abandoned because Appellant's one-sentence argument on appeal is wholly conclusory and contains no citations to authority. See State v. Jones, 392 S.C. 647, 655, 709 S.E.2d 696, 700 (Ct. App. 2011) (holding that "short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review"); State v. Jones, 344 S.C. 48, 58-59, 543 S.E.2d 541, 546 (2001) (noting, where the only passage in a brief relating to an issue appealed is a single conclusory statement which leaves un-argued the error assigned by exception, the issue will be deemed abandoned on appeal; an issue will be deemed abandoned on appeal if it is argued in a short, conclusory statement without supporting authority). Regardless, even if the issue had been preserved and not abandoned, the evidence regarding Appellant's intent was more than sufficient to submit the charge of attempted murder to the jury where the evidence demonstrated that a very angry and jealous Appellant brought the victim to his house to fight with her and, even after his gun accidentally went off during their struggle and did not strike the

Harmless Error

Even assuming the trial judge erred by failing to inform the jury that attempted murder includes a specific intent to kill, Appellant could not possibly have suffered any prejudice because the jury could have reached no other conclusion but that Appellant had a specific intent to kill the victim. The evidence reflected that Appellant had been angry and physically aggressive with the victim in the days leading up to the incident because he believed the victim was seeing another man behind his back. (R. p. 148-62). Just two days before Appellant shot the victim, he beat her with a gun and choked her. (R. p. 153-62; p. 289-91). The night of the shooting Appellant lured the victim into his car by convincing her he wanted to apologize for the previous beating, but as soon as she entered his vehicle he sped off, took her cell phone away from her, and began berating the victim about her voice mails. (R. p. 163-66). Appellant then took the victim to his home, where no one else was present (except Appellant's sister, who was present briefly but then left), and called her a liar, told her he was giving her the chance to tell the truth, and said they were "going to have a good night" or "a bad night." (R. p. 168, lines 23-25). After making that comment, Appellant jumped up and started attacking the victim with a gun in his hand. (R. p. 169, lines 9-14). When they fell to the floor, Appellant's gun went off but did not actually strike the victim. (R. p. 169, lines 14-21). The victim began screaming and tried to crawl away between the bed and the closet, but Appellant stood up, and walked to the edge of the room, looked directly at the victim and then pointed the gun at her and pulled the trigger. (R. p. 169, lines 21-25).

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victim, Appellant deliberately aimed his loaded gun at the victim from only a few feet away and pulled the trigger. (See R. p. 184-205; see *infra* p. 3-5).

As illustrated by the facts set forth above, under the State's version of events, an increasingly angry Appellant, who brought the victim to his house to fight with her and brought a gun to the confrontation, deliberately aimed his loaded gun at the victim from only a few feet away and pulled the trigger. He did this even *after* the gun accidentally discharged but did not strike the victim, which clearly demonstrated he was determined to actually shoot the victim. Appellant's conduct left no doubt about his specific intent to kill the victim. See State v. Sutton, 340 S.C. 393, 397, 532 S.E.2d 283, 285 n5 (2000) ("A specific intent to kill may be, and normally is, inferred from the surrounding circumstances, such as the character of the attack, the use of a deadly weapon, and the nature and extent of the victim's injuries."); 41 C.J.S. *Homicide* § 179 (intent to kill may be inferred from the character of the assault, the use of a deadly weapon with an opportunity to deliberate, or the use of a dangerous or deadly weapon in a manner reasonably calculated to cause death or great bodily harm; intent may be inferred when it is demonstrated that the accused voluntarily and willfully commits an act, the natural tendency of which is to destroy another's life); cf. State v. Middleton, 407 S.C. 312, 319, 755 S.E.2d 432, 436 (2014) (the evidence conclusively established appellant was guilty of only attempted murder where appellant deliberately drove up to the passenger window of a car and shot into the car at least five times, and victims testified the only reason they were not injured is because one of them jumped into the driver's seat and ran appellant off the road); see also Mendenhall v. State, 963 N.E.2d 553, 568 (Ind. Ct. App. 2012) (specific intent to kill "may be inferred from the deliberate use of a deadly weapon in a manner likely to cause death or serious injury.") (citation omitted); People v Lopez, 96 A.D.3d 1621, 946 N.Y.S.2d 780 (N.Y. App. Div. 2012) (in attempted murder case, the

evidence was legally sufficient to support the defendant's intent to kill where the defendant and the victim quarreled immediately before the shooting and the defendant was only a few feet away from the victim when he pointed the gun at him and fired); People v. Smith, 37 Cal.4th 733, 741, 124 P.3d 730, 736 (Cal. Ct. App. 2005) (the act of firing toward a victim at a close range in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill; the fact that the victim may have escaped death because of the shooter's poor marksmanship does not establish a less culpable state of mind) (citations omitted); Graves v. State, 782 S.W.2d 5, 7 (Tex. Crim. App. 1989) (despite defendant's insistence that he only intended to scare the victim and did not specifically intend to kill the victim, the defendant's "deliberate aiming and firing of the gun [at the victim] constitutes use of a gun in a deadly manner," and the jury could properly find specific intent to kill based upon the defendant's "displaying, aiming, and firing the gun at complainant's window").

Significantly, the defense theory was **not** that Appellant did not intend to kill the victim or that the shooting was mitigated in some way, but was instead that another person shot the victim. (See R. p. 508-81; p. 601-14).

Accordingly, because the State's version of the facts demonstrated beyond a reasonable doubt that Appellant had the specific intent to kill the victim, Appellant could not have suffered prejudice even assuming the trial judge's attempted murder charge was erroneous. See State v. Jefferies, 316 S.C. 13, 23, 446 S.E.2d 427, 433 (1994) (erroneous charge harmless where it does not contribute to the verdict); State v. Middleton, 407 S.C. 312, 319, 755 S.E.2d 432, 436 (2014) (any error in failing to charge a lesser-included offense of attempted murder was harmless beyond a reasonable doubt where the error

could not have contributed to the verdict). Appellant is not entitled to reversal on this ground.

II. The trial judge properly allowed evidence of a physical altercation between Appellant and the victim where the occurrence of this altercation was established by clear and convincing evidence.

Appellant argues that the trial judge erred by admitting testimony about a prior physical altercation between Appellant and the victim "because it was not shown to be true by clear and convincing evidence" as required by Rule 404(b), SCRE. (See Brief of Appellant, p. 7). Appellant contends that the victim's testimony, "standing virtually alone," was "highly improbable" and "did not carry the burden of proving this highly inflammatory testimony to a degree of clear and convincing." (Brief of Appellant, p. 7). Appellant's argument on this issue is wholly without merit.

In State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001), our Supreme Court articulated the appropriate standard of review in prior bad act cases. The Wilson court stated that in prior bad act cases under Rule 404(b), SCRE, "we do not review a trial judge's ruling on the admissibility of other bad acts by determining *de novo* whether the evidence rises to the level of clear and convincing. If there is any evidence to support the admission of the bad act evidence, the trial judge's ruling will not be disturbed on appeal." Wilson at 6, 545 S.E.2d at 829. Applying this standard of review, the Supreme Court held that the Court of Appeals erred by basing its ruling on the credibility of the prior bad act witness. Id. at 6-7, 545 S.E.2d at 829. The single witness' testimony that she directly witnessed the prior bad act "factually support[ed] the admission of this testimony as evidence of a prior [bad act]." Id. at 7, 545 S.E.2d at 829-30. The credibility of the witness was an issue for the jury's consideration. Id.

Similarly, here, the victim's testimony about her direct observation of the prior physical altercation factually supported admission of the prior altercation as a prior bad act.[6] (See R. p. 92-111). The credibility and plausibility of her testimony were issues for the jury and are not issues for this Court on appeal. Accordingly, the trial judge's admission of the prior bad act evidence must be upheld. See Wilson at 6-7. 545 S.E.2d at 829-30; State v. Aiken, 322 S.C. 177, 181, 470 S.E.2d 404, 407 (Ct. App. 1996) ("As for Aiken's contention that the evidence of Aiken's other bad acts was not clear and convincing, Govan testified he had direct knowledge of Aiken's participation because the two of them committed the crimes together. We therefore hold the trial court did not abuse its discretion in allowing the testimony of Aiken's participation in the other robberies."); cf. State v. Fletcher, 379 S.C. 17, 24-25, 664 S.E.2d 480, 483-84 (2008) (finding there was not clear and convincing evidence of the defendant's alleged prior bad act where there was no testimony showing that he was the one who perpetrated the prior injuries to the victim); see also State v. Plyler, 275 S.C. 291, 296, 270 S.E.2d 126, 128 (1980) ("Evidence of previous difficulties or ill feelings between the accused and the victim and of facts showing the cause of such difficulties or ill will is admissible on the question of motives where there is some connection of cause and effect between the evidence and the crime. The challenged evidence tends to show motive on the part of the accused and is not so remote in time as to negate its probative value. As such, it is

[6] Note that the victim's testimony about the prior bad acts were corroborated by the testimony of former deputy sheriff Adam Moore, who took pictures of the victim's prior injuries on the night of the shooting (see R. p. 112-17); by the testimony of Investigator Helen Cain, who spoke with the victim about the prior bad acts (see R. p. 403, lines 4-19); and by the photographs of the victim's injuries. (See Court's Exhibits 2 & 3).

admissible as a circumstance bearing on the identity of the accused as the perpetrator of the crime.") (citations omitted). Appellant is not entitled to reversal on this ground.

III. The trial judge properly excluded testimony proffered by the defense because the proffered testimony was not relevant and would have served only to confuse the issues. However, even assuming the judge erred by excluding the testimony, such error did not prejudice Appellant where Appellant was in fact able to present a complete defense.

Relevant Facts

After witness Coty Heneghan[7] was located by law enforcement following his failure to respond to defense counsel's subpoena, defense counsel told the judge that, rather than calling Mr. Heneghan as a witness before the jury, he would prefer to "maybe do a proffer and then let the Court decide whether the testimony is admissible." (R. p. 563-64). Outside of the presence of the jury, Mr. Heneghan testified that he signed a statement, marked Court's Exhibit # 8, back in May and stated that the things in the statement were true and that he knew these things from his own personal knowledge. (R. p. 565-66; p. 666). Mr. Heneghan also testified that he recognized Court's Exhibit # 9 as e-mail correspondence and that it contained "threats" against Appellant's "whole family." (R. p. 566; p. 667-68). He stated he received the threats from a "dude" whom he knew as "Joe"[8] from "around the way." (R. p. 566, lines 14-25). Mr. Heneghan also testified that he "really d[idn't] know" anything about the relationship between "Joe" and the victim except that they had been "talking." (R. p. 567, lines 7-18).

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[7] Coty had been previously identified as the victim's cousin. (See R. p. 110, lines 23-25). His last name is spelled "Heneghan" in the trial transcript but is spelled "Henneghan" in Court's Exhibit # 9. (See R. p. 564; p. 667-68). For purposes of this Brief, the State will refer to this witness as Coty "Heneghan" to be consistent with the trial transcript.

8 "Joe" had been previously identified at trial as Joe Lamb, a man the victim had previously dated and with whom she had a tumultuous relationship. (R. p. 111, lines 3-8; p. 174, line 23 – p. 175, line 1; p. 176, lines 10-17; p. 180-81).

Court's Exhibit # 8, Coty Heneghan's statement, indicates that "a couple of months before this incident," Mr. Heneghan was in front of "Sugar Hill" and "Joe" approached him with a gun, shot in Mr. Heneghan's direction, and then "drove off fast." (R. p. 666). He states that "[a]ll that was because of Brittany Singletary" (the victim in this case), who asked Mr. Heneghan to defend her because Joe "was beatin (sic) her." (R. p. 666). The statement also indicates that Joe and Mr. Heneghan had "problems" and verbal altercations many times before and that he believed the victim "set [Appellant] up just like she did me." (R. p. 666).

Court's Exhibit # 9, e-mail correspondence between Mr. Heneghan and "Styllz YA Digg," contains six separate communications. (See R. p. 667-68). The communications are dated as follows: March 8, 2011, September 12, 2011, September 13, 2011 (two e-mails), September 14, 2011 (two e-mails). Note that the victim was shot on September 11, 2011. (R. p. 153-70). The first e-mail, from "Styllz YA Digg" to Mr. Heneghan, and dated approximately six months before the victim was shot, states as follows: "Next time my peoples gonna do u worse iam (sic) not a little kid yall not ready for grown man shit next time u gonna get put in a box." (R. p. 667). There is a six-month gap between this first e-mail and the second; it is unclear whether intervening e-mails were deleted before the string of e-mails was printed or whether there were no communications during that time. The second e-mail, also from "Styllz YA Digg" to Mr. Heneghan and dated one day after the victim's shooting, is similarly threatening and states: "Let all them bitches in tht (sic) house and u know wtf I am talking about ITS GONNA BE A BODY COUNT BANG BANG BITCHES SEE Y'ALL SOON." (R. p. 667). The third e-mail, from Mr. Heneghan to "Styllz YA Digg" and dated the next day,

appears to be in response to the previous e-mail and states: "hold up playa! talk to me!!!..". (R. p. 667). The fourth e-mail is also from Mr. Heneghan later that same day and states "YOU TALKING BOUT MY HOUSE?" (R. p. 668). The fifth e-mail is a response from "Styllz YA Digg" to Mr. Heneghan the following day and states: "U know wht (sic) the fuck iam (sic) talkin dnt (sic) care about u and ya brother I gave ya a pass iam (sic) talkin about ya little crew u always be with iam (sic) already here and iam (sic) sure u know u cuz got shot tell them fags they better be strap cuz we comin yea we y'all wanted to see how I get down. Good thing ya mom got u out cuz u would be dead. BODY COUNT BITCHES." (R. p. 668). The sixth e-mail is a follow up from "Styllz YA Digg" later that day: "Na u good coty with me unless ya want beef but I am talkin about them fags u be hangin with." (R. p. 668). It appears there may have been further communications which were not printed out. (See R. p. 667-68).

Following the proffer of Mr. Heneghan's testimony, defense counsel stated "that's what I wanted to ask" and said he also wanted Mr. Heneghan to "give us the content of the statement" before the jury. (R. p. 567, lines 19-23; p. 567, line 25 – p. 568, line 1). The solicitor responded that Mr. Heneghan's statement was not relevant to Appellant's case and that the Facebook e-mails were hearsay. (R. p. 568, lines 7-17). Defense counsel responded that since the victim testified at trial, her "character" is at issue; he also stated that Mr. Heneghan's "information" shows the victim's motive to lie and proves her relationship with Joe. (R. p. 568, lines 19-25). However, defense counsel agreed with the solicitor's assessment that the last sentence in the statement, regarding Mr. Heneghan's belief that the victim "set up" Appellant, was not admissible. (R. p. 569, lines 7-22). Defense counsel also stated that he did not wish to enter the statement itself

into evidence. (R. p. 569, lines 21-22). The solicitor then argued that the proffered evidence was not relevant as third party guilt evidence because Mr. Heneghan did not have knowledge that anyone else committed the offense for which Appellant was on trial; instead, Mr. Heneghan knew only of the third party's "general character." (R. p. 570, lines 1-4). He also noted that the defense's proffered evidence was "akin to putting up a prior bad act by a non-defendant or a non-party to the case," and that such evidence was not admissible because it did not go to show motive, intent, absence of mistake, or common scheme or plan as to the crime for which Appellant was on trial. (R. p. 570, lines 10-16).

After taking a break to consider the matter, the judge ruled that he would not allow Mr. Heneghan's testimony as set forth in the proffer. (R. p. 571, lines 6-14). The judge indicated he did not believe it was relevant under the rules nor was it proper evidence of prior crimes, wrongs, or acts because it was blatant and impermissible propensity evidence. (See R. p. 571, lines 16-22). In that vein, the actions taken by Joe as reflected in Mr. Heneghan's statement were directed at Mr. Heneghan and not at the victim in this case. (R. p. 571, line 23 – p. 572, line 1). The judge also noted that the victim admitted that she had an abusive relationship with Joe and that Mr. Heneghan's statement was therefore not necessary to prove that point. (R. p. 572, lines 2-6). Finally, with regard to the e-mails, the judge stated that the e-mails purportedly from Joe were difficult to understand; that it was not clear who was being threatened and why; and that the e-mails were inadmissible hearsay. (R. p. 572, lines 14-21). Accordingly, the trial judge declined to admit Mr. Heneghan's testimony as proffered.

Following the judge's ruling, defense counsel added that one of the reasons he was offering Mr. Heneghan's statement was because "it shows that this victim has the propensity and – and a prior history of getting other people involved in these physical altercations with her and this person Joe." (R. p. 573, lines 2-7). With regard to the e-mails, defense counsel argued that it was Appellant's position that "this is a threat that's being communicated" and that even though it was directed at Coty Heneghan, it was "directed at my defendant and his family;" therefore, he argued, "I would think that the threat is admissible even though – even if the Court said that the – actual words are not admissible in – in its entirety -- the text in its entirety." (R. p. 573, lines 12-23).

In response, the solicitor pointed out that the e-mails did not once mention the specific house where the shooting took place, Appellant's name, or the names of any of Appellant's relatives or friends. (R. p. 574, lines 3-9). He further argued that the e-mails were not only hearsay but also irrelevant, especially where the sender of the e-mails identified himself only as "Styllz YA Digg." (R. p. 574, lines 10-13). The trial judge declined to alter his ruling that the testimony of Coty Heneghan as set forth in the defense's proffer would not be admissible. (R. p. 575, lines 3-6).

Discussion

"Relevant evidence" refers to evidence that has a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. State v. Lyles, 379 S.C. 328, 336-37, 665 S.E.2d 201, 206 (Ct. App. 2008). "Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in

controversy." Id. (citations omitted). The existence of a logical connection to the facts in debate makes evidence relevant. Id. at 340, 665 S.E.2d at 207.

The admission or exclusion of evidence is a matter left to the sound discretion of the trial judge. See e.g., State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001) (citation omitted). Error may not be based upon a ruling admitting or excluding evidence unless a substantial right of the complaining party is affected. State v. Patterson, 367 S.C. 219, 231, 625 S.E.2d 239, 245 (Ct. App. 2006) (citing Rule 103, SCRE). A trial court's ruling on the admissibility of evidence will not be reversed by the appellate court absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant. State v. Mansfield, 343 S.C. 66, 78, 538 S.E.2d 257, 263 (2000). The appellate court may affirm the evidentiary rulings of the trial court based upon any grounds appearing in the record. See Rule 220(c), SCACR.

Appellant argues that the trial judge abused his discretion by declining to allow the defense to present the testimony of Coty Heneghan as pertaining to Court's Exhibit # 8 and # 9 because the testimony was "relevant because it showed that Brittany Singletary had a motive to lie and otherwise corroborated appellant's alibi defense," and because exclusion of the testimony denied Appellant the right to present his defense. (See Brief of Appellant, p. 8). To the contrary, the judge properly excluded the testimony as proffered by the defense because the proffered testimony had no relevance, was not admissible, and exclusion of the testimony did not deny Appellant his right to present a defense.

Appellant asserts that the testimony was relevant because "it tended to show that Brittany had a relationship with a person named 'Joe' who appellant argued was the

shooter." (Brief of Appellant, p. 9). However, Appellant never requested below to present testimony limited to this issue; instead, defense counsel told the judge he wished to present essentially the contents of Court's Exhibit # 8 (minus Mr. Heneghan's opinion regarding a "set-up") and, presumably, testimony about Mr. Heneghan's interpretation of the e-mails contained in Court's Exhibit # 9. Court's Exhibit # 8 describes a completely unrelated shooting event involving "Joe" that occurred prior to the incident for which Appellant was on trial and which bore no similarity to the victim's subsequent shooting. (See R. p. 666). Court's Exhibit # 9 contains vague threats directed at Coty Heneghan and his "crew" and the "fags" he hung around with. (See R. p. 667-68). The first e-mail, dated March 8, 2011, indicated that "Styllz YA Digg" had threatened that his "peoples" were going to put Mr. Heneghan "in a box," thus revealing that "Styllz YA Digg" and Mr. Heneghan had problems with one another that were totally unconnected to the victim's shooting, which occurred six months later. The subsequent e-mails from "Styllz YA Digg" mention the "bitches" in "th[a]t house," but Appellant failed to proffer any testimony adequately explaining which house was being discussed.[9] (See R. p. 667-68).

In sum, the threats directed at Mr. Heneghan and his "crew" were ambiguous at best and Appellant failed to proffer sufficient testimony to establish that the threats were related in some way to the incident for which he was on trial. Cf. State v. Lyles, 379 S.C. 328, 339-40, 665 S.E.2d 201, 207-208 (Ct. App. 2008) (defendant's proffered testimony that the victims were drug dealers and that drugs were present at the time of the offense was not admissible where there was "no probative link between the proffered testimony and the pending charges" and where there was a "risk of confusion or misdirection" that

[9] Appellant proffered no testimony about where Mr. Heneghan was living at the time he received the e-mails.

rendered the testimony unduly prejudicial given the "tenuous probative link"). In that vein, Appellant also failed to adequately explain why the e-mails, which were obviously rank hearsay, would have been admissible via the testimony of Mr. Heneghan.[10] See Rule 801(c), SCRE ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."); Rule 802, SCRE ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute."). Furthermore, testimony about Joe's bad character and unconnected prior bad acts would have merely served to confuse the issues. See Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

Appellant also asserts that Mr. Heneghan's testimony "would have corroborated his witness's testimonies that Joe was the shooter who entered appellant's house while he was absent."[11] (See Brief of Appellant, p. 10). However, Appellant totally fails to explain how the testimony of Mr. Heneghan, as set forth in Appellant's proffer, would have corroborated the defense theory that Joe was the shooter. Again, the incident Mr. Heneghan described in Court's Exhibit # 8 occurred well before the victim's shooting

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[10] Significantly, Court's Exhibit # 9 also appears to be incomplete in that it omits any e-mails that occurred between March 8, 2011 and September 12, 2011, and omits any e-mails occurring after September 14, 2011. (See R. p. 667-68). It may have also omitted other e-mails occurring in between the e-mails printed out. Appellant failed to proffer any testimony to establish the e-mails were a complete depiction of the entire correspondence between the parties. See State v. Taylor, 333 S.C. 159, 170, 508 S.E.2d 870, 876 (1998) (pointing out that the purpose of Rule 106, SCRE, and the "rule of completeness" is to "reduc[e] the risk that a writing or recording will be taken out of context and that an initial misleading impression will take hold in the mind of the jury.") (citations omitted).

[11] Appellant has not argued, at trial or on appeal, that the proffered testimony was proper as third-party guilt evidence.

and was totally unconnected to it. Such evidence would not have been admissible even as Lyle evidence. See Rule 404(b), SCRE (stating that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."). Furthermore, the hearsay e-mails contained in Court's Exhibit # 9 began six months before the victim's shooting and do not support that Joe was the person who shot the victim on September 11, 2011. The e-mails contained in Court's Exhibit # 9 just as easily support that Joe was angry after learning that his former girlfriend (the victim) had been shot.

Moreover, contrary to Appellant's contentions, Appellant's right to present a defense was not violated by the judge's exclusion of Mr. Heneghan's testimony. The right to present a defense is not unlimited; instead, it must accommodate other legitimate interests in the criminal trial process. State v. Hamilton, 344 S.C. 344, 359, 543 S.E.2d 586, 594 (Ct. App. 2001), *overruled in part on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) (citing Rock v. Arkansas, 483 U.S. 44, 55, (1987). While defendants are entitled to a fair opportunity to present a defense, that right does not allow defendants to present any evidence they wish regardless of its admissibility under the rules of evidence. Id. In Hamilton, this Court concluded that the trial judge's exclusion of the testimony of the defendant's expert witness did not violate the defendant's constitutional right to fully present a defense. Id. at 359, 543 S.E.2d at 594. Likewise, in this case, exclusion of Mr. Heneghan's testimony, which was not admissible under our rules of evidence as discussed above, did not violate Appellant's right to present a

complete defense, particularly where Appellant did in fact present two witnesses who testified that Joe was the shooter and one additional alibi witness; where one of these witnesses confirmed that the victim had a relationship with Joe; and where the victim herself admitted that she had a relationship with Joe and that Joe was "controlling" and physically violent with her. (See R. p. 180, lines 8-19; p. 508-62). Even assuming the trial judge erred by excluding Mr. Heneghan's testimony, Appellant suffered no prejudice where he did in fact present his complete defense. See State v. Lyles, 379 S.C. 328, 345-46, 665 S.E.2d 201, 210 (Ct. App. 2008) (any error in exclusion of the defense's proffered testimony was harmless where the proffered testimony could not have affected the outcome of the case); see also State v. Atchison, 268 S.C. 588, 596, 235 S.E.2d 294, 297 (1977) (finding there was no prejudice in the exclusion of the defense's proffered testimony where the trial judge permitted considerable testimony from the defense witnesses on the pertinent issues). Appellant is not entitled to reversal on this ground.

CONCLUSION

For the reasons discussed above, the State requests that this Court affirm Appellant's conviction and sentence.

Respectfully submitted,

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January 13, 2015

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

Appellate Case No. 2013-001445

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

WILLIAM JAMELL THOMAS, JR.,

APPELLANT.

CERTIFICATE OF COUNSEL

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

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PROOF OF SERVICE

The undersigned attorney hereby certifies that the **Final Brief of Respondent** in the above-referenced case has been served upon **Elizabeth A. Franklin-Best**, Blume Norris & Franklin-Best, 900 Elmwood Avenue, Suite 101, Columbia, South Carolina 29201, this **13th** day of **January, 2015.**

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