STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY

Court of General Sessions

James R. Barber, Circuit Court Judge

Appellate Case No. 2014-000165

THE STATE,

Respondent,

v.

ERNEST MAURICE ALLEN,

Appellant.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

Post Office Box 192
Columbia, SC 29202
(803) 576-1800

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

ARGUMENT 8

I. The trial court correctly denied Appellant's motion for directed verdict on the charge of resisting arrest with a deadly weapon because the evidence was sufficient to demonstrate the officers intended to arrest him 8

II. Appellant's argument regarding prior bad act evidence is not preserved, but even if preserved, the trial court properly allowed evidence that Appellant was facing substantial prison time to show motive and intent pursuant to Rule 404(b), SCRE 17

CONCLUSION 25

TABLE OF AUTHORITIES

Cases:

Jenkins v. United States, 161 F.2d 99 (10th Cir. 1947) 14

State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996) *overruled on other grounds by* State v. Giles, 407 S.C. 14, 754 S.E.2d 261 (2014). 24

State v. Brannon, 388 S.C. 498, 697 S.E.2d 593 (2010) 9, 10, 11, 12, 15

State v. Curtis, 356 S.C. 622, 591 S.E.2d 600 (2004) 23, 24

State v. Dowd, 306 S.C. 268, 411 S.E.2d 428 (1991) 9

State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001) 22

State v. Hernandez, 382 S.C. 620, 677 S.E.2d 603 (2009) 8, 9

State v. Ladner, 373 S.C. 103, 644 S.E.2d 684 (2007) 9

State v. Mueller, 319 S.C. 266, 460 S.E.2d 409 (Ct. App. 1995) 22

State v. Weston, 367 S.C. 279, 625 S.E.2d 641 (2006) 8

State v. Williams, 237 S.C. 252, 116 S.E.2d 858 (1960) 8, 9, 12, 13, 14, 15

Terry v. Ohio, 392 U.S. 1 (1968) 11

Other Authorities:

Rule 403, SCRE 17, 18, 23

Rule 404(b), SCRE 17, 23

S.C. Code Ann. § 16-3-625 (2003) 9, 10

S.C. Code Ann. § 16-9-320 (2003) 9, 10

STATEMENT OF ISSUES ON APPEAL

I.

The trial court correctly denied Appellant's motion for directed verdict on the charge of resisting arrest with a deadly weapon because the evidence was sufficient to demonstrate the officers intended to arrest him.

II.

Appellant's argument regarding prior bad act evidence is not preserved, but even if preserved, the trial court properly allowed evidence that Appellant was facing substantial prison time to show motive and intent pursuant to Rule 404(b), SCRE.

STATEMENT OF THE CASE

A Kershaw County Grand Jury indicted Appellant for four counts of attempted murder, one count of resisting arrest with a deadly weapon, and one count of possession of a firearm during the commission of a violent crime. (R.* Indictments.) On January 13-16, Appellant proceeded to trial before a jury and the Honorable James R. Barber. Jason D. Kirincich, Esquire, represented Appellant, and Assistant Solicitor Brett Perry represented the State. The jury found Appellant guilty on two counts of attempted murder, one count of the lesser included offense of assault and battery of a high and aggravated nature (ABHAN), one count of resisting arrest with a deadly weapon, and one count of possession of a firearm during the commission of a violent crime.[1] (Tr. 281-82.) Judge Barber sentenced him to twenty years' imprisonment for the two attempted murder charges and the ABHAN charge, two years' imprisonment for the resisting arrest with a deadly weapon charge, to run concurrently, and four years' imprisonment on the possession of a firearm during the commission of a violent crime charge, to run consecutive to the others. (Sent. Tr. 10.)

On January 21, 2014, Appellant filed a Notice of Appeal.

[1] The trial court directed a verdict on one attempted murder charge. (Tr. 220, lines 20-21.)

STATEMENT OF FACTS

In December of 2010, Appellant had nine outstanding Kershaw County bench warrants for failure to appear in court. (Tr. 98, lines 1-6.) Sergeant Michael Sellers with the Kershaw County Sheriff's Office left his number with people at local apartment complexes to let them know he was looking for Appellant. (Tr. 95, lines 18-24.) On December 20, 2012, he received a text message from a citizen notifying him that Appellant was in a beige van leaving a particular apartment complex. (Tr. 95, line 15-Tr. 96, line 22.) The citizen advised Sgt. Sellers that Appellant had a firearm on him. (Tr. 97, line 1.) Based on the information, Sgt. Sellers did not want to approach Appellant by himself, so he gave a description of the van and its general direction to some other deputies. (Tr. 97, lines 1-11.) Sgt. Sellers parked on the side of the road with his lights off and awaited the van. (Tr. 97, lines 11-17.) Captain Edward Corey joined him and soon they saw the van. (Tr. 97, lines 17-22.) They began following, and as the van got close to a trailer park, Sgt. Sellers decided to make a felony car stop.[2] (Tr. 98, line 8-Tr. 99, line 10.)

Sgt. Sellers activated his blue lights, the van stopped, and Appellant bailed out of the passenger side and began running across the brightly lit yard of a home. (Tr. 99, lines 1-23.) Sgt. Sellers was able to recognize Appellant because he knew him from past experience. (Tr. 99, line 25-Tr. 100, line 7.) Other units were on the scene too, and Deputy Justin Scott ran after Appellant and was able to gain on him quickly. (Tr. 100, lines 18-23.) Sgt. Sellers saw something silver and a flash in his direction, and then he

[2] A felony traffic stop, or felony car stop, is one that is carried out with consideration for the safety of the public and the officers. (Tr. 136, lines 2-10.) Rather than a typical traffic stop where the officer approaches the driver, in a felony stop the officer does not walk up to the car but rather calls the suspect out of the car to him. (Tr. 99, lines 6-15; Tr. 135, line 23-Tr. 136, line 13.)

heard a loud noise and began looking for something to get behind. (Tr. 100, line 23-Tr. 101, line 24.) He yelled to Deputy Scott that Appellant had a gun because Scott was closing in on him. (Tr. 101, lines 12-13; Tr. 102, lines 1-2.) He saw Deputy Scott and Appellant face each other about fifteen to twenty yards apart and saw the muzzle flash of numerous shots fired. (Tr. 102, lines 6-15.) Deputy Scott returned fired but did not hit Appellant. (Tr. 153, line 16-Tr. 155, line 12.) The officers decided to retreat to their cars rather than follow a man with a gun into a dark area. (Tr. 103, lines 10-21.) Appellant was not apprehended that night but was arrested the next day and charged with four counts of attempted murder, one count of resisting arrest with a deadly weapon, and one count of possession of a firearm during the commission of a violent crime. (Tr. 104, lines 14-20; R.* Indictments.)

Prior to trial, the State moved to introduce Appellant's pending charges at the time the incident took place, arguing it showed motive and intent as to why he was willing to do whatever it took not to be taken into custody, including shooting at law enforcement. (Tr. 49, line 10-Tr. 51, line 25.) The trial court ruled it would allow evidence that he had nine serious charges pending to be admitted based on intent and motive. (Tr. 55, lines 11-13; Tr. 56, lines 9-12.) The trial court then determined it would decide the next morning whether the evidence regarding the amount of time Appellant was facing on those pending charges, ten to thirty years, could come in. (Tr. 57, lines 2-4.)

Defense counsel argued Appellant should be able to invoke his Fifth Amendment right not to be questioned regarding the charges he had pending at the time of this incident. (Tr. 58, line 2-Tr. 61, line 13.) The trial court agreed with defense counsel that going into the details of the offenses would not be relevant but that the State would have

the right to ask Appellant whether he understood he had nine warrants that were outstanding and whether he understood he was "looking at serious time for these offenses." (Tr. 62, lines 9-22.) Defense counsel agreed with the trial court on that distinction. (Tr. 62, lines 23-24.) The trial court then clarified the State could pursue the line of questioning about the amount of time he was facing on pending charges but prohibited the State from asking whether he was guilty of those charges. (Tr. 63, lines 3-7.) Defense counsel stated, "Yes, sir. And that's kind of what I was looking for so I could fully advise him." (Tr. 63, lines 8-9.)

The next morning, neither party asked the trial court for a further ruling on whether the evidence regarding the specific amount of time Appellant was facing on those pending charges could come in. Indeed, Appellant seemed satisfied with the trial court's decision to prohibit any evidence about the facts or merits of the pending charges. When the State mentioned in its opening statement that Appellant "had nine charges pending at the time [and] could have done significant time up to [thirty] years," Appellant did not object. (Tr. 82, lines 8-12.) Sgt. Sellers testified that the reason the sheriff's department was looking for Appellant was because he had nine outstanding bench warrants for failure to appear in court. (Tr. 97, line 23-Tr. 98, line 6.) Sgt. Sellers further testified Appellant was wanted on nine serious charges. (Tr. 99, line 8.) Investigator Rick Bailey testified that he was approached by Captain Ed Corey to assist Sellers on warrant service. (Tr. 123, lines 1-5.) Captain Corey confirmed he was contacted by Sellers to assist him in serving outstanding warrants on Appellant. (Tr. 134, lines 9-12.) Deputy Justin Scott testified that his job was to arrest people who were wanted. He further elaborated that if they run, it is his duty to chase them and try to arrest them and that is what he did here. He specifically stated that he did not arrest Appellant that night,

but he tried. (Tr. 152, line 19-Tr. 153, line 9.) Appellant objected to none of this testimony. Nor did Appellant object when the State argued in its closing, "This young man was wanted for multiple serious charges for which he could have gotten as much as [thirty] years on some of those charges." (Tr. 239, lines 13-15.)

Before closing arguments, after the State rested, defense counsel moved for a directed verdict on the various charges. (Tr. 208-22.) As to the charge of resisting arrest with a deadly weapon, he argued that because the officers did not advise Appellant he was under arrest, no arrest was effectuated and, thus, the charge should be dismissed. (Tr. 214, line 7-Tr. 215, line 6.) The State responded that as soon as the van stopped Appellant bailed out, began running, and began shooting at the officers. (Tr. 215, lines 13-14.) Thus, the State argued, Appellant's own actions kept the officers from getting close enough to tell him he was under arrest. (Tr. 215, lines 15-20.) The State argued Appellant knew he was under arrest and fled from that arrest. (Tr. 215, lines 21-24.) The trial court denied the directed verdict motion, ruling:

> [Appellant] knew that he had an obligation to be in court at some point in time in the past and had failed to do so and that likely arrest warrants were issued for him and that they attempted to effect the service of these arrest warrants. He clearly did not give them the chance to take him into custody at that point in time. So, I'm going to find that that's an appropriate charge and I'm going to go forward with it.

(Tr. 216, lines 3-12.)

Ultimately, the jury found Appellant guilty on two counts of attempted murder, one count of the lesser included offense of assault and battery of a high and aggravated nature (ABHAN), one count of resisting arrest with a deadly weapon, and one count of

possession of a firearm during the commission of a violent crime.[3] (Tr. 281-82.) The trial court sentenced Appellant to twenty years' imprisonment for the two attempted murder charges and the ABHAN charge, two years' imprisonment for the resisting arrest with a deadly weapon charge, to run concurrently, and four years' imprisonment on the possession of a firearm during the commission of a violent crime charge, to run consecutive to the others. (Sent. Tr. 10.)

[3] The trial court directed a verdict on one attempted murder charge. (Tr. 220, lines 20-21.)

ARGUMENT

I.

The trial court correctly denied Appellant's motion for directed verdict on the charge of resisting arrest with a deadly weapon because the evidence was sufficient to demonstrate the officers intended to arrest him.

Appellant argues the trial court erred in denying his "motion for directed verdict on the resisting arrest [with a deadly weapon] charge." (App.Br.7.) First, he argues the trial court improperly applied a "seizure analysis" in determining whether an arrest had been effectuated. Second, he argues there was not sufficient evidence presented that an arrest had occurred because the evidence showed Appellant did not submit to the arrest under the Williams[4] standard. However, the trial court did not apply a seizure analysis, and the State was not required to show Appellant submitted to the arrest in order to demonstrate he met the elements of the crime of "resisting arrest with a deadly weapon." Thus, the trial court correctly denied the directed verdict motion, and this Court should affirm.

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). When reviewing a denial of a directed verdict, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State. Id. "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, this Court must find the case was properly submitted to the jury." Id. at 292-93, 625 S.E.2d at 648. The trial court should grant a directed verdict when the evidence merely raises a

[4] State v. Williams, 237 S.C. 252, 116 S.E.2d 858 (1960).

suspicion that the accused is guilty. State v. Hernandez, 382 S.C. 620, 625-26, 677 S.E.2d 603, 605-06 (2009). A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. Ladner, 373 S.C. 103, 120, 644 S.E.2d 684, 693 (2007).

The South Carolina Code defines "resisting arrest with a deadly weapon" as follows: "A person who resists the lawful efforts of a law enforcement officer to arrest him or another person with the use or threat of use of a deadly weapon against the officer, and the person is in possession or claims to be in possession of a deadly weapon . . . ." S.C. Code Ann. § 16-3-625 (2003). In contrast, "opposing or resisting law enforcement officer serving process" is defined as:

> It is unlawful for a person knowingly and willfully to oppose or resist a law enforcement officer in serving, executing, or attempting to serve or execute a legal writ or process or to resist an arrest being made by one whom the person knows or reasonably should know is a law enforcement officer, whether under process or not.

S.C. Code Ann. § 16-9-320 (2003).

Appellant relies on State v. Brannon, 388 S.C. 498, 697 S.E.2d 593 (2010), and State v. Williams, 237 S.C. 252, 116 S.E.2d 858 (1960), in arguing a suspect must submit to the officers in order for an arrest to occur for the purposes of resisting arrest. He first argues Brannon stands for the proposition that on a resisting arrest charge the State must show an actual arrest occurred. Yet a close look at Brannon reveals the Court views an arrest in South Carolina an "ongoing process." Brannon, 388 S.C. at 504, 697 S.E.2d at 597 (quoting State v. Dowd, 306 S.C. 268, 270, 411 S.E.2d 428, 429 (1991)). Thus, the Court's inquiry centered on whether the arresting process was underway when Brannon fled. Brannon, 388 S.C. at 504, 697 S.E.2d at 597. The Court found an arrest was not

being made because the State "failed to put forth any evidence demonstrating that the officers either intended to arrest Brannon or that Brannon submitted to the arrest." Id. (emphasis added.)

There are two factors in Brannon that immediately distinguish it from the case at hand. First, Brannon was charged with resisting arrest under section 16-9-320, and the Court emphasized that "knowingly and willfully" are elements of that crime. They are not elements of the crime charged here, resisting arrest with a deadly weapon. Based on the language of the two statutes, only section 16-9-320, "opposing or resisting law enforcement officer serving process," requires the person to act "knowingly and willfully." Because that is the statute under which Brannon was charged, Appellant's reliance on Brannon is misplaced. Section 16-3-625, the statute under which Appellant was charged, does not require that the person act knowingly and willfully. Second, the Court found the State did not put forth enough evidence that an arrest was being made because the officers testified they merely stopped Brannon to question him. Here, direct testimony was given by the officers that their intent was to arrest Appellant. Thus, the Court's analysis in Brannon and its focus on proof of submission to the arrest is inapplicable to the situation here. In Brannon, the Court focused on the fact that neither officer testified he intended to arrest Brannon. Specifically, one officer testified "our intention was to approach the subject and find out exactly what he was doing there at the time." Brannon, 388 S.C. at 505, 697 S.E.2d at 597. Here, rather than having testimony that the officers only wanted to approach Appellant, clear evidence exists through the officers' testimony that they were trying to serve outstanding warrants on Appellant and arrest him. Thus, the intention of the arresting officers was clear.

Although Appellant acknowledges he "was charged with violation of a different statute than that of the [d]efendant in Brannon" and that the statute at issue has a "lower threshold," he still emphasizes the need for an inquiry into whether an arrest was being effectuated. (App.Br.9.) He then argues that here the effort was on seizing Appellant rather than arresting him. He argues the trial judge's analysis in denying the direct motion "amounts to an analysis of whether or not the Appellant was seized, as opposed to whether or not he was under arrest, because it relies on the reasonable expectation of the Appellant, not on the actual intents of both the officer and the suspect." (App.Br.10.) This argument is a red herring and appears to confuse the real issue.

In Brannon, the Court analyzed the difference between a seizure and an arrest. "[A]n arrest represents the highest form of seizure." Brannon, 388 S.C. at 503, 697 S.E.2d at 596. A seizure can occur, as in Terry v. Ohio[5], without leading to an arrest. However, the trial court was not analyzing whether Appellant was arrested or whether he was seized because Appellant ran, shot at police, and was not apprehended. Evidence was presented that the officers' sole intent in performing the felony traffic stop was to arrest Appellant for his nine serious outstanding charges. The State respectfully disagrees with Appellant's contention that the trial court improperly engaged in a "seizure analysis" by examining Appellant's reasonable expectation during the encounter. In denying Appellant's directed verdict motion, the trial court stated, "[Appellant] knew that he had an obligation to be in court at some point in time in the past and had failed to do so and that likely arrest warrants were issued for him and that they attempted to effect the service of these arrest warrants. He clearly did not give them the chance to take him into custody at that point in time." (Tr. 216, lines 4-10.) Nothing about the trial court's

[5] 392 U.S. 1 (1968).

ruling indicated he conducted a reasonable person, objective analysis. On the contrary, the trial court clearly looked at the subjective intent of Appellant. Indeed, Appellant's argument defies logic. It is Appellant alone who attempts to interject the word "reasonable" and the incorrect "objective" standard into the discussion. The trial court either considered a subjective standard under what Appellant claims is the proper arrest analysis by looking at the intent of both the officers and Appellant, or it considered an objective standard by looking at whether a reasonable person would consider himself free to leave. It certainly cannot be both. Here, the trial judge considered the evidence regarding the officers' intent, the evidence that Appellant knew he was under the ongoing process of arrest because he had been noticed for court and not appeared, and the evidence that Appellant ran from and shot at the officers so as not to give them a chance to take him into custody. Thus, the trial court followed the guidelines in Brannon and Williams for analyzing whether an arrest was occurring using a subjective standard.

It would be an absurd result indeed if our jurisprudence was such that a person who knew he had nine outstanding warrants for his arrest could escape a charge of resisting arrest with a deadly weapon simply by evading apprehension after running and shooting as soon as the police pulled him over. Similarly, it would be absurd if a defendant simply had to testify he did not submit to an arrest in order to obtain a directed verdict on a resisting arrest charge. The Court's analysis in Brannon relates only to situations like Brannon's in which the only evidence shows the police merely stopped the person to question him about possible involvement in a crime, not to serve arrest warrants that both the police and the person knew were outstanding.

Appellant argues that Williams made clear the person being arrested must understand he is in the power of the one arresting and submit in consequence. He further

argues that in cases like this one in which there is no manual touching, the Williams court established there must be intent on the part of the officer to arrest the suspect and intent on the part of the suspect to submit. The actual quote from Williams as is follows:

> However, in all cases in which there is no manual touching or seizure **or any resistance**, the intentions of the parties to the transaction are very important; there must have been intent on the part of one of them to arrest the other, and intent on the part of such other to submit, under the belief and impression that submission was necessary. **There can be no arrest where the person sought to be arrested is not conscious of any restraint of his liberty**.

237 S.C. at 257, 116 S.E.2d at 860-61 (emphasis added).

Appellant argues Williams requires the suspect have a subjective intent to submit. Appellant does not explicitly argue he did not submit to the arrest, but he does argue the trial court failed to analyze whether he ever intended to submit to the arrest. Appellant seems to misconstrue Williams' analysis of a suspect's subjective intent. By referring to "all cases in which there is no . . . resistance," the Williams court made clear it was laying out guidelines for specific situations where a suspect would not likely know he was being arrested because there was "no manual touching or seizure or any resistance." Only then does the Court stress the importance of considering the intent of both parties. On the other hand, the Court seems to be saying, in a situation where there is touching, seizure, or resistance (in other words, actions on the part of either the officer or the suspect that show a restraint on liberty is occurring), intent is clear and no further analysis is required. It makes sense that when actions show a restraint of liberty, such as touching, resistance, running, and chasing, the internal intent of the parties need not be considered.

The circumstances in Williams distinguish it from the case at hand. An officer performed a traffic stop of Williams' brother and noticed Williams bend over as if putting

something under the seat. He asked Williams to get out of the car and noticed a jar of unstamped liquor under the front seat. While the officer radioed another officer, Williams started walking away. The officer went up to him and placed his hand on Williams' shoulder, at which time Williams jerked loose. The officer asked Williams' brother to get him to not resist. Williams calmed down and came back to the patrol car, but suddenly caught the officer by the arm, took his pistol, and went down the road. He then disappeared.

Williams's complaint on appeal was that he was unlawfully arrested after the car was stopped. However, the Court analyzed when the actual arrest occurred, determining that Williams was not arrested until after the officer found the liquor. Prior to that time, the officer had only requested he get out of the car. The Court found a request to get out of the car did not amount to an arrest, finding "there must be an actual or constructive seizure or detention of the person, performed with the intention to effect an arrest and so understood by the person detained." Williams, 237 S.C. at 257, 116 S.E.2d at 860 (quoting Jenkins v. United States, 161 F.2d 99, 101 (10th Cir. 1947)). To determine Williams did not consider himself under arrest when he stepped out of the car, the Court analyzed his own testimony where he said he walked away from the car even though the officer told him to stand there because "[h]e hadn't told me about an arrest or nothing." Williams, 237 S.C. at 258, 116 S.E.2d at 861.

Here, the situation was vastly different. The officers here were in pursuit of the van Appellant was riding in solely for the purpose of arresting him for nine outstanding warrants.[6] This was anything but a random traffic stop. As soon as the officers activated

[6] Appellant was aware of the warrants because he was noticed to be at trial and did not appear. (Tr. 62, lines 18-19.)

their blue lights and stopped the van, Appellant began resisting by running from them. Unlike Brannon, where the Court found an arrest was not being made because the State "failed to put forth any evidence demonstrating that the officers either intended to arrest Brannon or that Brannon submitted to the arrest," extensive evidence was put forth that the officers intended to arrest Appellant. Sgt. Sellers testified that the reason the sheriff's department was looking for Appellant was because he had nine outstanding bench warrants for failure to appear in court. (Tr. 97, line 23-Tr. 98, line 6.) Sgt. Sellers further testified Appellant was wanted on nine serious charges. (Tr. 99, line 8.) Investigator Rick Bailey testified that he was approached by Captain Ed Corey to assist Sellers on warrant service. (Tr. 123, lines 1-5.) Captain Corey testified he was contacted by Sellers to assist him in serving outstanding warrants on Appellant. (Tr. 134, lines 9-12.) Deputy Justin Scott testified that his job was to arrest people who were wanted. He further elaborated that if they run, it is his duty to chase them and try to arrest them and that is what he did here. He specifically stated that he did not arrest Appellant that night, but he tried. (Tr. 152, line 19-Tr. 153, line 9.)

Appellant also argues the officers made no verbal notification to Appellant that he was under arrest. However, one of the very cases Appellant relies on makes clear "a formal declaration of arrest" is not necessary. Williams, 237 S.C. at 257, 116 S.E.2d at 860. Also, the officers had activated their blue lights which indicated an intent to arrest. Furthermore, Appellant's own actions kept the officers from getting close enough to tell him he was under arrest. In his brief, Appellant states, "The record shows that officer[s'] actions, at all relevant times, amounted to a continuation of the effort to seize, as opposed to an effort to arrest." (App.Br.10.) However, based on the Court's analysis in Brannon, what took place here was never simply a seizure, even one that would eventually result in

an arrest. Rather, the record shows the officers stopped the van for the purpose of arresting Appellant for nine outstanding warrants. Most notably, Deputy Scott testified that his job was to arrest people who were wanted and that if they run, it is his duty to chase them and try to arrest them and that is what he did here. He specifically stated that he did not arrest Appellant that night, but he tried. (Tr. 152, line 19-Tr. 153, line 9.) This testimony alone is sufficient to distinguish Appellant's case from Brannon and Williams.

In sum, the evidence presented established the officers' intent was to arrest Appellant and Appellant actively resisted the arrest by running and shooting as soon as the officers stopped the van. Furthermore, the trial court did not analyze the stop under a seizure analysis and, even if it did, it had no impact on the sufficiency of the evidence to survive a directed verdict motion. Sufficient evidence existed to prove the elements of resisting arrest with a deadly weapon, and the trial court properly submitted the case to the jury for its resolution. Therefore, this Court should affirm the trial court's decision.

II.

Appellant's argument regarding prior bad act evidence is not preserved, but even if preserved, the trial court properly allowed evidence that Appellant was facing substantial prison time to show motive and intent pursuant to Rule 404(b), SCRE.

Appellant argues the trial court erred in allowing evidence to be submitted to the jury that he was facing substantial jail time on pending charges, under the intent/motive exception to Rule 404(b), SCRE. He argues the trial court failed to conduct a prejudice analysis under Rule 403, SCRE, and that because the pending charges held no logical relevance to the crime of attempted murder, the evidence was inherently prejudicial.[7] On the contrary, the trial court properly allowed the State to introduce evidence that Appellant was facing substantial prison time to show why he ran from police and began shooting at them when faced with an arrest. Thus, this Court should affirm the trial court's decision.

Initially, the State submits this issue is not preserved. The State wanted to introduce the fact Appellant had pending charges and brought the issue before the trial court in a pretrial matter. Defense counsel stated he would agree "wholeheartedly" if the State simply wanted to say Appellant had warrants for prior failures to appear issued by the trial court. (Tr. 52, lines 12-16.) However, he argued the State should not be allowed to mention the nature of the charges or the sentencing ranges. (Tr. 52, lines 17-20.) He

[7] In his brief, Appellant also seems to argue the fact that a juror told other jurors he had made up his mind and did not need to hear more, and was subsequently held in contempt and taken into custody, demonstrated the prejudicial nature of the evidence. (App.Br.14; Tr. 188-89.) He does not elaborate on how this shows prejudice, but regardless, when the trial judge asked both parties if they had any objection to his removing the juror and replacing him with an alternate, he did not object. (Tr. 190, line 23-Tr. 191, line 19.) Thus, any issue involving this matter is not preserved for this Court's review.

further argued that if the trial court found the charges could come in for the purpose of intent, the trial court would still have to go through a Rule 403, SCRE, balancing test. (Tr. 53, lines 2-5.) He also stated:

> I think the State needs to be fair warned that that's the only reason that it comes in for intent not to prove his general bad character. That would be too far and that would be the reason we have 404(b). I don't know if there's any limiting instruction or if there is an admonishment from the Court beforehand to the State. But for the limited purpose that they want to introduce it, it's very hard for me to argue.

(Tr. 53, lines 8-16.) (emphasis added.) The solicitor conceded he did not care that the jury hear the nature of the charges but simply wanted to be able to state that Appellant had pending charges for which he could have faced mandatory minimums of ten to thirty years. (Tr. 54, lines 1-15.) In addition, the State asked to introduce evidence of a previous occasion when law enforcement tried to stop Appellant and he fled at a high rate of speed; however, the trial court did not allow that evidence. (Tr. 54, lines 5-21.) The trial court then stated:

> I'm going [to] find that—first of all, I don't know that it is relevant, second of all, even if it is, because he did know about it or the charges were pending, to put that in would substantially outweigh the probative value. I am going to allow the evidence to come in based on intent and motive.

(Tr. 55, lines 7-13.) The trial judge determined he would think about whether to allow testimony about the mandatory minimums to come in and told the parties he would let them know in the morning, but he ruled that the State would at least be able to put in evidence that Appellant had the nine serious charges pending. (Tr. 56, lines 1-12.)

At that point, the following exchange took place:

> The Court: Defense motions?

> [Appellant]: I do have one, Your Honor. I was going to let them finish up whatever they had.
>
> The Court: I thought that was your motion.
>
> [Appellant]: I think if the State wants to introduce it, they have to--
>
> The Court: I thought that was a motion in limine to keep all that out.
>
> [Appellant]: I think if the State wants to introduce it, it has to be their motion to make sure it passes that balance test. We could have done it at the time of trial.

(Tr. 57, lines 11-22.) (emphasis added.)

Defense counsel then argued Appellant should be able to invoke his Fifth Amendment right not to be questioned regarding the charges he had pending at the time of this incident. (Tr. 58, line 2-Tr. 61, line 13.) The trial court agreed with defense counsel that going into the merits of the drug offenses would not be relevant but that the State would have the right to ask Appellant about whether he understood he had nine warrants that were outstanding and whether he understood he was "looking at serious time for these offenses." (Tr. 62, lines 9-22.) Defense counsel agreed with the trial court on that distinction. (Tr. 62, lines 23-24.) The trial court than clarified the State could pursue the line of questioning about the amount of time he was facing on pending charges but prohibited the State from asking whether he was guilty of those charges. (Tr. 63, lines 3-7.) Defense counsel stated, "Yes, sir. And that's kind of what I was looking for so I could fully advise him." (Tr. 63, lines 8-9.) After the State assured the trial court it was "not here to try the drug cases" but simply wanted to use the pending charges to show motivation, Appellant stated, "And if it comes up during trial, I'll obviously object

to it. We've already covered these issues. Thank you, Your Honor." (Tr. 63, lines 17-19.)

The next morning, neither party asked the trial court for an additional ruling on whether the evidence regarding the specific amount of time he was facing on those pending charges could come in. Indeed, Appellant seemed satisfied with the trial court's decision to prohibit any evidence about the facts or merits of the pending charges. The State submits the above discussion that began with Appellant's argument regarding his Fifth Amendment right not to answer questions about the pending charges was sufficient to address the issue of the amount of time he was facing. Thus, the trial court's ruling that the State could pursue the line of questioning about the amount of time he was facing on pending charges but was prohibited from asking whether he was guilty of those charges seems to have encompassed the State's original motion regarding amount of time. It is clear from the following exchange that defense counsel agreed with the trial court's decision to allow the State to question Appellant regarding the minimums he could have been convicted for.

> The Court: I agree with you. If he starts to go into the merits of the drug offenses, I don't think it's relevant.
>
> [Appellant]: Okay.
>
> The Court: I think he certainly would have a right to say, Mr. Allen, you understand that you had nine—nine warrants that were outstanding and I guess they had been served on him and he had made a first appearance or something.
>
> [The State]: He was noticed to be at trial, Judge, and didn't show up.
>
> The Court: I think he can ask him all that stuff. You understand that you were looking at serious time for these offenses.

> [Appellant]: I can agree with you there, Judge.
>
> The Court: He could have been convicted a minimum of 10 years on some of them. I can't remember what—
>
> [The State]: 10 to 30, 0 to 15 and 0 to 10, Judge.
>
> The Court: So I think he can pursue that line of questioning. He can't go into anything about were you guilty of that.
>
> [Appellant]: Yes, sir. And that's kind of what I was looking for so I could fully advise him.

(Tr. 62, line 9-Tr. 63, line 9.) (emphasis added.) The fact that defense counsel then stated that he would object if "it" came up during trial shows that he realized the requirement to object contemporaneously to evidence that had been ruled upon during *in limine* motions. Yet he did not object at any time to the evidence the State presented during trial that Appellant had those nine pending charges and that he was facing significant time. The State submits defense counsel's failure to object to this evidence after acknowledging he would object when necessary demonstrates that the "it" he was referring to was any evidence of the nature of the charges themselves, which is what Appellant wanted to keep out. Thus, his argument now on appeal that evidence regarding the amount of time Appellant was facing was admitted in error misconstrues the record's account of the trial judge's rulings and counsel's arguments and statements.

When the State mentioned in its opening statement that Appellant "had nine charges pending at the time [and] could have done significant time up to [thirty] years,"

Appellant did not object. (Tr. 82, lines 8-12.)[8] As Appellant points out in his brief, Captain Corey later testified that he had "outstanding bench warrants, all for serious felony charges," to which Appellant did not object. (App.Br.13.) Appellant argues that "[t]hough counsel for [Appellant] did not renew his objection at this time, the admission of the evidence was so close in time to his objection prior to opening statements that it is preserved for review." He bases this argument on State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001). "In most cases, [m]aking a motion *in limine* to exclude evidence at the beginning of trial does not preserve an issue for review because a motion *in limine* is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced." Forrester, 343 S.C. at 642, 541 S.E.2d at 840 (citation and internal quotation marks omitted). However, the Supreme Court held in Forrester that "[b]ecause no evidence was presented between the ruling and [the] testimony, there was no basis for the trial court to change its ruling. Thus, . . . [the] motion was not a motion *in limine.* The trial court's ruling in this instance was in no way preliminary, but to the contrary, was a final ruling. Accordingly, [the defendant] was not required to renew her objection to the admission of the testimony in order to preserve the issue for appeal." Id. (quoting State v. Mueller, 319 S.C. 266, 268-69, 460 S.E.2d 409, 410 (Ct. App. 1995)). The rationale behind this exception is that when no evidence is taken between the ruling and the introduction, no opportunity exists for the court to change its ruling. Here, Captain Corey was the fourth witness, so this certainly was not a case of the ruling coming directly prior to Appellant's lack of objection to the evidence. Thus, Forrester is inapplicable and standard *in limine* rules apply. Consequently,

[8] Appellant also did not object when the State argued in its closing, "This young man was wanted for multiple serious charges for which he could have gotten as much as [thirty] years on some of those charges." (Tr. 239, lines 13-15.)

Appellant's failure to object prevents this issue from being preserved for appellate review. Additionally, when the trial court ruled during the discussion regarding Appellant's Fifth Amendment right not to answer questions that the pending charges and the amount of time he was facing could come in, Appellant argued the nature of the charges should not come in, and the trial court agreed. Thus, Appellant got what he asked for—that any evidence of the nature of the drug charges be excluded—and, consequently, had no need to object when evidence he agreed to was presented. The State submits the reason defense counsel did not object, then, is because he had already agreed with the trial court that evidence of the pending charges and their sentencing ranges could come in as long as the nature of the charges did not.

As to Appellant's argument that the trial judge failed to conduct a balancing test, the State submits the trial judge did conduct a balancing test under Rule 403, SCRE, when considering the totality of the 404(b) evidence the State sought to introduce. The trial judge excluded evidence that Appellant ran from the police a previous time. He specifically found "to put that in would substantially outweigh the probative value." (Tr. 55, lines 7-15.) By ruling immediately after making that statement that, "I am going to allow the evidence to come in based on intent and motive," the trial judge implicitly indicated the probative value of the evidence of the nine pending charges was not substantially outweighed by danger of prejudice. If Appellant desired a more specific ruling that than, he could have and should have requested one. It is incumbent upon an appellant to obtain a ruling from the trial judge to preserve an issue for appeal. Shortly after his ruling to allow the evidence in, when the trial court asked Appellant whether the *in limine* motion was a defense motion "to keep all that out," Appellant stated, "I think if the State wants to introduce it, it has to be their motion to make sure it passes that balance

test. We could have done it at the time of trial." (Tr. 57, lines 17-22.) Despite saying this, Appellant did not ask for a balancing test or even object at all to the evidence at the time of trial. Thus, Appellant cannot now complain about an alleged error his own conduct caused. See State v. Curtis, 356 S.C. 622, 632, 591 S.E.2d 600, 605 (2004) ("A party cannot complain of an error which his own conduct created.").

Appellant's argument that there must be "logical relevance" between the prior charges and the ones being prosecuted is based on State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996) *overruled on other grounds by* State v. Giles, 407 S.C. 14, 754 S.E.2d 261 (2014). In Adams, the issue was whether drug use could be used to establish motive for the crime charged. Specifically, the State sought to show the defendant robbed the store to get money for drugs. The Adams court found logical relevance between the drug use and the crime based on testimony by the defendant that he robbed the store because he ran out of money to buy drugs. The Court distinguished three other cases where drug use was not logically relevant to the crime because it was not contemporaneous with, or closely related to, the crimes committed. Appellant's reliance on this "logical relevance" connection is misplaced. Here, the trial court did not allow evidence regarding the nature of the pending charges to come in, in direct response to defense counsel's argument to exclude it. Thus, no testimony about possession of cocaine was presented to the jury. Consequently, it is of no moment that possession of cocaine is not "logically relevant" to resisting arrest with a deadly weapon and attempted murder. What was important in this case was the fact that Appellant had pending charges, was facing a significant amount of time in prison, and thus was motivated to resist arrest and shoot at the officers when the police stopped him. Any pending charge that fit this criteria was logically relevant. No other connection between the nature of the pending charges and the current crime was

necessary because that evidence was excluded pursuant to the trial judge's favorable ruling for Appellant to exclude any evidence of the merits of the drug offenses. Thus, the trial court's decision and Appellant's convictions should be affirmed.

CONCLUSION

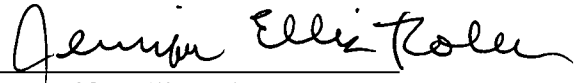
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

BY: 
Jennifer Ellis Roberts
Bar # 79818

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

April 22, 2015

RECEIVED
APR 22 2015
SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of General Sessions
James R. Barber, Circuit Court Judge

Appellate Case No. 2014-000165

THE STATE,

Respondent,

v.

ERNEST MAURICE ALLEN,

Appellant.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

T. Jarrett Bouchette, Esquire
The Floyd Law Firm PC
P.O. Drawer 14607
Surfside Beach, SC 29587

Robert M. Dudek, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served. This 22nd day of April, 2015.

Angela Bennett

ANGELA BENNETT
Legal Assistant
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
APR 22 2015
SC Court of Appeals

April 22, 2015

T. Jarrett Bouchette, Esquire
The Floyd Law Firm PC
P.O. Drawer 14607
Surfside Beach, SC 29587

Robert M. Dudek, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29201

RE: State v. Ernest Maurice Allen
Appellate Case No. 2014-000165

Dear Counsel:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Jennifer Ellis Roberts
Assistant Attorney General
Bar # 79818

JER/ab
Enclosures

cc: Honorable Jenny A. Kitchings
Victim Services