

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Florence County
Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2017-000105

THOMAS E. DAVIS,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT PURSUANT TO WHITE V. STATE

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S.C. SUPREME COURT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL1

STATEMENT OF THE CASE.....2

STATEMENT OF THE FACTS3

ARGUMENT6

 I. The trial court correctly denied Petitioner’s motion for a directed verdict because the State presented some evidence of a specific intent to kill, and any error in denying the motion was harmless beyond a reasonable doubt where Petitioner was only convicted of the lesser-included charge, which does not require specific intent.....6

 II. The issue of whether the trial court incorrectly charged the jury on implied malice as an element of attempted murder is not preserved for appellate review because trial counsel did not object to the charge given. Even if this Court finds the issue preserved, the jury instruction on implied malice was proper because State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), aff’d as modified, 422 S.C. 47, 810 S.E.2d 18 (2017), does not address the issue of whether an implied malice charge is proper in a trial for attempted murder, and in any event, King had not yet been decided so the charge was a correct statement of law at the time of Petitioner’s trial. Further, because Petitioner was convicted of the lesser-included charge of assault and battery of a high and aggravated nature rather than attempted murder, any error in the jury charge was harmless beyond a reasonable doubt.....8

CONCLUSION.....12

TABLE OF AUTHORITIES

Cases

Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 518 S.E.2d 591 (1999)..7
Herron v. Century BMW, 719 S.E.2d 640 (S.C. 2011) 6, 8
Madison ex rel. Bryant v. Babcock Center, Inc., 371 S.C. 123, 634 S.E.2d 650 (2006).... 8
State v. Bennett, 415 S.C. 232, 781 S.E.2d 352 (2016)..... 6
State v. Brandt, 393 S.C. 526, 713 S.E.2d 591 (2011) 10
State v. Brown, 205 S.C. 514, 32 S.E.2d 825 (1945) 7
State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004) 6
State v. Dennis, 402 S.C. 627, 742 S.E.2d 21 (Ct. App. 2013) 11
State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000) 11
State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), aff'd as modified, 422 S.C. 47, 810 S.E.2d 18 (2017)..... 1, 8, 9
State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017) 9, 11
State v. Middleton, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2012)..... 10
State v. Nix, 288 S.C. 492, 343 S.E.2d 627 (Ct. App. 1986)..... 6
State v. Stanko, 402 S.C. 252, 741 S.E.2d 708 (2013) 10
State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012) 10
State v. Walker, 349 S.C. 49, 562 S.E.2d 313 (2002)..... 6
State v. Williams, 422 S.C. 525, 812 S.E.2d 917 (Ct. App. 2018)..... 10
White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974)..... 2

Statutes

S.C. Code Ann. § 16-3-600(B)(3)..... 10
S.C. Code Ann § 16-3-600(B)(1)..... 10

Rules

Rule 20(b), SCRCrimP 8

STATEMENT OF ISSUES ON APPEAL

- I. The trial court correctly denied Petitioner's motion for a directed verdict because the State presented some evidence of a specific intent to kill, and any error in denying the motion was harmless beyond a reasonable doubt where Petitioner was only convicted of the lesser-included charge, which does not require specific intent.

- II. The issue of whether the trial court incorrectly charged the jury on implied malice as an element of attempted murder is not preserved for appellate review because trial counsel did not object to the charge given. Even if this Court finds the issue preserved, the jury instruction on implied malice was proper because State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), aff'd as modified, 422 S.C. 47, 810 S.E.2d 18 (2017), does not address the issue of whether an implied malice charge is proper in a trial for attempted murder, and in any event, King had not yet been decided so the charge was a correct statement of law at the time of Petitioner's trial. Further, because Petitioner was convicted of the lesser-included charge of assault and battery of a high and aggravated nature rather than attempted murder, any error in the jury charge was harmless beyond a reasonable doubt.

STATEMENT OF THE CASE

On September 8, 2011, the Florence County Grand Jury indicted Petitioner, along with codefendants Tyon Michael Evans (Evans) and Rasheem Kevin Thomas (Thomas), for attempted murder and armed robbery. The Grand Jury additionally indicted Petitioner for possession of a weapon during the commission of a violent crime (2011-GS-21-1371). Richard Strobel represented Petitioner. Deputy Assistant Solicitor John Jepertinger prosecuted the case for the State. On June 18, 2012, Petitioner proceeded to trial before the Honorable Thomas A. Russo and a jury. On June 20, 2012, the jury convicted Petitioner as indicted of armed robbery and possession of a weapon during the commission of a violent crime and of the lesser-included offense of assault and battery of a high and aggravated nature. Judge Russo sentenced Petitioner to concurrent terms of imprisonment of thirty years for armed robbery and twenty years for assault and battery of a high and aggravated nature, plus a consecutive term of five years for the weapons charge. Petitioner did not file a notice of appeal.

On March 27, 2013, Petitioner filed an application for post-conviction relief. The State filed a return on December 17, 2013. On October 9, 2014, an evidentiary hearing was held before the Honorable Edgar W. Dickson. Jonathan D. Waller represented Petitioner at the PCR hearing. Croom Hunter represented the State. In an amended order filed December 29, 2016, Judge Dickson denied relief but found Petitioner was entitled to belated review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974). On January 19, 2017, Petitioner filed and served his notice of appeal. Petitioner filed a Petition for a Writ of Certiorari and a Brief of Appellant Pursuant to White v. State on March 2, 2018. This Brief of Respondent follows.

STATEMENT OF THE FACTS

On April 6, 2011, Johnny Henicks (Henicks) was at home with his three-year-old son, Shaheem, when a Nissan Altima pulled into his mobile home park. App. p. 61. Evans was driving with passengers Thomas and Petitioner. App. p. 61. Henicks testified a person matching Petitioner's description walked up behind him and struck him in the back of the head multiple times while his son sat on his lap. App. pp. 73-77. Henicks testified he threw his wallet out in hopes of saving his life. App. pp. 79-80. According to Henicks, his attacker then shot him and took the gold chain from around his neck. App. pp. 77-80. Henicks testified the shooter then fled back to the car, which drove off. App. p. 77. Arenthus Garrett, who was visiting a neighbor of Henicks' at the time of the incident, testified he looked out the window after hearing a shot and saw the shooter, whom he described as a man wearing a light-colored shirt with dreadlocks pulled into a ponytail who bore a "strong resemblance" to Petitioner. App. pp. 88-90, 96. Garrett testified the shooter got into the backseat of the Nissan Altima and left. App. p. 92. Garrett further testified he observed the Altima's license plate and remembered the tag had two Z's. App. p. 92.

Almost immediately after the Altima pulled away from the shooting, a vehicle driven by undercover Florence Police Department officers took up pursuit. App. pp. 101-02. Officer Rodney Fridley testified that after a high speed chase, the Altima¹ eventually came to a stop, and three people jumped out. App. pp. 102-05. All three occupants of the car were eventually apprehended. App. pp. 105-06. Officer Jessie Collins testified he observed Petitioner hiding underneath a house shortly after the suspects bailed out of the car, and he was forced to tase

¹ Officer Fridley testified dispatch notified officers to be on the lookout for a white Nissan Altima with license plate FZZ526. App. p. 101.

Petitioner after a struggle. App. pp. 115-16. Officer Collins testified, of the three suspects, Petitioner was the only one with dreadlocks. App. p. 117.

Officer Kendrick Spears of the Florence Police Department testified he found a gun in a wood line in the same direction Petitioner and Thomas ran. App. pp. 150-51. Sergeant Nida of the Florence Police Department testified the victim's wallet was recovered at the scene near where the suspects were apprehended. App. pp. 160-61. Ira Parnell, the SLED firearms examiner, testified the bullet recovered from the scene of the shooting matched the gun recovered from the woods near where the suspects fled. App. pp. 184-86, 218, 220, 227. Ila Simmons, also of SLED, testified both of Petitioner's hands tested positive for traces of gunshot residue, and none of the codefendants tested positive for gunshot residue. App. pp. 194-97.

Evans, Petitioner's codefendant, testified against Petitioner. App. pp. 245-70. Evans testified he drove the car to the trailer park where Henicks lived, and Thomas rode up front, while Petitioner was in the back passenger seat. App. p. 251-52. Evans testified Petitioner got out of the car at the victim's house, and a few minutes later Evans heard a gunshot. App. pp. 254-56. According to Evans, Petitioner then came back to the car, jumped in, and said to go. App. p. 256. Evans testified he saw the gun in the backseat with Petitioner when he looked in the rearview mirror. App. pp. 256-57.

Petitioner presented a much different story when he took the stand in his own defense. App. p. 284. Petitioner claimed he went to Evans' home and smoked marijuana, after which Evans said "come ride with me." App. pp. 289-90. Petitioner testified he knew nothing about the gun but did admit he sat in the backseat of the car as they drove to the trailer park where Henicks lived. App. p. 291. According to Petitioner, the other codefendant, Thomas, spotted the victim, who had allegedly been in a fight with Thomas a few weeks earlier. App. pp. 289, 291-92.

Petitioner testified he was going get out of the car to backup Thomas in a confrontation with Henicks until Evans pulled the gun out, at which point Petitioner decided to stay in the car. App. pp. 292-93. Petitioner then testified Thomas got out of the car, walked up behind Henricks and hit him in the head with the gun, then shot him. App. pp. 294-95. Petitioner testified he never shot anyone, never robbed the victim, and never touched the gun. App. p. 299.

ARGUMENT

- I. **The trial court correctly denied Petitioner’s motion for a directed verdict because the State presented some evidence of a specific intent to kill, and any error in denying the motion was harmless beyond a reasonable doubt where Petitioner was only convicted of the lesser-included charge, which does not require specific intent.**

At the conclusion of the State’s case, Petitioner moved for a directed verdict. App. p. 271.

Petitioner’s counsel contended the State had “not presented sufficient evidence on these three charges to go any further with the trial of this case.”² App. p. 271. The trial judge ruled:

Alright, I’m gonna respectfully deny the motions. I think that at this point the Court is only concerned about existence of evidence and does not give any weight or credibility to that evidence as the jury’s role, and I think there is evidence that is in the record whereby depending on how the jury views the evidence they could find in this case so I’m gonna respectfully deny the motion.

App. pp. 271-72. Although perhaps not the most articulate explanation, the trial court clearly applied the correct standing in weighing Petitioner’s motion.

When considering a motion for directed verdict, the trial court is concerned with the existence of evidence, not its weight. State v. Walker, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). The role of the trial court is only to determine “whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt.” State v. Bennett, 415 S.C. 232, 781 S.E.2d 352 (2016). If there is any direct or circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must affirm the trial judge’s ruling. State v. Cherry, 361 S.C. 588, 593-94, 606 S.E.2d 475, 478

² Respondent submits this bare bones argument is arguably insufficient to preserve the specific issue Petitioner raises in his brief – whether the State presented sufficient evidence of a specific intent to kill so as to permit the attempted murder charge to be submitted to the jury. “In order to be preserved, an issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge.” Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011). The quoted text above is the extent of the argument trial counsel made on the motion.

(2004). “In deciding motions for a directed verdict. . . , the evidence and all reasonable inferences which may be drawn from it must be viewed in the light most favorable to the non-moving party. If more than one reasonable inference can be drawn from the evidence, the case must be submitted to the jury.” Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 611, 518 S.E.2d 591, 597 (1999). “[U]nless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge’s ruling upon a motion for a directed verdict must stand absent an error of law.” State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986).

In Petitioner’s case, the State presented evidence Petitioner approached the victim, who was seated in a chair with his son his lap, from behind and struck him in the back of his head multiple times. App. pp. 75-77. Then, while the victim was disoriented and falling to the ground, Petitioner shot him the back. App. pp. 74-75. The victim, while on the ground, took his wallet from his pants and tossed it out for his attacker. App. pp. 79-80. Petitioner took the wallet and a gold chain from around the victim’s neck. App. pp. 78-80.

The State’s theory of guilt could induce a reasonable juror to conclude Petitioner deliberately shot victim in the back with the intent to rob him. While Petitioner alleges there was no evidence of a specific intent to kill, this assertion ignores the significant circumstantial evidence showing Petitioner deliberately shot the victim from behind after the victim was already falling to the ground. Given the State’s theory of robbery as the motive, Petitioner had no need to shoot the victim, who testified he was disoriented and falling to the ground after receiving the blows to the head, unless he intended to kill the victim.

Petitioner’s case did not present a complete failure of evidence of his guilt because the jury could reasonably infer a specific intent to kill from the evidence the State presented. See

State v. Brown, 205 S.C. 514, 520, 32 S.E.2d 825, 827 (1945) (“Where there is any evidence, however slight, on which the jury may justifiably find the existence or the non-existence of material facts in issue, or if the evidence is of such character that different conclusions as to such facts reasonably may be drawn therefrom, the issues should be submitted to the jury.”). Instead, circumstantial evidence of Petitioner’s specific intent to kill was presented, and his motion for a directed verdict was properly denied. Additionally, as discussed more fully below, Petitioner was not convicted of attempted murder, but of assault and battery of a high and aggravated nature, which does not require a specific intent to kill, so any error in denying the motion as to the attempted murder charge was harmless. App. p. 545. Therefore, Petitioner’s convictions and sentences should therefore be affirmed.

II. The issue of whether the trial court incorrectly charged the jury on implied malice as an element of attempted murder is not preserved for appellate review because trial counsel did not object to the charge given. Even if this Court finds the issue preserved, the jury instruction on implied malice was proper because State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), *aff’d as modified*, 422 S.C. 47, 810 S.E.2d 18 (2017), does not address the issue of whether an implied malice charge is proper in a trial for attempted murder, and in any event, King had not yet been decided so the charge was a correct statement of law at the time of Petitioner’s trial. Further, because Petitioner was convicted of the lesser-included charge of assault and battery of a high and aggravated nature rather than attempted murder, any error in the jury charge was harmless beyond a reasonable doubt.

Petitioner contends the trial court erred in instructing the jury implied malice was sufficient to establish the malice element of attempted murder. As an initial matter, Respondent asserts this allegation is unpreserved.

It is axiomatic that an issue cannot be raised for the first time on appeal. Herron, 395 S.C. at 465, 719 S.E.2d at 642. Arguments not presented to nor ruled upon by the trial court are not preserved for appellate review. Madison ex rel. Bryant v. Babcock Center, Inc., 371 S.C. 123,

144, 634 S.E.2d 650, 661 (2006). In order to preserve an objection to a jury charge, trial counsel was required to object to the charge before the jury retired, and his failure to do so has waived the issue on appeal. Rule 20(b), SCRCrimP (“[T]he parties shall be given the opportunity to object to the giving or failure to give an instruction before the jury retires, but out of hearing of the jury. . . . Failure to object in accordance with this rule shall constitute a waiver of objection.”). Petitioner’s Petition for Certiorari which accompanied this brief alleges trial counsel was ineffective for failing to object to the implied malice jury instruction, and the record reflects trial counsel indeed did not object to the charge. PWC p. 10; App. pp. 354-55. Therefore, by his own admission, Petitioner has conceded this issue is not preserved for appellate review.

However, even if this Court declines to find this issue unpreserved, Petitioner’s reliance exclusively on King in arguing the trial court’s jury instruction was erroneous is misplaced. Brief of Petitioner, p. 8. First, Petitioner’s argument misconstrues this Court’s decision in State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017) aff’g as modified State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015) (holding the State must prove a defendant acted with a specific intent to kill in order to be found guilty of attempted murder). King itself clearly acknowledges it did not address the unsettled question of whether or not an implied malice charge is appropriate in an attempted murder case. Id. at 64 n. 5, 810 S.E.2d at 27 n. 5 (“[W]e find it unnecessary to address King’s additional sustaining ground [that the the trial court erred in instructing the jury that malice could be inferred from the use of a deadly weapon]. . . .”) (second brackets in original). Second, in any event, the trial court in this case instructed the jury it must find a specific intent to kill in order to convict Petitioner of attempted murder, thus conforming to this Court’s decision in King. App. p. 355 (“An attempt includes a specific intent to do a particular criminal act along

with an act falling short of the act intended. . . . Intent means intending the result which actually occurs, not accidentally or involuntarily.”).

Moreover, the Court of Appeals’ decision was filed in June 2015 and this Court’s decision in October 2017; this case was tried in June 2012, well before King was decided. App. p. 1. At the time of trial, South Carolina law was unclear as to the level of intent required for attempted murder, especially given the conflicting language of the statute, as noted by this Court in its analysis in King, 422 S.C. at 62, 810 S.E.2d at 25-26 (“While we are convinced this is the correct interpretation, we also acknowledge the ambiguity created by the language in section 16-3-29. . . .”). The trial court, therefore, cannot have erred based on King, because it was not error at the time of Petitioner’s trial to charge implied malice in a trial for attempted murder, and the trial court gave the correct charge with respect to specific intent. State v. Williams, 422 S.C. 525, 533, 812 S.E.2d 917, 921 (Ct. App. 2018) (“The circuit ‘court is required to charge only the current and correct law of South Carolina.’”) (quoting State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011)).

Finally, even if the trial court erred in instructing the jury on implied malice, the error was harmless beyond a reasonable doubt because Petitioner was not convicted of attempted murder, but rather the lesser-included charge of assault and battery of a high and aggravated nature (ABHAN). App. p. 545. “Errors, including erroneous jury instructions, are subject to harmless error analysis.” State v. Stanko, 402 S.C. 252, 264, 741 S.E.2d 708, 714 (2013). Whether a particular error is harmless is subject to a case-by-case analysis, but an “error is harmless when it could not reasonably have affected the result at trial.” State v. Tapp, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012). “When considering whether an error with respect to a jury instruction is harmless, the appellate court must determine beyond a reasonable doubt that

the error complained of did not contribute to the verdict.” Williams, 422 S.C. at 535, 812 S.E.2d at 922 (quoting State v. Middleton, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2012)).

“Assault and battery of a high and aggravated nature is a lesser-included offense of attempted murder.” S.C. Code Ann. § 16-3-600(B)(3). “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 results; or (b) the act is accomplished by means likely to produce death or great bodily injury. S.C. Code Ann § 16-3-600(B)(1). “An ABHAN charge is appropriate *when the evidence demonstrates the defendant lacked the requisite intent to kill.*” State v. Shands, Op. No. 5569 (S.C. Ct. App. filed June 13, 2018) (Shearouse Adv. Sh. No. 24 at 59) (quoting State v. Dennis, 402 S.C. 627, 638, 742 S.E.2d 21, 27 (Ct. App. 2013)) (emphasis added). “The State does not . . . have to prove the defendant acted with malice to obtain an ABHAN conviction because the circumstances that give rise to ABHAN may also give rise to an inference of malice. Thus, a defendant may be convicted of ABHAN regardless of whether malice is present.” State v. Fennell, 340 S.C. 266, 274-75, 531 S.E.2d 512, 517 (2000). See also King, 422 S.C. at 64 n. 5, 810 S.E.2d at 27 n. 5 (“[I]f there is no evidence that one charged with attempted murder had express malice and a specific intent to kill, we believe the crime would involve a lower level of intent[, and] thus, would fall within the lesser degrees of the assault and battery offenses codified in section 16-3-600.”)

Accordingly, Petitioner’s conviction as to the lesser-included ABHAN charge demonstrates the jury found Petitioner lacked the specific intent required for attempted murder, and he could be properly convicted of ABHAN regardless of the existence or nonexistence of malice. Therefore, any error in charging the jury as to implied malice was harmless error, and Petitioner’s conviction should be affirmed.

CONCLUSION

For all the foregoing reasons, the State asks this Court affirm the trial court.

Respectfully submitted,

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August 1, 2018

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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THOMAS E. DAVIS,

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STATE OF SOUTH CAROLINA,

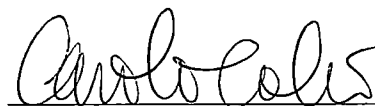
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Brief of Respondent Pursuant to White v. State**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Rose Mary Parham, Esquire
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This 1st day of August, 2018



CAROLINE COLLINS

Administrative Coordinator



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S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

August 1, 2018

The Honorable Daniel E. Shearouse
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Columbia, South Carolina 29211

Re: **Thomas E. Davis v. State of South Carolina**
Lower Court Case No. 2013-CP-21-0846
Appellate Case No. 2017-000105

Dear Mr. Shearouse:

Attached are the original and fifteen (15) copies of the **Brief of Respondent Pursuant to White v. State** in the above referenced case for filing in your office.

Sincerely,

Lindsey A. McCallister
Assistant Attorney General
S.C. Bar No. 79054

LAM/cc

cc: Rose Mary Parham, Esquire