STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY

Court of General Sessions

The Honorable John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2017-001713

THE STATE,

Respondent,

v.

WILLIAM GUY SHUMPERT,

Appellant.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Other Authorities:

STATEMENT OF ISSUE ON APPEAL

The trial judge properly denied Appellant's motion for a directed verdict because the defense of legal impossibility was inapplicable in Appellant's case and the State presented direct and substantial circumstantial evidence of all elements of the charged offenses, including proof that Appellant acted with specific intent.

STATEMENT OF THE CASE

Appellant was indicted during the March 2016 term of the Grand Jury for Berkeley County for two counts of attempted murder (2016-GS-08-00401; 2016-GS-08-00402), and one count of possession of a weapon during the commission of a violent crime (2016-GS-08-00403). Appellant proceeded to a jury trial before the Honorable John C. Hayes, III, from August 7-8, 2017, in Moncks Corner, South Carolina. At the conclusion of trial, the jury found Appellant guilty as indicted. He was sentenced by Judge Hayes to imprisonment for a term of seventeen years for each count of attempted murder and imprisonment for a term of five years for possession of a weapon during the commission of a violent crime, with all charges running concurrently. Appellant timely filed a notice of appeal and subsequently submitted a brief. This Brief of Respondent follows.

STATEMENT OF FACTS

In November of 2015, Faye Boone was living in an apartment complex in Moncks Corner with Appellant. Boone testified Appellant was her best friend's son and that, after her best friend's death, Appellant approached her and asked if he could live with her. Tr. p. 75. Boone told Appellant he could live with her on the condition that he did not bring drugs or alcohol into her home. Tr. p. 75. Boone stated Appellant slept on the couch while he was living with her. Tr. p. 76. On the evening before Thanksgiving 2015, Boone's son called and invited her to dinner at his home. Tr. p. 77-78. Boone left on that Wednesday night, spent the night at her son's house, and returned Thursday evening after eating Thanksgiving dinner with her son and his family. Tr. p. 78. Before Boone left she told Appellant not to invite anyone over to her home while she was away. Tr. p. 78.

When Boone returned home from celebrating Thanksgiving with her family, she found Appellant asleep on the couch. Tr. p. 79. Boone testified there were four or five bottles of Jack Daniels on the floor next to him. Tr. p. 79. Boone stated she confronted Appellant, telling him, "I told you no drinking in the house. No drugs in my house." Tr. p. 79-80. Appellant simply replied, "You lied." Tr. p. 80. Boone's son subsequently placed some leftover food in the refrigerator and left. Tr. p. 80. Shortly after Boone's son left, her neighbor, Karen Clarkson, came over to her house. Tr. p. 80. Boone testified Clarkson was a neighbor that adopted her as a mother. Tr. p. 77. A short while later, Boone asked Clarkson to get some of the leftovers out of the refrigerator and make them a snack. Tr. p. 81. As Boone and Clarkson were eating their food, Appellant jumped up and shouted, "You lied. You lied." Tr. p. 81. Boone asked Appellant what she lied about and Appellant responded by knocking a plate out of Clarkson's hand. Tr. p. 81. Appellant then shoved Clarkson against the wall and began swearing at her. Tr. p. 81. Boone implored Appellant to leave Clarkson alone and threatened to call the police if he did not stop.

Tr. p. 82. Boone then called 911. Tr. p. 82. Appellant then let go of Clarkson, walked outside to his vehicle and retrieved bullets and a gun. Tr. p. 82. Appellant then approached Clarkson, pointed the gun at her stomach, and pulled the trigger a number of times. Tr. p. 82. Boone told Appellant, "[Appellant], have you lost your mind, son? You want to go to jail?" Tr. p. 82. Appellant replied that he did not care. Tr. p. 83. Appellant also stated, "I'm going to kill her. I'm going to kill her." Tr. p. 83. While Boone was on the phone with the 911 operator, Appellant pointed the gun at her and pulled the trigger three times. Tr. p. 83. Boone testified that when Appellant pointed the gun at her, he stated, "I'll kill you." Tr. p. 84. After law enforcement arrived, an officer picked up Appellant's gun and Boone could see bullets in the officer's hand. Tr. p. 85.

Karen Clarkson testified that when she arrived at Boone's home on the day of the incident, the home was ransacked and there were liquor bottles all over the place. Tr. p. 114. Clarkson testified that after she heated up a plate of food for Boone, Appellant knocked it out of her hand, choked her, and threw her against the wall. Tr. p. 115. While he was attacking her, Appellant continued to scream, "You're liars, you're liars." Tr. p. 116. Clarkson stated Appellant punched her and threw her into a television, causing the glass to break. Tr. p. 116. Clarkson testified Appellant then walked outside to his vehicle, got a gun, returned to the house, pointed the gun at her head and pulled the trigger. Tr. p. 117. Clarkson fell back and Appellant pointed the gun at her stomach and continued pulling the trigger. Tr. p. 117. After the gun failed to fire, Appellant got angry and punched Clarkson again. Tr. p. 117. Clarkson stated she believed Appellant was going to kill her because, "he put the gun to my stomach and started pulling the trigger and he put it to my head and started pulling the trigger. I don't know how the gun didn't go off. I don't know." Tr. p. 119. After attacking Clarkson, Appellant pointed the gun at Boone's

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head and stated, "I will f'ing kill you." Tr. p. 120. Clarkson was finally able to get away from Appellant as law enforcement arrived. Tr. p. 120.

Officer Jeremey Younginer of the Moncks Corner Police Department was dispatched to the incident at Boone's home on November 26, 2015. Tr. p. 190. As he approached the residence, Officer Younginer observed Boone with her hands in the air. Tr. p. 192. Boone saw Officer Younginer and indicated she was in distress. Tr. p. 192. As he approached the front door, Officer Younginer heard, "Just a bunch of yelling." Tr. p. 193. When he entered the apartment, Officer Younginer observed Clarkson pointing towards the hallway where Appellant was walking out with a weapon. Tr. p. 194. Officer Younginer testified that when he and another officer went to restrain Appellant, he began to struggle. Tr. p. 196. Officer Younginer noted Appellant smelled like alcohol and that it was clear that he was under the influence of something. Tr. p. 196. Eventually, the officers were able to handcuff Appellant and began to move him outside. Tr. p. 196. Appellant then began kicking the officers' shins and attempting to wriggle away from Officer Younginer's patrol car. Tr. p. 197. The officers eventually had to put Appellant in shackles because they were concerned he would kick the window out of the patrol car. Tr. p. 198. After Appellant was secured, Officer Younginer obtained Appellant's weapon from the floor of the hallway. Tr. p. 201. Officer Younginer testified the gun was a .22 caliber revolver and that there was a round in each chamber. Tr. p. 202. Officer Younginer observed multiple pin stripes from the firing pin striking each round. Tr. p. 203.

Lieutenant Tracy Thrower of SLED conducted testing of Appellant's firearm. Tr. pp. 251-52. Lieutenant Thrower is the supervisor of the firearm and tool mark department at SLED. Tr. p. 247. Lieutenant Thrower testified Appellant's pistol was a revolver and contained six misfired .22 long rifle caliber cartridges. Tr. p. 251. In examining the weapon, Lieutenant

Thrower noticed there was a crack between the hammer and the back strap of the gun's frame. Tr. p. 253. Lieutenant Thrower attempted to test-fire Appellant's weapon but was unable to get the gun to fire. Tr. p. 254. Importantly, Lieutenant Thrower testified that, despite the fact that Appellant's weapon did not fire during testimony, it was still within the realm of possibility that the gun could go off. Tr. p. 256. Lieutenant Thrower explained:

> Different manufacturers use different hardness of metal to make that cartridge case. Some metals or some manufacturers use harder metal than others. So if they had a cartridge that has a softer metal than what I test fired, it could cause that weak firing pin impression to dent it a little bit more and possibly cause it to crush enough to cause ignition and cause a firearm to actually discharge. There's always a possibility that trying to shoot it more than one time. As you keep pulling the trigger and that revolver cylinder rotates around putting the next round in the line to be fired, eventually you are going to come all the way around. If you strike the same area of that cartridge a second time where it's already partially crushed it could cause that rim to crush a little bit more and possibly this time cause it to discharge.

Tr. pp. 257-58. Lieutenant Thrower noted there was no way of knowing whether the gun could fire unless an individual tried to fire it and that in examining the gun and conducting testing he felt, "like it ought to fire." Tr. p. 256.

At the conclusion of the State's evidence, Defense Counsel moved for a directed verdict on the attempted murder charge. Tr. p. 270. Defense Counsel contended that Appellant's weapon was inoperable and, as a result, there was not actually an attempt to kill either of the victims in the case. Tr. p. 270. Defense Counsel further argued that Appellant did not possess the requisite attempt to kill because his firearm was inoperable and, "there's no indication that my client didn't know that the gun was inoperational." Tr. p. 271. Defense Counsel further averred that the possession of a weapon during the commission of a violent crime charge should be dismissed as well if the trial judge agreed that a directed verdict was proper for the attempted murder charges. Tr. p. 273. The trial judge denied Appellant's motion, finding there was sufficient direct and

substantial circumstantial evidence from which the jury could conclude the State proved all elements of attempted murder. Tr. p. 273.

Appellant subsequently testified in his own defense.[1] Tr. pp. 281-85. Appellant acknowledged the gun was his but claimed he did not intend to kill the victims in this case. Tr. pp. 281-83. Appellant alleged he knew the gun did not work and his true intent was simply to scare the victims because they were "jerks" and acted "kind of mean" toward him on the day of the incident. Tr. pp. 283-84.

[1] In his brief, Appellant contends, "Appellant did not testify at trial or present witnesses on behalf of the defense. Br. of App. p. 4. The record, however, reveals that Appellant did testify at trial. See Tr. pp. 281-85.

STANDARD OF REVIEW

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 task of the trial court is to simply 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, 237, 781 S.E.2d 352, 354 (2016). "In an appeal from the denial of a directed verdict motion, the appellate court must view the evidence in the light most favorable to the State." State v. Cope, 405 S.C. 317, 348, 748 S.E.2d 194, 210 (2013). If there is **any** direct evidence or substantial 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 (2004). The appellate court may only reverse the trial judge's denial of a directed verdict motion if there is no evidence supporting the trial judge's ruling. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002). "[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)

ARGUMENT

The trial judge properly denied Appellant's motion for a directed verdict because the defense of legal impossibility was inapplicable in Appellant's case and the State presented direct and substantial circumstantial evidence of all elements of the charged offenses, including proof that Appellant acted with specific intent.

Appellant contends the trial judge erred in denying his motion for directed verdict on both the attempted murder charges and the charge of possession of a weapon during the commission of a violent crime. Appellant makes two distinct allegations of error. First, Appellant avers a directed verdict was proper because the defense of legal impossibility applied in the case. Second, Appellant asserts the State's evidence failed to establish that he specifically intended to kill each of his victims, as is required by State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017). Both of these argument lack merit. The defense of legal impossibility is wholly inapplicable to the facts of Appellant's case. Further, the State proved the element of specific intent where the State presented evidence Appellant pointed a loaded weapon at both of his victims and stated that he was going to kill them.

Legal Impossibility

"Legal impossibility occurs when the actions that the defendant performs or sets in motion, even if fully carried out as he or she desires, would not constitute a crime, whereas factual impossibility occurs when the objective of the defendant is proscribed by the criminal law but a circumstance unknown to the actor prevents him or her from bringing about that objective." State v. Green, 397 S.C. 268, 724 S.E.2d 664 (2012) (citing 21 Am. Jur.2d *Criminal Law* § 156 (2008)). See also McAninch, Fairey & Coggiola, The Criminal Law of South Carolina 463-64 (6th ed.2013) ("There is a narrow sense in which legal impossibility does preclude conviction, when the actor engages in conduct in which he erroneously believes to be proscribed

by the criminal law. For example, should one drink beer on his front porch on Sunday morning thinking such conduct against the law, he still could not be convicted of an attempt to violate the law because of a legal impossibility; the substantive conduct is not a criminal offense."). Appellant avers that because the gun could not fire, it was not legally possible for him to have committed the two counts of attempted murder for which he was charged. Initially, the State would note Appellant misapprehends the definition and application of the doctrine of legal impossibility. As noted *supra*, in order for the defense of legal impossibility to be applicable, the underlying crime one attempted to perpetrate must not actually be an illegal act. In contrast, Appellant pointed a loaded gun at Faye Boone and Karen Clarkson, told them he was going to kill them, and pulled the trigger. Appellant's actions thus fall more under the purview of factual impossibility than legal impossibility, as Appellant did not misconstrue his action and think that it was not a crime to point a gun at another. Critically, any argument Appellant could make regarding factual impossibility would ultimately fail, as factual impossibility is not a defense to an attempt crime. See e.g. United States v. Hamrick, 43 F.3d 877 (4th Cir. 1995) (noting factual impossibility is not a defense to an attempt crime). Appellant thus failed to prove his actions fell within the ambit of legal impossibility.

Further, Lieutenant Thrower's testimony established that it was entirely possible that Appellant's gun could fire, nullifying Appellant's argument that it was impossible for the gun to be used to perpetrate a murder. Lieutenant Thrower testified that, although Appellant's gun did not fire during the incident, it was still within the realm of possibility that the gun could fire under the right circumstances. Lieutenant Thrower believed that Appellant's gun could still fire if the cartridge was made of a softer metal than the cartridge he test fired or if the firing pin struck the round in the same place multiple times. Specifically, Lieutenant Thrower noted that in

examining the gun and conducting testimony he felt like the gun, "ought to fire." Tr. p. 256. The trial judge thus properly denied Appellant's motion for directed verdict where the State presented sufficient evidence to disprove Appellant's contention that the defense of legal impossibility was applicable to his case. Not only was the commission of the crime not legally impossible, it was not impossible in any sense.

Specific Intent

Appellant next contends that, because the gun was inoperable, he could not have formulated the specific intent required to prove guilt on both counts of attempted murder. Appellant avers that "he surely knew" the gun was inoperable, therefore the State failed to prove specific intent. On the contrary, the State presented both direct and circumstantial evidence that Appellant specifically intended to kill both Faye Boone and Karen Clarkson.

As correctly noted by Appellant, the crime of attempted murder requires proof that one possessed the specific intent to kill. See State v. King, 422 S.C. 47, 70, 810 S.E.2d 18, 30 (2017) ("[W]e clarify that the offense of attempted murder, as codified in section 16-3-29 of the South Carolina Code and viewed in its entirety, requires a specific intent to kill."). Contrary to Appellant's contentions, the State presented both direct and substantial circumstantial evidence that Appellant possessed the specific intent to kill. As far as direct evidence is concerned, Boone testified Appellant told her, "I'm going to kill you," as her pulled the trigger while pointing his gun at her. Boone also testified she observed Appellant point his gun at Karen and state, "I'm going to kill her. I'm going to kill her." Similarly, Karen testified Appellant pointed his gun at Boone's head and stated, "I will f'ing kill you."

As to the substantial circumstantial evidence of Appellant's specific intent presented by the State, the State presented evidence that Appellant attacked Boone and Clarkson, retrieved his

firearm from his vehicle, loaded it, and pointed the gun at both Boone and Clarkson, and pulled the trigger. It is readily inferable from the circumstances that Appellant intended to kill both women in a drunken rage. Karen stated she believed Appellant was going to kill her because, "he put the gun to my stomach and started pulling the trigger and he put it to my head and started pulling the trigger. I don't know how the gun didn't go off. I don't know." Appellant's words and conduct thus provided direct and substantial circumstantial evidence from which a reasonable juror could find beyond a reasonable doubt Appellant committed the charged offenses. Even taking Appellant's subsequent testimony into account, at a minimum it created question of fact that needed to be resolved by a jury. The trial judge therefore properly denied Appellant's motion for directed verdict. Appellant's convictions and sentences should be affirmed.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

V. HENRY GUNTER, JR.
Assistant Attorney General

SCARLETT A. WILSON
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BY: _____
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PROOF OF SERVICE

I, Destiny Blue, certify that I have served the Initial Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Wanda H. Carter, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.
This 29th day of August, 2018.

Destiny Blue

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Legal Assistant

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ALAN WILSON
ATTORNEY GENERAL

August 29, 2018

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

Re: The State v. William Guy Shumpert
Appellate Case No: 2017-001713

Dear Ms. Kitchings:

Enclosed please find the original and one copy of the Initial Brief of Respondent along with proof of service in the above-referenced case.

Sincerely,

V. Henry Gunter
Assistant Attorney General
S.C. Bar No: 102259

VHR/db
Enclosures

cc: Wanda H. Carter, Esquire
Victim Advocacy Division