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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY

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SC Court of Appeals

Court of General Sessions

The Honorable R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2016-002288

THE STATE,

Respondent,

v.

JACOB DANIEL DROTNING,

Appellant.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

ARGUMENT 6

Appellant's Double Jeopardy argument is not preserved for appellate review. Error preservation concerns aside, Appellant's prosecution for attempted murder and criminal domestic violence of a high and aggravated nature did not violate the Double Jeopardy Clause where each offense requires proof of distinct elements the other does not.

CONCLUSION 11

TABLE OF AUTHORITIES

Cases:

Blockburger v. United States, 284 U.S. 299 (1932) 7

Missouri v. Hunter, 459 U.S. 359 (1983) 8

Rutledge v. United States, 517 U.S. 292 (1996) 8

State v. Cuccia, 353 S.C. 430, 578 S.E.2d 45 (Ct. App. 2003) 7

State v. Fleming, 254 S.C. 415, 175 S.E.2d 624 (1970) 7

State v. Norton, 286 S.C. 95, 332 S.E.2d 531 (1985) 8

State v. Patterson, 324 S.C. 5, 482 S.E.2d 760 (1997) 7

State v. Plath, 277 S.C. 126, 284 S.E.2d 221 (1981) 6

State v. Thomason, 355 S.C. 278, 584 S.E.2d 143 (Ct. App. 2003) 7

State v. Woods et al., 189 S.C. 281, 1 S.E.2d 190 (1939) 6

Statutes:

S.C. Code Ann. §16-3-29 .... 8, 9

S.C. Code Ann. §16-25-20 8

S.C. Code Ann. §16-25-65 8

S.C. Code Ann. §16-25-65(A) 8

S.C. Const. art. I, C 7

U.S. Const. amend. V 7

STATEMENT OF ISSUE ON APPEAL

Appellant's Double Jeopardy argument is not preserved for appellate review. Error preservation concerns aside, Appellant's prosecution for attempted murder and criminal domestic violence of a high and aggravated nature did not violate the Double Jeopardy Clause where each offense requires proof of distinct elements the other does not.

STATEMENT OF THE CASE

Appellant was indicted during the July 2014 term of the Grand Jury for Oconee County for attempted murder (2014-GS-37-00742) and arson in the second degree (2014-GS-37-00743). Appellant was later indicted during the May 2015 term of the Grand Jury for Oconee County for criminal domestic violence of a high and aggravated nature (CDVHAN) (2015-GS-37-00441) and malicious injury to property (2015-GS-37-00442). Appellant proceeded to a jury trial before the Honorable R. Scott Sprouse from October 17-20, 2016, in Walhalla, South Carolina. At the conclusion of trial, the jury found Appellant guilty as indicted. He was sentenced by Judge Sprouse to thirty years' imprisonment for attempted murder, twenty years' imprisonment for arson in the second degree, ten years' imprisonment for CDVHAN, and five years' imprisonment for malicious injury to property, with Appellant's arson sentence to be served consecutive to his sentence for attempted murder, with all other sentences running concurrently. Appellant timely filed a notice of appeal and subsequently submitted a brief. This Brief of Respondent follows.

STATEMENT OF FACTS

Background Facts

Katie Cook and Appellant were married in April of 2009 and moved to South Carolina in May of 2013. R. p. 71. Cook testified that by May of 2014, she and Appellant's relationship had significantly deteriorated. R. p. 73. She testified, "We were like strangers in the house. He had just lost his job. I just lost my job. Neither one of us was working so we couldn't pay bills or rent. There was a lot of resentment." R. p. 73. Cook stated that, as a result of an incident with Appellant on May 16, 2014, she suffered burns to sixty percent of her body. R. p. 76. Cook recalled of the incident:

> I was in the hallway, and I looked down at my arms and they were glowing. And I was terrified. And when I looked up, I saw him standing there. And he didn't look concerned, and he didn't look worried. And he didn't even look panicked. He didn't look anything. And that's when I knew that if I was going to get help. I had to get it myself.

R. p. 76. Cook identified Appellant as the individual who watched her burning on the ground. R. p. 77. Cook subsequently ran to a neighbor's home and passed out on their porch. R. p. 76.

When she arrived at the burn unit at the Joseph M. Still burn center in Augusta, Georgia, Cook had third-degree burns on sixty percent of her body. R. p. 80. Cook suffered burns so severe that her organs went into shock and began to shut down. R. p. 80. She noted her wounds "should have been fatal." R. p. 80. Cook was in a medically induced coma for four months. R. p. 80. She subsequently needed forty-seven surgeries for her wounds and incurred medical expenses in excess of ten million dollars. R. p. 81.

On the evening of May 16, 2014, Isaac Lewis of the Seneca Fire Department responded to the scene of a fire. R. pp. 88-89. At the time of Lewis's arrival, he was told to take over responsibility for treating Cook. R. p. 89. Lewis observed Cook had extensive second-degree and third-degree burns covering an area from the bottom of her head to the bottoms of her feet. R. p.

90. Lewis stated Cook and Appellant were the only people at the home when he arrived. R. p. 90. Lewis asked Cook if she remembered what happened and, after hesitating, she replied. "Yes, I do. He set me on fire. Why would he do this to me? I'm a nice person. Why would he do this to me?" R. p. 91. Lewis clarified that by "he," Cook was referring to Appellant, who was her husband. R. p. 91. While Lewis was treating Cook, Appellant kept repeating "I'm sorry. I'm sorry." R. p. 92. Appellant stated Cook's injuries were caused by the grill outside flaming up while he was trying to light it. R. p. 92.[1]

Brandy Towe, a volunteer EMT, also responded to the scene of the fire on May 16, 2014. R. pp. 98-99. Towe observed severed second-degree and third-degree burns covering sixty percent of Cook's body. R. p. 99. Towe testified Cook was "absolutely" at risk of imminent death. R. p. 100. Cook told Towe, "He done this to me. He blew me up." R. pp. 100-01. Appellant told Towe the fire started because he was pouring accelerant on the grill from a gas can. R. p. 101. Towe testified that her observations at the scene did not support Appellant's assertion the grill was the cause of Cook's injuries. R. p. 101.

Chief Jan Oliver of the Seneca Fire Department was the ranking firefighter at the scene. R. p. 115. Chief Oliver testified he observed:

> Inside the house, once you enter the front door, just a few feet inside the door, there were burn marks on the floor. You go back a little further into the room, there is a couch turned over. And just behind and beside it, there's burn marks on the floor there. There was a rug in the kitchen that had been burnt. You go back down the hall towards the back bedroom, there is another burn mark close to one of the hall. And then at the far end where the room was, when you enter the room, to the right is a closet. The bottom half of the door had been burnt and some of the tiles in the floor.

R. pp. 115-16. Chief Oliver also noticed a gas can sitting outside the room where the fire originated. R. p. 116. The smoke detectors located nearby were laying on the floor with the

[1] Appellant later told Bryan Evans, an individual who was housed with Appellant at the Oconee County Detention Center, that he poured gasoline on Cook and "torched the bitch." R. pp. 194-95.

batteries removed. R. p. 117, 119. Chief Oliver located a grill on a patio outside the home with a layer of dew on top of it. R. p. 117. Chief Oliver testified there was no evidence that the grill was used inside the home and in turn started the fire. R. p. 118. Similarly, Sergeant Scott Arnold of the Oconee Sheriff's Office noted the grill was cool and there was no evidence whatsoever it had been used that night. R. p. 136. Sergeant Arnold also noted:

> Once I entered in later, found out their bedroom, the bedroom all the way down to the end to the left, I noticed that the closet door had a lot of burns at the bottom area, and the floor had burned, had a small area burned also. And also noticed that - - we found a broken lighter in the floor.

R. p. 138.

Appellant's Motion to Dismiss Based Upon the Merger Doctrine

Prior to trial, Appellant made a motion to dismiss the CDVHAN charge because it merged with the charge of attempted murder. R. p. 49. Defense Counsel argued that there was not really an extra element in the CDVHAN charge and it would therefore be a lesser-included offense of attempted murder. R. p. 50. Defense Counsel concluded his argument by stating, "So I think that it would be - - the merger doctrine would apply in this situation so I would ask for the charge of CDVHAN to be dismissed." R. p. 50. The trial judge found:

> These cases are - - my understanding of what the law is, the CDV high and aggravated nature has an element that is not present in the attempted murder charge. And as Ms. Simmons correctly stated, the test is whether the greater of the two offenses includes all of the elements of the lesser offense. That's been long-standing law. And, clearly, the attempted murder charge does not have the household member element that's present in the CDV high and aggravated. So, [Defense Counsel], I'm going to deny your motion on that on that basis.

R. pp. 52-53.

ARGUMENT

Appellant's Double Jeopardy argument is not preserved for appellate review. Error preservation concerns aside, Appellant's prosecution for attempted murder and criminal domestic violence of a high and aggravated nature did not violate the Double Jeopardy Clause where each offense requires proof of distinct elements the other does not.

Appellant asserts the trial judge erred in allowing the State to prosecute Appellant for both attempted murder and criminal domestic violence of a high and aggravated nature because the prosecution of both charges violates the Double Jeopardy Clause. This argument lacks merit. As a threshold matter, Appellant's argument is not preserved for appellate review where he failed to make a double jeopardy argument to the trial judge. Error preservation concerns aside, CDVHAN and attempted murder both require proof of an element that the other does not. Further, it is preposterous to suggest the legislature did not intend for attempted murder and CDVHAN to be two distinct offenses.

Initially, Appellant's argument is not preserved for appellate review. Appellant's arguments below were based on the merger doctrine. Specifically, Defense Counsel contended the elements of CDVHAN "merged" with attempted murder.[2] This is a separate and distinct argument from the Double Jeopardy argument being made before this Court. Appellant offered no substantive argument whatsoever at trial on the Double Jeopardy Clause. The appellate court will not consider any issues or arguments that were not presented to or passed upon by the trial court, and an appellant is limited on appeal solely to the grounds raised during trial. State v.

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[2] Interestingly, Defense Counsel's argument that the elements of CDVHAN merged into attempted murder is plainly incorrect, as both crimes are felonies, thus barring the application of the merger doctrine. See State v. Plath, 277 S.C. 126, 284 S.E.2d 221 (1981) (finding the doctrine of merger is not applicable where both crimes at issue are felonies), overruled on other grounds by State v. Short, 333 S.C. 473, 511 S.E.2d 358 (1999); State v. Woods et al., 189 S.C. 281, 303, 1 S.E.2d 190, 200 (1939) (Baker, J. dissenting) ("In the commission of felonies, although they are interlinked, and both consummated, there is no merger of the crimes, and one committing two or more felonies in the consummation of one of the felonies may be tried and convicted of either of the felonies. It is only where the criminal act constitutes both a felony and misdemeanor that there is a merger of the lesser crime into the greater, and there can be no conviction except for the felony.").

Fleming, 254 S.C. 415, 421, 175 S.E.2d 624, 627 (1970); see State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."); see also State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal."). Appellant's argument is thus not preserved for appellate review.

Error preservation concerns notwithstanding, Appellant's Double Jeopardy argument lacks merit. Through their Double Jeopardy Clauses, the United States Constitution and the South Carolina Constitution offer protection to citizens from being subjected to double jeopardy for the same offense. See U.S. Const. amend. V ("No person shall be . . . subject from the same offense to be twice put in jeopardy of life or limb . . . ."); S.C. Const. art. I, C ("No person shall be subject for the same offense to be twice put in jeopardy of life or liberty . . . ."). The guarantee against double jeopardy offers three separate constitutional protections: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense. State v. Cuccia, 353 S.C. 430, 434, 578 S.E.2d 45, 48 (Ct. App. 2003).

The proper manner of determining if two charges constitutes the same offense is application of the "same elements" test pursuant to Blockburger v. United States, 284 U.S. 299 (1932).

Our United States Supreme Court has declared:

> If the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. In subsequent applications of the [Blockburger] test, we have often concluded that two different statutes define the same offense, typically

because one is a lesser included offense of the other.

Rutledge v. United States, 517 U.S. 292, 298 (1996) (internal quotation marks and citations omitted); see also State v. Norton, 286 S.C. 95, 332 S.E.2d 531 (1985) (noting that when a single act combines requisite elements of two distinct offenses, the defendant may be indicted and punished for each offense). Ultimately, the existence of double jeopardy depends on whether the legislature intended to create one crime or more than one. Missouri v. Hunter, 459 U.S. 359, 365-68 (1983).

S.C. Code Ann. §16-25-65, South Carolina's CDVHAN statue, provides:

> (A) A person who violates Section 16-25-20(A) is guilty of the offense of domestic violence of a high and aggravated nature when one of the following occurs. The person:
>
> (1) commits the offense under circumstances manifesting extreme indifference to the value of human life and great bodily injury to the victim results;
> (2) commits the offense, with or without an accompanying battery and under circumstances manifesting extreme indifference to the value of human life, and would reasonably cause a person to fear imminent great bodily injury or death; or
> (3) violates a protection order and, in the process of violating the order, commits domestic violence in the first degree.

S.C. Code Ann. §16-25-65(A)

S.C. Code Ann. §16-25-20 provides:

> (A) It is unlawful to:
>
> (1) cause physical harm or injury to a person's own household member; or
> (2) offer or attempt to cause physical harm or injury to a person's own household member with apparent present ability under circumstances reasonably creating fear of imminent peril.

S.C. Code Ann. §16-25-20

Distinguishably, S.C. Code Ann. §16-3-29, South Carolina's attempted murder statute, provides:

> A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder. A person who violates this section is guilty of a felony, and, upon conviction, must be imprisoned for not more than thirty years. A sentence imposed pursuant to this section may not be suspended nor may probation be granted.

S.C. Code Ann. §16-3-29

A review of the elements of both crimes emphatically proves that a prosecution for both offenses would pass constitutional muster under the Blockburger test. First, Appellant's contention that CDVHAN includes all the elements of attempted murder is simply not correct. Attempted murder requires that one, with intent to kill, attempts to kill another person with malice aforethought. CDVHAN imposes no requirement that one attempted to kill another person with malice aforethought. CDVHAN simply requires that one causes physical harm or injury to a person's own household member under circumstances manifesting extreme difference to the value of human life and great bodily injury to the victim results, and the offense is committed with or without accompanying battery and under circumstances manifesting extreme indifference to the value of human life; and would reasonably cause a person to fear imminent great bodily injury or death. For CDVHAN there is no requirement that one attempts to kill another, as imposed by attempted murder. Further, attempted murder requires the element of specific intent, while CDVHAN imposes no such requirement. See State v. King, Op. No. 27744 (S.C. Sup. Ct. filed October 25, 2017) (Shearouse Adv. Sh. No. 40 at 22-45) (holding the offense of attempted murder includes a "specific intent to kill" as an element). Second, as was correctly noted by the trial judge, attempted murder does not include the element that one attempted to cause harm or injury to a person's own household member. Each offense, therefore, requires distinct elements that the other does not. The legislature clearly intended to create two crimes in the codification of attempted murder and CDVHAN rather than one. Appellant's Double

Jeopardy argument is thus without merit. Appellant's convictions and sentences should be affirmed.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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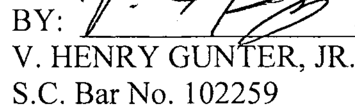

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