STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

RODNEY R. GREEN,

APPELLANT

APPELLATE CASE NO 2015-002443

Appeal from Sumter County

George C. James, Circuit Court Judge

Opinion No. 2018-UP-187

PETITION FOR REHEARING

On May 9, 2018, this Court affirmed Appellant's convictions and sentences in an unpublished opinion. State v. Green, 2018-UP-187 (S.C. Ct. App. filed May 9, 2018). Pursuant to Rule 221(a), SCACR, Appellant now files this petition for rehearing in light of points overlooked and/or misapprehended by this Court in arriving at its holdings. For the sake of clarity, Appellant notes that this petition for rehearing addresses only the second and third issues in the brief. Appellant does not seek rehearing on the first issue in the brief. In other words, Appellant does not ask this Court to rehear the trial court's refusal to grant a directed verdict on the attempted murder charge; however, Appellant requests rehearing regarding the trial judge's

erroneous jury instructions and the trial judge's erroneous denial of Appellant's motion for a mistrial.

Erroneous jury instructions

On appeal, Appellant challenged the trial judge's instruction regarding transferred intent in the context of murder and attempted murder. Appellant argued the trial judge erred (1) in charging the jury that the state was not required to prove that Ray'Quann Jenkins was the intended target, (2) in charging the jury that general intent for murder could be transferred and would satisfy the element of specific intent to kill, and (3) in equating malice and specific intent to kill during the jury charge.

This Court affirmed Appellant's convictions, citing State v. Williams, Op. No. 5540 (S.C. Ct. App. filed Feb. 28, 2018) (Shearouse Adv. Sh. No. 9 at 112). State v. Green, 2018-UP-187 (S.C. Ct. App. filed May 9, 2018). Specifically, this Court concluded that "South Carolina's criminal laws require imposition of the doctrine of transferred intent." Id. Next, this Court concluded that statutory attempted murder "does not require a *specific* victim." Id. (emphasis added). However, according to this Court, the statute requires only that the defendant attempt to kill another person. Id. Very telling of the analysis used, this Court held that "as long as the state has shown the specific intent to kill *or commit a murder*, the identity of the victim is irrelevant." Id. (emphasis added). Thus, this Court concluded that instructing a jury on "the doctrine of transferred intent is proper to convict a defendant of attempted murder regardless of whether a victim, intended or unintended, suffers an injury." Id.

It appears this Court's decision addressed only one of Appellant's arguments – whether the judge erred in charging the jury that the state was not required to prove that Jenkins was the

intended target.[1] Appellant respectfully requests rehearing as to this argument. Additionally, Appellant respectfully requests rehearing regarding his other arguments related to the judge's erroneous jury charge.[2]

The state prosecuted Appellant for the murder of Tyrus Archie. R. 707. According to the state, Appellant killed Archie with malice aforethought. R. 707. Additionally, the state alleged Appellant "did with intent to kill, attempt to kill another person, Tyrus Archie, with malice aforethought, either express or implied, by shooting Rayquann Jenkins." R. 707. In other words, the state claimed that Appellant attempted to kill Archie, but shot Jenkins, an unintended victim, instead.

Murder

The judge charged the jury with the elements of murder, explaining that the state must present "proof beyond a reasonable doubt, that the defendant killed another person with malice aforethought." R. 663, ll. 9-14. He defined malice as "hatred, ill will or hostility towards another person." R. 663, ll. 14-16. He further defined malice as "the intentional doing of a wrongful act without just cause or excuse, and with an intent to inflict an injury or under circumstances that the law would infer an evil intent." R. 663, ll. 16-19.

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[1] Indeed, State v. Williams, Op. No. 5540 (S.C. Ct. App. filed Feb. 28, 2018) (Shearouse Adv. Sh. No. 9 at 112) concerned only whether transferred intent applied to attempted murder where the intended victim was not the person actually harmed. The Williams opinion did not indicate any issue, like the one in the present case, with the judge charging the jury that general intent for murder could be transferred and would satisfy the element of specific intent to kill, in equating malice and specific intent to kill during the jury charge, or the impact of an implied malice charge from the use of a weapon on the requirement for the state to prove specific intent.

[2] Further, this Court's analysis completely omitted any impact of the trial judge's instruction permitting the jury to infer malice from the use of a deadly weapon where the judge equating malice and specific intent in light of the Supreme Court's holding that implied malice can never give rise to specific intent.

The judge explained that malice aforethought could be "either express or it can be implied." R. 664, ll. 1-2. "Express malice may be shown when a person speaks words that express hatred or ill will for another person. Or when the person prepared beforehand to do the act which was later accomplished." R. 664, ll. 7-11. On the other hand, the judge told the jurors, malice "may be implied from conduct showing a total disregard for human life." R. 664, ll. 12-13. Finally, according to the judge, "[i]mplied malice may also arise when the act is done with a deadly weapon," including a pistol. R. 664, ll. 13-23.

Attempted murder

Thereafter, the judge instructed the jury on attempted murder. According to the judge, the state was required to prove Appellant "with the intent to kill, attempted to kill another person with malice aforethought express or implied." R. 665, ll. 4-10. He reiterated his earlier instruction regarding malice, including the instruction permitting an inference of malice from the use of a deadly weapon. R. 665, l. 11 – R. 666, l. 10. The judge then instructed the jury regarding specific intent:

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

R. 666, l. 11-20.

The judge told the jury that intent could be "shown by acts and conduct of the defendant and other circumstances from which you may naturally and reasonably infer intent." R. 666, ll. 21-24. These circumstances included "[e]vidence of the character of the act, the character of the instrument used, the manner in which it was used, the purpose sought to be accomplished and the resulting wounds or injuries." R. 666, l. 24 – R. 667, l. 4. He explained yet another way the

jurors could infer intent – "when it is demonstrated ... that the defendant voluntarily, and willfully commits an act, the natural tendency of which is to destroy another person's life." R. 667, ll. 5-9.

Transferred intent

Pursuant to the state's request, and over Appellant's objection, the judge instructed the jury on the doctrine of transferred intent:

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

R. 667, ll. 9-18 (emphasis added). This was error.

Due Process requires the prosecution prove every element of the charged offense beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970); Todd v. State, 355 S.C. 396, 400, 585 S.E.2d 305, 307 (2003); State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000); State v. Lane, 406 S.C. 118, 749 S.E.2d 165 (Ct. App. 2013). "The office and purpose of instructions are to enlighten the jury and to aid them in arriving at a correct verdict." State v. Hewitt, 205 S.C. 207, 31 S.E.2d 257, 259 (1944). This Court should reverse Appellant's conviction and sentence for attempted murder based upon the trial judge's erroneous instructions regarding transferred intent. See State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 583 (2010) (holding that reversal is required where a trial judge's refusal to give a requested jury charge is erroneous and prejudicial to the defendant); State v. Lee-Grigg, 374 S.C. 388, 405, 649 S.E.2d 41, 50 (Ct. App. 2007) (holding that a "trial court has a duty to give a requested instruction that is supported by the evidence and correctly states the law applicable to the issues").

Recently, the South Carolina General Assembly created the crime of attempted murder. Lawmakers defined the offense as: "A person who, *with intent to kill*, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." S.C. Code Ann. § 16-3-29 (emphasis added). The South Carolina Supreme Court held the Legislature intended to require the state prove specific intent to commit murder as an element of attempted murder. State v. King, 422 S.C. 47, 55, 810 S.E.2d 18, 22 (2017).

Additionally, the Supreme Court addressed the "implications of the phrase 'malice aforethought, either express or implied'" as used in the attempted murder statute. Id. at 56, 810 S.E.2d at 22. Citing Keys v. State, 766 P.2d 270 (Nev. 1988), the Court explained how the Nevada Supreme Court clarified how to distinguish between attempted murder and murder by analogizing express malice to a specific intent to kill. Id. at 57, 810 S.E.2d at 23. To explain the interplay between express malice and specific intent to kill, the Supreme Court quoted the Nevada Court: "'Attempted murder can be committed only when the accused's acts are accompanied by express malice, malice in fact. One cannot *attempt* to kill another with implied malice because there is no such criminal offense as an attempt to achieve an unintended result.'" Id. (quoting Keys, 766 P.2d at 273) (internal quotation omitted) (emphasis in original). Further, the Court explained that "one cannot ... attempt to have the general malignant recklessness contemplated by the legal concept, 'implied malice.'" Id. (internal quotation omitted). In short, "[o]ne cannot be guilty of attempted murder by implied malice because implied malice does not encompass the essential specific intent to kill." Id. However, "[a]n attempt to kill with express malice is" "completely consistent with the specific intent requirement of the crime of attempt." Id. (emphasis in original). "Attempted murder is the performance of an act or acts which tend, but fail, to kill a human being, when such acts are

done with express malice, namely, with the deliberate intention unlawfully to kill." Id. (internal quotation omitted).

The Court explained that assault and battery with intent to kill (ABWIK), which was supplanted by the codification of attempted murder, required "the same general intent as murder." Id. at 59, 810 S.E.2d at 24. After recounting prior law interpreting ABWIK, the Court noted that our appellate courts had interpreted malice aforethought and general intent to kill, as required under ABWIK, as the equivalent of each other. Id. at 60-61, 810 S.E.2d at 25. In sharp contrast, statutory attempted murder required "intent to kill" *and* "malice aforethought," which the Supreme Court interpreted to mean the Legislature intended to "elevate[] the required mental state above a general-intent crime." Id. at 61, 810 S.E.2d at 25.

"In the context of an attempt crime, specific intent means the defendant intended to complete the acts comprising the underlying offense." State v. Reid, 393 S.C. 325, 329, 713 S.E.2d 274, 276 (2011). "The act constituting the attempt must be done with intent to commit that particular crime." State v. Sutton, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000) (internal quotation omitted). The defendant must "consciously intend" the completion of acts comprising the offense. Id.

"Criminal liability normally is based upon the concurrence of two factors: the defendant's criminal intent and the actual, physical act constituting the offense." State v. Fennell, 340 S.C. 266, 271, 531 S.E.2d 512, 515 (2000). "A defendant may not be convicted of a criminal offense unless the state proves beyond a reasonable doubt that he acted with the criminal intent, or mental state, required for that particular offense." Id.

In State v. Heyward, 197 S.C. 371, 15 S.E.2d 669 (1941), the defendant shot the deceased because he believed the deceased was another man who had threatened him earlier in the day. Given those facts, the South Carolina Supreme Court explained:

> [I]t is a well-settled principle of law that where a slayer designs or intends to kill one person but, through mistake, kills another, his crime is the same as if he had executed his intended purpose. If there was malice in appellant's heart, he was guilty of the crime charged, it matters not whether he killed his intended victim or a third person through mistake. Our inquiry, therefore, will be whether there was such legal justification or excuse for the shooting as would eliminate the element of malice.

197 S.C. at 371, 15 S.E.2d at 672.

In Fennell, the South Carolina Supreme Court permitted the application of the doctrine of transferred intent where the defendant intended to kill one person, which he did, but the defendant also killed a second person, an unintended victim. Fennell, 340 S.C. at 272, 531 S.E.2d 515. The Court recognized that "the defendant did not act with malice toward the unintended victim," but allowed the defendant's "mental state of malice" to be transferred to the unintended victim to support a conviction for assault and battery with intent to kill, which only required a showing of malice. Id. The Court held "the doctrine of transferred intent may be used to convict a defendant of ABIK when the defendant kills the intended victim and also injures an unintended victim." Id. at 276, 531 S.E.2d at 517. Transferred intent could apply where the *mens rea* for the two offenses was the same. After all, "it is the *mens rea* which is determinative of whether transferred intent should be applied in the appropriate case." Pettigrew v. State, 927 A.2d 69, 79 (Md. 2007); see also People v. Slater, 924 N.E.2d 1039, 1047 (Ill. App. Ct. 2009) (calling "transferred intent" a "misnomer" and finding "transferred mental state" to be a more accurate term).

In Connecticut, like South Carolina, attempted murder requires specific intent. State v. Hinton, 630 A.2d 593, 601 (Conn. 1993). When analyzing attempted murder, the Connecticut Supreme Court explained that "[p]roof of an attempt to commit a specific offense requires proof that the actor intended to bring about the elements of the completed offense." Id. Regarding transferred intent and attempted murder, the Connecticut court held that "[i]f the completed offense includes an intent to kill a particular person, the attempt to kill must also include an intent to kill that same person." Id. "Transferred intent is not needed, however, to insure that a defendant is prosecuted for attempted murder." Id. at 600-02. "A defendant can still be prosecuted for his intent to kill and conduct aimed at killing the intended victim whether a third party is killed or no one is even injured." Id. "The doctrine of transferred intent, generally considered a necessary fiction, is therefore not necessary to prosecute for attempted murder a defendant whose aim was poor." Id. According to the Hinton court, the rule of lenity also required this result. Id. See also State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) (explaining a core rule of statutory construction that "when a statute is penal in nature, it must be construed strictly against the state and in favor of the defendant").

In People v. Bland, 48 P.3d 1107, 1116-18 (Cal. 2002), the California Supreme Court explained that an attempt crime "sanctions what the person intended to do but did not accomplish, not unintended and unaccomplished potential consequences." Particularly important for the instant case, the court noted that differing *mens rea* required for murder and attempted murder and explained that "[t]o constitute murder, the guilty person need not intend to take life; but to constitute an attempt to murder, he must so intend." Bland, 48 P.3d at 1117. "The wrong-doer must specifically contemplate taking life; and though his act is such as, were it successful,

would be murder, if in truth he does not mean to kill, he does not become guilty of an attempt to commit murder." Id.

Regarding the applicability of transferred intent, the court held:

> To be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else. The defendant's mental state must be examined as to each alleged attempted murder victim. Someone who intends to kill only one person and attempts unsuccessfully to do so, is guilty of the attempted murder of the intended victim, but not of others.

Id. To help explain its rationale, the court noted that applying transferred intent when no bystander was physically injured would result in situations where "it is virtually impossible to decide to whom the defendant's intent should be transferred." Id. The court rhetorically asked: "Is the intent to murder transferred to everyone in proximity to the path of the bullet? Is the intent transferred to everyone frightened and thereby assaulted by the shot? There is no rational method for deciding how the defendant's intent to murder should be transferred." Id.

In Cascen v. Virgin Islands, 60 V.I. 392 (V.I. 2014), the Supreme Court of the Virgin Islands reversed Cascen's conviction for third degree assault, which was based upon the transferred intent theory. Cascen fired fifteen shots at a group of people, which included his intended victim, Cyril Peters. Id. at 398. W.J., a minor, was grazed by one of the bullets. Id. The Court held there was no evidence that Cascen intended to assault W.J.; therefore, the conviction depended solely on whether Cascen's intent to murder Peters could be transferred to W.J. Id. at 407.

Examining the *mens rea* of the two offenses, the court noted that unlike first-degree murder, which required only intent to commit murder, the assault charge required proof of the specific intent to injure the alleged victim. Id. (citing Boston v. People, 56 V.I. 634, 641 (V.I. 2012)). Ultimately, the Court held Cascen's intent to murder Peters could not be "used to

support an assault conviction because even though the People showed that Cascen used 'unlawful violence upon the person of' W.J., the People introduced no evidence establishing that Cascen had the 'intent to injure' W.J." Id. at 408.

Understanding the nature of specific intent and the doctrine of transferred intent makes clear that the transferred intent does not apply to attempt crimes. See Hinton, 630 A.2d at 600-02; see also Cockrell v. State, 890 So.2d 174, 181 (Ala. 2004) (refusing to apply the doctrine of transferred intent to attempted murder); Ramsey v. State, 56 P.3d 675, 682 (Alaska 2002) (holding that attempted murder requires a specific intent to kill a particular person and refusing to apply transferred intent); People v. Smith, 124 P.3d 730, 739-40 (Cal. 2005) (explaining "[t]he mental state required for *attempted* murder is further distinguished from the mental state required for murder in that the doctrine of 'transferred intent' applies to murder but not to attempted murder"); People v. McCloud, 149 Cal. Rptr.3d 902, 909 (Cal. Ct. App. 2012) (explaining that intent to kill does not transfer to victims who are not killed, and, as a result, transferred intent cannot serve as a basis for a finding of attempted murder); Harrison v. State, 855 A.2d 1220, 1237 (Md. 2004) (rejecting application of the doctrine of transferred intent to attempted murder offense); State v. Williamson, 102 S.W. 519, 520 (Mo. 1907) (holding the state failed to prove assault with intent to kill a particular person because the only evidence in the case showed the defendant shot at a second person and was not even aware that the person who ultimately died was present).

The judge's instructions at Appellant's trial lowered the state's burden of proof for attempted murder. According to the judge, in order for them to find Appellant guilty of attempted murder, the state was required to prove Appellant "with the intent to kill, attempted to kill another person with malice aforethought express or implied." R. 665, ll. 4-10. Concerning

specific intent, the judge told the jurors that "specific intent" did *not* mean an *intent to kill a specific person*, but rather that the defendant consciously intended the completion of acts that comprise the act of attempted murder. R. 666, l. 11-20; Cf. R. 707 (indictment alleging Appellant "did with intent to kill another person, Tyrus Archie, with malice aforethought, either express or implied, by shooting Rayquann Jenkins").

Additionally, the judge told the jurors that intent, even specific intent, could be transferred. R. 667, ll. 9-18. He incorrectly told the jurors that if a person with malice aforethought attempts to kill another person, but by mistake injures or kills a different person, then that person has the specific intent to kill the person injured. R. 667, ll. 9-18. This instruction conflated malice with a specific intent to kill. He then compounded the problem by permitting the jurors to transfer that "intent to kill," which he had effectively defined as malice, from the original person the defendant attempted to kill, to the person who was actually killed or injured. R. 667, ll. 9-18. See State v. Higgins, 826 A.2d 1126, 1141 (Conn. 2003) (explaining the bar to application of the transferred intent doctrine when the *mens rea* requirements of the two offenses are different); State v. Robinson, 883 P.2d 764, 767-768 (Kan. 1994) (holding that the transferred intent doctrine does not permit transferring a lesser intent, such as recklessness or general intent, from one crime to a crime requiring proof of greater intent, such as specific intent); People v. Trinkle, 369 N.E.2d 888, 890 (Ill. 1977) (warning against commingling of crimes with different levels of *mens rea*, such as "attempted murder" with "other forcible felonies" because one cannot attempt to achieve an unintended result).

The instructions permitted the jurors to transfer general criminal intent for murder to an unintended victim, Jenkins. Appellant was not charged with the murder of Jenkins, he was charged with the attempted murder of Jenkins, which requires a specific intent to kill. Thus, the

state was required to prove that Appellant acted specifically to kill Jenkins. The judge erred (1) in charging the jury that the state was not required to prove that Jenkins was the intended target, (2) in charging the jury that general intent for murder could be transferred and would satisfy the element of specific intent to kill, and (3) in equating malice and specific intent. The judge's error in equating malice and specific intent was compounded by his instruction that malice could be implied, even for attempted murder, and permitting the jury to infer malice from the use of a deadly weapon. See State v. Belcher, 385 S.C. 597, 610, 685 S.E.2d 802, 809 (2009) (finding error for a trial judge to instruct a jury that malice may be implied from the use of a deadly weapon where there is evidence that would reduce, mitigate, excuse, or justify the killing or assault and battery with intent to kill). Appellant respectfully requests rehearing of this issue.

Mistrial

Appellant challenged the trial judge's failure to grant a mistrial based upon the state's failure to produce a necessary witness for cross-examination to establish the chain of custody on critical evidence in the case. In rejecting Appellant's claim, this Court refused to address Appellant's Confrontation Clause claim, stating that Appellant only addressed the issue under a chain of custody analysis. State v. Green, 2018-UP-187 (S.C. Ct. App. filed May 9, 2018). Appellant respectfully requests rehearing as to his claim that the state's failure to call a necessary witness, which would have permitted cross-examination of that witness, in order to establish the chain of custody in the case, violated Appellant's rights under the Confrontation Clause, and required the granting of Appellant's motion for mistrial. Additionally, this Court held the chain of custody for the shell casings was established as far as practicable. Appellant respectfully requests hearing on this matter due to the state's failure to call a critical witness in the chain of custody.

In the brief, Appellant cited the United States Constitution and relevant controlling case law to support his contention that he had the right to confront his accusers. Undoubtedly, Appellant's Confrontation Clause claim was intertwined with his claim that the state failed to establish a chain of custody as to the critical evidence because it was the essential witness within that chain that Appellant was unable to cross-examine. However, Appellant's issue at trial, and on appeal, is not simply that evidence should not have been admitted because of an insufficient chain; rather, Appellant's issue is that a mistrial should have been granted because the state presented evidence of a ballistics "match" where the state had not presented a critical witness to testify, and be subject to cross-examination, in order to establish that the evidence tested was the evidence collected.

The state failed to present a critical witness – Bean – to establish the chain of custody of the three shell casings found at the scene.[3] As a result, Appellant was unable to cross examine this critical witness and the state was unable to establish a proper chain of custody for the shell casings. None of the witnesses presented were able to say that the three shell casings transported to SLED, tested by the firearms' expert, and introduced at trial were the same three shell casings found at the scene. Contrary to the solicitor's argument that the shell casings had unique identifying features, nothing could be further from the truth. The shell casings looked like every other shell casing of the same type. Nothing on the shell casings identified them as the same ones in the photographs or the

[3] The South Carolina Supreme Court has long held that a party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable. State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007). Although the evidence must be clear as to who handled the evidence and what was done with it between the taking and the analysis, testimony from each custodian is not a prerequisite to establishing a chain of custody sufficient for admissibility. Benton v. Pellum, 232 S.C. 26, 33-34, 100 S.E.2d 534, 537 (1957); Sweet, 374 S.C. at 7, 647 S.E.2d at 206. Police need not account for every transfer of the fungible evidence, but must demonstrate a reasonable assurance the condition of the item remained the same from the time it was obtained until its introduction at trial. State v. Hatcher, 392 S.C. 86, 94, 708 S.E.2d 750, 754 (2011) (quoting State v. Price, 731 S.W.2d 287, 290 (Mo. Ct. App. 1987)).

same ones collected by Bean. As such, the state failed to establish the chain of custody as far as practicable by failing to call a critical witness and preventing Appellant from cross-examining that witness.

Appellant moved for a mistrial based on the state's failure to call Bean as a witness in light of the expert's testimony about a ballistics "match." R. 469, ll. 16-22. Appellant explained that Bean had collected the spent shell casings and the state's presentation of that evidence to the jury without Bean's presence violated Appellant's right to confront his accusers. R. 470, ll. 7-22. Appellant made clear that Bean's absence broke the chain of custody of the spent shell casings. R. 472, ll. 1-8. Appellant reiterated his motion for mistrial based on the state's failure to present Bean as witness in light of his having collected the shell casings from the scene and being the only witness who could say the casings transported to SLED were the same ones collected from the scene. R. 581, ll. 14-22. Appellant noted the importance of the firearms expert's testimony to the state's case. R. 582, ll. 2-10. Appellant further explained Bean's absence denied him his constitutional right to cross examine his accuser. R. 583, ll. 14-22.

The judge denied the motion for mistrial, explaining

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

R. 584, ll. 1-12. According to the judge, Burnish and Hawkins adequately covered it for admissibility purposes. As a result, the judge denied the mistrial motion. R. 584, ll. 13-16. Further, the judge denied the request to instruct the jury to disregard the firearms examiner's testimony. R. 584, ll. 16-21.

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

The solicitor relied upon the ballistics evidence in his closing argument. According to the solicitor, the jury knew Appellant had fired the gun three times because the gun had been matched to the shell casings by the firearms expert from SLED. R. 618, l. 24 – R. 619, l. 3. According to the solicitor, there was "[n]o question about that. There's not going to be any controversy about that. This gun fired 3 times." R. 619, ll. 3-5. To explain inconsistencies in statements presented by various witnesses, the prosecutor asked the jurors to "look at the physical evidence. Look at the markers on the ground. Look at what the police officers found when they got there." R. 626, ll. 14-18. According to the solicitor, the evidence markers proved "[t]he gun was moving. It was moving in a straight line, because the shell casings that were kicked out of that gun, one here, one here, one here. It's not manipulation by the police. They didn't manipulate the evidence. This is what they found." R. 626, ll. 19-24. To support this point, the solicitor asked the jurors why the shell casings were found "20 or 25 feet away from the door" when "the gun that fired those shell casings [were] 500 feet out here in this field." R.

627, ll. 7-13. The solicitor emphasized that Appellant "was arrested 20 feet from the gun which matched the three shell casings." R. 630, ll. 10-11.

Appellant respectfully requests rehearing of this issue. This Court overlooked or misapprehended that Appellant's request for a mistrial was based upon the state's failure to call a critical witness in the chain of custody, which prevented Appellant's cross-examination of the witness. Additionally, this Court overlooked or misapprehended that the state failed to establish the chain of custody as far as practicable where no witness who actually testified could establish that the shell casings tested by the ballistics expert were the shell casings found at the crime scene.

Respectfully Submitted,

Susan B. Hackett

SUSAN B. HACKETT
Appellate Defender

This 24th day of May, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County

George C. James, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RODNEY R. GREEN,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Alphonso Simon Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Rodney R. Green, #335829, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 24th day of May, 2018.

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE ME this 24th day of May, 2018.

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