STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SUMTER COUNTY
The Honorable George C. James, Circuit Court Judge

On Petition for Writ of Certiorari to the Court of Appeals
Appellate Case No. 2018-001361 (Ct. App. Case No. 2015-002443)
Opinion No. 2018-UP-187 (S.C. Ct. App. Filed May 9, 2018)

THE STATE,

RESPONDENT,

V.

RODNEY R. GREEN,

PETITIONER.

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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PETITIONER'S QUESTIONS PRESENTED

I. Where Petitioner was charged with murder and attempted murder, did the trial judge err by instructing the jury on the doctrine of transferred intent, which improperly allowed the jury to (1) substitute the general intent of murder for the specific intent of attempted murder, (2) equate malice with a specific intent to kill, and (3) fund Petitioner guilty of attempted murder of an unintended person?

II. Did the trial judge err in failing to grant Petitioner's motion for mistrial, or instruct the jury to disregard expert testimony regarding ballistics, where the police officer who found the shell casings at the scene did not testify and no other witnesses could testify that the shell casings introduced at trial or tested by the expert were the shell casings found at the scene, which violated Petitioner's rights under the Sixth Amendment's Confrontation Clause?

RESPONDENT'S COUNTERSTATEMENT OF QUESTION PRESENTED

1. Whether certiorari should be granted when the Court of Appeals properly found the trial court did not abuse its discretion in instructing the jury on the doctrine of transferred intent as it related to the attempted murder charge?

2. Whether certiorari should be granted when the Court of Appeals properly found the trial court did not abuse its discretion in denying Green's motion for a mistrial when the ballistics evidence was properly admitted, the State presented a sufficient chain of custody of that evidence, and a mistrial was not warranted?

STATEMENT OF THE CASE

On November 9-11, 2015, Petitioner Rodney R. Green ("Green") was tried by a jury for the murder of Tyrese Archie, the attempted murder of Ray'Quann Jenkins, possession of a firearm during the commission of a violent crime, and possession of a stolen handgun. Green

was tried in the Sumter County Court of General Sessions before the Honorable George C. James, Circuit Court Judge. Charlie J. Johnson, Jr., represented Green. The State was represented by Solicitor Ernest A. Finney, III, of the Third Judicial Circuit Solicitor's Office.

On November 11, 2015, Green was convicted of murder, attempted murder, possession of a weapon during the commission of a violent crime, and possession of a stolen handgun. (R. p. 688). He was sentenced to life confinement for the murder conviction, thirty years confinement for the attempted murder conviction, five years confinement for the possession of a weapon during the commission of a violent crime conviction, and time served for the possession of a stolen pistol conviction, all to be served concurrently. (R. p. 696). After full briefing, the South Carolina Court of Appeals issued an unpublished opinion affirming Green's convictions. State v. Green, Op. No. 2018-UP-187 (S.C. Ct. App. Filed May 9, 2018). (App. pp. 1-3). Green filed a Petition for Rehearing on May 24, 2018. (App. pp. 4-21). The Court of Appeals denied the petition on June 21, 2018. (App. p. 22). Green now seeks review of the South Carolina Court of Appeals' opinion in this Court.

STATEMENT OF FACTS

On the early morning of March 17, 2014, Petitioner Rodney Green shot and killed Tyrese Archie outside of Club Miami in Sumter. In the shooting, Green also shot Ray'Quann Jenkins in the leg.

Ray'Quann Jenkins, the attempted murder victim, testified he was with Tyrese Archie, the murder victim, most of the day. (R. pp. 61-64). Jenkins, Archie, and Archie's nephew were at a birthday party and cookout from 7 p.m. to around midnight. (R. p. 62). The three later went to Club Miami. (R. p. 67). Jenkins noted they arrived at Club Miami between 12:30 and 1 a.m. (R. p. 67).

Between 1 and 2 a.m., Jenkins and Archie went outside the club. (R. p. 70). They saw some of Archie's cousins were involved in an altercation outside. (R. pp. 70-71). Jenkins testified that Archie attempted to break up the fight; he encouraged his younger cousins to stop, get in their cars, and leave. (R. pp. 72, 73). Jenkins noted that Archie did not participate in the fight. (R. p. 72). He also stated that no one in the fight had a weapon, and no one was getting kicked and stomped on the ground. (R. p. 73).

Archie then attempted to call his nephew so the three could leave. (R. p. 73). While they were waiting on Archie's nephew, Archie and Jenkins were standing in the parking lot. (R. pp. 74-75). Jenkins testified that three guys came to where they were and tried to jump Archie. (R. p. 75). Jenkins stepped in to break up that confrontation, but Archie and one of the guys got into a fist fight. (R. pp. 75-76). The fight did not last long, but shortly after it was broken up, Jenkins saw four or five more guys coming towards them from behind a wire fence that was serving as a property line. (R. pp. 75-76). Jenkins testified that Green was among this group of guys. (R. p. 79). Jenkins testified he saw Green reach into his shirt and pull out a weapon. (R. pp. 79-80). Jenkins then pulled Archie from the ground and pushed him away from the scene. (R. p. 80).

During that early morning, a fight also started inside the club. (R. pp. 18, 148, 191, 220, 252, 287). The bouncers brought the individuals that were fighting to the outside, and security attempted to control the situation. (R. pp. 252-53, 287; see R. p. 148). The argument continued for some time, and Myron Conyers, one of the security officers outside the club, attempted to separate one of the participants from the situation in an effort to get him to calm down. (R. p. 253). A fight also broke out outside of the club. (R. pp. 191, 220, 282, 287).

Several of Archie's relatives who were at the club noted Archie told everybody to go home because of the fight. (R. pp. 149, 191-92, 221). Auntachie Blanding, one of Archie's cousins, testified Archie was just making sure everyone in his family went home. (R. p. 206).

The Shooting

Lavitra Harvin, Green's girlfriend, heard gunshots when she got outside the club with her group of friends. (R. p. 20). She dropped beside a black truck for safety. (R. p. 20). Shortly thereafter, Jenkins ran past her and said he was shot. (R. p. 20). Harvin testified that when she looked up, she saw gunfire. (R. p. 21). Harvin noted the gunfire was close to the rear end of the truck, but she did not see anyone firing a gun. (R. p. 25). She did see Green running, and she was later able to identify him in a picture taken that early morning. (R. pp. 26, 27). Harvin testified she did not see Green with a gun, but she did see him running towards a field. (R. p. 34). However, in her statement to law enforcement, Harvin had indicated she saw Green firing a handgun and that he ran away after firing the gun. (R. pp. 36, 344-45). In the statement, she noted she saw Green with a black handgun. (R. pp. 45, 344-45).

Harvin heard one shot when Jenkins ran past her. (R. p. 37). She thought the gun fired probably twice shortly thereafter. (R. p. 38). When she stood up after hearing those shots, she saw Green running. (R. p. 38). Harvin also stated the window on the driver's side of the truck she was near was shattered. (R. p.p. 38-39).

After Jenkins pulled Archie off the ground, he heard Green say watch out.[1] (R. pp. 80, 100). That's when Jenkins heard the first gunshot. (R. p. 80). Jenkins testified the first shot hit him, and he fell forward. (R. p. 82). Jenkins noted he was hit in the left femur, right above the pelvis. (R. p. 82). Jenkins caught himself on his hands, and he tried to pick himself up. (R. p.

[1] Jenkins recognized Green and heard his voice. (R. p. 81).

82). Jenkins leaned against the truck he was beside when he got shot. (R. p. 83). When he picked himself up, Jenkins looked towards Archie, who was running away from the parking lot and back towards the club. (R. pp. 82, 92). Jenkins heard two or three more shots. (R. p. 83). Jenkins could tell Green was firing those shots. (R. p. 84). He saw Green firing the weapon as he was running towards Jenkins and Archie. (R. pp. 83-85).

Ultimately, Jenkins testified he saw Green with a black handgun, and he thought Green fired the gun three or four times. (R. pp. 85, 103). Jenkins could not move because of his gunshot injury, and he did not see Archie get shot. (R. pp. 85, 96). Jenkins did not hear any other gunshots that night. (R. p. 86). While Jenkins did attempt to go towards the area where he saw Archie fall, he could not get there because of his leg injury. (R. pp. 89, 101).

Demetrice Brooks, another of Archie's cousins, was outside of the club when the shooting happened. (R. p. 147). Archie was directing Brooks and other relatives to leave the club and go home. (R. p. 149). After she saw that, she heard Green yell out, "Yo, Stymie."[2] (R. pp. 150, 174). Archie continued telling his family members to get into their cars and to go home. (R. p. 153). At that point, Brooks was standing near Archie, Jenkins, and Davontae Blanding (another cousin). (R. p. 153). Brooks did not see Archie involved in any fights outside of the club. (R. p. 173).

Brooks then headed towards Auntachie's car. (R. p. 153). When she looked back, she saw Green shooting a gun three or four times. (R. p. 153). She did not see Green's target. (R. pp. 153, 176). As Auntachie was heading towards her car, she heard gunshots. (R. p. 193). Auntachie heard the gunshots, but she did not see who was firing the weapon. (R. p. 193).

[2] Stymie was Archie's nickname. (R. pp. 150-51).

Just prior to the shooting, Davontae saw a young lady running towards Green, screaming "don't do it."[3] (R. p. 225, l 6). Davontae saw Green raise his arm and start shooting. (R. p. 234). Archie walked away from where Davontae was standing, and approximately ten seconds later, Davontae heard gunshots. (R. pp. 222, 224). Once Davontae heard the shots, he took cover. (R. p. 235). Davontae saw both Jenkins and Archie after the shooting. (R. p. 236). Jenkins was on the ground. (R. p. 236). Archie was running to get away from the shooter, and Davontae followed. (R. p. 236). Davontae noted that Archie indicated he was hit, and once Archie got to the back of the club, he collapsed. (R. pp. 236, 239). Davontae identified Green as the shooter in a photo lineup. (R. pp. 228-33). Davontae also testified that Green was the only person shooting that night. (R. pp. 245-46).

Conyers had noticed an individual at the fence line when he was dealing with another patron. (R. pp. 253, 256). The individual fired one shot, paused, and then fired two more shots into the crowd. (R. pp. 253, 256). The individual then turn and ran away. Conyers and Patrick Washington, another security officer, started chasing the individual. (R. pp. 253, 256). Conyers noted that he had not heard any gunshots before that individual fired those three shots, and he heard no other gunfire after those shots. (R. pp. 256, 274). Conyers testified the shooter was dressed in all white, and he was firing an automatic weapon. (R. pp. 259-60). Conyers identified Green as the shooter in a photo lineup. (R. pp. 260-62).

After Washington verified the guy he was following did not have a weapon, he heard gunshots. (R. p. 287). Washington looked back, and he saw someone in all white attire shooting. (R. p. 287). Washington testified he saw the weapon in the shooter's hand, and it looked like either a .40 or .45 caliber pistol. (R. p. 291). Washington did not hear any other

[3] In his statement to law enforcement, Davontae indicated he saw two girls attempt to stop Green from shooting. (R. p. 243).

gunshots that night. (R. p. 293). He also identified Green as the shooter in the courtroom. (R. pp. 294-95).

ARGUMENT

I. Certiorari should be denied because the Court of Appeals properly found the trial court did not abuse its discretion in giving an instruction on transferred intent in relation to the attempted murder charge. The instruction given by the trial court was proper.

Certiorari should be denied because the Court of Appeals properly affirmed the trial court's instruction regarding the application of transferred intent in relation to the attempted murder charge. Much of Green's argument in this petition was neither raised to the trial court nor to the Court of Appeals. This argument does not present a novel question of law. There was no dissent in the Court of Appeals. Contrary to Green's assertions, the Court of Appeals' opinion did not conflict with this Court's opinion in State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017). No constitutional question is presented, and no federal question was presented below.

The Court of Appeals ruled as follows:

> State v. Holland, 385 S.C. 159, 166, 682 S.E.2d 898, 901 (Ct. App. 2009) ("This [c]ourt will not reverse the trial court's ruling regarding jury instructions unless the trial court abused its discretion."); State v. Zeigler, 364 S.C. 94, 106, 610 S.E.2d 859, 865 (Ct. App. 2005) ("A jury charge which is substantially correct and covers the law does not require reversal."); State v. Williams, Op. No. 5540 (S.C. Ct. App. filed Feb. 28, 2018) (Shearouse Adv. Sh. No. 9 at 112, 124-25) (providing that in attempted murder cases involving an unintentional victim, "South Carolina's criminal laws require the imposition of the doctrine of transferred intent"); id. at 125 ("Section 16-3-29 does not require a specific victim; instead, it states a 'person who, with the intent to kill, attempts to kill *another* person' is guilty of attempted murder." (emphasis added by court) (quoting S.C. Code Ann. § 16-3-29 (2015)); id. ("[A]s long as the State has shown the specific intent to kill or commit a murder, the identity of the victim is irrelevant."); id. at 122 ("[C]harging 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."); see also State v. Fennell, 340 S.C. 266, 272, 531 S.E.2d 512, 515 (2000) ("Although the defendant did not act with malice toward the unintended victim, the defendant's criminal intent to kill the intended victim (i.e., his mental state of malice) is transferred to the unintended victim.").

State v. Green, Opinion No. 2018-UP-187 (S.C. Ct. App. Filed May 9, 2018).

What Occurred at Trial

During the discussions regarding the jury charge, the trial court indicated that it would instruct the jury "that a specific intent to kill is not an element of attempted murder, but there must be a general intent to commit serious bodily injury." (R. p. 604, ll 18-20). At that point, the State requested an instruction regarding transferred intent. (R. p. 605). The trial court indicated it would consider a proposed charge regarding transferred intent. (R. p. 605).

During this discussion, defense counsel objected, noting the requested charge went to his earlier concern regarding the State's failure to present evidence that Mr. Jenkins was shot. (R. pp. 605-06). Defense counsel contended that it was his concern when he made his initial argument (directed verdict), that there was no evidence Mr. Jenkins was even injured by a bullet. (R. p. 606).

The trial court then discussed the Court of Appeals' opinion in State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct.App.2015). (R. pp. 606-07). The trial court indicated that based upon King, it did not see how it could charge transferred intent. (R. p. 608).

In response, the State argued there was no conflict between having to charge specific intent and transferred intent. (R. p. 609). In support of this position, the State noted that one could be convicted of attempted murder without the victim suffering an injury. (R. p. 609).

After a brief recess, the trial court determined it would instruct the jury on the doctrine of transferred intent. (R. p. 610).

> Here's what I think the appropriate interpretation of King is. The court said that a specific intent to kill is necessary. It doesn't say there has to be a specific intent to kill any certain person. And I think common sense has to prevail at some point, and I think transferred intent charge in some fashion would be appropriate.

(R. p. 610, ll 13-19). The trial court then confirmed that defense counsel objected to the decision regarding the instruction. (R. p. 610). The trial court later stated that its charge would be, "if a person with malice aforethought attempts to kill another person, but by mistake injures or kills a different person, and the defendant still has the specific intent to kill." (R. p. 611, ll 16-20). The defense objected to the proposed instruction. (R. p. 611). Defense counsel asserted "the problem I have with the transferred intent just for the record is that, there is no evidence that my client was aiming at Mr. Archie." (R. p. 612, ll 7-10). The trial court noted there was circumstantial evidence Green was aiming at Archie from the testimony indicating Green yelled out Archie's nickname. (R. p. 612).

Instruction that was given

In defining the charge of attempted murder, the trial court instructed the jury as follows:

> Now, Ladies and gentlemen, the defendant is also charged with the offense of attempted murder. In order to prove this crime, in order for you to find the defendant guilty, the State must prove beyond a reasonable doubt that the defendant with the intent to kill, attempted to kill another person with malice aforethought express or implied. Malice again is hatred, ill will or hostility towards another person. It's the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under circumstances the law will infer an evil intent.
>
> Again, I am going to summarize this in just a moment. Malice aforethought just as it as with murder, is not required that malice exist for any particular time before the act is committed. But malice must exist in the mind of the defendant just before and at the time the act is committed. So there has to be a combination of the previous evil intent and the act itself.
>
> Now the earlier instructions I gave you about express and implied malice apply to your analysis of attempted murder as well. And again, a deadly weapon is any article, instrument or substance which is likely to cause death or great bodily harm. And the earlier examples of deadly weapons apply here as well. And again, if facts are proven beyond a reasonable doubt to raise an inference of malice to your satisfaction, that inference is simply evidentiary fact you are to consider, and you give it the weight you believe it should receive.

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.

Now, Ladies and gentlemen, intent can also be shown by acts and conduct of the defendant and other circumstances from which you may naturally and reasonably infer intent. Evidence 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 may be considered by you in determining the intent with which the act was committed.

Now, Ladies and gentlemen, intent may also be inferred when the act — when it is demonstrated rather that the defendant voluntarily, and willfully commits an act, the natural tendency of which is to destroy another person's life. Now, Ladies and gentlemen, I further charge you that if a person with malice aforethought attempts to kill another person, but by mistake injuries 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. pp. 665, l 4 - 667, l 18).

Discussion

"'An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion.'" State v. Williams, 367 S.C. 192, 195, 624 S.E.2d 443, 445 (Ct.App.2005) (quoting Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). Furthermore, "[t]o warrant reversal, a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." State v. Patterson, 367 S.C. 219, 232, 625 S.E.2d 239, 245 (Ct.App.2006). "The law to be charged must be determined from the evidence presented at trial." Id. If there is any evidence to support the requested charge, the trial court should grant the request. Williams, at 195, 624 S.E.2d at 445. The evidence must be

reviewed in the light most favorable to appellant. State v. Cottrell, 376 S.C. 260, 262, 657 S.E.2d 451, 452 (2008).

"Generally, the trial judge is required to charge only the current and correct law of South Carolina." State v. Zeigler, 364 S.C. 94, 106, 610 S.E.2d 859, 865 (Ct.App.2005). If a charge is substantially correct and covers the law there is no need for reversal. Id. To warrant reversal, the refusal to give a requested charge must be erroneous and prejudicial to the defendant. State v. Hill, 382 S.C. 360, 368, 675 S.E.2d 764, 768 (Ct.App.2009) (citing Zeigler, supra). "Jury instructions must be considered as a whole and, if as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible error." State v. Jackson, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989).

"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. "A person who, acting with malice, unleashes a deadly force in an attempt to kill or injure 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." State v. Fennell, 340 S.C. 266, 276, 531 S.E.2d 512, 517 (2000).

1. Green's argument that implied malice is not specific intent to kill was not presented at trial or on appeal to the Court of Appeals.

Green first contends the transferred intent charge conflated implied malice with a specific intent to kill. This argument was not presented at trial. (See R. pp. 605-10). Nor was this argument raised to the Court of Appeals. (See FBOA, pp. 16-23). Thus, this argument is not properly preserved for this Court's consideration. State v. Primus, 349 S.C. 576, 583, 564 S.E.2d 103, 107 (2002), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

2. The transferred intent jury instruction does not conflict with this Court's opinion in State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017).

Contrary to Green's assertions, the Court of Appeals' opinion in affirming the use of a transferred intent jury instruction does not conflict with this Court's opinion in State v. King. In King, this Court held a specific intent to kill is an element of attempted murder as codified in section 16-3-29. Id. at 56, 810 S.E.2d at 22. This Court also found that instructing jury that charging a jury that specific intent is not an element of attempted murder was not harmless. Id. at 64, 810 S.E.2d at 26-7.

These determinations do not eliminate the applicability of the doctrine of "transferred intent." In Fennell, this Court cited with approval the case of Ochoa v. State, 981 P.2d 1201 (Nev.1999) and its rationale. Fennell, 340 S.C. at 276, 531 S.E.2d at 518. In Ochoa, the Court specifically applied "transferred intent" to all crimes where an **unintended victim** is harmed as a result of a defendant's **specific intent to harm an intended victim** regardless of whether the intended victim is injured. In that case, the Nevada Court found it was appropriate to charge defendant who killed the intended victim and injured a bystander with a stray bullet with murder and attempted murder. Ochoa, 981 P.2d at 1205 ("Since there was sufficient evidence that Ochoa intended to kill Ortiz, that intent may be transferred to the unintended victim, Smith. As Smith did not die, the appropriate charge was attempted murder."). This is the same circumstance relating to attempted murder as is present in the instant case. The appropriate charge in this case, as in Ochoa, was attempted murder.

Furthermore, Green's contention that the doctrine of transferred intent does not apply to attempted murder appears to be based upon the mistaken belief that specific intent can only exist as to one specific intended victim. This underlying belief is not supported by the plain language of the statute or by common law. In fact, case law reflects just the opposite. For example, in

State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000), this 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. "A person who, acting with malice, unleashes a deadly force in an attempt to kill or injure 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." Fennell, 340 S.C. at 276, 531 S.E.2d at 517. This Court explained the defendant's mental state,

> 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."

Id. at 271, 531 S.E.2d at 515. Further, the "spotlight" was not extinguished at the moment a bullet strikes and killed the intended victim, but in that case shined on both victims. Id. at 271-72, 531 S.E.2d at 515. This Court noted it would be "[in]appropriate" to limit the defendant's punishment and penalty to maximum punishment of ten years' imprisonment provided under that version of the State's ABHAN statute. Id. at 276, 531 S.E.2d at 518.

Similarly, this Court has found that the specific intent required to establish an attempt in the context of attempted criminal sexual conduct with a minor in the second-degree also did not require proof that the intent was tied to a specific victim.

> "In the context of an 'attempt' crime, specific intent means that the defendant consciously intended the completion of acts comprising the choate offense." State v. Sutton, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000). Accordingly, "[t]o prove attempt, the State must prove that the defendant had the *specific intent* to commit the underlying offense, along with some *overt act*, beyond mere preparation in furtherance of the intent." State v. Reid, 393 S.C. 325, 329, 713 S.E.2d 274, 276 (2011) (emphasis in the original).

State v. Green, 397 S.C. 268, 283, 724 S.E.2d 664, 671–72 (2012). In Green, this Court noted the defendant was not required to complete the sexual battery in order to be prosecuted and convicted for attempted CSC with a minor in the second degree. Id. at 284, 724 S.E.2d at 672. Further, this Court found the fact that the intended victim was not an actual minor was irrelevant as the State was only required to show the defendant had the intent to commit a sexual battery on a victim between the ages of eleven and fourteen coupled with some overt act toward the commission of the offense. Id.

This reasoning holds true with the offense of attempted murder. To establish Green was guilty of attempted murder, the State had to prove he had the specific intent "to kill another person with malice aforethought, either expressed or implied." That the victim of the attempted murder was not the defendant's intended murder victim is of no consequence as long as Green acted with the intent to murder someone when he fired the shots.

The Court of Appeals has similarly interpreted S.C. Code § 16-3-29 as not precluding the application of the doctrine of transferred intent to attempted murder.

> Section 16-3-29 does not require a specific victim; instead, it states a "person who, with the intent to kill, attempts to kill another person" is guilty of attempted murder. See S.C. Code Ann. § 16-3-29 (emphasis added). Furthermore, the requisite specific intent for attempted murder is the specific intent to commit murder. See King, 422 S.C. at 55-57, 63, 810 S.E.2d at 22-23, 26 (2017). Murder is defined as "the killing of any person with malice aforethought, either express or implied," and does not require a specific victim be killed. See S.C. Code Ann. § 16-3-10 (2015) (defining murder); see also 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); Heyward, 197 S.C. at 377, 15 S.E.2d at 672. Finally, 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. See Sutton, 340 S.C. at 397 n.5, 532 S.E.2d at 285 n.5.

State v. Williams, 422 S.C. 525, 542, 812 S.E.2d 917, 925–26 (Ct. App. 2018), reh'g denied (May 1, 2018). See also State v. Smith, Op. No. 5591 (S.C. Ct. App. filed August 15, 2018)(Shearouse Adv.Sh. No. 33 at 52).

In his petition, Green cites to cases from several jurisdictions to support his claim that the doctrine of transferred intent is not applicable to the crime of attempted murder. See State v. Hinton, 630 A.2d 593 (Conn.1993); Cockrell v. State, 890 So.2d 174 (Ala. 2004); People v. Bland, 48 P.3d 1107 (Cal. 2002); Cascen v. Virgin Islands, 60 V.I. 392 (V.I. 2014). In most of these jurisdictions, the courts found the doctrine inapplicable due to the language used in the states' murder statutes. See Cockrell, 890 So.2d at 176-81 (finding the doctrine of transferred intent was explicitly codified in the state's murder statute, and due to this the court felt constrained by the rule of lenity to conclude the state legislatures did not intend for transferred intent to apply); People v. Bland, 48 P.3d 1107, 1116-17 (Cal. 2002) (finding "no suggestion the [California] [l]egislature intended to extend liability for unintended victims" to attempt crimes); Hinton, 630 A.2d at 601-02 (stating Connecticut's murder and assault statutes had specific provisions allowing for the transfer of intent to unintended victims, and because the Connecticut code did not contain a specific attempted murder statute, but a general attempt statute which states an attempt has been made if a defendant acts " with the kind of mental state required for commission of the crime . . . ," the Connecticut Supreme Court felt constrained by the rule of lenity to conclude the doctrine of transferred intent should not be applied to attempted murder); Cascen, 60 V.I. at 406 (finding evidence sufficient for first-degree murder conviction of one victim and attempted first-degree murder conviction of another victim under theory of transferred intent).

More importantly, each of these jurisdictions recognizes a form of "concurrent intent." Using this doctrine, these jurisdictions allow for convictions for the attempted murder of unintended victims based on defendants engaging in a course of conduct which, based on the method of attack, endangers those in proximity to the intended target; notably, these versions of concurrent intent mirror South Carolina's version of transferred intent. Compare Fennell, 340 S.C. at 271– 72, 531 S.E.2d at 515 (comparing a defendant's intent to a spotlight which shines on his victims), and Sutton, 340 S.C. at 397 n.5, 532 S.E.2d at 285 n.5 (stating a specific intent to kill may be inferred from the circumstances of the crime, including the character of the attack and the weapon used) with Cockrell, 890 So.2d at 175-76 (recognizing California's use of concurrent intent to convict a defendant of attempted murder when a defendant employs a means to commit the crime against a primary victim from which a fact finder can "reasonably infer that the defendant intended that harm to all who are in the anticipated zone" (internal citation omitted)), Bland, 48 P.3d at 1118-19 (finding the concurrent intent to kill persons other than a primary target can be inferred from the facts of a case, such as the number of shots fired and the type of ammunition used, which may demonstrate that a defendant intended to create a "kill zone" around the intended victim), Hinton, 630 A.2d at 595-96; 599-603 (remanding for a new trial because defendant could not have been convicted of both the attempted murder and first-degree assault of a victim, but noting the facts of the case, which included the defendant firing a sawed-off shotgun loaded with the largest commercially available buckshot, could be evidence the defendant intended to kill the victim in question).

3. Green did not present a constitutional claim below.

In the petition, Green now contends the transferred intent charge, and the trial court's improper use of the charge, violates Green's right to due process. This assertion was not made at

trial, and it was not presented to the Court of Appeals. This contention is thus not preserved for review here. See Primus, supra.

Altogether, the State presented evidence that Green was attempting to kill Archie, and Jenkins was hit in the process. In applying the principles of transferred intent, the record supports the trial court's determination that the State presented sufficient evidence to warrant the charge going to the jury. The trial court did not err in giving an instruction reflecting that transferred intent applies. There was no abuse of the trial court's discretion. The attempted murder conviction was correctly affirmed. Certiorari should be denied on this issue.

II. Certiorari should be denied upon Green's argument that the trial court erred in denying his motion for a mistrial and denying his request for a jury instruction that would have instructed the jury to disregard the testimony regarding the ballistics evidence.

First, contrary to Green's assertions, a Sixth Amendment Confrontation Clause was not presented in the appeal before the Court of Appeals. The Court of Appeals specifically found

> Green frames the issue of whether the trial court erred in denying his motion for a mistrial as a violation of his right to confront his accusers under the Sixth Amendment Confrontation Clause; however, Green solely addresses the issue under a chain of custody analysis and provides no argument on the alleged violation of his constitutional rights.

Green, Opinion No. 2018-UP-187 (S.C. Ct. App. Filed May 9, 2018) n. 1. The Court of Appeals thus only addressed the mistrial issue within the context of Green's chain of custody argument. Id.

Second, the Court of Appeals' opinion did not conflict with this Court's jurisprudence regarding chain of custody matters. In affirming the denial of the mistrial motion, the Court of Appeals ruled as follows:

> State v. Chisholm, 395 S.C. 259, 265-66, 717 S.E.2d 614, 617 (Ct. App. 2011) ("[W]hether to grant or deny a mistrial is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion." (quoting State

> v. Herring, 387 S.C. 201, 216, 692 S.E.2d 490, 498 (2009))); id. at 266, 717 S.E.2d at 617 ("A mistrial should be granted only when absolutely necessary, and a defendant must show both error and resulting prejudice to be entitled to a mistrial."); State v. Hatcher, 392 S.C. 86, 95, 708 S.E.2d 750, 755 (2011) ("The ultimate goal of chain of custody requirements is simply to ensure that the item is what it is purported to be."); id. ("[T]he chain of custody need be established *only as far as practicable*, . . . every person handling the evidence need not be identified in all cases." (emphasis added)); id. at 93, 708 S.E.2d 753-54 ("[W]here all individuals in the chain are, in fact, identified and the manner of handling is reasonably demonstrated, it is not an abuse of discretion for the trial [court] to admit the evidence in the absence of proof of tampering, bad faith, or ill-motive."); id. at 91, 708 S.E.2d at 753 ("Testimony from each custodian of fungible evidence, . . . is not a prerequisite to establishing a chain of custody sufficient for admissibility." (quoting State v. Sweet, 374 S.C. 1, 7, 647 S.E.2d 202, 206 (2007))).

Green, Opinion No. 2018-UP-187 (S.C. Ct. App. Filed May 9, 2018).

Contrary to Green's assertions, the Court of Appeals correctly found the trial court did not abuse its discretion in denying the motion for a mistrial. The trial court correctly determined a mistrial was not warranted. This issue stems from the unavailability of Investigator Mike Bean, an evidence technician and crime scene investigator with the Sumter County Sheriff's Office, to testify at trial.

The trial court did not abuse its discretion in denying Green's motion for a mistrial.

The trial court did not abuse its discretion in denying Green's motion for a mistrial. Green's motion was based upon his contention that the shell casings were improperly admitted at trial because the State failed to establish a sufficient chain of custody for the three fired shell casings. The State did ultimately present a sufficient chain of custody to support the admission of the shell casings. Since the shell casings were properly admitted and a sufficient chain of custody was established, the trial court did not abuse its discretion in denying the motion for a mistrial.

Standard of Review

The decision to grant or deny a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Crim, 327 S.C. 254, 257, 489 S.E.2d 478, 479 (1997); State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 851 (Ct.App.1999). Appellate courts have favored the exercise of wide discretion of the trial judge in determining the merits of such motion in each individual case. State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988). "It is only in cases of abuse of discretion which result in prejudice that this court will intervene and grant a new trial." State v. Key, 256 S.C. 90, 94, 180 S.E.2d 888, 890 (1971). "A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons." Patterson, 337 S.C. at 227, 522 S.E.2d at 851; see also State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989); State v. Kirby, 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1977) ("The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes.").

"[A] mistrial should not be ordered in every case in which incompetent evidence is improperly admitted." State v. White, 371 S.C. 439, 444, 639 S.E.2d 160, 162 (Ct.App.2006)(citing State v. Johnson, 334 S.C. 78, 89, 512 S.E.2d 795, 801 (1999) and Patterson, 337 S.C. at 227, 522 S.E.2d at 851). "[T]he trial judge should exhaust other methods to cure possible prejudice before aborting a trial. In order to receive a mistrial, the defendant must show error and resulting prejudice." State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999) (internal citation omitted). "In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion." State v. Scott, 405 S.C.

489, 497, 748 S.E.2d 236, 241 (Ct.App.2013) (citing State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Whitner, 399 S.C. at 557, 732 S.E.2d at 866 (citation omitted).

The State established a sufficient chain of custody regarding the three fired shell casings, even without the testimony of the investigator who collected the shell casings. Investigator Burnish was at the crime scene when the shell casings were discovered, when they were marked, and when they were photographed by Bean. (R. p. 503). Burnish was also present when the casings were collected by Bean and when they were placed into evidence bags. (R. pp. 504, 507, 510-11). Burnish recalled that someone else collected the firearm. (R. p. 509). Burnish saw Bean mark the casings, and he observed as Bean took pictures of the casings from different angles. (R. p. 512). Burnish maintained he saw Bean collect the casings. (R. p. 511).

Investigator Hawkins testified he was the one who initially marked the three shell casings. (R. p. 524). Hawkins did not disturb them, but he documented where they were found and placed markers for the crime scene technicians to later collect. (R. p. 524). Hawkins indicated that Bean documented the scene with the photographs he took. Hawkins identified State's Exhibits 20, 21, and 22 as the photographs that Bean took of the three fired casings that were located in the parking lot that night. (R. p. 525). State's Exhibits 14 and 15 were photographs of the same shell casings, but from a further distance. (R. p. 526). Hawkins indicated Bean was the individual who collected the shell casings, and Bean would have been the person who placed the casings in the tins. (R. p. 527). Hawkins further noted that Bean would have taken the casings to the evidence room. (R. p. 527). During cross-examination, Hawkins

maintained he marked the shell casings at that time, and the photographs reflected the markers Hawkins placed by the casings. (R. p. 564).

Soloman testified the firearm had been sent to SLED, SLED returned the gun to the Sheriff's Office, and the gun had since been maintained in the evidence room. (R. pp. 427-31). The three fired shell casings were also sent back by SLED and were maintained in the evidence room. (R. pp. 431-32). Soloman noted the three fired shell casings were listed on the property evidence voucher for this case. (R. pp. 477-78). He also noted that they use specific cans for collecting bullets or cartridge casings so they would not be damaged before they are sent to SLED. (R. p. 478). The person collecting the evidence would have placed the three fired shell casings in the cans that were in the evidence room. (R. pp. 479-80). The evidence report indicated Michael Bean collected those casings, and he would have put them in the cans. (R. pp. 479-80). The report also indicated James Atkinson, who was the prior evidence technician responsible for the evidence room, was the person who took the evidence to SLED. (R. p. 480). The property voucher was submitted into evidence without objection as State's Exhibit 37. (R. p. 482). Soloman also testified that the gun and the casings were held in the evidence room after being returned from SLED until he brought them to court. (R. pp. 430-32).

Agent Eichenmiller testified she received the Smith & Wesson .45 caliber handgun from the Sumter County Sheriff's Office for analysis, along with the six unfired cartridges in its magazine and the three fired shell casings. (R. pp. 372-78, 382). She also indicated that the three shell casings that were presented to her in court were in the same condition as she received them at SLED. (R. p. 383). Altogether, this testimony and evidence by way of the photographs and property voucher established a sufficient chain of custody to support the admission of the three shell casings.

South Carolina courts have long held that proof of chain of custody need not negate all possibility of tampering but must establish a complete chain of evidence as far as practicable. See State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001). If there is a weak link in the chain of custody, the question is only one of credibility and not admissibility. See State v. Horton, 359 S.C. 555, 568, 598 S.E.2d 279, 286 (Ct.App.2004). State v. Hatcher, 392 S.C. 86, 708 S.E.2d 750 (2011) is instructive. In Hatcher, the defendant was convicted of distribution of crack cocaine for selling crack to an undercover informant. The officer took possession of the crack from the buyer-informant and placed it in an evidence bag he sealed and personally transported to SLED. The SLED analyst testified officers bring evidence to SLED in sealed containers, which the SLED Log-In Department receives and marks with a unique case number. The analyst testified she retrieved the evidence from the Log-In Department, tested the substance, returned it to the Log-In Department, which then returned the evidence to the Sheriffs Department. Though the defense objected to an improper chain of custody, the trial judge admitted the evidence and this Court affirmed the admission. This Court found "[t]estimony from each custodian of fungible evidence . . . is not a prerequisite to establishing a chain of custody sufficient for admissibility." Id. at 92, 708 S.E.2d at 753. This Court held:

> It is unnecessary . . . that the police account for "every hand-to-hand transfer" of the item; it is sufficient if the evidence demonstrates a reasonable assurance the condition of the item remains the same from the time it was obtained until its introduction at trial. To expect the [prosecuting authority] to produce every possible individual who may have had fleeting contact with the evidence would cause unnecessary logistical problems concerning chain of custody.

Id. at 94, 708 S.E.2d at 754. Further, in State v. Sweet, 374 S.C. 1, 647 S.E.2d 202 (2007), this Court noted,

> Testimony from each custodian of fungible evidence, however, is not a prerequisite to establishing a chain of custody sufficient for admissibility. [State

> v.]Taylor, 360 S.C. [18,]27, 598 S.E.2d [735,] 739 [Ct.App.2004]. Where other evidence establishes the identity of those who have handled the evidence and reasonably demonstrates the manner of handling of the evidence, our courts have been willing to fill gaps in the chain of custody due to an absent witness. See State v. Williams, 297 S.C. 290, 376 S.E.2d 773 (1989) (upholding the admissibility of a blood test even though a nurse who drew the blood from the defendant did not testify at trial; hospital forms completed by the absent nurse and testimony from the other evidence custodians sufficiently established a chain of custody).

Sweet, 374 S.C. at 7, 647 S.E.2d at 206.

Similarly, in South Carolina Dep't of Social Servs. v. Cochran, 364 S.C. 621, 614 S.E.2d 642 (2005), this Court found the chain of custody to be complete even though the person who collected the sample did not testily, the courier who transported the sample from the collection facility to the testing facility was not identified, and the person who received the sample at the testing facility did not testify. This Court found the forms completed each time possession of the sample transferred from one custodian to another - coupled with the testimony provided by the custodians who did testify - was sufficient to establish a complete chain of custody. This Court further held the chain of custody rule does not require "every person associated with the procedure [to] be available to testify or identified personally, depending on the facts of the case. . . . Generally, we will uphold the chain of custody if the safeguards instituted ensure the integrity of the evidence, even if every person associated with the procedure is not personally identified." Id. at 629, 614 S.E.2d at 646.

"While the chain of custody requirement is strict where fungible evidence is involved, where the issue is the admissibility of non-fungible evidence-that is, evidence that is unique and identifiable-the establishment of a strict chain of custody is not required." State v. Glenn, 328 S.C. 300, 305, 492 S.E.2d 393, 395 (Ct.App.1997). Fired shell casings are not fungible items. See Brockmeyer, 406 S.C. at 351, 751 S.E.2d at 659 (finding shell casing, fired projectile, and

other physical evidence were non-fungible items); see also Simmons v. State, 282 Ga. 183, 188, 646 S.E.2d 55, 60 (2007) (finding shell casing recovered at murder scene non-fungible); Hough v. State, 560 N.E.2d 511, 517 (Ind. 1990)(spent shell casings retrieved from crime scene non-fungible).

Altogether, the State presented a sufficient chain of custody for the three fired shell casings. Thus, the trial court did not improperly admit the three casings into evidence. Since the casings were properly admitted into evidence, the trial court properly denied Green's motion for a mistrial. See State v. Adams, 354 S.C. 361, 379, 580 S.E.2d 785, 794 (Ct.App.2003) (finding mistrial not warranted when evidence of a prior theft was properly admitted). Certiorari should not be granted on this issue.

CONCLUSION

Petitioner has failed to show that there is a special and important reason for this Court to grant his Petition. It raises no novel question of law. There is no conflict between the Court of Appeals' opinion and any prior decision of this Court. The Court of Appeals was correct in its findings. As a result, Green's Petition for a Writ of Certiorari should be dismissed.

Respectfully submitted,

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September 24, 2018

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SUMTER COUNTY
The Honorable George C. James, Circuit Court Judge

On Petition for Writ of Certiorari to the Court of Appeals
Appellate Case No. 2018-001361 (Ct. App. Case No. 2015-002443)
Opinion No. 2018-UP-187 (S.C. Ct. App. Filed May 9, 2018)

THE STATE,

RESPONDENT,

V.

RODNEY R. GREEN,

PETITIONER.

PROOF OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the Return to Petition for Writ of Certiorari on Petitioner by depositing two (2) copies of the same via U.S. mail, first class, postage prepaid to his attorney of record, Susan B. Hackett, Esq., South Carolina Commission on Indigent Defense, Division of Appellate Defense, 1330 Lady Street, Ste. #401, Columbia, SC 29201.

I further certify that all parties required by Rule to be served have been served.

This 24th day of September, 2018

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