STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of General Sessions
Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2016-001220

THE STATE, ...RESPONDENT,

v.

PATRICK O'NEIL MCGOWAN,.....APPELLANT.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Statutes:

Other:

STATEMENT OF ISSUES ON APPEAL

I. The trial judge did not refuse Appellant's request to charge the jury that first-degree assault and battery requires specific intent to harm be proven for each victim. Moreover, even if the trial judge had rejected Appellant's request charge, such refusal would have been proper: specific intent was not required for each victim in this case because Appellant's intent to harm any single victim was transferred to the others.

II. The trial judge properly denied Appellant's motion to direct a verdict on the indictment involving the child victim because Appellant was guilty of attempting to harm the child through the doctrine of transferred intent.

STATEMENT OF THE CASE

On August 3, 2012, the Saluda County Grand Jury indicted Appellant on four counts of attempted murder. On May 31–June 2, 2016, Appellant proceeded to a jury trial before the Honorable Donald B. Hocker. Thomas Adduci, Esquire, represented Appellant; Assistant Solicitors C. Dale Scott, Esquire, and Margaret Boykin, Esquire, represented the State. The jury found Appellant guilty of the lesser-included charge of first-degree assault and battery on all four charges, and the trial judge sentenced him to seven and one-half years' incarceration on each count, running the sentences for two of the victims consecutively and the other sentences concurrently. Thereafter, Appellant filed a timely notice of appeal.

On May 11, 2017, Appellant filed his initial brief, claiming the trial judge erred in: (1) failing to direct a verdict on the indictment for Appellant's fourth victim, a four-year-old girl who was asleep in the home he fired upon, because there was no evidence Appellant was aware that victim was in the house when he opened fire, and the three shots Appellant fired could only be used to convict him of the assault and battery of the three other victims; and (2) the trial court erred in denying Appellant's defense that the jury charge the jury on first-degree assault and battery and include an instruction that the State had to prove Appellant had a specific intent to harm each of the four victims. Appellant argued both of his issues on appeal were supported by this Court's opinion in State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015).

On July 24, 2017, the State moved to hold this case in abeyance pending a final decision in State v. King, Op. No. 27744 (S.C. Sup. Ct. filed Oct. 25, 2017) (Shearouse Adv. Sh. No. 40 at 22). This Court granted that motion on August 15, 2017. On March 9, 2018, the Supreme Court denied rehearing in the case and remitted the case to the lower court, rendering it final. State v. King, S.C. Sup. Ct. Order dated March 9, 2018. This Brief of Respondent follows.

STATEMENT OF FACTS

The State's Case

John Glenn, Sarah Irby (Glenn's wife), Tiffany Garrett (Irby's daughter), and Child (Irby's granddaughter) lived together.[1] On March 31, 2012, they hosted a birthday party to celebrate Child's fourth birthday. After Child's party concluded in the early evening, several of the family's neighbors and friends came over for an adult party stretching into the night. Glenn, a Freemason with a local Masonic lodge, was approached by his neighbor James McGowan[2] about joining the organization. Glenn was forbidden to disclose substantive information about the organization to James, a non-member, but was permitted to disclose the necessary steps and qualifications for joining the local lodge. At this point, Appellant approached the conversation, claiming he was a "motherf***ing five percenter." Appellant and Glenn began arguing and swearing at each other. Upon hearing the commotion, Irby, who was inside with Child, exited their home and brought Glenn inside. As he walked away, Glenn asked Appellant to leave. Glenn walked into the home and sat at their table and Irby went into the bathroom. Within moments, bullets were fired into the home, flying past Glenn, Irby, and Child. As they fled the home, Irby saw Appellant running down the road, holding a gun. (Tr.p.154, line 8–Tr.p.204, line 9; State's Exhibits 1–12; State's Exhibits 14–15).

Garrett was also at the party that night. Garrett was well-acquainted with Appellant's family, knowing Appellant, James McGowan, and other family members before the shooting. However, Garrett did not know Appellant's full name: she knew him only as "Pee." She recalled

[1] The record indicates Tiffany's siblings, Brittany and Brantley Irby, also lived in the home. However, it is unclear whether they were at the party that night and no charges were filed against Appellant for attempting to harm them. (Tr.p.218, line 24–Tr.p.219, line 15).

[2] James is referred to as "Willie James," "Big James," and "James" by various witnesses at trial. See, e.g., (Tr.p.221, line 15–Tr.p.222, line 15).

seeing Appellant arrive at the party sometime between 7:30 p.m. and 8:00 p.m. on the night in question. She observed Glenn and James' conversation and also saw Appellant interject and start arguing with the Glenn. After Glenn entered the house Garrett, from her location on the home's lit porch, saw Appellant walk towards the road. Garrett assumed Appellant was walking down the road to head home, but looked up and saw him shooting. After Appellant fired several shots, Garrett saw him run down the road. Initially, she believed Appellant had shot into the air, but later saw the bullet holes scattered around the front of the house. (Tr.p.218, line 18–Tr.p.223, line 23; Tr.p.227, line 7–Tr.p.252, line 3).

Irby contacted the police and officers responded to the scene within minutes. Officer Barton Holmes photographed the bullet holes and damages to the home and its contents. Witnesses on the scene provided a description of Appellant, but were unable to give his legal name. However, Irby and Garrett informed Officer Holmes they were familiar with the shooter. (Tr.p.123, line 19–Tr.p.153, line 13).

The case was quickly assigned to Investigator Chris Martin of the Laurens County Sheriff's Department. He contacted the victims and found out Garrett now had Appellant's full name. Using that name, he put together a photographic lineup. Within seconds, she identified Appellant as the shooter. (Tr.p.204, line 18–Tr.p.217, line 3; State's Exhibit 13).

Sometime after the shooting, Appellant went to the victims' home, attempting to settle the dispute by paying for the damage he caused. (Tr.p.164, line 11–Tr.p.166, line 25; Tr.p.189, line 2–Tr.p.190, line 11).

Directed Verdict Motion

At the conclusion of the State's case, trial counsel moved for a direct verdict on all Appellant's charges for attempted murder. Citing to State v. King, 412 S.C. 403, 772 S.E.2d 189

(Ct. App. 2015), trial counsel argued attempted murder is a specific intent crime and the State failed to provide evidence of specific intent pertaining to Glenn, Garrett, Irby, and Child. He pointed to the locations of the victims at the time of the shooting, and the testimony stating only three shots were fired, to complain the State was unable to show specific intent to murder the four victims. Trial counsel further asseverated that the "attempt" language in the S.C. Code Ann. § 16-3-600(C)(1)(b), the section concerning first-degree assault and battery, also required a specific intent to harm. Disagreeing with trial counsel's position, the State noted "[s]pecific intent means that [a] [d]efendant consciously intended . . . the completion of acts" but admitted King found attempted murder is a specific intent crime and should be charged to the jury as such. However, the State admitted that it may be proper to charge the jury on the lesser-offense of first-degree assault and battery for the charges relating to and Irby and Child. It argued first-degree assault and battery is a general intent crime. (Tr.p.252, line 25–Tr.p.263, line 12; Tr.p.263, line 23–Tr.p.267, line 8).

The trial judge noted King appeared to stand for the proposition that all attempt crimes required specific intent. The trial judge decided to take the matter under advisement and further research "intent" law over the upcoming lunch break. (Tr.p.261, lines 20–22; Tr.p.263, lines 13–22; Tr.p.267, line 9–Tr.p.268, line 25).

Following the break, the parties discussed the applicability of transferred intent. Citing to State v. Childers, 373 S.C. 367, 645 S.E.2d 233 (2007), the State argued that if the doctrine of transferred intent applies to murder it should also apply to attempted murder. The trial judge stated he reviewed transferred intent, but did not believe he had to rely on the doctrine to rule on the direct verdict motion; however, it could factor into his jury charges depending on his final instructions on "specific general intent." He also found there was at least some evidence

Appellant specifically intended to harm Glenn, Irby, and Garrett and informed the parties he was inclined to charge the lesser-included offense of first-degree assault and battery for all four indictments. However, he admitted he might granted directed verdict for the charge relating to Child at the end of the case. (Tr.p.273, line 11–Tr.p.278, line 8).

After the close of Appellant's case, trial counsel renewed his request for a directed verdict. The trial judge took it under advisement, noting he still was unsure whether directed verdict was appropriate for the charge related to Child. The trial judge dismissed the jurors around 3:25 p.m., and he decided to take the rest of the afternoon to consider the directed verdict motion and to work on his charges for the following day. The trial judge also asked trial counsel to remind him the following morning to put his final ruling on the directed verdict motion into the record. (Tr.p.350, line 2–Tr.p.354, line 18).

Jury Charge Conference

The following morning, the trial judge gave the parties to memorialize the charge requests discussed during an off-the-record charge conference. Trial counsel requested the trial judge add the names of each victim as an element of corresponding charged crime. Trial counsel argued such action would be a "more clear expression of what specific intent is regarding the[] charges." The trial judge denied the request, noting trial counsel argued "specific intent" meant a "specific act would include not only the shooting, but also the person involved." He also described the State's position as "specific intent" included "just the shooting." Neither party objected to his description of their positions. Additionally, the trial judge did not place a final ruling on the directed verdict motion into the record. (Tr.p.355, line 2–Tr.p.356, line 9).

Jury Instructions

During his instructions to the jury, the trial judge stated:

The indictments in this case allege four counts of attempted murder against [Appellant], attempted murder of Sarah Irby, attempted murder of John Glenn, attempted murder of Tiffany Garrett, and attempted murder of [Child]. Each indictment charges a separate and distinct offense because each indictment involves a separate alleged victim. You must decide each indictment separately based upon the evidence and law applicable to it uninfluenced by your decision as to any other indictment. [Appellant] may be convicted or acquitted on any or all of the indictments. You will be asked to write a separate verdict of guilty or not guilty for each indictment. And I will explain that to you at the conclusion of my charge.

. . . .

Now, criminal intent can either be specific or general. . . .A specific intent crime requires that the [d]efendant had the intent to cause a particular result or that the [d]efendant had the specific intent in committing the act. A person acts with specific intent when his conscious objective is to cause the specific result [de]scribed by the statute defining the events.

. . . .

Now, ladies and gentlemen, if you find that the State has failed to prove beyond a reasonable doubt that [Appellant] committed attempted murder on any of the four indictments, then you may consider whether the State has proven beyond a reasonable doubt the lesser included charge of assault and battery in the first degree. A person commits the offense of assault and battery in the first degree if the person unlawfully offers or attempts to injure another person with the present ability to do so and the act is accomplished by means likely to produce death or great bodily injury.

. . . .

A specific intent is an element of assault and battery first degree which must be proven by the State beyond a reasonable doubt.

. . . .

Now, in just a moment, I'm going to come down to the jury box and explain the verdict form that I have prepared to assist you in your deliberations and in reaching your verdict. As to each indictment, your verdict must be unanimous, an agreement by the 12 of you. Once you have reached a verdict as to each indictment, then you will notify the bailiff that a verdict has been reached.

. . . .

And [the verdict form is] divided up into four sections. One section for each indictment. And it refers as to the – there's no particular order, it's just as they came about. First indictment involves Sarah Irby. You make a determination whether or not [Appellant] is guilt[y] or not guilty as to the attempted murder. If you determine that [Appellant] is guilty, then you would go to the second indictment and conduct the same analysis. **However, if**

> **you believe that the State has failed to meet its burden of proof by proving to you each and every element of attempted murder as to Sarah Irby, then you can go to the lesser included offense of assault and battery in the first degree and determine whether or not the defendant is not guilty or guilty. That same analysis will apply to each indictment.** The next indictment involves John Glenn. The same analysis. The third indictment, Tiffany Garrett, same analysis. The fourth indictment is involving [Child]. Okay.
>
> When the jury has reached a unanimous verdict and you make the appropriate line, but your initials, okay, to indicate the verdict as to each indictment.

(Tr.p.391, line 24–Tr.p.406, line 15)(emphasis added).

The State did not object to the trial judge's instructions. Trial counsel only objected to "the exceptions previously noted." (Tr.p.406, lines 16–23).

ARGUMENT

I.

The trial judge did not refuse Appellant's request to charge the jury that first-degree assault and battery requires specific intent to harm be proven for each victim. Moreover, even if the trial judge had rejected Appellant's request charge, such refusal would have been proper: specific intent was not required for each victim in this case because Appellant's intent to harm any single victim was transferred to the others.

Appellant argues the trial judge erred in refusing to instruct the jury that each count of first-degree assault and battery required the State to prove a specific intent to injure a specific victim. Initially, the State notes Appellant's alleged error did not occur because the trial judge did, in fact, instruct the jury that the State had to prove a specific intent to harm each individual victim. Further, assuming the trial judge did not give the requested instruction, the State contends his decision was proper because South Carolina law does not require the State prove Appellant had the specific intent to harm each victim; under the doctrine of transferred intent, recognized under South Carolina law, Appellant's intent to harm a specific victim may be transferred to unintended victims.

Law

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The law to be charged to the jury is determined by the evidence presented at trial. State v. Holland, 385 S.C. 159, 165, 682 S.E.2d 898, 901 (Ct. App. 2009). "No instruction should be given by the trial judge, at the request of the appellant, which tenders an issue which is not presented or supported by the evidence." State v. Weaver, 265 S.C. 130, 137, 217 S.E.2d 31, 34 (1975). "Ordinarily, the trial court has the duty to give requested instructions which correctly state the law applicable to the issues and which are supported by the evidence." State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App.

1996). The trial court only commits reversible error if it fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 838, 849 (1993). An appellate court will not reverse a trial judge's decision regarding a jury charge absent an abuse of discretion. State v. Santiago, 370 S.C. 153, 159, 634 S.E.2d 23, 26 (Ct. App. 2006).

"The cardinal rule of statutory construction is a court must ascertain and give effect to the intent of the legislature." State v. Scott, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002) (citing Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993)). "The legislature's intent should be ascertained primarily from the plain language of the statute. Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation." State v. Dupree, 354 S.C. 676, 693, 583 S.E.2d 437, 446 (Ct. App. 2003) (internal citation omitted).

The Omnibus Crime Reduction and Sentencing Reform Act of 2010 (Omnibus Act) substantially overhauled the state's criminal law in regard to assault and battery offenses. State v. Middleton, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014). It codified attempted murder in § 16-3-29 (2015) and four degrees of assault and battery in § 16-3-600 (2015). S.C. Code Ann. §§ 16-3-29, -600 (2015). The new degrees of assault and battery are, in descending order of severity, assault and battery of a high and aggravated nature (ABHAN), and assault and battery in the first, second, and third degrees. Middleton, 407 S.C. at 315, 755 S.E.2d at 434. Under the statute, ABHAN is a lesser-included offense of attempted murder. S.C. Code Ann. § 16-3-600(B)(3) (2015). Assault and battery in the first degree is a lesser-included offense of both attempted murder and ABHAN. S.C. Code Ann. § 16-3-600(C)(3) (2015). Further, assault and battery in the second and third degree are each lesser-included offenses of every preceding offense. S.C. Code Ann. § 16-3-600(D)(3) & (E)(3) (2015). Finally, the Omnibus Act abolished

the common law offense of assault and battery with intent to kill, assault with intent to kill, assault and battery of a high and aggravated nature, simple assault and battery, assault of a high and aggravated nature, aggravated assault, and simple assault. See Act No. 273, 2010 S.C. Acts 1947.

In relevant part, S.C. Code Ann. § 16-3-600 provides:

(A) For purposes of this section:

(1) "Great bodily injury" means bodily injury which causes a substantial risk of death or which causes serious, permanent disgifurement or protracted loss or impairment of the function of a bodily member or organ.

(2) "Moderate bodily injury" means physical injury that involves prolonged loss of consciousness, or that causes temporary or moderate disfigurement or temporary loss of the function of a bodily member or organ, or injury that requires medical treatment when the treatment requires the use of regional or general anesthesia or injury that results in a fracture or dislocation. Moderate bodily injury does not include one-time treatment and subsequent observation of scratches, cuts, abrasions, bruises, burns, splinters, or any other minor injuries that do not ordinarily require extensive medical care.

. . . .

(B)(1) A person commits the offense of assault and battery of a high and aggravated nature if the person unlawfully injures another person, and:

(a) great bodily injury to another person results; or

(b) the act is accomplished by means likely to produce death or great bodily injury.

. . . .

(C)(1) A person commits the offense of assault and battery in the first degree if the person unlawfully:

(a) injures another person and the act: (i) involves nonconsensual touching of the private parts of a person, either under or above clothing, with lewd and

> lascivious intent; or (ii) occurred during the commission of a robbery, burglary, kidnapping, or theft; or
>
> (b) offers or attempts to injure another person with the present ability to do so, and the act: (i) is accomplished by means likely to produce death or great bodily injury or (ii) occurred during the commission of a robbery, burglary, kidnapping, or theft.
>
> . . . .

(emphasis added).

The crux of Appellant's argument is the mistaken belief that specific intent can only exist as to the specific, intended victim of attempted murder. Not only is there an absence of language requiring a specific victim in § 16-3-29, but this contradicts established state law. In State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000), the South Carolina Supreme Court found a defendant who killed his intended target but also injured an unrelated third party in his shooting spree was guilty of murder of the intended victim and, using the doctrine of transferred intent, ABWIK of the third party. The court explained:

> The defendant's mental state, or mens rea, whatever it may be at the time he allegedly commits a criminal act, is contained within the defendant's brain when he commits the act. That mental state never leaves the defendant's brain; it is not "transferred from the defendant's brain to another person or place. A more apt description might be that the mental state is like a spotlight emanating from its source—the defendant's mind—to its target—the intended victim.
>
> Nor is that mental state in limited supply. The mental state "spotlight" is not extinguished at the moment a bullet strikes and kills the intended victim, such that there is no mental state left upon which to convict an unintended victim who also is injured or killed.

340 S.C. at 271, 531 S.E.2d at 515.

More recently, the doctrine of transferred intent was applied to South Carolina's successor to ABWIK, attempted murder, in State v. Williams, Op. No. 5540 (S.C. Ct. App. filed

February 28, 2018) (Shearouse Adv. Sh. No. 9 at 112). In Williams, the defendant was charged with three counts of attempted murder after he and codefendant fired numerous shots at a home, intending to kill Al Young. However, Young was joined by Ycedra Williams and Joseph Wrighton, in the home that night and the two defendants ended up focusing their shots on Wrighton. None of the home's occupants were injured in the attack. Id. at 113–14.

At trial, Williams objected to several of the circuit court's jury charges, including the transferred intent charge. He argued that the evidence showed, at most, he attempted to harm Young and because attempted murder is a specific intent crime, he could not have had a specific intent to harm the unknown persons in the home. The trial judge refused his request and the jury ultimately convicted Appellant of all three attempted murder charges. Id. at 114–116.

Citing to this Court's opinion in King, the Court agreed attempted murder under South Carolina law requires proving a defendant had the specific intent to commit murder. However, the Court found the circuit court properly charged the jury on the doctrine of transferred intent because "South Carolina's criminal laws require the imposition of the doctrine of transferred intent." Id. at 124–25. The Court further found Williams misconstrued the attempted murder statute when he argued S.C. Code Ann. § 16-3-29 requires specific intent to murder specific victims, noting the statute "states a 'person who, with the intent to kill, attempts to kill another person' is guilty of attempted murder." Id. at 125– 26 (emphasis in original). Thus, like murder, attempted murder does not require a specific victim be killed. See S.C. Code Ann. § 16-3-10 (2015) (defining "murder" as "the killing of any person with malice aforethought, either express or implied" (emphasis added)); Williams at 124–25. Further, the Court found the specific intent to kill can be inferred by the surrounding circumstances of the case, including the use of a deadly

weapon and the character of the attack. Id. at 126 (citing State v. Sutton, 340 S.C. 393, 397 n.5, 532 S.E.2d 283, 285 n.5 (2000)).

Applying these standards to Williams, the Court found the evidence presented at trial, including: (1) testimonial and forensic evidence showing Williams and his codefendant fired multiple shots into the walls and doors of the home and at the silhouetted figure represented an attempt to kill another person with malice aforethought; (2) evidence also indicated codefendant was aware Young did not live alone at the residence. Id. at 126. Accordingly, the Court determined "Williams' use of deadly force in attempting to kill Young would warrant the transferred intent charge as to Ycedra and Wrighton because it was foreseeable that Young would not be alone, especially when considering Young lived at the [r]esidence with several other people." Id. at 126–27.

Analysis

Initially, the State notes Appellant's alleged error did not occur. Trial counsel requested the trial judge to add the names of the victims as "an element of the crime" to his instructions on the indictments so as to indicate to the jurors that guilt for each charge required a finding of a specific intent to harm each specific victim. The trial judge denied the charge but actually instructed the jury in a manner consistent with trial counsel's request. Notably, the trial judge instructed the jury: (1) "specific intent" required the State to prove Appellant had the intent to cause a particular result or commit a specific act; (2) "specific intent" is an element of first-degree assault and battery; (3) the State had to prove "each and every element" of the charged crime as to Irby, then was required to perform the same analysis for each indictment and victim. Combined, these instructions indicated to the jurors they had to find a specific intent to harm

each individual victim. Accordingly, Appellant received the jury instructions requested by trial counsel.

Further, assuming the trial judge's instructions did not comply with trial counsel's request, the trial judge's refusal to charge the requested language was proper: Appellant's proffered definition of "specific intent" is inconsistent with South Carolina law. Section 16-3-600(C)(1)(b) does not require a specific victim; instead, it states a person commits first-degree assault and battery if the person "offers or attempts to injure another person." S.C. Code Ann. § 16-3-600(C)(1)(b) (emphasis added). This plain reading of the statute is also supported by the treatment of both murder and attempted murder under State law. See S.C. Code Ann. § 16-3-10 (2015) (defining "murder" as "the killing of any person with malice aforethought, either express or implied" (emphasis added)); S.C. Code Ann. § 16-3-29 (stating a "person who, with the intent to kill, attempts to kill another person" is guilty of attempted murder (emphasis added)); Fennell, 340 S.C. at 276, 531 S.E.2d at 517 (finding the defendant's state of mind is more important than the identity of the victim in convicting a defendant of homicide); Williams at 125 ("[A]s long as the State has shown the specific intent to kill or commit a murder, the identity of the victim is irrelevant).

Consistent with the established definition of "specific intent," the Williams court found the doctrine of transferred intent was not just consistent with South Carolina law, but that "South Carolina's criminal laws require the imposition of the doctrine of transferred intent." Williams at 124–25; see also Fennell, 340 S.C. at 273–74, 531 S.E.2d at 516 (finding other states' rejections of the doctrine of transferred intent, including those of California courts and the Maryland Court of Special Appeals in Harvey v. State, 681 A.2d 628 (Md. Ct. Spec. App. 1996), were because those states' laws allowed for criminal prosecution for injuring both intended and

unintended victims, rendering transferred intent unnecessary in those jurisdictions). Pursuant to this doctrine, the State needed only to prove Appellant's specific intent to harm one of the victims to establish his intent shone like a spotlight on his intended and unintended victims; in other words, by proving Appellant offered or attempted to harm Glenn, the State also demonstrated Appellant intended to harm Irby, Garrett, and Child. See Williams at 126–27, (finding the evidence that Appellant intended to kill Young, his intended Victim, combined with the evidence Appellant's codefendant was aware other people lived in Young's home warranted a transferred intent charge for his two unintended victims because "it was foreseeable that Young would not be alone, especially when considering he lived at [his] [r]esidence with several other people"); see also Fennell, 340 S.C. at 276, 531 S.E.2d at 517 ("A person who, acting with malice, unleashes a deadly force in an attempt to kill . . . 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); id. at 272, 531 S.E.2d at 515 (finding in a common case of transferred intent, "[a]lthough the defendant did not act with malice toward the unintended victim, the defendant's criminal intent to kill the intended victim . . . is transferred to the unintended victim").

Yet, even without the doctrine of transferred intent, the evidence indicated Appellant had a specific intent to harm and/or offer to do such to Glenn, Irby, Garrett, and anyone in their general proximity. As noted by this Court in Williams, "specific" intent can be inferred by the circumstances of a case, including "the use of a deadly weapon and the character of the attack." Williams at 126. In Williams, it was foreseeable to the defendant that other people were in the home and vulnerable to his attack. Id. In the instant case, however, the record indicated Appellant knew Glenn was not alone in the house. Irby went outside to intervene in Glenn and Appellant's argument and escorted the former inside. Garrett was standing on the home's lit

porch, on the same side of the house which Appellant fired upon. Further, the undisputed record indicated Glenn and Irby's party was attended by a multitude of guests, any of which could have been inside the home at the time Appellant began firing. Thus, it was not just foreseeable, but expected, that Appellant's attempt to use deadly force against Glenn could harm anyone inside or near the home. See Sutton, 340 S.C. at 397 n.5, 532 S.E.2d at 285 n.5; Williams at 126.

Further, Appellant's actions could also be interpreted as an "offer" to harm the victims. Notably, section 16-3-600(C)(1)(b) criminalizes both "offers" and "attempts" to injure other persons. If Appellant did not intend to injure the victims, the only other reasonable interpretation of his actions was that he was intending to threaten and scare them. In such a situation, Appellant "intended" to terrorize those in the bullets' proximities and his actions still constitute a violation of the assault and battery statute. See id.

As noted by Appellant in his brief, "it would not have made sense to wait for [Glenn] to [go] inside and walk into the street before shooting" if his target was Glenn. (Br. of Appellant p.27). What Appellant fails to understand is that this very point underscores the State's case; Appellant's decision to fire multiple shots at a building he knew contained multiple people, with someone standing on the porch of the building, at a well-attended party, indicates his intent to harm or threaten multiple people and betrays any argument that he sought to limit his intent to Glenn.

Accordingly, the trial judge, even if he did not give the charge requested by trial counsel, did not err in his instructions to the jury.

II.

The trial judge properly denied Appellant's motion to direct a verdict on the indictment involving the child victim because Appellant was guilty of attempting to harm the child through the doctrine of transferred intent.

Appellant argues the trial judge improperly denied Appellant's motion to direct a verdict on the indictment involving Child because the State failed to present evidence Appellant knew Child was inside the home and thus Appellant could not have possessed the specific intent to injure her. Appellant also complains the evidence only showed three shots were fired at the home, and therefore Appellant could, at most, have been convicted of three attempt offenses. The State disagrees with these allegations of error. First, the trial judge failed to rule on the motion for a directed verdict and trial counsel failed to request such a ruling. Accordingly, the issue is not preserved for review. Second, first-degree assault and battery does not require a specific intent to harm a specific victim, and Appellant's specific intent to harm Glenn, Irby, and Garrett was transferred to Child because of the circumstances surrounding his attack and the foreseeability that multiple people could be harmed. Third, Appellant's argument that he could, at most, have been charged with only three crimes because he fired only three bullets demonstrates a fundamental misunderstanding of criminal law and ignores that a physical injury is not required under S.C. Code Ann. § 16-3-600(C)(1)(b).

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. Id. When reviewing a denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Cherry, 361 S.C. 588, 593–94, 606 S.E.2d 475, 477–78 (2004). "If there is

any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." Id. (emphasis added). A circuit judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty. State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011).

Issue Preservation

Initially, the State notes this issue is not preserved for review by this Court. During the final directed verdict discussion, the trial judge indicated he was considering granting Appellant's motion, but would think about it overnight. He specifically requested trial counsel remind him of the motion the following morning. However, no further mention of the motion was made by either trial counsel or the trial judge. Accordingly, this issue is not proper for appellate consideration. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal."); cf. State v. Hepburn, 406 S.C. 416, 753 S.E.2d 402 (2013) ("A motion for directed verdict made only at the close of one party's evidence loses any significance once it is denied and the other party, by producing further evidence, chooses not to stand on it." (internal citations omitted)).

Analysis

As discussed supra in Issue I, South Carolina law recognizes the doctrine of transferred intent. See Williams at 124–25. Thus, so long as the State provides evidence that a defendant had the specific intent to injure or threaten another person, such intent can be transferred to foreseeable, unintended victims. See id., (finding the evidence that Appellant intended to kill

Young, his intended Victim, combined with the evidence Appellant's codefendant was aware other people lived in Young's home warranted a transferred intent charge for his two unintended victims because "it was foreseeable that Young would not be alone, especially when considering he lived at [his] [r]esidence with several other people").

Further, even without the doctrine of transferred intent, Appellant's specific intent to threaten or harm all the occupants of the home can be inferred from the record. See Williams at 126. (specific intent can be inferred by the circumstances of a case, including "the use of a deadly weapon and the character of the attack."). Appellant opened fire on an occupied home during a well-attended party. A reasonable interpretation of the record indicates Appellant specifically intended to either threaten or harm the victims in and around the home, whether or not he knew their identities.

Appellant's "One Bullet Per Victim" Theory

In his brief, Appellant is attempting to turn an inherently qualitative inquiry (a defendant's mental state) into a quantitative analysis (the number of bullets fired from a gun). Appellant's argument fails for a number of reasons. The first flaw in Appellant's argument is that bullets can, and often do, pass through objects and people. In fact, one needs to look no further than the instant case for an example: the evidence showed the bullets flew through the exterior walls and through several different rooms past the victims scattered in and around the house.

Appellant's argument also assumes a battery must occur for a defendant to be found guilty of first-degree assault and battery. However, no injury is necessary under section 16-3-600 (C)(1)(b). As noted by Black's Law Dictionary, "assault" is defined as:

> The threat or use of force on another that cases that person to have a reasonable apprehension of imminent harmful or offensive

> contact; the act of putting another person in reasonable fear or apprehension of an immediate battery by means of an act amounting to an attempt or threat to commit a battery.

Black's Law Dictionary (10th ed. 2014) (emphasis added). Appellant was charged with four counts of attempted murder because each bullet passed near at least one victim at some point in its trajectory. Thus, Appellant was guilty of an assault each time a bullet almost hit a victim and put that victim in reasonable apprehension of harm. See S.C. Code Ann. § 16-3-600(C)(1)(b).

If, as noted in Issue I, supra, Appellant only intended to threaten the victims then fear, not physical injury was Appellant's goal. In such a situation, Appellant's only goal would be to fire bullets near enough victims that then experience a reasonable apprehension of imminent harm and he would be unconcerned with the paths of the bullets so long as they produce the desired chaos.

Further, Appellant's interpretation puts undue emphasis on Appellant's actions, rather than his mental state. If, as Appellant ledges, each shot fired is a separate incident or attempted crime, a person emptying ten rounds of ammunition could be guilty of ten separate attempt crimes; each time that person fired a shot, that person was guilty of a new, separate attempt to kill, maim, or scare a victim.

Appellant's view point also fails to take into account situations in which a gun fails to function properly or a different weapon is used. Under Appellant's reasoning, a person who holds a gun up to another person and pulls the trigger would not be guilty of attempted murder or any lesser-included charge if the weapon jammed: a single victim would exceed the number of bullets fired. If a defendant swung a bat inches away from the faces of two people standing next to each other, Appellant's logic would dictate said defendant could only be found guilty of a single crime because he only swung the bat once. Appellant's argument is even more untenable

when applied to explosives and other heavy weaponry. What if a defendant, using semi-automatic weapons, shot ninety-nine bullets into a small home filled with one-hundred people. Such an action would lead to bedlam by creating an active warzone within that building. Undoubtedly, each and every person in that home would be in utter fear for her life. Yet, despite the clear intent to inflict mass harm and/or terror on everyone inside, such a defendant could not be punished for the full-extent of his actions. Thankfully, the doctrine of transferred intent avoids these, and other, illogical outcomes in criminal prosecution.

Accordingly, even if this issue were preserved for review, the trial judge did not err in denying Appellant's motion for a directed verdict as to Child.

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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ATTORNEYS FOR RESPONDENT

April 9, 2018

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of General Sessions
Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2016-001220

THE STATE, ...RESPONDENT,

v.

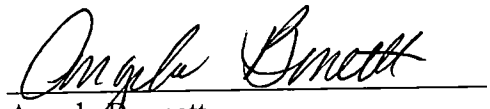
PATRICK O'NEIL MCGOWAN,.....APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by sending two copies of the same to:

Laura R. Baer, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served this 9th day of April, 2018.



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RE: State v. Patrick O'Neil McGowan – Appellate Case No. 2016-001220

Dear Ms. Baer:

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

Sincerely,

William F. Schumacher, IV
Assistant Attorney General
S.C. Bar No. 100231

Enclosures

cc: Honorable Jenny A. Kitchings (original and one enclosed)
Victim Advocacy Division