STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County

George C. James, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RODNEY R. GREEN,

APPELLANT

APPELLATE CASE NO 2015-002443

INITIAL BRIEF OF APPELLANT

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II. Violating Appellant's federal and state constitutional right to require the state to prove every element of the offense beyond a reasonable doubt, did the trial judge err by instructing the jury regarding the doctrine of transferred intent for the offense of attempted murder, which requires a specific intent to kill, in light of the requirement of only general intent for murder?

III. Did the trial judge err in failing to grant Appellant's motion for mistrial, or instruct the jury to disregard expert testimony regarding ballistics, where the police officer who found the shell casings at the scene did not testify and no other witnesses could testify that the shell casings introduced at trial or tested by the expert were the shell casings found at the scene, which violated Appellant's rights under the Sixth Amendment's Confrontation Clause?

STATEMENT OF THE CASE

During its July 2014 term, a Sumter County grand jury issued a multi-count indictment charging Appellant with murder, attempted murder, possession of a weapon during the commission of a violent crime, and possession of a stolen handgun (2014-GS-43-0524). R. *(indictment). The state, represented by Ernest A. Finney, III, called the case to trial before the Honorable George C. James and a jury on November 9, 2015. Tr. 1. Charlie Johnson represented Appellant. Tr. 1. The jury found Appellant guilty as charged. Tr. 833, ll. 7-19. On November 13, 2015, Judge James sentenced Appellant to life imprisonment without the possibility for parole for murder, to thirty years' imprisonment for attempted murder, to five years' imprisonment for possession of a weapon during the commission of a violent crime, and to time served for possession of a stolen pistol. Tr. 860, ll. 9-17; R. *(sentence sheets).

On November 16, 2015, Appellant filed and served his notice of appeal. This brief follows.

ARGUMENT

I. The trial judge erred in failing to direct a verdict of acquittal where the state failed to present any direct evidence or substantial circumstantial evidence that Appellant acted with a specific intent to kill as required to prove attempted murder.

Relevant facts

Testimony

In March 2014, Appellant and Lavitra Harvin were involved in a romantic relationship. Tr. 134, ll. 3-5. On March 15-16, 2014, the two went to an "all white" party, where the guests dressed in all white. Tr. 134, ll. 10-24. At 1:45 a.m., she left the party and went to Club Miami with her girlfriends. Tr. 134, ll. 7-19. A fight broke out inside the club, so she, her friends, and most of the other club's patrons went outside. Tr. 138, ll. 9-19. The commotion continued outside. Tr. 139, ll. 21-23. Harvin heard gunshots, and dropped down by a black truck for safety. Tr. 140, ll. 9-15. She then saw a man named Ray'Quann Jenkins run by her saying he had been shot. Tr. 140, ll. 16-23. Harvin then looked up and saw gunfire coming from behind the truck. Tr. 140, ll. 11-14; Tr. 145, ll. 9-10. However, she could not see who was firing the gun – the scene was total chaos. Tr. 145, l. 23 – Tr. 146, l. 1. Harvin saw Appellant running. Tr. 146, ll. 3-8. Shortly after seeing Appellant run by, Harvin went home. Tr. 150, ll. 2-11.

The state impeached Harvin with a statement she gave to law enforcement. According to the written statement, Harvin told police that she saw Appellant fire a handgun and run. Tr. 156, ll. 20-25. Harvin explained that the police pressured her to say she saw Appellant fire the handgun. Tr. 164, ll. 8-10. Specifically, the questioning officer threatened to arrest Harvin and take her children. Tr. 164, ll. 11-13; Tr. 166, ll. 3-13. Initially, Harvin told the police officer the truth – she never saw Appellant shoot a gun, and only heard gunshots. Tr. 167, ll. 1-5. The

officer was not satisfied this this answer and threatened to arrest Harvin and take away her children in order to force Harvin to say she saw Appellant with a gun. Tr. 167, ll. 1-5; Tr. 168, ll. 3-11; Tr. 172, ll. 18-20; Tr. 716, ll. 1-3. The officer who interrogated Harvin, Melissa Addison, initially denied threatening Harvin that she would lose her children if she did not cooperate. Tr. 495, l. 17 – Tr. 496, l. 4. The judge ordered a break for the parties to review the video of the Harvin's interrogation. Tr. 496, l. 5 – Tr. 497, l. 5. At the conclusion of the break, the state assured the judge that the issue had been "worked out." Tr. 497, ll. 6-13. When Addison resumed testifying, she explained:

> The only thing I'd like to add is that, if it was stated, it wasn't as a way to threaten her. It would b[e] an investigative tool, because it's actually could be a possibility, if one does have children, if you don't tell the truth, and we find out that you did in that, it could be some pending charges. Of course, if you have children and you're charged, then the children are going to have to someone to take care of them. So it was a possibility.

Tr. 498, ll. 9-18. Addison was adamant that her statements to Harvin regarding the loss of her children was not a threat, but was simply "a reality of what could happen." Tr. 498, l. 21 – Tr. 499, l. 1. Finally, she conceded the person hearing such may perceive it has a threat. Tr. 499, ll. 2-6.

Ray'Quann Jenkins and his friend, Tyrese Archie, were at Club Miami on March 16, 2014, as well. Tr. 184, ll. 2-9. After having a few drinks, Jenkins and Archie planned to leave. Tr. 192, ll. 8-15. On the way out of the club, they ran into some of Archie's cousins who were fighting in the parking lot. Tr. 192, ll. 13-22. Jenkins and Archie tried to defuse the situation. Tr. 196, ll. 8-21. Jenkins claimed the fight broke up, and he and Archie waited for their ride. Tr. 198, ll. 1-7. Three unknown men approached Archie. Tr. 199, ll. 2-13. The men "tried to jump" Archie, but Jenkins intervened. Tr. 199, ll. 14-25. Despite Jenkins' efforts, Archie and one of the men started fist-fighting. Tr. 200, ll. 5-15. While Archie and the man were on the ground

fighting, Jenkins saw four or five other men approaching. Tr. 201, ll. 1-4. Jenkins claimed he also saw Appellant "coming in between and saying, watch out." Tr. 202, ll. 3-6. He further claimed Appellant reached "in his shirt to pull out a weapon." Tr. 203, l. 25 – Tr. 204, l. 1.

Jenkins turned to pick up Archie from the ground, and heard Appellant say "watch out." Tr. 204, ll. 12-16. He then heard the first gunshot. Tr. 204, ll. 16-17. Jenkins claimed the first shot hit him causing him to fall forward. Tr. 206, ll. 3-6. Although Jenkins claimed he saw Appellant shot him, he also stated Appellant simply pointed the gun in his direction – he could not say Appellant pointed at him deliberately. Tr. 229, ll. 4-7. After the first shot, he saw Archie running away from him. Tr. 207, ll. 17-21. Jenkins claimed he heard two or three more shots ring out, and further claimed Appellant was the shooter. Tr. 207, l. 22 – Tr. 208, l. 8. Jenkins did not see Archie get shot. Tr. 209, ll. 24-25. Although Jenkins gave a statement to the police shortly after the shooting, he did not identify Appellant as the shooter. Tr. 232, ll. 14-18; Tr. 233, l. 25 – Tr. 234, l. 9. It was not until the week before the trial that Jenkins claimed he could identify Appellant as the shooter. Tr. 234, ll. 10-13; Tr. 236, ll. 19-23.

Archie's cousin, Demetrice "Diamond" Brooks, was at Club Miami as well. Tr. 268, ll. 5-25. She was with her cousins, Auntachie Blanding and Shataeja Rivers. Tr. 269, ll. 4-11; Tr. 314, ll. 19-22; Tr. 315, ll. 9-19. When people started fighting in the club, Diamond and Auntachie walked outside. Tr. 272, ll. 20-23; Tr. 316, ll. 8-14. The fighting continued outside. Tr. 273, ll. 15-18; Tr. 316, ll. 15-20. Diamond and Auntachie saw Archie telling me people to leave. Tr. 274, ll. 7-15; Tr. 316, ll. 21-22. However, Diamond did not see Archie fighting anyone. Tr. 297, l. 8 – Tr. 298, l. 21. While walking to Auntachie's car, Diamond claimed she saw Appellant shooting at someone. Tr. 278, ll. 3-19. Auntachie claimed she also heard gunshots, but did not allege that Appellant was the shooter. Tr. 318, ll. 3-4; Tr. 318, ll. 19-20. In

fact, Auntachie denied even seeing Appellant at the club that night. Tr. 330, ll. 13-15. Diamond could not see if Appellant's shots struck anyone or if he was aiming at anyone at all. Tr. 278, ll. 13-14; Tr. 281, ll. 14-23. While the cousins were leaving, they heard additional gunshots. Tr. 279, ll. 23-24. Diamond and Auntachie saw Carter Man firing two pistols and blocking their exit. Tr. 280, ll. 4-18; Tr. 282, ll. 3-6; Tr. 282, ll. 19-25; Tr. 325, ll. 4-13; Tr. 327, ll. 20-22. In fact, Man shot at their car. Tr. 291, ll. 14-19; Tr. 329, l. 18. Although Diamond was questioned by police three days after the shooting, she never mentioned Appellant. Instead, she went to the police a month later at the insistence of her aunt to say she saw Appellant shooting a gun. Tr. 285, l. 6 – Tr. 289, l. 6.

Another of Archie's cousins was at the club that night – Davontae Blanding. Tr. 345, l. 24 - Tr. 346, l. 8. Blanding also saw individuals fighting in the club. Tr. 348, ll. 4-8. He was part of the crowd pushed out by the security guards. Tr. 348, ll. 9-14. The fighting continued outside. Tr. 348, ll. 19-21. Blanding heard Archie encouraging others to leave the club. Tr. 349, ll. 15-21. After Archie walked away, Blanding heard gunshots. Tr. 352, l. 24 – Tr. 353, l. 1. Blanding claimed he saw a young lady running toward Appellant, "screaming, don't do it." Tr. 352, ll. 2-6.[1] Blanding looked toward the young lady screaming and saw Appellant raise his arm and start shooting. Tr. 361, l. 24 – Tr. 362, l. 3. Blanding did not see the bullet – he did not see Appellant shoot Archie. Tr. 362, ll. 1-2; Tr. 369, ll. 24-25. Blanding heard four of five shots. Tr. 362, ll. 21-22. Archie began running after the shooting, and Blanding followed him. Tr. 364, ll. 10-14. He followed Archie until he collapsed behind the club. Tr. 364, ll. 16-17.

[1] Blanding did not know Appellant and was only aware of his name after the police informed him of Appellant's name. Tr. 354, ll. 17-20. However, Washington claimed he knew Appellant and recognized him when he was arrested. Tr. 417, ll. 16-18.

Security officer, Myron Conyers, told a very different story regarding the shooting. Around 2 a.m., a fight broke out inside the club. Tr. 380, l. 16-19. The bouncers removed the people who were fighting to outside the club. Tr. 380, l. 19-25. Conyers separated one individual from the crowd in an attempt to calm him. Tr. 381, ll. 1-5. Another security officer, Patrick Washington, heard one of the fighters say he was going to retrieve a gun and then walk toward a truck. Tr. 415, ll. 12-14. Washington followed the fighter to his truck. Tr. 415, l. 14.

Conyers noticed someone appear "from the fence line" and fire a shot. Tr. 381, ll. 5-7. There was a pause, then two more shots fired into the crowd. Tr. 381, ll. 7-8. The person turned and ran. Tr. 381, ll. 8-9. Washington was still dealing with the fighter when he heard between four and six shots ring out. Tr. 415, ll. 19-21; Tr. 428, l. 15 – Tr. 429, l. 6. Washington claimed he saw someone dressed in all white shooting. Tr. 415, ll. 21-22. Conyers and Washington chased the person. Tr. 381, ll. 9-12; Tr. 415, ll. 23-25. As Washington continued to chase the individual, Conyers used his flashlight to signal their location to a police officer driving nearby. Tr. 381, ll. 13-19. Washington and the officer later caught up with the person. Tr. 381, ll. 23-25. Washington claimed the person appeared to throw something shortly before Washington tackled him. Tr. 416, ll. 13 – 20.

The police arrived at Club Miami around 2:50 a.m. Tr. 242, ll. 9-18. The police chased Appellant across a field adjacent to the club and arrested him. Tr. 242, l. 19 - Tr. 243, l. 18. The police found a handgun approximately twenty feet away from where Appellant was arrested. Tr. 260, ll. 7-13; Tr. 262, ll. 8-10; Tr. 451, ll. 11-17. The gun was later determined to be a Smith & Wesson .45 auto caliber. Tr. 508, l. 23 – Tr. 509, l. 2. Upon his arrest, Appellant was interrogated by the police. Tr. 667, ll. 19-21. Appellant admitted being at Club Miami, but denied shooting anyone. Tr. 672, ll. 1-10. He heard people fighting and heard gunshots, but

denied taking part in those activities. Tr. 672, ll. 1-10. He explained he was running because he heard gunshots. Tr. 672, ll. 1-10.

The police found three cartridge casings[2] at the scene, which were compared with test fires from the recovered gun. Tr. 514, ll. 14-18. Michele Eichenmiller, a firearms examiner, opined the three fired cartridge cases were fired by the recovered firearm. Tr. 514, ll. 19-22. Upon Appellant's arrest, the police also tested his hands for gunshot residue. Tr. 674, ll. 11-16. The state's trace evidence expert claimed she found "gunshot residue" on Appellant's right palm. Tr. 545, ll. 4-6. She explained that in conducting a gunshot residue analysis, she is "looking for a population of particles." Tr. 545, ll. 20-21. She emphasized that "one or two particles by themselves may not hold necessarily as much weight as if you found a bunch of three component GSR particles with some round lead particles or some round antimony particles with them to back them up and support them. Tr. 545, l. 21 – Tr. 546, l. 1. On cross-examination, she revealed she found only two particles on Appellant's hand. Tr. 551, ll. 20-22.

The pathologist found no bullets or metal fragments in the body of Archie. Tr. 622, ll. 1-3. She located an entry and exit wound, however. Tr. 622, ll. 4-6. The bullet entered through the left upper chest and went through the left lung, causing hemorrhaging. Tr. 622, ll. 10-19. The exit wound was in the left back. Tr. 622, ll. 20-22. She estimated the wound was likely caused by a medium caliber bullet, "which could be 38 or a 357." Tr. 623, l. 20 – Tr. 624, l. 1.

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[2] Appellant challenges whether the state proved the cartridge casings tested by SLED were the cartridge casings found at the crime scene in light of the state's failure to call as a witness the officer who allegedly collected the cartridge cases in order to establish a chain of custody. See Issue III. Appellant does not abandon that issue by including the ballistics testing in this factual recitation. Rather, Appellant includes the results of the ballistics testing as that was evidence considered by the trial judge at the directed verdict stage regardless of the propriety of the admission of such evidence.

She distinguished those calibers from a 45 caliber round, which she considered large. Tr. 625, ll. 20-24.

Motion for directed verdict

Appellant moved for a directed verdict on the attempted murder charge based on the state's failure to present evidence that Appellant shot Jenkins with specific intent. Tr. 732, ll. 3-13. Appellant noted there was no medical evidence or other evidence to indicate Jenkins was actually shot – on the word of Jenkins. Tr. 732, ll. 3-13; Tr. 735, ll. 3-17. The judge denied the motion. Tr. 737, ll. 12-17.

Discussion

Recently, the South Carolina General Assembly created the crime of attempted murder. Lawmakers defined the offense as: "A person who, *with intent to kill*, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." S.C. Code Ann. § 16-3-29 (emphasis added). The statute became effective on June 2, 2010. According to the Act, attempted murder replaced the common law crime of assault and battery with intent to kill: "wherever in the 1976 Code reference is made to the assault and battery with intent to kill, it means attempted murder as defined in Section 16-3-29." 2010 Act No. 273, § 7.C. Thus, the General Assembly was aware of the prior offense of assault and battery with intent to kill and the case law defining the common law offense.

Under the South Carolina common law, assault and battery with intent to kill was defined as "an unlawful act of a violent nature to the person of another with malice aforethought, either express or implied." State v. Hinson, 253 S.C. 607, 611, 172 S.E.2d 548, 550 (1970). Although assault and battery with intent to kill was a common law offense, a statute provided for its punishment: "The crime of assault and battery with intent to kill shall be a felony in this state and any person convicted

of such crime shall be punished by imprisonment not to exceed twenty years." S.C. Code Ann. § 16-3-620 (2009).

In State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996), the South Carolina Supreme Court analyzed the offense of assault and battery with intent to kill and discussed the required elements of the offense. Based upon the traditional comparison of assault and battery with intent to kill to murder – that the offense would have been murder had the victim died – and the lack of a specific intent requirement for murder, the Court held "the logical inference is that, likewise, a specific intent is not required to commit" assault and battery with intent to kill. Id. at 14-15, 479 S.E.2d at 51. The Court explained that although the offense required both an intent to kill and malice, the offense did not require a specific intent to kill. Id. at 15, 479 S.E.2d at 51. Thus, the Court held it sufficient "if there is some general intent, such as that heretofore applied in cases of murder in this state." Id.

In State v. Sutton, 340 S.C. 393, 398, 532 S.E.2d 283, 286 (2000), the South Carolina Supreme Court refused to recognize the offense of attempted murder. The Court explained that an attempt to commit murder requires a specific intent to kill. Specifically, the Court stated "[i]n general, '[a]ttempt is a specific intent crime.'" Id. at 397, 532 S.E.2d at 285 (citing 21 Am.Jur.2d Criminal Law § 176 (1998)). Further, the Court explained "'[t]he act constituting the attempt must be done with the intent to commit that particular crime.'" Id. (quoting 21 Am.Jur.2d Criminal Law § 176). "In the context of an 'attempt' crime, specific intent means that the defendant consciously intended the completion of acts comprising the choate offense." Id. at 397, 532 S.E.2d at 285. The Court then distinguished attempted murder from assault and battery with intent to kill: "Attempted murder would require the specific intent to kill and conduct

towards that end. ABIK requires an unlawful act of violence to the person of another with malice. Clearly, each offense has an element the other does not." Id.

Repeatedly, South Carolina's appellate courts have held that attempt crimes require specific intent to complete the acts comprising the principal offense. See e.g., State v. Green, 397 S.C. 268, 283, 724 S.E.2d 664, 671-672 (2012); State v. Reid, 393 S.C. 325, 329, 713 S.E.2d 274, 276 (2011); State v. Evans, 216 S.C. 328, 332, 57 S.E.2d 756, 758 (1950); State v. Quick, 199 S.C. 256, 19 S.E.2d 101 (1942); State v. Atieh, 397 S.C. 641, 725 S.E.2d 730 (Ct. App. 2012); State v. Nesbitt, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001).

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). Under the plain meaning rule, courts should not alter the meaning of a clear and unambiguous statute. In re Vincent J., 333 S.C. 233, 235, 509 S.E.2d 261, 262 (1998) (citations omitted). Where the statute's language is plain and unambiguous, conveying a clear and definite meaning, the rules of statutory interpretation are not needed and courts should not impose another meaning. Id. (citing Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

The clear and unambiguous meaning of the statute concerning attempted murder is a requirement of specific intent: "A person who, *with intent to kill*, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." S.C. Code Ann. § 16-3-29 (emphasis added). Any statutory ambiguity is resolved by a review of

South Carolina's case law demonstrating the legislature intended to require a specific intent to kill when it created attempted murder. The Supreme Court had held repeatedly that attempted murder required a specific intent to kill. In fact, our appellate courts had long maintained that attempt crimes are specific intent crimes. The legislature was aware of South Carolina's case law concerning attempted murder specifically, and attempt crimes in general. Therefore, the legislature understood that by creating the crime of attempted murder, the legislature was requiring a showing of specific intent.

In State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), this Court held as much.[3] Relying upon prior case law and the plain and ordinary meaning of the statute, this Court held the newly created statutory offense of attempted murder requires the state prove a specific intent to kill. In King, this Court held that the attempted murder statute requires the state to prove the defendant acted with the specific intent to kill. Id. at 407-11, 772 S.E.2d at 191-93. In arriving at this conclusion, this Court relied on the language used by the legislature when it enacted the attempted murder statute. Id. This Court also relied on Sutton, supra, in which the Supreme Court refused to recognize a separate offense of attempted murder and stated that attempted murder would require specific intent. Id. "With this history of our courts requiring the state to prove specific intent as an element of attempt crimes, the legislature chose to include the phrase 'with intent to kill' in section 16-3-29. The legislature is presumed to know how the terms and phrases it uses in a statute have been interpreted in the past." Id. at 192, 772 S.E.2d at 409. In short, this Court held the legislature's use of the phrase "with intent to kill," coupled with the appellate courts' jurisprudence regarding attempt crimes, indicated the legislature "intended to

[3] On, March 28, 2016, the South Carolina Supreme Court granted the certiorari to review the case pursuant to the petitions filed by King and the state. Oral argument was held on September 7, 2016.

require the state to prove the specific intent to kill as an element of attempted murder." Id. at 193, 772 S.E.2d at 410.

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. State v. Brown, 103S.C. 437, 88 S.E.21 (1916); State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. McHoney, 344 S.C. 85, 97 544 S.E.2d 30, 36 (2001). "If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused," the trial judge may deny the motion for directed verdict. State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001); State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000); State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000). When the prosecution relies exclusively on circumstantial evidence, the trial judge must direct a verdict in the defendant's favor unless there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the defendant or from which his guilt may be fairly and logically deduced. State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011); State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). Likewise, a directed verdict is appropriate when the evidence produced "merely raises a suspicion the accused is guilty." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Arnold, 361 S.C. 386, 389-390, 605 S.E.2d 529, 531 (2004); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984); State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999). Our courts define suspicion as "a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963).

In Mitchell, 341 S.C. at 409, 535 S.E.2d at 127, the South Carolina Supreme Court held the lower court erred in failing to direct a verdict where the only evidence presented against the defendant was his fingerprint at the scene of the burglary. Likewise, the Lollis Court directed a

verdict of acquittal in the defendant's favor where the state presented no direct evidence that Lollis was involved in setting fire to his home. The only circumstantial evidence against Lollis was that his wife admitted to the arson, he had placed valuables in storage prior to the fire, he possessed a key to the storage unit, and he allegedly had financial troubles. Our state supreme court found this evidence insufficient. Lollis, 343 S.C. at 584-585, 541 S.E.2d at 256-257.

In State v. Odems, 395 S.C 582, 720 S.E.2d 48 (2012), the Court held the defendant was entitled to a directed verdict based upon a lack of substantial circumstantial evidence that the defendant was involved in the burglary. Although Odems was in a car with other individuals who admittedly burglarized a home, the state failed to provide substantial circumstantial evidence that Odems was present during the home invasion. The witness who saw individuals at the home claimed she saw two, not three as were found in the car. Fingerprints collected from the stolen goods did not match Odems, but matched the other individuals in the car. One of the individuals who admitted his involvement claimed Odems was picked up after the burglary at a gas station. Id. at 588, 720 S.E.2d at 51. As explained by the Odems Court, although our courts have abandoned the traditional circumstantial evidence jury charge, the language of the charge is instructive in making a directed verdict determination. The traditional charge provided:

> Every circumstance relied upon by the State be proven beyond a reasonable doubt; and ... all of the circumstances proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis.

Id. at 590, 720 S.E.2d at 52 (quoting State v. Hernandez, 382 S.C. 620, 626 n.2, 677 S.E.2d 603, 606 n.2 (2009).

In one of the Supreme Court's most recent circumstantial evidence case, State v. Bostick, 392 S.C. 134, 141, 708 S.E.2d 774, 778 (2011), the Court held the prosecution failed to present substantial circumstantial evidence of Bostick's guilt. Rather, the state's evidence was capable of

producing only a suspicion of Bostick's guilt. Id. Although the police found items belonging to the victim in a burn pile behind the home of Bostick's mother, the Court held no evidence linked Bostick to the evidence in the burn pile and the prosecution presented no testimony that Bostick had control over the burn pile. Id. at 137-141, 708 S.E.2d at 775-778. The only other evidence presented against Bostick was that he had a chemical pattern that matched gasoline on his shoes and gasoline was used to start the fire at the victim's home, and DNA from blood on Bostick's jeans excluded ninety-nine percent of the population, but the expert could not testify the DNA matched the victim. Id. at 142, 708 S.E.2d at 778.

The state failed to present direct or substantial circumstantial evidence that Appellant acted with the specific intent to kill Jenkins. The solicitor readily admitted in closing that he had no proof of Appellant's intent. Tr. 775, ll. 3-5. The state's evidence, at most, established general criminal intent because it involved the firing of a gun. The state failed to show any animosity between Appellant and Jenkins or any indication whatsoever that Appellant acted with a specific intent to kill Jenkins. By all accounts, the two were friendly. The state failed to present any medical evidence to support Jenkins' testimony that he was shot. Rather, the state relied solely upon Jenkins' testimony that he was shot by Appellant. Jenkins' testimony regarding the injury provided only that he suffered an injury to the leg with no indication of the severity of the injury. Even Jenkins admitted that Appellant did not aim directly at him. The state simply failed to carry its burden of providing the court with any direct or substantial circumstantial evidence of specific intent to kill Jenkins.

II. In violation of Appellant's federal and state constitutional right to require the state to prove every element of the offense beyond a reasonable doubt, the trial judge erred by instructing the jury regarding the doctrine of transferred intent for the offense of attempted murder, which requires a specific intent to kill, in light of the requirement of only general intent for murder.

Relevant facts

Charge conference

Initially, during the charge conference, the judge explained he planned to charge the jury that as far as "intent to kill" as an element of attempted murder was concerned "that a specific intent to kill is not an element of attempted murder, but there must be a general intent to commit serious bodily injury." Tr. 743, ll. 12-24; Tr. 744, ll. 2-4. During this discussion, the state requested the judge instruct the jury regarding "transferred intent." Tr. 744, ll. 5-11. Specifically, the state requested "that either if the jury thought that he was - - that the shooter was trying to kill Mr. Archie or harm Mr. Archie, and that he shot and hit Mr. Jenkins." Tr. 744, ll. 8-11. The judge responded that "a general intent to kill" would cover such a scenario. Tr. 744, ll. 12-13. Appellant objected, explaining there was no evidence that Jenkins was shot by the gun allegedly connected to Appellant. Tr. 744, l. 20 – Tr. 745, l. 3.

While having the conversation regarding the applicability of the doctrine of transferred intent with specific intent crimes, the trial judge reviewed the recent opinion of this Court in King, supra, with the lawyers. Tr. 745, l. 23 – Tr. 746, l. 20. The judge noted that per King, supra, the trial judge erred by charging the jury that a specific intent to kill was not an element of attempted murder. Tr. 746, ll. 2-5. The judge disagreed with the holding, and explained he did not "really understand the rational[e]." Tr. 746, ll. 7-20. After reading the case, the judge agreed

that he must charge the jury that a specific intent to kill would be required for attempted murder. Tr. 746, ll. 6-11.

Concerning transferred intent, the judge explained his opinion by way of analogy: "Common sense tells you that if I am shooting at a crowd of people trying to hit Mr. Finney, but he ducks at the perfect moment, and I hit the person behind him and either kill or almost kill him, I should be subject to being convicted for attempting to murder the person who was hit by the bullet, not just Mr. Finney, because he was wise enough to duck." Tr. 747, ll. 11-18. According to the judge, "It doesn't make any sense, but that's what that opinion says. I didn't say that. I didn't say it doesn't make any - - it makes perfect sense according to the Court of Appeals, so let's just leave it at that. Let's just say it makes no practical sense in some settings." Tr. 747, ll. 18-23. He concluded that although "as a practical matter," he believed transferred intent was an appropriate charge, he could not charge the jury with transferred intent based upon the requirement of specific intent. Tr. 747, l. 24 – Tr. 748, l. 2.

The state argued that the judge could and should instruct the jurors on transferred intent for the attempted murder charge. The solicitor wanted the judge to tell the jury "if they find the specific intent of the shooter to harm and kill and attempt to kill, and then it can be transferred one from the other." Tr. 748, ll. 14-18. The solicitor candidly admitted the evidence did not show "what was in the shooter's mind about whether he wanted to kill Mr. Archie, Mr. Jenkins, or both." Tr. 748, ll. 18-20.

After a short break, the judge ruled that although this court "said that a specific intent to kill is necessary," this Court had not said "there has to be a specific intent to kill any certain person." Tr. 749, ll. 12-17. Picking up on his earlier thread regarding "common sense," the judge ruled a "transferred intent charge in some fashion would be appropriate" as "common

sense has to prevail at some point." Tr. 749, ll. 17-20. The judge espoused his belief that it would "quite frankly ... defy common sense that someone could shoot. Just in any given case, shoot into a crowded room of people meaning to kill person A, but hits person Z. And you can't be found guilty of that crime by the reason of transferred intent." Tr. 751, ll. 1-6. Appellant reiterated his objection, and noted there was no evidence Appellant "was aiming at Mr. Archie." Tr. 749, ll. 20-21; Tr. 749, ll. 22-24; Tr. 751, ll. 7-10. The judge clarified that he intended to charge the jury that "if a person with malice aforethought attempts to kill another person, but by mistake injures or kills a different person, and the defendant still has the specific intent to kill." Tr. 749, ll. 15-20.

State's closing argument

While explaining to the jurors that count one of the indictment concerned the murder of Archie, the solicitor told the jurors that "[m]urder is the malicious killing of another human being with malice aforethought." Tr. 774, ll. 12-14. He defined malice as "evilness, wickedness, meanness, mean spiritedness." Tr. 774, ll. 15-17. He explained that in order for the jury to find Appellant killed Archie "illegally and intentionally," the jury would have to find the presence of malice. Tr. 774, ll. 17-20. He noted, "You've got to have malice. You've got to have intent." Tr. 774, ll. 19-20. Immediately following this argument, the solicitor told the jurors the judge would instruct them on "something called transferred intent." Tr. 774, ll. 20-21. He continued, "Transferred intent means that if you find that [Appellant] was really trying to shoot Mr. Archie, but he also hit Mr. Jenkins, that transferred intent, that intent to fire that weapon transfers, and he can be found guilty under that theory of the law as well. That's for you to consider." Tr. 774, l. 22 – Tr. 775, l. 2.

Jury instructions

Initially, the judge charged the jury with the elements of murder. He explained that state must present "proof beyond a reasonable doubt, that the defendant killed another person with malice aforethought." Tr. 806, ll. 9-14. He defined malice as "hatred, ill will or hostility towards another person." Tr. 806, ll. 14-16. He further denied malice as "the intentional doing of a wrongful act without just cause or excuse, and with an intent to inflict an injury or under circumstances that the law would infer an evil intent." Tr. 806, ll. 16-19. The judge explained that malice aforethought could be "either express or it can be implied." Tr. 807, ll. 1-2. "Express malice may be shown when a person speaks words that express hatred or ill will for another person. Or when the person prepared beforehand to do the act which was later accomplished." Tr. 807, ll. 7-11. On the other hand, the judge told the jurors, malice "may be implied from conduct showing a total disregard for human life." Tr. 807, ll. 12-13. "Implied malice may also arise when the act is done with a deadly weapon," including a pistol. Tr. 807, ll. 13-23.

Thereafter, the judge began instructing the jury on attempted murder. According to the judge, the state was required to prove Appellant "with the intent to kill, attempted to kill another person with malice aforethought express or implied." Tr. 808, ll. 4-10. He reiterated his earlier instruction regarding malice, including the instruction permitting an inference of malice from the use of a deadly weapon. Tr. 808, l. 11 – Tr. 809, l. 10. The judge then instructed the jury regarding specific intent:

> Now, ladies and gentlemen, on the issue or the count of attempted murder, proof of attempted murder requires proof of a specific intent to kill. Specific intent does not mean an intent to kill a specific person, but rather that the defendant consciously intended the completion of acts that comprise the act of attempted murder. And the word intent as I will tell you in more detail later, means intending the result which actually occurs and not accidentally or involuntary.

Tr. 809, l. 11-20.

The judge told the jury that intent could be "shown by acts and conduct of the defendant and other circumstances from which you may naturally and reasonably infer intent." Tr. 809, ll. 21-24. These circumstances included "[e]vidence of the character of the act, the character of the instrument used, the manner in which it was used, the purpose sought to be accomplished and the resulting wounds or injuries." Tr. 809, l. 24 – Tr. 810, l. 4. He explained yet another way the jurors could infer intent – "when it is demonstrated ... that the defendant voluntarily, and willfully commits an act, the natural tendency of which is to destroy another person's life." Tr. 810, ll. 5-9.

Turning to transferred intent, the judge instructed:

> Now, ladies and gentlemen, I further charge you that if a person with malice aforethought attempts to kill another person, but by mistake injures or kills a different person, then that person based on your view of the evidence, has the specific intent to kill. The intent to kill in that regard would be merely transferred from the original person the defendant attempted to kill, to the person who was actually killed or injured.

Tr. 810, ll. 9-18.

Jury deliberations

During the deliberations, the jury first requested the written statements of four witnesses, which had not been admitted as evidence. Tr. 822, ll. 12-16. The judge instructed the jurors that they had all of the evidence available to them in the jury room. Tr. 823, l. 18 – Tr. 824, l. 4. The jury returned, asking for all testimony from the court reporter and "the legal definition for murder." Tr. 825, ll. 9-12. Seeking clarification, the judge asked if the jurors wanted to hear the testimony of all seventeen witnesses. Tr. 827, ll. 17-19. The foreperson explained the jurors did not understand the testimony would be replayed audibly, but thought they could receive written transcripts. Tr. 827, l. 22 – Tr. 829, l. 11. Thereafter, the judge charged the jurors with

definition of murder, including an instruction on general criminal intent. Tr. 829, l. 12 – Tr. 832, l. 4. Shortly after this instruction, the jury returned its guilty verdicts. Tr. 833, ll. 7-19.

Discussion

As previously mentioned, this Court held attempted murder requires the state to prove a specific intent to kill. King, supra. "In the context of an attempt crime, specific intent means the defendant intended to complete the acts comprising the underlying offense." State v. Reid, 393 S.C. 325, 329, 713 S.E.2d 274, 276 (2011). "The act constituting the attempt must be done with intent to commit that particular crime." State v. Sutton, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000)(internal quotation omitted). The defendant must "consciously intend" the completion of acts comprising the offense. Id. "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." Id. at 397 n.5, 532 S.E.2d at 285 n.5.

Understanding the nature of specific intent makes clear that the transferred intent doctrine does not apply to attempt crimes. See State v. Hinton, 630 A.2d 593, 600-02 (Conn. 1993); see also People v. Smith, 124 P.3d 730, 739-40 (Cal. 2005) ("The mental state required for *attempted* murder is further distinguished from the mental state required for murder in that the doctrine of 'transferred intent' applies to murder but not to attempted murder."). In Connecticut, attempted murder requires specific intent. Hinton, 630 A.2d at 601. "Proof of an attempt to commit a specific offense requires proof that the actor intended to bring about the elements of the completed offense. Id. "If the completed offense includes an intent to kill a particular person, the attempt to kill must also include an intent to kill that same person." Id.

"Transferred intent is not needed, however, to insure that a defendant is prosecuted for attempted murder." Id. at 600-02. "A defendant can still be prosecuted for his intent to kill and

conduct aimed at killing the intended victim whether a third party is killed or no one is even injured." Id. "The doctrine of transferred intent, generally considered a necessary fiction, is therefore not necessary to prosecute for attempted murder a defendant whose aim was poor." Id. The Hinton court further reasoned that the rule of lenity required this result. Id. See also State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) ("Finally, when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant.").

This Court should reverse Appellant's conviction and sentence for attempted murder based upon the trial judge's erroneous instruction. See State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010) ("To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant."); State v. Lee-Grigg, 374 S.C. 388, 405, 649 S.E.2d 41, 50 (Ct. App. 2007) ("A trial court has a duty to give a requested instruction that is supported by the evidence and correctly states the law applicable to the issues."); State v. Buckner, 341 S.C. 241, 247, 534 S.E.2d 15, 18 (Ct. App. 2000) ("In making a harmless error analysis, [the Court's] inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered.").

The judge's instructions in the case were confusing, at best. According to the judge, in order for them to find Appellant guilty of attempted murder, the state was required to prove Appellant "with the intent to kill, attempted to kill another person with malice aforethought express or implied." Tr. 808, ll. 4-10. Concerning specific intent, the judge told the jurors that "specific intent" did *not* mean an *intent to kill a specific person*, but rather that the defendant consciously intended the completion of acts that comprise the act of attempted murder. Tr. 809, l. 11-20. Additionally, the judge told the jurors that intent, even the specific intent to kill, could

be transferred. Tr. 810, ll. 9-18. He incorrectly told the jurors that if a person with malice aforethought attempts to kill another person, but by mistake injures or kills a different person, then that person has the specific intent to kill. Tr. 810, ll. 9-18. This instruction conflated malice with a specific intent to kill. He then compounded the problem by permitting the jurors to transfer that "intent to kill," which he had effectively defined as malice, from the original person the defendant attempted to kill, to the person who was actually killed or injured. Tr. 810, ll. 9-18.

The instructions permitted the jurors to transfer general criminal intent for murder to an unintended victim, Jenkins. However, Appellant was not charged with the murder of Jenkins, he was charged with the attempted murder of Jenkins, which requires a specific intent to kill. Thus, the state was required to prove that Appellant acted specifically to kill Jenkins. The judge erred in charging the jury that the state was not required to prove that Jenkins was the intended target, the judge erred in charging the jury that general intent for murder could be transferred and would satisfy the element of specific intent to kill, and the judge erred in equating malice and specific intent.

III. The trial judge erred in failing to grant Appellant's motion for mistrial, or instruct the jury to disregard expert testimony regarding ballistics, where the police officer who found the shell casings at the scene did not testify and no other witnesses could testify that the shell casings introduced at trial or tested by the expert were the shell casings found at the scene, which violated Appellant's rights under the Sixth Amendment's Confrontation Clause.

Relevant facts

Testimony

One of the first police officers to testify was Misty Lee. She responded to a call at Club Miami around 3 a.m. on March 16, 2014. Tr. 447, l. 22 - Tr. 448, l. 25. When she arrived, she heard another officer announce that he had the suspect in custody. Tr. 450, ll. 1-4. While on her way to where the suspect was being held, she saw a gun down in the valley of the sand berms in the field adjacent to Club Miami. Tr. 451, ll. 7-13. After ensuring that the officer had the suspect secure, Lee seized the gun. Tr. 452, l. 13 – Tr. 453, l. 3.

Shortly thereafter, the state called Michelle Eichenmiller, an expert firearms examiner, to testify. Eichenmiller received the gun found by Lee from the Sumter County Sheriff's Department. Tr. 507, ll. 2-6. Along with the gun, she received six unfired cartridges in the magazine. Tr. 509, ll. 19-22. Eichenmiller also received three fired shell casings from Sumter County. Tr. 513, ll. 2-6. She identified State's Exhibit #34 as containing the three cartridge casings that she examined. Tr. 513, ll. 6-12. According to Eichenmiller, the three fired shell casings were consistent in construction with the cartridge cases submitted with the firearm. Tr. 513, ll. 17-19. After examining the fired cartridge casings and the test round she fired from the firearm, Eichenmiller opined the fired cartridge cases were fired by that firearm. Tr. 514, ll. 19-22.

Later, the state called Derron Soloman with the Sumter County Sheriff's Office to testify. Soloman was crime scene investigator at the time of Appellant's trial. Tr. 559, ll. 1-9. He also served as the evidence technician for the department. Tr. 559, ll. 16-24. According to Soloman, he received a heat sealed envelope containing three fired shell casings, which were marked as State's Exhibit #34, from SLED. Tr. 562, ll. 12-16. The envelope was maintained inside the evidence room. Tr. 562, ll. 17-20. Soloman did not respond to the scene and was not the evidence technician at the time. Tr. 568, ll. 19-24. In fact, Jim Atkinson was the evidence technician at the time. Tr. 569, l. 1; Tr. 569, ll. 13-17. The reports indicated Mike Bean collected the fired shell casings. Tr. 569, ll. 2-7. However, at the time of trial, Bean was no longer employed by the department. Tr. 569, ll. 8-12.

Motion for mistrial

At the conclusion of Soloman's testimony, the state informed the judge he had a "matter for the court." Tr. 575, ll. 22-23. The prosecutor explained that defense counsel was insisting that the state call Bean as a witness. Tr. 576, ll. 15-17. However, the solicitor claimed Bean was "under medical orders not to participate in any work related activities regarding his former job as the evidence technician" in light of his post-traumatic stress disorder diagnosis. Tr. 576, ll. 18-25. Thereafter, the solicitor asked the judge to allow him "to get the evidence that this witness, that this last witness as his official duties into evidence, without having to call Mr. Bean." Tr. 577, ll. 3-7.

Defense counsel explained that he was not aware that Bean would not be called as a witness until during the trial. Tr. 579, ll. 2-3. He further noted that Bean collected the shell casings. Tr. 579, ll. 10-13. The location of the shell casings was critical to the case. Tr. 579, ll. 14-15. Bean's failure to appear meant that defense counsel could not question him about the

location of the shell casings or whether the casings sent to SLED were the casings that were collected at the scene. Tr. 579, ll. 15-18. In light of the state's assurances that another officer would be able to provide the missing elements of the chain of custody, the judge explained he would not be able to rule on the admissibility until that officer testified. Tr. 580, ll. 15-19. Specifically, the judge explained he could not deny Appellant's rights "to confront the accusers of one of whom is Mr. Bean, by virtue of his job." Tr. 581, ll. 14-22. The judge assured the judge that another witness would be able to lay the foundation for the crime scene, the collection [of] evidence, the photographs, and several other matters that are relative to this case." Tr. 582, ll. 1-9.

Appellant did not object when the shell casings were offered into evidence. Tr. 563, ll. 4-7. Appellant acknowledged this fact when discussing his motion for mistrial, but noted that he was under the impression that the people collecting the evidence would be available and called as witnesses. He was not made aware of the fact that the state had no intention of calling Bean until that very moment. Tr. 582, ll. 15-21. The state and the judge accepted Appellant's explanation. Tr. 583, ll. 8-23.

In camera testimony & argument

Greg Hawkins was the lead investigator on the case. Tr. 585, l. 25 – Tr. 586, l. 2. Hawkins claimed he observed Bean take photographs of the shell casings. Tr. 587, ll. 2-7. He was able to describe where the casings were found in the parking lot. Tr. 587, l. 12 – Tr. 588, l. 7. When shown photographs of the shell casings (State's Exhibits #20, 21, 22), Hawkins explained those were photographs of the shell casings found in the parking lot. Tr. 590, l. 23 – Tr. 591, l. 2. Hawkins also claimed that he located the casings and placed the markers "so they'd be easier to locate the casings as Bean came along to process them." Tr. 591, ll. 8-15. However,

Hawkins did not collect the shell casings – Bean actually collected the evidence. Tr. 596, ll. 16-22. Hawkins could say where casings were found, but could not tell how the evidence was collected or if the evidence transported to SLED and later presented in court was the same evidence collected at the scene. Tr. 598, ll. 1-6.

Appellant moved for a mistrial based on the state's failure to call Bean as a witness. Tr. 600, ll. 16-22. Appellant explained that Bean had collected the spent shell casings and the state's presentation of that evidence to the jury without Bean's presence violated Appellant's right to confront his accusers. Tr. 601, ll. 7-22. Appellant made clear that Bean's absence broke the chain of custody of the spent shell casings. Tr. 603, ll. 1-8.

The judge made clear he understood Appellant's motion

> If the chain between the photograph or identifying on the ground, which I think Investigator Hawkins can do, if the chain between the collection of the case and delivery to SLED for testing is broken, or is unsatisfactory in the eyes of the law, should there be a mistrial or should I instruct the jury to disregard the testimony of the fire examiner.

Tr. 603, l. 22 – Tr. 604, l. 6.

Additional testimony

Solomon told the jurors that the property voucher, marked as State's Exhibit #37, showed the three shell casings and coordinated those casings to photographs and markers. Tr. 609, ll. 1-11. The actual containers for the casings indicated the casings were collected by Bean and placed into those containers by Bean. Tr. 611, l. 21 – Tr. 611, l. 6. Per the chain of custody report, James Atkinson, took the casings to SLED. Tr. 611, ll. 16-20.

When Hawkins arrived at Club Miami, he found three spent shell casings in the parking lot. Tr. 654, l. 21 – Tr. 655, l. 5. Markers were placed by the shell casings. Tr. 655, ll. 18-20. Investigator Mike Bean photographed the shell casings. Tr. 656, ll. 1-2. According to Hawkins,

Bean collected the shell casings. Tr. 658, ll. 6-11. Hawkins claimed Bean would have followed "[t]he standard procedure" in collecting the shell casings by placing them into "little tins" and "would turn those into the evidence room." Tr. 658, ll. 12-19.

Hawkins claimed that he had marked the shell casings with evidence markers when he found them at the scene. Tr. 695, ll. 4-6. He acknowledged Officer Robert Burnish's contrary testimony that Bean had marked the evidence. Tr. 695, ll. 7-10. When asked to explain the inconsistency, Hawkins testified

> I know when I saw the casings, I had my markers with me, so I marked them at that time. Now whether Bean used different numbers and remarked them later, I have no idea. But I know that I used my markers to initially mark them, so they would be able to easily find where those casings were at again.

Tr. 695, ll. 12-18. However, he claimed the markers in the photograph appeared to be "the same type of markers" that he used. Tr. 695, ll. 19-23. He was unable to say definitively if the markers were the ones he had set. Tr. 696, ll. 1-3.

According to Burnish, Bean marked the shell casings and collected them. Tr. 632, l. 21 – Tr. 633, l. 7. He was adamant that Hawkins had not marked the location of the shell casings. Tr. 643, ll. 8-12. "Collecting means after the photograph has been taken, he would have picked up the evidence. In this case the shell casings, placed them in a plastic bag and turned them in to evidence." Tr. 633, ll. 8-13. In fact, Burnish claimed that he was with Bean when Bean collected the shell casings. Tr. 638, ll. 15-21. Although Burnish claimed he was present when the shell casings were discovered at the scene, he was unable initially to say who actually discovered them. Tr. 632, ll. 18-20; Tr. 634, ll. 16-18. Upon further questioning, he claimed Bean found the shell casings. Tr. 641, ll. 19-24. Burnish was confident that Bean had found the shell casings. Tr. 641, l. 23 – Tr. 642, l. 6. Bean alerted him to the rounds and told him that he had found the rounds. Tr. 642, ll. 12-17.

Argument & ruling on mistrial motion

Appellant reiterated his motion for mistrial based on the state's failure to present Bean as witness in light of his having collected the shell casings from the scene and being the only witness who could say the casings transported to SLED were the same ones collected from the scene. Tr. 717, ll. 14-22. Appellant noted the importance of the firearms expert's testimony to the state's case. Tr. 718, ll. 2-10. Appellant further explained Bean's absence denied him his constitutional right to cross examine his accuser. Tr. 719, ll. 14-22.

The state argued he was only required to show that the investigation was handled in a reasonable manner and that the evidence was collected in a manner in which it was normally collected. Tr. 719, ll. 1-9. Oddly, the state insisted the shell casings were "non-fungible item[s] with specific identifying features. Which they did, they marked each one individually, took pictures of their location. And then collected them and sent them to SLED." Tr. 719, ll. 9-13.

The judge denied the motion for mistrial explaining

> I don't think that the chain evidence has been damaged enough to require a mistrial. Obviously where this came up is when the SLED agent was called out of order because she was here in the morning. And that's not an unusual thing. I am not faulting anyone for that, but that's what happened. But when it became apparent that Mr. Bean wasn't going to be here to testify about what he did with them, the question was going to be then, what other witnesses would perhaps cover that sufficiently to have a suitable chain of custody.

Tr. 720, ll. 1-12. According to the judge, Burnish and Hawkins adequately covered it for admissibility purposes. As a result, the judge denied the mistrial motion. Tr. 720, ll. 13-16. Further, the judge denied the request to instruct the jury to disregard the firearms examiner's testimony. Tr. 720, ll. 16-21.

Closing argument

The solicitor relied upon the ballistics evidence in his closing argument. According to the solicitor, the jury knew Appellant had fired the gun three times because the gun had been matched to the shell casings by the firearms expert from SLED. Tr. 760, l. 24 – Tr. 761, l. 3. According to the solicitor, there was "[n]o question about that. There's not going to be any controversy about that. This gun fired 3 times." Tr. 761, ll. 3-5. To explain inconsistencies in statements presented by various witnesses, the prosecutor asked the jurors to "look at the physical evidence. Look at the markers on the ground. Look at what the police officers found when they got there." Tr. 768, ll. 14-18. According to the solicitor, the evidence markers proved "[t]he gun was moving. It was moving in a straight line, because the shell casings that were kicked out of that gun, one here, one here, one here. It's not manipulation by the police. They didn't manipulate the evidence. This is what they found." Tr. 768, ll. 19-24. To support this point, the solicitor asked the jurors why the shell casings were found "20 or 25 feet away from the door" when "the gun that fired those shell casings [were] 500 feet out here in this field." Tr. 769, ll. 7-13.[4] The solicitor emphasized that Appellant "was arrested 20 feet from the gun which matched the three shell casings." Tr. 772, ll. 10-11.

Motion for new trial

After the jury returned its verdict, Appellant renewed his motion for a mistrial in the form of a motion for new trial. The court recognized that Appellant's motion was based upon the fact that Bean was not called to testify regarding "where the shell casings were found, and how they were collected and sent to the evidence technician." Tr. 841, ll. 7-22. Had Appellant known

[4] In attempted to refute reasonable doubt in the case, the solicitor argued the case was about Appellant being "arrested 20 feet from the gun which matched the three shell casings." Tr. 771, l. 22 – Tr. 772, l. 11.

Bean was not going to testify, he would have objected to the testimony of the ballistics expert, who testified out of order, due to the lack of a "crucial link in the chain of custody." Tr. 841, l. 23 – Tr. 842, l. 5. In response, the state argued the law required only that the prosecution "put in enough evidence for the court to know there's no bad faith on the part of the state, and that the evidence that's going to be admitted was substantially like - - substantially like or supported by the exhibit that's being sought to be introduced." Tr. 842, l. 22 – Tr. 843, l. 3. According to the prosecutor, the state fulfilled this obligation "through the other scene investigators who were there and who corroborated all the information that was shown the photographs." Tr. 843, ll. 3-6.

The judge denied the motion, holding the case law provided that "the proof not need to negate all evidence or suggestion of tampering. Simply the evidence has to be sufficient enough to [e]stablish that the items were in fact what they were purported to be." Tr. 844, ll. 3-6. The judge admitted he was "concerned about that" until he "heard the testimony of Lieutenant Burnish, Investigator Hawkins." Tr. 844, ll. 9-11. The judge further admitted that when the state presented testimony from Soloman, "there was some uncertainty." Tr. 844, ll. 12-14. However, the judge determined "that the testimony as a whole established that the gunshots were fired from an automatic or a semiautomatic weapon. The spent chambers or the spent casings were ejected. And they were in the general area where witnesses identified the defendant as being." Tr. 844, ll. 16-21. Concerning the "crucial part" of the chain of custody evidence, the judge acknowledged the state had to prove "those shell casings that Mr. Hawkins identified as being on the ground, ... Burnish identified as being on the ground, are the same ones that were delivered to the evidence room, sent to [SLED] for testing. Sent back to this courtroom and presented to the jury." Tr. 844, l. 22 – Tr. 845, l. 4. Additionally, the judge acknowledged "it wasn't a

perfect chain," but determined that "under the law in this state, the evidence establishes how those items were obtained, and how they were handled in a sufficient manner for the jury to reasonably conclude that they were what the state claimed them to be." Tr. 845, ll. 4-10.

Discussion

It is axiomatic that a criminal defendant has the right to confront his accusers. U.S. Const. Amend. VI; S.C. Const. Art. I, § 14; Bullcoming v. New Mexico, 564 U.S. 647 (2011); Melendiaz v. Massachusetts, 557 U.S. 305, 313-314 (2009). The South Carolina Supreme "Court has long held that a party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable." State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007). Although the evidence must be clear as to who handled the evidence and what was done with it between the taking and the analysis, testimony from each custodian is not a prerequisite to establishing a chain of custody sufficient for admissibility. Benton v. Pellum, 232 S.C. 26, 33-34, 100 S.E.2d 534, 537 (1957); Sweet, 374 S.C. at 7, 647 S.E.2d at 206. If other evidence establishes the identity of those who handled the evidence and "reasonably demonstrates the manner of handling of the evidence," courts are willing to fill gaps in the chain of custody due to an absent witness. Sweet, 374 S.C. at 7, 647 S.E.2d at 206. "Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete." State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001). This Court has found evidence inadmissible "only where there is a missing link in the chain of possession because the identity of those who handled the [substance] was not established at least as far as practicable." Id. Police need not account for every transfer of the fungible evidence, but must demonstrate a reasonable assurance the condition of the item remained the same from the time it was obtained until its introduction at trial. State v. Hatcher,

392 S.C. 86, 94, 708 S.E.2d 750, 754 (2011)(quoting State v. Price, 731 S.W.2d 287, 290 (Mo. Ct. App. 1987).

"The right to a fair trial by an impartial jury in a criminal prosecution is guaranteed by the Sixth Amendment to the U.S. Constitution and by Article I, § 14, of the S.C. Constitution." State v. Stewart, 278 S.C. 296, 303, 295 S.E.2d 627, 630-631 (1982). Although the decision to grant or deny a mistrial is within the sound discretion of the trial court, the appellate court must reverse the ruling if the decision was an abuse of discretion amounting to an error of law. State v. Dial, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013) (citing State v. Wiley, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010). While a mistrial should be granted only when "absolutely necessary" and when a defendant can show error and resulting prejudice, a mistrial must be ordered when the incident "is so grievous that the prejudicial effect can be removed in no other way." Id. Another way of describing when a mistrial must be granted is when there is "manifest necessity." State v. Bilton, 156 S.C. 324, 153 S.E. 269 (1930). "The less than lucid test is ... whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment." State v. Prince, 279 S.C. 30, 32-33, 301 S.E.2d 471, 472 (1983).

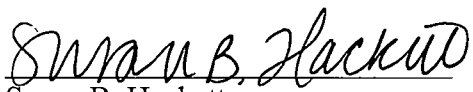
The state failed to present a critical witness to establish the chain of custody of the three shell casings found at the scene – Bean. None of the witnesses presented were able to say that the three shell casings transported to SLED, tested by the firearms' expert, and introduced at trial were the same three shell casings found at the scene. Contrary to the solicitor's argument that the shell casings had unique identifying features, nothing could be further from the truth. The shell casings looked like every other shell casing of the same type. Nothing on the shell casings identified them

as the same ones in the photographs or the same ones collected by Bean. As such, the state failed to establish the chain of custody as far as practicable.

In light of the testimony by the firearms' examiner concerning the "match" between the spent shell casings and the gun, the judge was obligated to grant Appellant's mistrial motion. The jury simply could not ignore the testimony as it was one of the few pieces of concrete evidence connecting Appellant to the charged offenses. The examiner's testimony carried with it the imprimatur of expertise, and therefore, more trustworthy. At a minimum, the judge should have instructed the jury to disregard the testimony by the firearms' examiner due to the state's failure to present a chain of custody for the spent shell casings and the significance of the evidence presented based upon the spent shell casings.

CONCLUSION

As to Issue I, Appellant respectfully requests this Court direct a verdict of acquittal in his favor or remand and direct the circuit court to issue a directed verdict of acquittal in the case. As to Issues II and III, Appellant respectfully requests this Court reverse his convictions and sentences and remand for a new trial.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of November, 2016.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
NOV 21 2016
SC Court of Appeals

Appeal from Sumter County

George C. James, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RODNEY R. GREEN,

APPELLANT

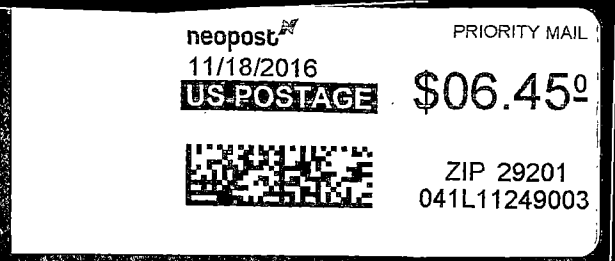
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert C. Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Rodney R. Green, #335829, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 18th day of November, 2016.

Susan B. Hackett
Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 18th day of November, 2016.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.



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