STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Honorable Robert E. Hood, Circuit Court Judge
Appellate Case Tracking No. 2015-001905

The State, Respondent,

vs.

Michael Juan Smith, Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608

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

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Honorable Robert E. Hood, Circuit Court Judge
Appellate Case Tracking No. 2015-001905

The State, Respondent,

vs.

Michael Juan Smith, Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608

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

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUES ON APPEAL

I. The trial court did not err in charging the jury based on the felony murder rule where the charge was correct and applicable. Further, any possible error is entirely harmless.

II. The trial court did not err in denying Appellant's motion for a directed verdict on attempted murder because the State provided sufficient direct and circumstantial evidence of all the required elements to send the case to the jury. Further, the argument on appeal is not preserved for review.

III. The trial court did not err in denying Appellant's motion for a mistrial during closing arguments because the court properly sustained Appellant's objection and issued a curative instruction which cured any possible prejudice.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

On October 13, 2013, Appellant, a known Gangster Killer Bloods gang member, fired a shot in the direction of a crowd of innocent persons. His bullet struck Martha Childress, a freshman at the University of South Carolina, in the chest. (T.233; 252-253; R. 233; 252-253). Appellant's bullet entered Ms. Childress' chest at the seventh rib, passed through the diaphragm and liver, and passed into the spinal canal. (T.610; R. 610). Appellant's bullet transected the spinal cord causing paralysis from the waist down. (T.611; R. 611).

Appellant went to Five Points with a group of people, including: Appellant, Ryan Ellison, Shante Bethel, Asia Bethel, and Taqayya White. (T.421; 424; 530; R. 421; 424; 530). Another group also visited Five Points that night. The group included Byron Tucker, Daquan Samuel, and Donnell Woodard. (T.500-501; R. 500-501). The two groups had several instances of interaction during the night in Five Points. (State's Exhibit 74).

Numerous video cameras are set up in and around Five Points in Columbia. The videos show the events of the night as they unfold. Appellant, dressed in a tan coat and tan pants, is seen throughout the videos with his girlfriend, Shante Bethel, who is wearing white pants, Ryan Ellison, a tall individual wearing a white "Aeropostale" t-shirt, and two other females. (T. 530; State's Exhibits 50; 58; 59; 74; R. 530). Appellant is seen moving a gun from one pocket of his coat into another, and then keeps his hand on the pocket with the gun throughout the videos. (T.293; State's Exhibit 74; R. 293). Several individuals are also seen in the video that appear to have multiple confrontations with Appellant and his group. (T.293; R. 293). They are Daquan Samuel, Byron Tucker, and Donnell Woodard. Daquan Samuel is wearing a white collared shirt. (T. 500-501; Defense Exhibit 2; R. 500-501). Byron Tucker is wearing a black t-shirt. (T.500;

Defense Exhibit 3; R. 500). Finally, Donnell Woodard is wearing a white t-shirt with "Bustin It." (T.501; Defense Exhibit 2; R. 501).

Captain Thorton testified the recorded video was important to the investigation into the shooting that changed Martha Childress' life. (T.289; R. 289). He traced the steps of the various groups, Appellant's group and Byron Tucker's group, through Five Points, highlighting their interactions and exchanges. (T.291-293; 296; 298-299; 302-303; State's Exhibit 59; State's Exhibit 70; State's Exhibit 74; R. 291-293; 296; 298-299; 302-303). He highlighted Appellant's possession of the firearm. (T.293-294; R. 293-294). He then highlighted videos showing the shooting and Appellant attempting to flee from the scene. (T.304-305; 307-308; State's Exhibit 60; State's Exhibit 63; State's Exhibit 64; State's Exhibit 65; State's Exhibit 70; State's Exhibit 74; R. 304-305; 307-308). State's Exhibit 74 ends as Martha Childress tragically falls to the pavement, shot by Appellant's bullet. (State's Exhibit 74).

Officer McLaughlin with the Columbia Police Department was on shift in the Five Points area in the early morning hours of October 13, 2013. While watching, he heard apparent gunshots come from the fountain area. He testified he heard one or two shots. (T.342; R. 342). After the shots, he saw a "young man running in the sidewalk dodging other students or people on the sidewalk." (T.342; R. 342). Officer McLaughlin indicated the individual "had his right hand in his right coat pocket, and it looked like he was holding something from bouncing. It was a heavy object." (T.343; R. 343). Officer McLaughlin caught up to the individual, and moved him into a doorway. Then, he felt the front pocket of the individual and felt the pistol. (T.344-345; R. 344-345). Officer McLaughlin pulled the individual's hand out of his pocket, which still held the gun, and took the pistol from him. (T.345; R. 345). Officer McLaughlin indicated the pistol was still warm to the touch. (T.346; R. 346).

Captain Vincent Goggins, the supervisor of the Midlands Gang Task Force, testified law enforcement keeps a "gang database." (T.858-859; R. 858-859). He testified Mr. Tucker, Mr. Samuel, and Mr. Woodard are not documented gang members. (T.860-861; R. 860-861). However, he testified Appellant is a "self-admitted gang member" since the age of fifteen. (T.861; R. 861). Further, Captain Goggins identified several pictures showing Appellant making known Gangster Killer Bloods gang signs. (T.861-862; State's Exhibit 79; State's Exhibit 80; R. 861-862).

Every member of Appellant's group testified at trial. None of them saw anyone pull a weapon or fire a shot at Appellant. Several of them specifically testified they did not see anyone with a weapon in Five Points that night and several indicated Appellant was the only one who fired a shot that night.

Ryan Ellison testified he and the other members of Appellant's group went down to Five Points to go to a club, but it was closed when they arrived. (T.424-426; R. 424-426). He indicated he saw no guns the whole night, and did not know Appellant had a gun. (T.426; R. 426). After stopping to talk with some girls, he walked to catch back up to the rest of the group who were about to leave. He saw several individuals, including one holding his hands up. He "felt like it was some animosity or some tension going on." (T.430-431; R. 430-431). He could not tell what they were doing, but again indicated he did not see any guns. (T.432; R. 432). He did indicate Appellant and the other group were not close to each other. (T.444; R. 444). As he was walking toward his group and the car, he heard gunshots, ducked, and ran. (T.433; R. 433). Appellant was running in front of Ellison, but was stopped by an officer. Ellison, with a "high odor of an alcoholic beverage about his breath and person and . . . unsteady on his feet," was detained and ultimately charged with disorderly conduct. (T.271; 434; 436; R. 271; 434; 436).

Asia Bethel, another member of Appellant's group and the niece of Shante Bethel, testified the group she was with wanted to go to one club, but it was closed. Instead, they went to Five Points. While there, she stated several guys were trying to talk to her and the other girls in her group. She said they kept walking and didn't want to engage them. (T.460; R. 460). She indicated that she said "they looked broke" and kept walking. The individuals then called her or others a "bitch." Asia explained she and Shante did not want to tell Appellant that the individuals called them a "bitch" because Appellant would get mad. (T.464-463; R. 463-464). Asia heard gunshots, but testified she did not know who fired a gun. (T.464; R. 464).

Taqayya White testified while she and the others in Appellant's group were in Five Points several "dudes approached" looking to talk to the girls. The girls would not respond and the individuals "got mad and started calling us names and stuff." (T.486; R. 486). She explained the guys called them "bitches." (T.487; R. 487). Ms. White stated Appellant "was amped" and asking whether the other guys were talking to the girls in his group. (T.487; R. 487). She then testified Appellant and the other individuals that tried to talk to the girls in Appellant's group exchanged words. (T.488; R. 488).

Significantly, Ms. White indicated she had been threatened through Facebook and text messages regarding her testimony in court. (T.492; R. 492). She explained Appellant's family threatened her. (T.493; R. 493). Ms. White gave a statement to law enforcement in which she indicated she saw Appellant shoot a gun the night in question in Five Points. (T.493; R. 493). She also explained no other person had a gun. During her testimony, she specifically identified Appellant as "the only person [she] saw with a gun shooting that night." (T.494; R. 494).

Shante Bethel, Appellant's girlfriend on the night Martha Childress was shot, testified she was aware Appellant had a gun when they went to Five Points. (T.531; R. 531). She stated it

upset her he had the gun with him and she knew he was not supposed to be carrying a gun. (T.532; R. 532). She indicated a group of guys tried talking with the girls in her group. Sometime after, her group with Appellant was near the Exxon in Five Points and the guys that tried talking with them were on the fountain side. She indicated the two groups got into an argument and that words were exchanged. (T.535; R. 535). She indicated none of the things being said to her group or Appellant were threatening, just disrespectful. (T.550; R. 550).Shante testified Appellant was the only person she saw with a gun that night. (T.536; R. 536). She admitted in her statement to police that she said she saw Appellant fire a gun. She also said in her statement that no one else fired a gun. (T.538; 542; R. 538; 542). However, in her testimony she said she did not see anyone shoot a gun. (T.542; R. 542).

Appellant admitted in his testimony to brining a weapon and knowing it was wrong for him to have the gun. (T.936; R. 936). He further acknowledged he had the gun because of violence in Five Points. (T.936; R. 936). Appellant testified several guys walked by and said "slob" because "they already figured out I was a gang member." (T.937; R. 937). However, he later claimed he was not "beaten in" the Bloods gang but had a lot of friends in the gang. (T.937; R. 937). Appellant indicated he saw the guys again later as his group was trying to leave. He testified someone said they had a gun and he heard a shot. (T.937-938; R. 937-938). He admitted firing one shot back. (T.938; R. 938).

On cross-examination, Appellant stated he was a "friend of the Bloods." (T.943; R. 943). He stated he had to cock the gun to put a round in the chamber before he fired. (T.945; R. 945). Appellant admitted had the gun even though they were originally not planning to go to Five Points, but instead planned to go to a club in a different location. (T.951; R. 951). Appellant admitted drinking and smoking weed that night. (T.956; R. 956). Appellant was asked about the

direction he fired his gun and he responded: "I didn't aim in particular." (T.957; R. 957). Appellant acknowledged he was "drunk and high," and admitted it was illegal for him to be carrying the gun. (T.963; R. 963).

The State also played some jail phone recordings, including ones in which Appellant used another inmates pin number in an attempt to avoid the calls being discovered. (State's Exhibit 89). During the phone calls, in addition to claiming Martha Childress was faking and not seriously injured, he also attempts to get several witnesses to testify in a specific way to help his case. (State's Exhibit 89; T.967-980; R. 967-980). Further, there appear to be multiple threats made during the course of the phone calls, threats to the victim's family and to other potential witnesses. (State's Exhibit 89; 967-968; 976-977; R. 967-968; 976-977). Appellant admitted he used another inmate's pin number for phone calls. Appellant was asked: "So you didn't want us to hear about how you were telling people what to say, what to do, threats, all that, right?" He responded: "Yes, ma'am, but they didn't say what I told them to say." (T.992; R. 992).

Byron Tucker, a member of the group who had interactions with Appellant's group in Five Points, testified he was in Five Points with Daquan Samuel and Donnell Woodard. (T.500-501; R. 500-501). Mr. Tucker made certain before they left for Five Points that no one had a gun because he did not need any drama because he was trying to get his commercial driver's license. (T.502; 512; R. 502; 512). He testified Mr. Samuel and Mr. Woodard attempted to talk to a group of girls—the girls from Appellant's group. (T.504; R. 504). According to Mr. Tucker, one of the girls made a comment about the guys not having enough money to talk to them. He indicated Mr. Samuel pulled some cash out of his pocket and the girls turned around. He indicated Appellant turned to walk back in their direction and "the first shot rang out." (T.504; R. 504). Mr. Tucker explained he did not shoot at anyone because he did not have a gun that night

in Five Points. (T.505; R. 505). Mr. Tucker admitted Mr. Woodard is in a gang that is a rival of the Bloods. He also admitted before they arrived in Five Points, which he stated was Blood territory, Mr. Woodard used the term "slob" which is disrespectful to Bloods. (T.509; R. 509). He reiterated no one in his group had a gun, and especially he did not have a gun. (T.512; 517; R.512; 517).

Michael Painter, a first-time visitor to Columbia and the Five Points area who did not know any of the individuals involved, was near the fountain in Five Points a little after 2:00 A.M. on October 13, 2013. He indicated a black male in a tan jacket and tan pants, who is identified by others as Appellant, was standing on the corner. Two black males walked up to him, and then he saw a muzzle flash. (T.363; R. 363). Mr. Painter testified the muzzle flash came from the man in the tan clothing. (T.364; R. 364). He indicated the muzzle flash came in the direction of the people at the fountain, and the man in tan that fired the shot ran in the opposite direction. (T.364; R. 364). Mr. Painter testified he did not see anyone else with a gun. (T.365; R. 365).

Ellison Dew, a long-time friend of Martha Childress came to Columbia to visit Ms. Childress and attend the State Fair and the Hunter Hayes concert. (T.243; R. 243). After the concert the two of them and some other friends went to Five Points in Columbia. After hanging out and getting something to eat, they were going to leave. (T.243-244; 256-257; R. 243-244; 256-257). While waiting near the fountain in Five Points for a cab to take them back to Ms. Childress' dormitory, Ms. Dew heard a gunshot, and Martha Childress "fell down." (T.244; 257; R. 244; 257). According to Ms. Dew, Martha "said she couldn't feel her legs and she was really scared." (T.245; R. 245).

Martha Childress testified after she and Ms. Dew went to the fair, they decided to meet some friends at another dormitory and then walk to Five Points. (T.256; R. 256). After eating and hanging out, they decided to go to the fountain where you put your name on a list and waited for a cab. (T. 257; R. 257). Ms. Childress "heard this really loud noise" and "just fell to the ground." (T.257; R. 257). She held out her hand to Ms. Dew to help her up, but she could not move her legs. (T.257; R. 257). It was only after she was placed into the ambulance that Ms. Childress learned she had been shot. (T.258; R. 258). Ms. Childress indicated it became really hard to breathe and she blacked out, not remembering anything until being in the hospital. (T.258-259; R. 258-259). She remained in ICU for about a week, couldn't sleep, in horrible pain, and having nightmares. (T.259; R. 259). After being released from the hospital, Ms. Childress went to the Shepherd Center in Atlanta, which specializes in rehabilitation for brain and spinal cord injuries. (T.259; R. 259).

Appellant's bullet is still lodged in Martha Childress' spine. (T.667; R. 667). In addition to being paralyzed from the waist down, Martha Childress has a nick in her lung and had to have her liver resected because of Appellant's bullet. (T.260; R. 260). Every four to six hours for the remainder of her life, Martha Childress will have to insert a tube into her bladder to drain the urine. She has to set a timer to wake at night to do the intermittent catheterizations. Additionally, after every meal for the remainder of her life she will have to use rectal clears to remove stool. (T.669; R. 669). "[T]he bottom half of her body no longer works." (T.669; R.669). As Mr. Tucker summed up the night in Five Points stating: "[Appellant] has really no regard for human life." (T.506; R. 506).

ARGUMENT

I. The trial court did not err in charging the jury based on the felony murder rule where the charge was correct and applicable. Further, any possible error is entirely harmless.

Appellant contends the trial court erred in charging the jury that it could infer malice if the jury concluded the attempted murder was the proximate direct result of the commission of a felony. He asserts the charge is improper when the underlying felony is the possession of a weapon by a person convicted of a felony. Additionally, he appears to contest the language of the charge given, as well as its ramifications after the Supreme Court's decision in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). The charge given is entirely proper under the circumstances of this case. In addition, the arguments regarding the language of the charge given and the application of Belcher are clearly not preserved for review on appeal. Further, even if not proper, any error in giving the charge was entirely harmless when the evidence overwhelmingly establishes malice existed.

Preservation

Initially, the arguments raised by counsel related to the wording of the court's jury instruction on the "felony murder doctrine" and the application of the Supreme Court's decision in Belcher are not preserved for review on appeal. Appellant never contested the charge on the basis that it violated the tenets of Belcher. Further, once the charge was given, Appellant never objected to the wording of the charge as being an incorrect statement of the "felony murder doctrine." As a result, these issues are not preserved for review on appeal. See e.g., State v. Stahlnecker, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010) ("For an issue to be properly preserved it has to be raised to and ruled on by the trial court."); State v. Haselden, 353 S.C. 190,

196, 577 S.E.2d 445, 448 (2003) (holding a defendant may not argue one ground at trial and another on appeal).

Merits

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)). "In general, the trial court is required to charge only the current and correct law of South Carolina." Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). "'A request to charge a correct statement of the law on an issue raised by the indictment and the evidence presented at trial should not be refused.'" State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (quoting State v. Austin, 299 S.C. 456, 458, 385 S.E.2d 830, 831 (1989)).

"A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Mattison, 388 S.C. at 478, 697 S.E.2d at 583 (citations omitted). "The law to be charged must be determined from the evidence presented at trial." State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "'In reviewing jury charges for error, [the Court] must consider the court's jury charge as a whole in light of the evidence and issues presented at trial.'" Brandt, 393 S.C. at 549, 713 S.E.2d at 603 (quoting State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct.App.2013)).

South Carolina, unlike the majority of other jurisdictions, has not codified the "felony murder doctrine." The South Carolina Supreme Court in Gore v. Leeke, 261 S.C. 308, 199 S.E.2d 755 (1973), discussed the doctrine and recognized its establishment in common law. While the Court in Gore spoke frequently of crimes *malum in se*, it did not place a restriction on application of the "felony murder doctrine" to only those crimes. Specifically, the Court

indicated in the case: "Under the facts of this case we are not called upon to decide whether or not the felony-murder rule should, or should not, be applied as to every homicide committed in connection with the commission of Any and Every felony whether or not inherently or foreseeably dangerous." Id. at 318, 199 S.E.2d at 759. The Supreme Court had occasion to consider the appropriate jury charge for the "felony murder doctrine" in State v. Norris, 285 S.C. 86, 328 S.E.2d 339 (1985) *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) and State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). The Court explained:

> **The law says if one intentionally kills another during the commission of a felony, the implication of malice may arise.** If facts are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

Id. at 92, 328 S.E.2d at 343 (emphasis added). The Court placed no restriction on the type of felony and did not require that it be a felony *malum in se*.

In South Carolina, both possession of firearm during commission of a violent crime under section 16-23-490 of the South Carolina Code and possession of a firearm or ammunition by a person convicted of a violent crime under section 16-23-500(B) of the South Carolina Code are classified as Class F felonies. See S.C. Code Ann. § 16-1-90(F) (Supp. 2015). Accordingly, the trial court in this case correctly explained to the jury:

> Now, the law also allows you to infer malice if you conclude that the attempted murder was a proximate direct result of the commission of a felony. And for that regard, two of the gun charges, possession of a weapon by a person being convicted of a crime of violence and possession of a weapon by a person being convicted of a violent felony would be felonies under our law.
>
> You can imply that malice existed if a person in the commission of a felony at the time of the attempted fatal blow, if

> one attempts to kill another during the commission of a felony, the inference of malice may arise.

(T.1149; R. 1149).[1] The trial court's charge was a complete and correct statement of the law as taken directly Norris. There was no reason to differentiate the type of felony as that is not required under South Carolina's common law.[2]

Even if South Carolina were to distinguish some felonies from others and not apply the "felony murder doctrine" to any and every felony, the Court in Gore provided the best analysis for arriving at the determination of whether a particular felony in a particular case would provide the basis for the doctrines application. In Gore, the Court quoted language from the North Carolina Supreme Court in analyzing its felony murder statute:

> In our view, and we so hold, any unspecified felony is within the purview of G.S. s 14-17 if the commission or attempted commission thereof creates any substantial foreseeable human risk and actually results in the loss of life. This includes, but is not limited to, felonies which are inherently dangerous to life. Under this rule, any unspecified felony which is inherently dangerous to human life, or **foreseeably dangerous to human life due to the circumstances of its commission**, is within the purview of G.S. s 14-17.

State v. Thompson, 185 S.E.2d 666, 672 (1972) (emphasis added). The Court in North Carolina did not require a felony to be *malum in se*; instead, it required only the felony be "inherently dangerous to human life, or **foreseeably dangerous to human life due to the circumstances of its commission.**"

---

[1] The court previously charged: "If facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would simply be an evidentiary fact to be considered by you, the jury, along with the other evidence in the case. And you may give it the weight and credibility -- may give it the weight you decide it should receive." (T.1148; R. 1148).

[2] Appellant cites to courts around the country which have placed a limitation on the type of felony required for application of the "felony murder doctrine." It is significant to note that the vast majority of these cases arise from courts interpreting statutes defining the doctrine and not from a judicial based common law doctrine as in South Carolina.

In the instant case, the circumstances of the felony—possession of a weapon by a person convicted of a violent crime—being committed by Appellant, a member of the Gangster Killer Bloods gang, at the time he fired the gun into a crowd of innocent persons certainly made it foreseeably dangerous to human life. As the trial court concluded:

> I believe that the carrying of a firearm in these conditions with the Defendant's criminal history **put everybody in an extreme risk of danger** that was present in the area that night.
>
> . . .
>
> So the difference in this situation is it's not like we have somebody in the community lawfully carrying a firearm that chooses to, you know, use it or to defend themselves. This is an individual who based upon his prior criminal history would not be allowed to carry a firearm period in state court or in federal court. And so I -- you know, I think the unlawful carrying of a pistol by a convicted felon in our community in a situation such as a crowd in Five Points and in a situation where, according to his own testimony, **he knew was violent**, he had been beaten up and assaulted rises to a different level, and I will charge the version of felony murder.

(T.1048-1049; R. 1048-1049) (emphasis added). The trial court clearly recognized that it is inherently dangerous for a convicted felon to be in possession of a firearm, especially in an area he knows can be violent. The circumstance is not the same as carrying a weapon after a law abiding citizen has received the training and instruction to obtain a concealed weapon permit. The circumstances of this case certainly bear out the judge's concern—a gang member with a violent criminal history, drunk and high, illegally carrying a gun, firing the illegally possessed weapon into a crowd of innocent persons while aiming in the direction of a member of a rival gang, in an area that Appellant himself has described as violent—and demonstrate that under the particular circumstances of this case the felony being committed was inherently dangerous.

Further, even if it were error to provide the "felony murder doctrine" charge to the jury, any error is entirely harmless in light of the evidence of malice in the instant case. "Errors, including erroneous jury instructions, are subject to harmless error analysis." State v. Belcher,

385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009). "When considering whether an error with respect to a jury instruction was harmless, we must 'determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.'" State v. Middleton, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (citing State v. Kerr, 330 S.C. 132, 144–45, 498 S.E.2d 212, 218 (Ct. App. 1998)).

> In making a harmless error analysis, our 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. Thus, whether or not the error was harmless is a fact-intensive inquiry.

Id. (quotation marks and citation omitted). As the Court found in Middleton, "the only conclusion established by the evidence is that Appellant was guilty of attempted murder." Id. at 319, 755 S.E.2d at 436. In Middleton, the defendant was firing a gun into a vehicle, while in this case, Appellant was firing a weapon directly at a crowd of people. As in Arnold v. State, "it is clear that the [erroneous jury charge][3] beyond a reasonable doubt did not contribute to the verdict in this case." 309 S.C. 157, 170-171, 420 S.E.2d 834, 841 (1992).

> "'Malice' is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong." State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998). "It is the doing of a wrongful act intentionally and without just cause or excuse." Tate v. State, 351 S.C. 418, 426, 570 S.E.2d 522, 527 (2002). Malice can be inferred from conduct which is so reckless and wanton as to indicate a depravity of mind and general disregard for human life. State v. Mouzon, 231 S.C. 655, 662, 99 S.E.2d 672, 675 (1957). In the context of murder, malice does not require ill-will toward the individual injured, but rather it signifies "a general malignant recklessness of the lives and safety of others, or a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief." Id. at 662, 99 S.E.2d at 675–76 (quoting State v. Heyward, 197 S.C. 371, 375, 15 S.E.2d 669, 671 (1941)).

[3] The State again asserts that the charge was a correct and proper statement of the law in South Carolina and only assumes, arguendo, that the charge in this case was erroneous.

In re Tracy B., 391 S.C. 51, 69, 704 S.E.2d 71, 80 (Ct. App. 2010). The South Carolina Supreme Court recognized long ago:

> If one were to fire a loaded gun into a crowd, . . . **the law would infer malice** from the **wickedness** of the act: so also the law will imply that the prisoner intended the natural and probable consequences of his own act, as in the case of shooting a gun into a crowd, the law will imply, from the **wantonness** of the act, **that he intended to kill someone** . . . .

State v. Smith, 33 S.C.L. 77, 80–81, 2 Strob. 77 (S.C. App. L. 1847) (emphasis added).

In the instant case, Appellant's actions clearly demonstrate "a general malignant recklessness of the lives and safety of others" as well as "conduct which is so reckless and wanton as to indicate a depravity of mind and general disregard for human life." Again, Appellant, a drunk and high gang member, illegally brought a weapon to the Five Points area of Columbia, and then fired the weapon in the direction of a rival gang member and directly at a crowd of innocent individuals. He testified he "didn't aim in particular," and instead, just fired in the direction of a crowd of innocent people. (T.957; State's Exhibit 74; R. 957). Afterward, he fled the scene. (T.957-958; R. 957-958). Appellant's actions provided overwhelming evidence of malice, and the jury instruction, even if erroneous, did not contribute to the jury's determination he acted with malice. The testimony and video of Appellant's actions established malice well beyond any inference provided by the jury instruction.

Accordingly, this Court should find the jury instruction was a correct and proper statement of the law in South Carolina. Further, the Court should find the instruction applicable to the instant case because Appellant's actions as a felon in possession of a firearm under the circumstances of this case were inherently dangerous. Finally, even if error to give the charge, any error was entirely harmless in light of the overwhelming evidence of malice and the fact the jury instruction could not have contributed to the jury's determination.

II. The trial court did not err in denying Appellant's motion for a directed verdict on attempted murder because the State provided sufficient direct and circumstantial evidence of all the required elements to send the case to the jury. Further, the argument on appeal is not preserved for review.

Appellant maintains the trial court erred in denying his motion for a directed verdict because the State failed to prove Appellant had the specific intent to kill the victim and the transferred intent doctrine does not apply. Initially, this issue was never raised to the trial court and is not properly preserved for review on appeal. Even if preserved, the issue is without merit. The crime of attempted murder does not require specific intent. Even if it does require specific intent, it would only require a specific intent to kill someone and not a specific intent to kill the ultimate victim.

Preservation

First, the issue is not properly preserved for review on appeal. In making a motion for directed verdict after the State's case, the defense indicated: "we would move for a directed verdict on the charges under Rule 19 regarding the lack of evidence about the shooting, who was ultimately involved."(T.868; R. 868). The defense never mentioned an argument that transferred intent did not apply, nor did it argue the State failed to prove Appellant had the specific intent to kill the ultimate victim. After Appellant presented his case, he changed his argument for directed verdict, but still did not raise the particular issues being raised on appeal. Instead he maintained:

> They've shown no -- this is a specific intent crime. They've shown no specific intent to kill their -- what I understand their theory to be is that he recklessly fired a weapon into a crowd. That's what I understand their theory to be. Your Honor, we would submit that that doesn't meet the specific intent to commit a murder under the statute.

(T.1036; R. 1036). The new argument does not maintain transferred intent should not be allowed, nor does it contend the charges should have been brought as attempted murder charges listing

others as the victim instead of Ms. Childress, the ultimate victim of Appellant's malicious actions. As a result, the issue as raised in Appellant's brief is not preserved for review on appeal. See State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("A party cannot argue one ground for a directed verdict in trial and then an alternative ground on appeal."); State v. Jordan, 255 S.C. 86, 93, 177 S.E.2d 464, 468 (1970) (stating issues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review).[4]

Merits

Initially, the crime of attempted murder should not be considered a specific intent crime, and, therefore, should only require a general intent to kill. The South Carolina Supreme Court is currently considering the issue of whether attempted murder requires a specific intent to kill or only a general intent to act with malice aforethought.[5] When the South Carolina Supreme Court determines attempted murder, like its predecessor ABIK, does not require proof of a specific intent to kill, the State will only be required to prove a general intent and Appellant's issue is without merit. Additionally, once it is determined to be a general intent crime, the theory of "transferred intent" is certainly applicable as it was for a common law charge of ABIK. See State v. Fennell, 340 S.C. 266, 276, 531 S.E.2d 512, 517 (2000) ("A person who, acting with malice, unleashes a deadly force in an attempt to kill or injure an intended victim should anticipate that the law will require him to answer fully for his deeds when that force kills or injures an unintended victim. Accordingly, we hold that the doctrine of transferred intent may be

[4] Even if the second directed verdict motion could be found sufficient to raise any issue related to the specific intent to kill, the arguments were not raised during the initial motion for a directed verdict and should be considered waived by not raising known arguments at the first available opportunity.

[5] At the time of this brief, the Supreme Court has held oral arguments in the case of State v. Raheem King, Appellate Case Number 2015-001278, and a decision is pending. The issue is whether by making attempted murder a statutory crime, did the legislature intend it to require proof of a specific intent to kill as opposed to retaining the common law requirements of ABIK, which only required a general intent to act with malice aforethought. See State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996).

used to convict a defendant of ABIK when the defendant kills the intended victim and also injures an unintended victim.").

If the South Carolina Supreme Court upholds the Court of Appeals decision in King, and finds the statutory attempted murder charge requires proof of a specific intent to kill, it does not eliminate the applicability of the doctrine of "transferred intent." In Fennell, the South Carolina Supreme Court cited with approval the case of Ochoa v. State, 981 P.2d 1201 (Nev.1999) and its rationale. Fennell, 340 S.C. at 276, 531 S.E.2d at 518. In Ochoa, the Court specifically applied "transferred intent" to all crimes where an **unintended victim** is harmed as a result of a defendant's **specific intent to harm an intended victim** regardless of whether the intended victim is injured. In that case, the Nevada Court found it was appropriate to charge defendant who killed the intended victim and injured a bystander with a stray bullet with murder and attempted murder. Ochoa, 981 P.2d at 1205 ("Since there was sufficient evidence that Ochoa intended to kill Ortiz, that intent may be transferred to the unintended victim, Smith. As Smith did not die, the appropriate charge was attempted murder."). This is the same circumstance relating to attempted murder as is present in the instant case. Appellant intended to kill one of three members of a rival gang, and instead shot an innocent, unintended victim. The appropriate charge in this case, as in Ochoa, was attempted murder.

The case relied upon primarily by Appellant to argue that the doctrine of "transferred intent" should not apply, State v. Hinton, 630 A.2d 593 (Conn. 1993), is clearly distinguishable based on the statutory scheme employed in Connecticut. In Hinton, the jury returned guilty verdicts against Hinton on the charges of attempted murder as well as assault in the first degree as it related to a single victim. Id. at 599. The Court found these verdicts were inconsistent based on the **statutory scheme** established in Connecticut. Specifically, the Court noted both the

intentional murder statute and the first two subsections of the assault in the first degree statute specifically provide for the doctrine of "transferred intent" to apply. The general attempt statute, under which attempted murder would be prosecuted in Connecticut as opposed to our specific statute for attempted murder, did not include an express provision allowing for the doctrine of "transferred intent" to apply. The Court found, based on statutory construction and the rule of lenity, that a provision allowing the doctrine of "transferred intent" should not be read into the attempted murder statute. Id. at 601-602. The analysis and reasoning of Hinton are therefore inapposite to the situation in South Carolina because we do not have statutory "transferred intent."

In South Carolina, the reasoning of Ochoa is clearly more applicable. This Court should find the doctrine of "transferred intent" applicable under the attempted murder statute, find the State presented evidence demonstrating Appellant's malicious intent, and find the trial court in this case properly allowed the charge of attempted murder of the victim Ms. Childress to be presented to the jury.[6]

[6] Appellant's alternative is for the State to charge him with three counts of attempted murder based on his firing of the weapon at the three individuals especially because it is unclear, even through Appellant's testimony, at which individual he was shooting. The State would then also charge him with assault and battery of a high and aggravated nature under section 16-3-600(B)(1) (Supp. 2015). Appellant is thereby requesting to be subjected to a possible sentence of 110 years instead of 30 years as indicted by the State. This is unnecessary if the Court finds the doctrine of "transferred intent" applicable as the malice towards the three individuals would then apply to the victim in this case.

III. The trial court did not err in denying Appellant's motion for a mistrial during closing arguments because the court properly sustained Appellant's objection and issued a curative instruction which cured any possible prejudice.

Appellant contends the trial court erred in failing to grant a mistrial based on statements made by the assistant solicitor during closing arguments. The trial court sustained Appellant's objection and issued a curative instruction. This cured any error and the trial court correctly determined a mistrial was not necessary. Further, the issue is not preserved for review on appeal.

Preservation

During closing arguments, the assistant solicitor indicated to the jury that if they did not believe Appellant guilty the State would "give him back all of his stuff and put him back out on the street." (T.1133; R. 1133). Appellant immediately objected, and the objection was sustained. (T.1133; R. 1133). The trial court issued a curative instruction, explaining: "Disregard the last statement, ladies and gentlemen." (T.1133; R.1133). Appellant did not contemporaneously move for a mistrial. After the State completed closing argument, the court took a break to allow jurors to stand up and stretch prior to giving his charge. During this time, Appellant did not object to the curative instruction and did not move for a mistrial. (T.1134; R. 1134). It was only after the jury charge was given that Appellant raised his motion for a mistrial. During the motion, however, Appellant never indicated why the curative instruction was insufficient to cure any error and prejudice. (T.1163-1164; R.1163-1164).

As the Supreme Court has explained:

> If the trial judge sustains a timely objection to testimony and gives the jury a curative instruction to disregard the testimony, the error is deemed to be cured. No issue is preserved for appellate review if the objecting party accepts the judge's ruling and does not **contemporaneously** make an additional objection to the sufficiency of the curative charge or move for a mistrial.

State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 911–12 (1996) (emphasis added); see also, State v. Greene, 330 S.C. 551, 561, 499 S.E.2d 817, 822 (Ct. App. 1997) ("A contemporaneous objection to the sufficiency of a curative charge must be made to preserve the issue for appellate review."); State v. Moyd, 321 S.C. 256, 263, 468 S.E.2d 7, 11 (Ct. App. 1996) ("[I]f the objecting party accepts the ruling of the trial [court] and does not contemporaneously object to the sufficiency of a curative instruction or move for mistrial, the error is deemed cured, and the issue is not preserved for appeal."). It is unlikely the issue is properly preserved for review on appeal.

Merits

Even if properly preserved, the trial court correctly determined any error in the closing argument did not warrant the extreme remedy of a mistrial. A trial judge's ruling on a motion for a mistrial will not be disturbed absent an abuse of discretion amounting to an error of law. State v. Sparkman, 358 S.C. 491, 495, 596 S.E.2d 375, 377 (2004); State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000). This Court favors the exercise of wide discretion of the trial judge in determining the merits of such motion in each individual case. See State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 851 (Ct. App. 1999).

A mistrial should be declared only when absolutely necessary. In order to receive a mistrial, the defendant must show error and resulting prejudice. Harris, 340 S.C. at 63, 530 S.E.2d at 628; State v. Ward, 374 S.C. 606, 612, 649 S.E.2d 145, 148 (Ct. App. 2007). "A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons." Patterson, 337 S.C. at 227, 522 S.E.2d at 851 (citing State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989); State v. Kirby, 269 S.C. 25, 236 S.E.2d 33 (1977) (power of court to declare mistrial ought to be used with greatest caution under urgent

circumstances, and for very plain and obvious causes)). Granting of a mistrial is a serious and extreme measure which should only be taken when the prejudice can be removed no other way. State v. Edwards, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007) (citing State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005)). "The granting of a motion for a mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way." State v. Inman, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011).

While the statement by the assistant solicitor may be improper, not all improper closing arguments, however, mandate reversal. "A new trial will not be granted unless the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." State v. Huggins, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997). When making this determination, the Court must "review the alleged impropriety of argument in the context of the entire record." State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981). Further, this Court "will defer to the discretion of the trial judge, whose ruling will not ordinarily be disturbed." State v. South, 285 S.C. 529, 536, 331 S.E.2d 775, 779 (1985).

"Generally, a curative instruction is deemed to have cured any alleged error." State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 850 (Ct. App. 1999); State v. Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996); see also, State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998) (instruction to disregard inadmissible evidence is usually viewed as having cured the error in its admission); State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996) (if trial judge sustains timely objection to testimony and gives jury curative instruction to disregard testimony, error is deemed to be cured); State v. White, 371 S.C. 439, 445, 639 S.E.2d 160, 163 (Ct. App. 2006) ("A

curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission.").

First, the curative instruction given by the trial court, especially when juxtaposed to the instructions he had previously given the jury, cured any prejudice such that a mistrial was not necessary. When the statement was made by the assistant solicitor, Appellant's counsel immediately objected. The trial court immediately sustained the objection, told the solicitor to "move on," and instructed the jury "[d]isregard the last statement, ladies and gentlemen." (T.1133; R.1133).

The trial court made it abundantly clear to the jury that the arguments of counsel are not evidence in the case, and the jury should not consider any testimony he tells them to disregard. During his opening instructions to the jury he specifically told them:

> First, the State will be given an opportunity to make an opening statement. **The opening statements that you will hear this morning are not evidence.**
>
> . . . .
>
> Following the completion of the testimony, the attorneys will again have an opportunity to make what is called a closing statement or summation to you. This is an opportunity for the attorneys to summarize their respective points of view. **Again, these arguments are not evidence.**

(T.203-204; R.203-204) (emphasis added). The trial court continued by explaining what is not evidence for the jury to consider, and specifically instructed them that if he tells them to disregard testimony they are bound by their oath to disregard that information:

> Some things that you will hear during this trial are not evidence, and you must not consider them as evidence. These are number one, **the statements and the arguments of the attorneys are not evidence.** Number two, the questions and the objections of the attorneys are not evidence. **Number three, any testimony that I tell you to disregard. So at the end of something, if I sustain an objection and I tell you to disregard that testimony, you are required by your oath to disregard that information.**

(T.206; R.206) (emphasis added).

Further, at the end of trial, almost immediately after the solicitor's comments, the trial court instructed the jury again:

> You are to consider only the competent evidence before you. If there is **anything that I ordered stricken from the record in this case, you must disregard it**.

(T.1136; R.1136) (emphasis added). He continued:

> Now, **some things are not evidence, and you must not consider them as evidence.** Number one, the statements and **the arguments of the attorneys**; number two, the questions and the objections of the attorneys; number three, **anything that I've told you to disregard**.

(T.1142; R.1142) (emphasis added). The curative instruction, especially in light of the court's instructions to the jury on what they may and may not consider cured any possible error in this case.

In reviewing the comments by the assistant solicitor, in light of the entire record, it is clear the comments were not so inflammatory as to render the trial unfair and require the extreme measure of a mistrial. There is overwhelming evidence in this case establishing Appellant's guilt. Further, the comments by the solicitor consisted of one two-line sentence out of about 25 pages of closing argument by the State. The single comment, beyond a reasonable doubt, did not infect this trial with unfairness as to make Appellant's conviction a denial of due process.

CONCLUSION

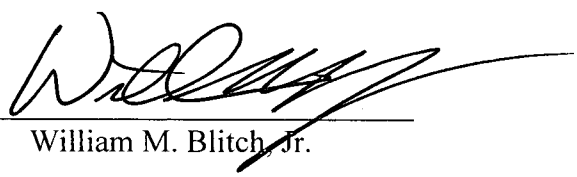
For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608

DANIEL E. JOHNSON
Solicitor, Fifth Judicial Circuit

BY: 
William M. Blitch, Jr.

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

ATTORNEYS FOR RESPONDENT

January 25, 2017

RECEIVED
JAN 25 2017
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Honorable Robert E. Hood, Circuit Court Judge
Appellate Case Tracking No. 2015-001905

The State, Respondent,

vs.

Michael Juan Smith, Appellant.

CERTIFICATE OF COUNSEL

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

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

BY: _____
William M. Blitch, Jr.

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

ATTORNEYS FOR RESPONDENT

January 25, 2017