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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable Robert E. Hood, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL JUAN SMITH,

APPELLANT

APPELLATE CASE NO. 2015-001905

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

In a self-defense case, whether the trial court erred in charging the jury they could infer malice based on the “felony murder rule” where the underlying predicate felonies were not inherently dangerous and involved only possession of a firearm?

2.

Whether appellant was entitled to a directed verdict on the attempted murder charge because the State failed to prove appellant had the specific intent to kill the victim where it was undisputed that the victim was not appellant’s intended target in self-defense?

3.

Whether appellant was entitled to a mistrial when, during the solicitor’s closing argument, she tossed the gun on top of the clothing appellant wore the night of the shooting and told the jury that if they had not proved their case, “then find him not guilty. We will give him back all of his stuff and put him back out on the street[?]”

STATEMENT OF THE CASE

On November 13, 2013, a Richland County grand jury indicted appellant for attempted murder, possession of a stolen pistol, possession of firearm or ammunition by person convicted of a violent felony, unlawful carrying of a pistol, unlawful possession of a weapon by a person convicted of a crime of violence, and possession of a weapon during the commission of a violent crime. R. 1190-1201. On August 10 – 17, 2015, appellant was tried before the Honorable Robert E. Hood and a jury. R. 1. Luck Campbell, Meghan Walker, and Dolly Garfield represented the State. R. 1. Aimee Zmroczek and Bridgette Brown represented appellant. R. 1.

Judge Hood directed a verdict on the possession of a stolen pistol charge. R. 871, ll. 6 – 18. The jury convicted appellant on the remaining three charges. R. 1170, ll. 1 – 25. Judge Hood sentenced appellant to thirty years' imprisonment for attempted murder, a consecutive term of five years' imprisonment for possession of a weapon during the commission of a violent crime, a consecutive term of five years' imprisonment for possession of a weapon by a person convicted of a violent felony, a concurrent term of five years' imprisonment for possession of a weapon by a person convicted of a crime of violence, and a sentence of one year's imprisonment for unlawful carrying of a pistol. R. 1187, ll. 3 – 22. This appeal follows.

ARGUMENT

1.

In this self-defense case, the trial court erred in charging the jury they could infer malice based on the “felony murder rule” where the underlying predicate felonies were not inherently dangerous and involved only possession of a firearm.

Relevant Facts

Two crucial facts were undisputed in this case. First, it was undisputed that the victim in this highly-publicized case, Martha Childress (“Childress”), was not the intended target of the bullet that tragically left her paralyzed. R. 1071, ll. 24 – 25. Second, it was undisputed that appellant was guilty of two firearm status crimes. Defense counsel conceded appellant’s guilt on these crimes in her opening statement.¹ R. 222, ll. 18 – 23.

A friend of Childress’s testified that they were waiting with a crowd in front of the fountain in Five Points for a taxi when Childress fell. R. 245, ll. 11 – 16. Childress said she could not feel her legs. R. 245, ll. 17 – 19. EMS quickly arrived, found a gunshot wound in Childress’s chest, and transported her to the hospital. R. 229, ll. 8 – 9. R. 232, l. 22 – 233, l. 14. R. 234, l. 16 – 235, l. 6. Childress survived the shooting, but suffered internal injuries and a permanent spinal cord injury. R. 259, l. 16 – 260, l. 5.

The shooting occurred after 2:00 AM early Sunday morning after a Saturday that included the State Fair and a Gamecock road football game. R. 276, ll. 5 – 13. Five

¹ As noted by defense counsel in her opening statement, appellant pled guilty in federal court to a firearm-related crime. R. 222, ll. 18 – 23. During sentencing, Judge Hood stated that it was likely that appellant’s federal sentence would run consecutive to his state sentence. R. 1186, ll. 3 – 14.

Points was crowded. R. 276, ll. 2 – 24. Many witnesses testified they heard more than one shot. Childress’s friend testified she heard “[a]bout four or five” gunshots. R. 245, ll. 11 – 13. The police officer who was the first person to respond to Childress heard at least two shots. R. 277, ll. 16 – 19. He could not tell who fired the shots. R. 277, ll. 18 – 19. Another police officer at the scene admitted on cross-examination that it was possible that he heard multiple shots and that the report he wrote after the incident just used the word “shots.” R. 356, ll. 2 – 24. Many witnesses testified they heard more than one shot. R. 433, ll. 9 – 10 (Ryan Ellison); R. 464, ll. 23 – 25 (Asia Bethel); R. 497, ll. 22 – 23 (Taqaayya White); R. 503, ll. 6 – 12 (Byron Tucker); R. 536, ll. 7 – 11 (Shante Bethel); R. 641, ll. 23 – 25 (Donnell Woodard); R. 940, ll. 9 – 12 (Appellant).

The Two Groups

Childress did not know the person who shot her. R. 260, ll. 11-14. Appellant Michael Juan Smith (“Smith”) was in Five Points that night with his girlfriend, Shante Bethel and some of their friends. R. 530, ll. 2 – 4. The people in Smith’s group were Smith, Shante Bethel, Asia Bethel, Taqaayya White, and Ryan “Rondo” Ellison (collectively, the “Smith Group”). R. 530, ll. 2 – 4. The Smith Group encountered “a group of three guys.” R. 533, ll. 19 – 24. These three men were Daquan Samuel, Byron Tucker, and Donnell Woodard (collectively, the “Samuel Group”). R. 500, l. 20 – 501, l. 9.

Numerous videos from cameras in Five Points were introduced by both sides during the trial. State’s Exhibit 74 is an edited version that condenses footage from several cameras into one edited video. R. 310, ll. 9 – 19. (State’s Ex. 74). At the very beginning of State’s Exhibit 74, Ryan Ellison is the first of the Smith Group to appear.

(State's Ex. 74). He is a tall, thin, black male wearing a white "Aeropostale" t-shirt. (State's Ex. 74). Two of the other girls in the Smith Group follow Ryan Ellison. (State's Ex. 74). Shante Bethel follows wearing white pants. R. 296, ll. 2 – 11. (State's Ex. 74). Smith is the last of the group wearing a tan outfit with a black undershirt. (State's Ex. 74).

Approximately twenty seconds into State's Exhibit 74, members of the Samuel Group appear. R. 293, ll. 5 – 14. (State's Ex. 74). Byron Tucker is wearing a black shirt that says "Watch Out for the Alphabet Boys." R. 500, ll. 20 – 23. (State's Ex. 74). (Defendant's Ex. 3). Donnell Woodard is wearing a short-sleeved white shirt that says "Bustin' It." R. 638, ll. 21 – 25. (Defendant's Ex. 2). (State's Ex. 74).

The Shooting, the Videos, and the Aftermath

The members of the Samuel Group exchange words with Smith. R. 293, ll. 5 – 14. (State's Ex. 74). Tucker admitted that Woodard used the word "slob" which is a derogatory term that is "a disrespect towards the Bloods." R. 509, ll. 10 – 19. Tucker agreed that Woodard was a criminal and that he knew Woodard was going to cause trouble the night of the shooting. R. 509, ll. 8 – 9. R. 512, ll. 11 – 12. Shante Bethel admitted being affiliated with the Folks gang and stated that the members of the Samuel Group were in the Folk gang. R. 547, ll. 4 – 12. She heard a member of the Samuel Group use the word "slob" and made statements "like throwing down Blood." R. 548, l. 2 – 549, l. 9. She stated that appellant had a lot of friends and family members who were Bloods. R. 548, l. 22 – 549, l. 2. Appellant stated that during this initial altercation with the Samuel Group he heard them call him a "slob." R. 937, ll. 11 – 16. Appellant denied being a member of the Bloods, but said he had many friends who were members. R. 937,

ll. 19 – 22. Shortly thereafter on the video, from another angle, Smith moves a handgun from one pocket to another. (State's Ex. 74).

From another angle, the Smith Group makes their way through the crowd waiting on taxis near the fountain. (State's Ex. 74). Childress is visible standing near the curb. (State's Ex. 74). The Smith Group heads toward an Exxon station past the fountain. (State's Ex. 74). The Samuel Group is already near the Exxon station. (State's Ex. 74). Daquan Samuel can be seen wearing a long-sleeved white shirt near Byron Tucker. R. 638, l. 21 – 639, l. 3. (Defendant's Ex. 2). (State's Ex. 74).

The Samuel Group turns around and follows the Smith Group. (State's Ex. 74). The two groups confront each other. (State's Ex. 74). Childress suddenly falls, which is the moment immediately after the gunshots. (State's Ex. 74). People duck and run. (State's Ex. 74). Daquan Samuel begins heading toward the fountain where Childress was shot. (State's Ex. 74). Donnell Woodard shoots the bird at the Smith Group. R. 642, l. 25 – 643, l. 13.

Defense expert Christopher Watkins ("Watkins") produced edited videos depicting several camera angles. R. 892, l. 9 – 896, l. 14. (Defendant's Ex. 6, 21). Watkins "matched up" the times on the videos to synchronize events depicted on the different cameras. R. 896, ll. 6 – 14. The State introduced a version of Watkins' video as State's Exhibit 101. R. 827, ll. 6 – 828, l. 18. (State's Ex. 101).

Samuel runs through the fountain area. (State's Exhibit 101). Samuel appears to

be holding something that looks like a gun in his hand.² (State's Ex. 101). R. 899, ll. 17 – 24. Samuel then runs across the street and hovers near an area with several trash cans. (State's Ex. 101). R. 899, ll. 17 - 24.

Smith took the stand in his own defense. R. 935, ll. 5 – 6. He brought a gun to Five Points because he had been assaulted there a couple of months before the shooting. R. 936, ll. 4 – 24. Smith said they were getting ready to leave when he heard a shot and “somebody screamed they had a gun.” R. 938, ll. 2 – 7. Smith fired one shot back. R. 938, ll. 6 – 9. Smith testified that he “was scared for my life. I was scared I was going to get shot, so I returned a shot.” R. 939, ll. 17 – 19. Smith was extensively cross-examined by the State on the contents of his jail calls which contained inflammatory comments about the victim and witnesses. R. 939, l. 25 – 993, l. 11.

Ellison testified he never saw a gun that night. R. 432, ll. 18 – 20. He heard two or three gunshots, ducked, then ran towards the car. R. 432, l. 24 – 433, l. 10. White testified that the man “in the white shirt, he just started acting crazy, like he was about to pull out a gun, pulling up his shirt.” R. 488, ll. 10 – 20. The man in the white shirt was “clutching” like he was about to pull out a gun. R. 489, ll. 3 – 6. According to White,

² Multiple viewings of this video are unlikely to provide concrete proof of whether Samuel was holding a gun. (State's Ex. 101). The video's lack of clarity did not stop the solicitor from excoriating defense counsel in closing for suggesting that Samuel held a gun and claimed that Samuel only had dark-complected hands. R. 1109, ll. 17 – 23. The solicitor called defense counsel's argument “the most offensive thing that's happened in the courtroom this week.” R. 1109, ll. 17 – 23. As will be further explained below, the erroneous malice charge given by the trial judge relieved the jury of its duty to critically examine the evidence and decide whether the State had disproved self-defense beyond a reasonable doubt. Indeed, the jury deliberated for little more than one hour in a trial that spanned seven days. R. 1177, ll. 17 – 25.

they kept walking and then heard gunshots and started running. R. 489, ll. 10 – 20. She did not see who fired a gun. R. 489, ll. 19 – 22.

In the statement White gave the night of the shooting, she told police that a man with braids had a gun. R. 495, ll. 22 – 24. White gave a fake name to the police when she gave this statement. R. 489, l. 23 – 490, l. 6. White said that the police did not accept her statement that another man had a gun. R. 496, l. 25 – 497, l. 9. White agreed with defense counsel that the police issued an arrest warrant and made her come to the station with her mother to “give a statement that they wanted.” R. 496, l. 25 – 497, l. 9. Shante Bethel agreed with White that she saw the man in the white shirt pull up his shirt and gesture. R. 535, ll. 20 – 24. She turned her head. R. 535, ll. 20 – 24. She never saw anyone fire a gun. R. 536, ll. 1 – 6. She did not see any members of the Samuel Group with a gun. R. 536, ll. 2 – 3.

Tucker testified that the Samuel Group was cruising through Five Points just “messaging with people pretty much.” R. 502, ll. 3 – 8. Tucker, who claimed to be “a law-abiding citizen,” said that before they went to Five Points he asked his friends if they had any guns on them. R. 502, ll. 18 – 25. R. 510, ll. 9 – 17. On cross-examination, Tucker admitted telling the police that Woodard was a liar and a member of a rival gang of the Bloods. R. 508, l. 17 – 509, l. 9. Samuel and Woodard tried to talk to the girls in the Smith Group. R. 504, ll. 4 – 17. One of the girls told them they did not have enough money. R. 504, ll. 10 – 17. Samuel pulled out some cash. R. 504, ll. 14 – 17. The Smith Group turned back in their direction and then he heard gunshots. R. 504, l. 18 – 505, l. 4. Tucker admitted that he walked away from the scene “[w]ith a smile.” R. 505, ll. 14 – 17.

Woodard denied being in a gang. R. 641, ll. 17 – 18. He said no one in his group had a gun that evening. R. 641, ll. 19 – 22. Woodard did not see who shot. R. 643, ll. 20 – 23. He admitted that after the shooting, he turned around and shot the bird (with both hands) at the Smith group. R. 643, ll. 3 – 13. Woodard was arrested that evening for disorderly conduct. R. 644, ll. 19 – 21. He had a pending assault and battery charge with the solicitor's office. R. 645, ll. 14 – 17. As for Samuel, even though the ATF knew that Samuel was located in Lawrenceville Georgia, he refused to return to Columbia to testify because he was “fearful of gang retaliation.” R. 826, ll. 13 – 20.

Officer Theodore McLaughlin was on foot patrol in Five Points the night of the shooting. R. 341, ll. 10 – 16. He heard gunshots originating from the fountain area. R. 341, l. 21 – 342, l. 5. On direct examination, Officer McLaughlin claimed that he heard “[o]ne or 2” shots. R. 342, ll. 2 – 5. The report did not say that he heard a pair of shots. R. 356, l. 20 – 357, l. 3.

After hearing the gunshots, Officer McLaughlin ran toward the fountain. R. 342, ll. 6 – 19. He saw appellant running with his hand in his coat pocket. R. 342, l. 20 – 343, l. 3. The officer could tell there was a heavy object in the pocket and caught Smith in front of a pizza restaurant. R. 342, l. 24 – 343, l. 20. He took a pistol from Smith's pocket and detained him. R. 344, l. 12 – 345, l. 18. Officer McLaughlin said the pistol “was still warm to the touch.” R. 346, ll. 1 – 3. Smith told Officer McLaughlin, “I didn't mean to shoot.” R. 350, ll. 3 – 9.

Officer McLaughlin put Smith in the back of the patrol car. R. 351, ll. 13 – 17. He turned on the recording device in the patrol car. R. 351, ll. 20 – 25. When asked whether Smith was in the back of the patrol car for “almost 2 hours,” Officer McLaughlin

replied that he was not sure. R. 358, ll. 5 – 7. Smith was respectful. R. 358, ll. 22 – 23. The recording was entered into evidence without objection. R. 353, ll. 16 – 22.

Michael Painter (“Painter”) was visiting Five Points from Florence. R. 362, l. 10 – 363, l. 5. He was standing near the fountain. R. 363, ll. 6 – 9. He saw a “black man in a tan jacket and tan pants” standing on the corner. R. 363, ll. 10 – 16. Two black males wearing black shirts and jeans walked up to the man in the tan jacket. R. 363, ll. 13 – 23. Painter saw the two men confront the man in the tan jacket. R. 367, ll. 10 – 21. Painter saw “a muzzle flash and heard a pop, pop.” R. 364, ll. 1 – 2. The muzzle flash came from the man in the tan jacket who ran away from the fountain. R. 364, ll. 5 – 25. Painter did not see anyone else with a gun. R. 365, ll. 1 – 2.

The police found one shell casing at the scene. R. 372, ll. 11 – 20. The police found a blood stain near the fountain. R. 379, ll. 7 – 380, l. 9. The distance from the blood stain to the shell casing was approximately 110 feet. R. 394, ll. 13 – 15. Revolvers do not eject shell casings. R. 411, ll. 5 – 16.

Investigator Gilliam directed the crime scene investigator to collect gunshot residue samples. R. 408, ll. 8 – 14. The police collected gunshot residue samples from two subjects, Smith and Rondo Ellison. R. 373, l. 17 – 374, l. 22. Investigator Gilliam did not direct the collection of a gunshot residue sample from Donnell Woodard. R. 408, ll. 8 – 17.

The Argument Below on the Felony Murder Instruction and the Trial Court’s Ruling

After the close of the evidence, the trial judge heard argument from the parties on jury charges. R. 1038, l. 4 – 1059, l. 10. The State immediately conceded that the court should charge self-defense. R. 1038, ll. 7 – 8. Defense counsel then argued that a felony

murder charge based on the gun indictments was improper because the gun offenses were “status” crimes. R. 1038, l. 12 – 1039, l. 13. Appellant argued that carrying a gun illegally was unlike crimes typically associated with felony murder, “like burglary, armed robbery, where you’re committing an act that is likely to lead.” R. 1038, ll. 18 – 22.

The State argued that the felony murder charge just gives the jury “another way to infer malice.” R. 1039, ll. 15 – 19. Judge Hood asked if any law limited the types of felonies to which the felony murder rule applied and the solicitor replied that she was unaware of any limitation. R. 1039, ll. 20 – 25. The solicitor then clarified her position, stating that the “only language” she had seen said “something about felonies that are inherently dangerous.” R. 1040, ll. 3 – 8. The solicitor then argued that a “person who is not allowed by law to carry a gun would be a felony and is inherently dangerous.” R. 1040, ll. 3 – 8.

Defense counsel argued that allowing the jury to infer malice from the defendant’s illegal possession of a pistol would make him “automatically responsible for the result.” R. 1040, l. 22 – 1041, l. 2. The court then read his proposed felony murder charge and asked the defense for any case “that says gun possession as a felony” does not trigger the rule. R. 1041, ll. 10 – 20. Defense counsel did not respond immediately with a citation, but argued that her research revealed that the felony murder rule “was intended for crimes such as kidnapping, armed robbery, burglary.” R. 1041, ll. 21 – 24. Judge Hood then took up other issues to allow defense counsel an opportunity to provide authority to the court. R. 1041, l. 25 – 1042, l. 7.

After taking up other questions, when the court returned to discussion of the felony murder rule, defense counsel cited Gore v. Leake 261 S.C. 308, 199 S.E.2d 755

(1973) and State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982) *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (abolishing *in favorem vitae* review). R. 1047, l. 7 – 1048, l. 2. Appellant argued that the felony murder rule only applies “to those felonies which are inherently foreseeable dangers to human life.” R. 1047, ll. 10 – 12.

Judge Hood then ruled that he would give the felony murder charge. R. 1048, l. 17 – 1049, l. 21. The trial court stated:

I believe that the carrying of a firearm in these conditions **with the Defendant’s criminal history** put everybody in an extreme risk of danger that was present in the area that night. . . .

So the difference in this situation is it’s not like we have somebody in the community lawfully carrying a firearm that chooses to, you know, use it or to defend themselves. This is an individual **who based upon his prior criminal history** would not be allowed to carry a firearm period in state court or in federal court. And so I—you know, I think the unlawful carrying of a pistol by a convicted felon in our community in a situation such as a crowd in Five Points and in a situation where, according to his own testimony, he knew was violent, he had been beaten up and assaulted rises to a different level, and I will charge the version of felony murder.

R. 1048, l. 23 – 1049, l. 21 (emphasis added). Judge Hood gave the following charge to the jury:

Now, the law also allows you to infer malice if you conclude that the attempted murder was a proximate direct result of the commission of a felony. And for that regard, two of the gun charges, possession of a weapon by a person being convicted of a crime of violence and possession of a weapon by a person being convicted of a violent felony would be felonies under our law.

You can imply that malice existed if a person in the commission of a felony at the time of the attempted fatal blow, if one attempts to kill

another during the commission of a felony, the inference of malice may arise.

R. 1149, ll. 7 – 17. Appellant specifically objected to this instruction after the court charged the jury and before deliberations began. R. 1165, ll. 18 – 23.

Discussion

South Carolina has never applied the felony murder rule to status firearm offenses. The trial court's erroneous felony murder charge allowed the jury to infer malice solely from appellant's possession of a firearm. As argued by trial counsel, illegally possessing a firearm is a status crime, not an inherently dangerous *malum in se* crime, and does not provide a sufficient basis to charge the felony murder rule. See Gore v. Leeke, 261 S.C. 308, 199 S.E.2d 755 (1973) (discussing application of rule to crimes that are inherently evil, or *malum in se*, and criticism of applying rule to other crimes (*malum prohibitum*)).

The giving of a felony murder instruction in this case was particularly egregious because appellant received a self-defense charge. Under State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), it is error to charge an inference of malice from the use of a deadly weapon when evidence mitigating the crime exists. If it is improper to charge that malice may be inferred from the use of a deadly weapon, then allowing a jury to infer malice from the mere possession of a deadly weapon is manifestly erroneous. The trial court's charge transformed a crime of specific intent into one of strict liability.

South Carolina's Felony Murder Rule

Gore contains our Supreme Court's most expansive discussion of the felony murder rule. Gore at 315-18, 199 S.E.2d at 757-59. Gore involved a burglary. Id. at 312-14, 199 S.E.2d at 756-57. A homeowner surprised thieves in her house. Id. The thieves were seen in Gore's car a few blocks away minutes after the robbery. Id. The police chased the car and the culprits crashed. Id. The police and the thieves had a gun battle. Id. Gore fled into the woods and was wounded by a shot from the police. Id. One of his confederates shot and killed a police officer. Id. The jury charge given by the trial judge blended an accomplice liability charge with the felony murder rule. Id. at 314-15, 199 S.E.2d at 757. The examples of felonies given by the trial court were grand larceny, robbery, and burglary. Id.

The Supreme Court surveyed the current status of the felony murder rule in other jurisdictions and in scholarly commentary. Id. at 315-18, 199 S.E.2d at 757-59. The Court first noted that many jurisdictions had statutory versions of the felony murder rule, but no such statute existed in South Carolina. Id. The Court stated that South Carolina had "consistently followed the common law rule" and quoted an early case: "Whenever an unlawful act, an act malum in se, is done in prosecution of a felonious intention, and death ensues, it will be murder." Id. quoting State v. Levelle, 34 S.C. 120, 13 S.E. 319 (1891).

The Gore Court dismissed the defendant's argument because his cases involved "statutory offenses which were malum prohibitum rather than malum in se." Id. "*Malum in se*" means "A wrong in itself; an act or case involving illegality from the very nature of the transaction, upon principles of natural, moral, and public law." Black's Law

Dictionary, (6th Ed. 1990). “An act is said to be *malum in se* when it is inherently and essentially evil, that is, immoral in its nature and injurious in its consequences, without any regard to the fact of its being noticed or punished by the law of the state.” Id. “*Malum prohibitum*” means “a thing which is wrong *because* prohibited; an act which is not inherently immoral, but becomes so because its commission is expressly forbidden by positive law.” Id.

Expanding on the difference between *malum in se* crimes and *malum prohibitum* crimes, the Gore Court stated:

Finally, in this connection attention is called to the fact that the felony-murder rule and the application thereof to a homicide committed in connection with the perpetration of ‘any felony’ has been increasingly criticized and/or modified by a number of writers and courts. It is argued that even though the rule might have sufficient justification when its operation is predicated upon the commission of an inherently dangerous felony, **there is no room for the logical application of that doctrine where the felony committed was not an inherently dangerous one.**

Gore at 316, 199 S.E.2d at 758 (emphasis added). The Court then noted the difference in how jurisdictions decide whether a felony is inherently dangerous. Id. at 316-17, 199 S.E.2d at 758-59. While some jurisdictions considered only the elements of the crime in the abstract, other considered both the nature of the felony and the circumstances surrounding its commission. Id. Ultimately, the Court determined that it did not need to decide this issue because the felony murder rule clearly applied to a burglary and shootout with the police. Id.

The cases cited by Gore as examples of previous applications of the felony murder rule in South Carolina involved inherently dangerous crimes. In State v. Cannon, 49 S.C. 550, 27 S.E. 526 (1897), a felony murder charge was given in a burglary case.

Levelle involved a suicide which was described as *malum in se*. Levelle, 13 S.E. at 321. State v. Johnson, 156 S.C. 63, 152 S.E. 825 (1930) contains limited facts, but one of the exceptions refers to the defendants stealing a watch or money, which likely means that the court applied the felony murder rule to a robbery. In State v. Williams, 189 S.C. 19, 199 S.E. 906, 907-08 (1938), the underlying felony was attempted murder. In State v. Woods, 189 S.C. 281, 1 S.E.2d 190, 193 (1939), the underlying crime was escape. In State v. Ciesiellski, 213 S.C. 513, 515, 50 S.E.2d 194, 194 (1948), the underlying crime “was robbery or burglary.” All of these crimes are unquestionably *malum in se* and inherently dangerous.

The Supreme Court next discussed the felony murder rule in the death penalty case of State v. Yates, 280 S.C. 29, 210 S.E.2d 805 (1982). Yates and a confederate robbed a rural store armed with a pistol and knife. Yates at 33, 310 S.E.2d at 807-08. Yates shot the clerk, but did not kill him. Id. The clerk’s mother entered the store and Yates ran with the money. Id. Yates’ accomplice stabbed the clerk’s mother to death, but the clerk got a gun and killed the accomplice. Id.

Yates asked the Court to strike armed robbery as an aggravating circumstance because of the prospect he was convicted on a theory of vicarious liability. Id. at 34, 310 S.E.2d at 808. Rejecting Yates’ argument, the Court stated, “Since this state adheres to the common law rule of murder and makes no distinction between murder and felony murder, a statutory aggravating circumstance of murder in a death penalty case remains as such regardless of whether the crime charged is murder or felony murder.” Id. While not a true felony murder case, the underlying felony—armed robbery—would certainly trigger its application as a *malum in se* crime.

In 1985, the Supreme Court promulgated a jury charge on implied malice and the felony murder rule. State v. Norris, 285 S.C. 86, 92, 328 S.E.2d 339, 342-43 (1985). The underlying felony in Norris was rape. Id. at 89, 328 S.E.2d at 341. The trial judge in Norris gave a felony murder charge nearly identical to the charge given by Judge Hood in this case:

The law also allows the jury to infer malice if you conclude that the homicide was a proximate, direct result of the commission of a felony. And for that regard, criminal sexual conduct in the first degree would be a felony under our law. You can imply that malice existed if a person is in the commission of a felony at the time of the fatal blow.

Id. at 91, 328 S.E.2d at 342 (emphasis removed). The Court, instead of approving the charge given by the trial judge in Norris (and the one given by Judge Hood), promulgated its own "proper charge on implied malice." Id. at 92, 328 S.E.2d at 342-43. The Supreme Court's implied malice charge is:

The law says if one intentionally kills another during the commission of a felony, the implication of malice may arise. If facts are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

Id. The Court's citation for its malice charge indicates that it created this charge from the inference of malice from use of a deadly weapon. Id. citing State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983).

In this case, Judge Hood did not give the Supreme Court's approved Norris charge, but instead used the trial judge's charge quoted in the Norris opinion. R. 1149, ll. 7 – 17. Not only was charging felony murder error in this case, the court also used the wrong felony murder charge. Furthermore, the underlying crime in Norris was

undoubtedly a *malum in se* crime—rape. The question of the applicability of the felony murder rule to rape was not seriously in question in Norris.

In 2008, the Supreme Court reversed a murder conviction and a life sentence because of trial counsel's failure to object to an improper felony murder charge. Lowry v. State, 376 S.C. 499, 657 S.E.2d 760 (2008). The underlying crime in Lowry was armed robbery—unquestionably a *malum in se* crime. Id. at 502, 657 S.E.2d at 761. The trial court originally gave the Supreme Court's approved Norris charge on felony murder. Id. at 502, 657 S.E.2d at 762. After the jury was sent to deliberate, the solicitor claimed not to have heard the trial judge's felony murder charge. Id. The trial judge brought the jury back to the courtroom and gave an altered felony murder charge: "That is, if a person kills another in the doing or attempting to do an act which is considered a felony, the fact that this occurs while one is doing or attempting to commit a felony makes the killing murder." Id. at 503, 657 S.E.2d at 762. The defendant's attorney did not object to this charge. Id.

The Supreme Court held that the additional charge shifted the burden of proof to the defendant and created a mandatory presumption of malice. Id. at 504-07, 657 S.E.2d at 763-64. The Court also held that the additional charge contradicted the proper Norris charge and "exacerbated the error by confusing the jury as to its fact-finding duties with respect to Petitioner's murder charge." Id. While Judge Hood's instruction did not create a mandatory presumption of malice with language such as "makes the killing murder," Lowry demonstrates the importance of using the correct Norris charge, not confusing the jury, and reducing the State's burden of proof.

The Impact of State v. Belcher

Belcher shows that the problems which led to a reversal in Lowry are present in appellant's case. In Belcher, the Supreme Court overturned decades of jurisprudence that allowed juries to infer malice from the use of a deadly weapon even when evidence of justification, excuse, or mitigation existed. Belcher at 612, 685 S.E.2d at 810. Belcher received a self-defense charge. Id. The Court found that allowing the jury to infer malice from the use of a deadly weapon where self-defense was charged was both inaccurate and confusing. Id. at 609-12, 685 S.E.2d at 808-10.

Like Belcher, here the jury could have inferred malice solely from Smith's admitted guilt on the weapons charges. The jury also could have found that Smith acted in self-defense, but because of the weapons charges, convicted him despite his justification in shooting. The same confusion and prejudice that the Court found erroneous in Belcher are present in appellant's case.

Furthermore, if the court's felony murder charge is allowed to stand, then our state's malice jurisprudence will contain a massive contradiction. Belcher forbids the inference of malice from the use of a deadly weapon. The jury charge in this case, if approved, would allow the inference of malice from the mere possession of a deadly weapon. Logic and consistency mandate elimination of this contradiction.

The Felony Murder Rule's Application to Status Firearm Offenses in Other Jurisdictions

In most states, the felony murder rule is a creature of statute and limits its application to enumerated felonies. See The Hon. Rudolph J. Gerber, The Felony Murder Rule: Conundrum Without Principle, 31 Ariz. St. L.J. 763, 766 (Fall 1999). None of these states apply the felony murder rule to status firearm offenses. See Guyora Binder,

Making the Best of Felony Murder, 91 B. U. L. Rev. 403, 450-53 and n.262-79 (Mar. 2011). See also, e.g., Alaska Stat. Ann. § 11.41.100(a) (limiting crimes for first-degree murder to sex offenses and kidnapping of children, first-degree criminal mischief, and terroristic threatening), Alaska Stat. Ann § 11.41.110 (limiting crimes for second-degree murder to arson, kidnapping, sexual assaults, burglary, escape, robbery, and certain drug crimes); Cal. Penal Code § 189 (limiting felonies to arson, rape, carjacking, robbery, mayhem, kidnapping, train wrecking, sex crimes, or shooting a firearm from a motor vehicle); 720 Ill. Comp. St. § 5/9-1(a)(3) (stating that felony murder rule applies to “forcible” felonies), 720 Ill. Comp. St. § 5/2-8 (defining “forcible felony” as including treason, murder, sexual assaults, robbery, kidnaping, burglary, and arson); N.D. Cent. Code § 12.1-16-01(1)(c) (listing applicable felonies as treason, robbery, burglary, kidnaping, arson, felony offenses against children, and escape); Me. Rev. Stat. Ann. Tit. 17-A, § 202(1) (defining felony murder as applying to robbery, burglary, kidnapping, arson, sexual assault, and escape); Nev. Rev. Stat. Ann. § 200.030(1)(b) (limiting felonies for first-degree murder to sexual assault, kidnapping, arson, robbery, burglary, home invasion, sex crimes, and child/elder abuse); N.H. Rev. Stat. Ann. § 630:1-a (limiting felonies for first-degree murder to sexual assault, armed robbery, burglary, and arson), N.H. Rev. Stat. Ann. § 630:1-b (limiting second-degree murder to Class A felonies), N.H. Rev. Stat. Ann. § 159:3 (stating possession of a firearm by a convicted felon is a Class B felony); N.H. Rev. Stat. Ann. § 159:4 (stating that carrying a concealed pistol without a license is a Class B felony); N.J. Stat. Ann § 2C:11-3(a)(3) (limiting felonies for murder to robbery, sexual assault, arson, burglary, kidnapping, carjacking, escape, and terrorism); 18 Pa. Cons. Stat. Ann. § 2502(b) (enumerating felonies for second-degree

murder as robbery, rape, arson, burglary, and kidnapping). Two states legislatively abolished the felony murder rule. See Haw. Rev. Stat. Ann. § 707-701 (abolishing felony murder rule); Ky. Rev. Stat. Ann. § 507.020 (abandoning felony murder rule as an independent basis for establishing an offense of homicide). The omission of status firearm offenses from felony murder statutes shows that the legislatures of the several states recognize that the felony murder rule should only apply to *malum in se* crimes.

Even where a statutory felony murder rule applies on its face to “any” felony and does not enumerate specific felonies, courts have limited their reach to inherently dangerous felonies. See State v. Anderson, 666 N.W.2d 696 (Minn. 2003). The Minnesota Supreme Court’s opinion in Anderson is instructive. In Anderson, the defendant killed the victim with a stolen shotgun and the underlying crimes for the felony murder rule were felon in possession of a firearm and possession of a stolen firearm. Id. at 697. The court confronted Minnesota’s second-degree murder statute, which provided that a person was guilty if they killed a person “while committing or attempting to commit a felony offense.” Minn Stat. Ann. § 609.19, subd. 2(1). Analyzing the statutory language, the court stated, “Admittedly, under its plain language, except for the three specified exceptions, the statute appears to apply to all other felonies.”³ Anderson, 666 N.W.2d at 700.

Despite this “plain language,” the court determined that the statute did not apply to status firearm offenses. Id. at 698-701. The court examined the history of the felony murder rule in America. Id. The felony murder rule was originally limited in scope

³ The exceptions are violent crimes, such as criminal sexual conduct, which make the crime first-degree murder. Minn Stat. Ann. § 609.19, subd. 2(1).

because there were few felonies, they were all *malum in se*, and they were all punishable by death. Id. citing James J. Tomkovicz, The Endurance of the Felony-Murder Rule: A Study of the Forces that Shape Our Criminal Law, 51 Wash. & Lee L. Rev. 1429 (1994); 2 Wayne R. LeFave & Austin W. Scott, Jr., Substantive Criminal Law § 7.5 (1986). The court noted that as the number of felonies expanded to include “comparatively minor offenses. . . . many courts have judicially limited the application of the doctrine so that not every felony offense serves as a predicate felony for a felony-murder charge.” Anderson, 666 N.W.2d at 699.

The Minnesota Supreme Court ultimately concluded that “the predicate offenses of felon in possession of a firearm and possession of a stolen firearm are not inherently dangerous.” Id. at 701. The court distinguished use of a firearm from possession of a firearm. Id. The court found that possession of a firearm by a felon was not dangerous in the abstract and did not have the “special danger” or imminency as the violent crimes traditionally associated with the felony murder rule. Id. See also Griffin v. Commonwealth, 533 S.E.2d 653, 658-60 (Va. 2000) (reversing felony murder conviction based on predicate offense of possession of a firearm by a convicted felon); People v. Satchell, 489 P.2d 1361, 1370 (Cal. 1971) (reversing a felony murder conviction based on the predicate offense of felon in possession of a concealable firearm and stating, “[W]e find it difficult to understand how any offense of mere passive possession can be considered to supply the element of malice in a murder prosecution.”) *overruled on other grounds by* People v. Flood, 957 P.2d 869 (Cal. 1998).

Appellant's Self-Defense Charge Negates the Felony Murder Rule

South Carolina's self-defense and accident jurisprudence further supports adoption of the reasoning of Anderson and the other states that conclude that the felony murder rule does not apply to a status firearm offense. State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999). In Burriss, the defendant illegally possessed a pistol because he was too young. Id. at 259, 513 S.E.2d at 106. The trial judge refused to charge accident because the defendant "was not acting lawfully because he was in unlawful possession of a firearm." Id. Examining earlier self-defense and accident cases, the court held that "a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting." Id. at 262, 513 S.E.2d at 262 *citing* State v. McCaskill, 300 S.C. 256, 300 S.E.2d 268 (1990) and State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994). Under Burriss—and as recognized by the trial judge in charging self-defense—appellant's status firearm offenses did not prevent a self-defense charge. Like Belcher, the rule from Burriss further causes contradiction and confusion in a jury charge if status firearm offenses can serve as the predicate for felony murder where self-defense is charged.

The Kansas Supreme Court confronted the contradiction between the felony murder rule and self-defense in State v. Underwood, 615 P.2d 153 (1980). Prior to its decision in Underwood, Kansas allowed status firearm crimes to serve as the predicate offense for felony murder. Underwood, 615 P.2d at 300-01. The defendant in Underwood was a felon in possession of a firearm and returned with a gun to the scene of an earlier argument. Id. at 155-56. The defendant ultimately shot the man with whom he had argued and claimed self-defense at trial. Id. The Underwood court overruled its

earlier precedent, partially because of the conflict between the felony murder rule and self-defense. Id. at 162-63. The court concluded that “filing a charge under the felony murder rule in most, if not all, cases removes any possibility of establishing the defense of self-defense.” Id. In part because of this intractable legal dilemma, the court held that status firearm crimes would no longer provide the predicate offense for felony murder. Id. Like in Underwood, the trial court’s felony murder charge in this case negated the jury’s duty to determine whether the State disproved self-defense beyond a reasonable doubt.

Simply put, mere possession of a firearm is not inherently dangerous. U.S. Const. Amend. II. S.C. Const. art. I, § 20. Possession of a firearm by a convicted felon is *malum prohibitum* and is not inherently dangerous. This Court should not expand our common law felony murder rule to include status firearm offenses, particularly in a case where self-defense is charged. The trial court’s felony murder charge allowed the jury to infer malice when it was undisputed appellant had no intent to shoot the victim. The charge contained an inherent contradiction and was confusing. State v. Rothell, 301 S.C. 168, 169-70, 391 S.E.2d 228, 229 (1990). This Court should reverse.

2.

Appellant was entitled to a direct verdict on the attempted murder charge because the State failed to prove appellant had the specific intent to kill the victim where it was undisputed that the victim was not appellant’s intended target in self-defense.

Even assuming that the bullet in Childress’s spine came from appellant’s gun, no evidence existed that Childress was appellant’s target. The State conceded this point in its closing argument. R. 1071, ll. 24 – 25. The State relied wholly on the felony murder rule

and the doctrine of transferred intent to prove the intent element of attempted murder. R. 1070, l. 24 – 1074, l. 19.

After the close of the evidence, appellant moved for a directed verdict on the attempted murder charge. R. 1036, ll. 11 – 19. Defense counsel argued that attempted murder is a “specific attempt crime” and that the State had not proved appellant had “the specific intent to commit a murder under the statute.” R. 1036, ll. 11 – 19. The solicitor responded that her position was “that firing into a crowd . . . would be a specific intent to kill.” R. 1037, ll. 1 – 4. The trial judge denied appellant’s motion. R. 1077, ll. 5 – 9.

Because attempted murder requires specific intent, the transferred intent doctrine does not apply. See State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015) *cert. granted* Mar. 28, 2016. In King, this Court held that the attempted murder statute requires the State to prove the defendant acted with the specific intent to kill. King at 407-11, 772 S.E.2d at 191-93. The Court relied on the language used by the Legislature when it enacted the attempted murder statute. Id. The Court also relied on State v. Sutton, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000) in which the Supreme Court refused to recognize a separate offense of attempted murder and stated that attempted murder would require specific intent. Id.

Furthermore, the transferred intent doctrine does not apply to attempt crimes. State v. Hinton, 630 A.2d 593, 600-02 (Conn. 1993). See also People v. Smith, 124 P.3d 730, 739-40 (Cal. 2005) (“The mental state required for *attempted* murder is further distinguished from the mental state required for murder in that the doctrine of ‘transferred intent’ applies to murder but not to attempted murder.”). In Connecticut, attempted murder requires specific intent. Hinton, 630 A.2d at 601. “Proof of an attempt to commit

a specific offense requires proof that the actor intended to bring about the elements of the completed offense. Id. “If the completed offense includes an intent to kill a particular person, the attempt to kill must also include an intent to kill that same person.” Id.

“Transferred intent is not needed, however, to insure that a defendant is prosecuted for attempted murder.” Id. at 600-02. “A defendant can still be prosecuted for his intent to kill and conduct aimed at killing the intended victim whether a third party is killed or no one is even injured.” Id. (emphasis added). “The doctrine of transferred intent, generally considered a necessary fiction, is therefore not necessary to prosecute for attempted murder a defendant whose aim was poor.” Id. The Hinton court further reasoned that the rule of lenity required this result. Id. See also State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) (“Finally, when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant.”).

Just like in Hinton, South Carolina’s version of attempted murder requires specific intent and South Carolina uses the rule of lenity. The State elected to prosecute appellant for the attempted murder of Childress instead of the attempted murder of Daquan Samuel, Byron Tucker, and Donnell Woodard. An injury to the victim is not a required element of attempted murder. S.C. Code Ann. § 16-3-29. Therefore, this Court should apply the reasoning of Hinton to this case and hold that South Carolina does not apply transferred intent to attempted murder. Without the doctrine of transferred intent, no evidence existed to sustain appellant’s attempted murder conviction. This Court should reverse.

Appellant was entitled to a mistrial when, during the solicitor's closing argument, she tossed the gun on top of the clothing appellant wore the night of the shooting and told the jury that if they had not proved their case, "then find him not guilty. We will give him back all of his stuff and put him back out on the street."

Relevant Facts

The State's closing argument improperly capitalized on the specter of Columbia's criminal street gangs, their presence in Five Points, and the jury's fear for their own safety and that of the community. Before voir dire, Judge Hood discussed the gang issue with the parties. R. 21, ll. 7 – 22, l. 25. Judge Hood asked defense counsel if appellant was going to admit he was in a gang. R. 21, ll. 7 – 8. Defense counsel responded, "He may, Your Honor, yes." R. 21, l. 9. During voir dire, the trial judge told the prospective jurors that the case "may involve gang activity" and asked if that information would affect their ability to be fair and impartial. R. 70, ll. 21 – 24. The trial judge also asked the venire whether anyone was a member of the Five Points Association. R. 69, ll. 6 – 8. The jury ultimately went to Five Points to view the scene. R. 337, ll. 3 – 24.

The trial judge conducted individual voir dire because of the intense media coverage surrounding this case. R. 12, ll. 7 – 15. R. 71, l. 1 – 74, l. 12. Many jurors had heard about the shooting. R. 75, l. 2 – 134, l. 8. One of the prospective jurors (who was excused) told Judge Hood that appellant "was in gang activity and he accidentally shot [the victim]." R. 129, ll. 21 – 25. She also stated that she had "read about it so much in the paper." R. 129, ll. 21 – 25. Another prospective juror who was excused told Judge Hood that he had seen gang graffiti in Five Points and that he was "predisposed to

thinking that it's a violent place and that crimes are committed." R. 132, ll. 4 – 18. Referencing the famed Gamecock running back, the juror said, "I think Marcus Lattimore's grandmother said you can go to Carolina to play ball, but you can't go to Five Points because it's different country at night." R. 132, ll. 9 – 14.

After beginning her opening statement talking about Childress's injuries, the solicitor invoked Five Points' importance to Columbia:

Five Points, a part of history of the City of Columbia, formed about 100 years ago in the root of our city that has brought hundreds of citizens, old and new, to make wonderful memories, celebrations, graduations, anniversaries. It brings old and new, men and women to come find a perfect gift in a store or have the perfect meal together. **Five Points should be about** memories, happy memories, laughter. **It should not be about** gunfire that leads to phone calls to a parent that no parent should ever have to answer.

R. 213, l. 24 – 214, l. 8 (emphasis added). Defense counsel candidly told the jury that the solicitor's version of Five Points "in this political culture in this political climate does not exist at 2:30 in the morning." R. 222, ll. 6 – 9. She told the jury that the individuals involved in this case were gang members. R. 222, ll. 15 – 17. She stated that while appellant had not "been jumped into a gang," he "associates with gang members." R. 222, ll. 18 – 23.

Testimony about Gang Affiliation

On cross-examination, Byron Tucker admitted telling the police that Donnell Woodard was a liar and a member of a rival gang of the Bloods. R. 508, l. 17 – 509, l. 9. This statement was made to an ATF agent who also confirmed the statement during his testimony. R. 844, ll. 1 – 5. Tucker admitted that Woodard used the word "slob" which is a derogatory term that is "a disrespect towards the Bloods." R. 509, ll. 10 – 19.

Tucker said he had associates and friends who are gang members, but emphatically denied that he was a member of a gang and said he was "a law-abiding citizen." R. 509, l. 17 – 510, l. 17. Tucker agreed that Woodard was a criminal and that he knew Woodard was going to cause trouble the night of the shooting. R. 509, ll. 8 – 9. R. 512, ll. 11 – 12.

Shante Bethel admitted being affiliated with the Folks gang and at one point the solicitor asked her if she had ever said she was the "queen of the Folk." R. 547, ll. 9 – 12. R. 557, ll. 12 – 17. She stated that the members of the Samuel Group were in the Folk gang. R. 547, ll. 4 – 7. She heard a member of the Samuel Group use the word "slob" and made statements "like throwing down Blood." R. 548, l. 2 – 549, l. 9. She stated that appellant had a lot of friends and family members who were Bloods. R. 548, l. 22 – 549, l. 2. Shante Bethel had previously testified for the State in a case where two children were "gunned down" by a Folk. R. 559, ll. 1 – 9.

Taqayya White told the jury she was afraid to testify and that her life was on the line. R. 492, ll. 5 – 15. She claimed she had been threatened through Facebook and text messages on her phone. R. 492, ll. 16 – 20. After initially saying she did not know who had threatened her, after prompting from the solicitor she claimed it was appellant and his family. R. 492, ll. 16 – 493, l. 1. No pages from Facebook or text messages were produced by the State to corroborate White's claims.

Woodard denied being a member of any gang. R. 641, ll. 17 – 18. He was in jail at the time of his testimony. R. 653, ll. 16 – 17. Samuel did not testify at trial. The solicitor told Judge Hood that they were attempting to find him, but that he was afraid to attend the trial "because of the gang situation in Columbia and feared retaliation." R. 193, ll. 3 – 25.

Appellant denied that he had ever been “initially beaten in” to the Bloods, but admitted he had many friends who were Bloods. R. 937, ll. 19 – 22. Appellant stated that during his first encounter with the Samuel Group he knew they believed he was a gang member because they said “slob.” R. 937, ll. 11 – 16.

As its final witness, the State called Deputy Sheriff Vince Goggins (“Goggins”), supervisor of the Midlands Gang Task Force. R. 858, ll. 2 – 20. Goggins told the jury that he kept a “gang database.” R. 859, ll. 10 – 12. The purpose of the database was for “officer safety.” R. 859, ll. 13 – 19. Goggins claimed that no one in the Samuel Group was a “documented” gang member. R. 860, l. 12 – 861, l. 4.

He said appellant was “a documented Blood gang member” and had been a member since he was fifteen years old. R. 861, ll. 5 – 9. He claimed that the “Gangster Killer Bloods is one of our more organized gangs in the state along the east coast.” R. 866, ll. 2 – 7. Goggins said Smith was making gang signs in photographs introduced by the State. R. 861, l. 10 – 862, l. 9. State’s Ex. 79, 80. On cross-examination, Goggins admitted that Columbia had another violent gang called the Folk Nation. R. 863, ll. 11 – 18. Goggins stated that members gain rank in a gang by committing violent crimes and that appellant had committed several assaults “from a young age until now.” R. 866, ll. 8 – 17. The State rested after Goggins’ testimony. R. 867, ll. 14 – 15.

The Jurors Were Afraid

During the middle of the State's case, the jury sent the following note to the court:

We are all concerned about our safety. It is our understanding that someone in a red shirt took a picture of all of us in the courtroom yesterday. We are not discussing the case, just concerned about our safety. We would like to discuss this with the judge when he has some time.

Thanks,
Jurors

R. 1202. R. 578, ll. 4 – 9. After talking to the lawyers in chambers, Judge Hood stated that he questioned the jury about the note. R. 578, ll. 10 – 22. The jurors told Judge Hood that they thought they saw someone take a picture of them and heard Judge Hood ban cellphones from the courtroom. R. 578, ll. 10 – 15. Judge Hood told them that he banned cellphones from the courtroom because he thought someone had taken a picture of him. R. 578, ll. 16 – 20. Judge Hood said that he then asked if anyone was concerned for their safety and the jurors responded they were not. R. 578, ll. 21 – 22. The trial judge said, “So they are fine.” R. 578, ll. 21 – 22.

The solicitor asked whether the court wanted them to investigate and Judge Hood said, “Yes. I think somebody should call Chief Keel. I want a SLED agent.” R. 579, ll. 2 – 5. Defense counsel stated that she provided names immediately and that if they checked the jail phone calls and family member phone calls they would find no connection to appellant. R. 579, ll. 6 – 9. The solicitor replied, “They are both documented Blood gang members, which the defendant is, too.” R. 579, ll. 11 – 12. One of the solicitors called SLED. R. 579, ll. 16 – 19.

*The State's Closing Argument, the Mistrial Motion, and the Jurors' Continued Fear for
Their Own Safety*

The State appealed to fear of gangs in its closing argument. The solicitor recounted White's testimony that she did not want to testify because "the Defendant's family had been threatening her." R. 1114, l. 24 – 1115, l. 6. The solicitor called Shante Bethel "the queen of the Folk." R. 1118, ll. 14 – 16. She reiterated Goggins' testimony that appellant had been in a gang since he was a teenager. R. 1130, ll. 10 – 15.

Near the end of her closing argument, the solicitor told the jury they should base their verdict on the fact that Childress gave Byron Tucker a hug after his testimony. R. 1132, l. 13 – 1133, l. 1. The solicitor then stated:

And if you don't think that we've done it, if you don't think that Michael Painter was right about the man in the tan outfit firing the gun, then find him not guilty. **We will give him back all of his stuff and put him back out on the street.**

R. 1133, ll. 2 – 6 (emphasis added). Appellant's objection was sustained and Judge Hood said, "Move on. Disregard the last statement, ladies and gentlemen." R. 1133, ll. 7 – 10.

After the trial judge gave his charge and sent the jurors to the jury room, appellant moved for a mistrial based on the Solicitor's inflammatory closing argument. R. 1163, l. 1 – 1165, l. 17. Citing State v. Liberte, 336 S.C. 648, 521 S.E.2d 648 (1999), defense counsel argued that the solicitor's comment about putting appellant "back on the streets" was calculated to "specifically inflame the passions and prejudice of the jury." R. 1163, l. 11 – 1164, l. 11. Defense counsel argued the solicitor injected an arbitrary factor into the jury's deliberations. R. 1163, l. 11 – 1164, l. 11. Appellant cited the due process clauses of the federal and state constitutions, the Eighth Amendment to the federal

constitution, and the state constitutional right to trial by an impartial jury. R. 1163, l. 11 – 1164, l. 11. U.S. Const. amends. V, VIII, XIV. S.C. Const. art. I, §§ 3, 14.

Defense counsel also described the solicitor's conduct when she made the inflammatory comment about putting appellant "back on the streets." R. 1164, ll. 2 – 11. The solicitor took appellant's clothing from the night of the shooting, which was in evidence, and tossed it when she said "We will give him back all of his stuff." R. 1164, ll. 2 – 11. She then threw the gun on top of the clothing. R. 1164, ll. 2 – 11.

The solicitor did not dispute defense counsel's description of her actions. R. 1164, ll. 14 – 23. She instead claimed that she "misspoke" and that she meant to say "find him not guilty." R. 1164, ll. 14 – 23. The trial judge denied appellant's motion for a mistrial, finding that the circumstances did not rise to the level of a manifest necessity. R. 1165, ll. 4 – 16.

After sending back to the jury room a copy of his written charges, the jury then sent another note expressing their fear: **"There have been concerns expressed by the group about safety."** R. 1168, ll. 2 – 23. R. 1203. This note from the jury is not discussed on the record prior to the verdict. R. 1168, l. 20 – 1169, l. 20. Judge Hood wrote on the note, "We will insure your safety at the conclusion of the trial! Thank you – REH Written w/the consent of the attorneys REH." R. 1203. The jury deliberated for approximately one hour before convicting appellant. R. 1177, ll. 17 – 25.

After the verdict, defense counsel renewed her motion for a mistrial based on the Solicitor's closing argument. R. 1175, ll. 1 – 24. She argued that because of the inferences that witnesses were in danger of gang activity, the inflammatory "back on the streets" argument, and the jurors' fear as evidenced by their notes denied appellant due

process and required a mistrial. R. 1175, ll. 1 – 24. The trial judge blamed defense counsel for injecting the gang issue into the case and denied the motion. R. 1176, l. 24 – 1177, l. 13.

Discussion

The solicitor's inflammatory argument to an already frightened jury, combined with her theatrics with appellant's clothes and gun, require reversal. A solicitor's argument that appeals to the personal biases of the jury and arouses their passions and prejudices violates due process. Tappeiner v. State, 416 S.C. 239, 250-51, 785 S.E.2d 471, 477 (2016); Donnelly v. DeChristoforo, 416 U.S. 637, 642 (1974). In this case, the solicitor capitalized not only on the jury's general fear of gangs, but on their specific fears for their own safety which they expressed twice in writing to the trial judge.

The solicitor's argument asked the jury to focus on the irrelevant factor of appellant's future dangerousness, not his guilt or innocence. A "jury is not free to convict a defendant simply because he poses a future danger; nor is a defendant's future dangerousness likely relevant to the question whether each element of an alleged offense has been proved beyond a reasonable doubt." Simmons v. South Carolina, 512 U.S. 154, 163 (1994). The solicitor's argument was also inaccurate and misleading, as the State knew that appellant had already been convicted and sentenced in federal court and under no circumstances would be "back on the streets." Id. at 170. See also Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004) ("The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence.")

The solicitor's argument in this case is nearly identical to the argument that caused reversal in State v. White, 246 S.C. 502, 144 S.E.2d 481 (1965). In White, the solicitor told the jury, "Let him go, let him come back to Williamsburg County. Let him come in your wife's bedroom or your mother or daughters, any of them, what would you do?" Id. at 504, 144 S.E.2d at 482. The Court reversed, holding that the effect of such an argument is to "completely destroy and nullify all sense of impartiality in a case of this kind." Id. at 506, 144 S.E.2d at 482. The Court criticized the solicitor for injecting "into the case considerations foreign to the record and calculated to take from the trial the necessary element of impartiality." Id. at 507, 144 S.E.2d at 483. The solicitor's argument in this case was even more egregious than in White because the State knew that the jurors feared for their own personal safety, not just that of the community. See Vasquez v. State, 388 S.C. 447, 698 S.E.2d 561 (2010).

In Martin v. Estelle, 546 F.2d 177, 179 (5th Cir. 1977), the prosecutor made the same comment as the solicitor in this case. The prosecutor continually referred to highly inflammatory evidence during closing argument. Id. The prosecutor then told the jury that if they found in the defendant's favor he "would be 'back on the streets.'" Id. Reviewing a habeas decision, the Fifth Circuit reversed. Id. The court found that the prosecutor's highly prejudicial remarks jeopardized the jury's deliberative process and denied the defendant a fair trial. Id.

In another habeas decision by the Fifth Circuit, the court found that introduction of the defendant's prior record required reversal. Wingate v. Wainwright, 464 F.2d 209, 215 (5th Cir. 1972). In reversing, the court noted the error was "quickenened by the prosecutor's emphatic and improper argument." Id. The improper argument made by the

prosecutor in Wingate was the same as here: “I am asking you not to allow this man to go back on the street and to redo those things that he has done.” Id. at 210.

In a PCR case, the Mississippi Court of Appeals reversed, in part, for trial counsel’s failure to object to a prosecutor’s “back on the streets” argument. Bigner v. State, 822 So.2d 342, 349 (Miss. Ct. App. 2002). The prosecutor in Bigner told the jury, “And if you want to talk about holding your heads high when you go home, you want to let that man walk out back on the streets? Find him guilty.” Id. See also United States v. Johnson, 968 F.2d 768, 770 (8th Cir. 1992) (finding that prosecutor telling the jury that they had “to ‘stand as a bulwark against the continuation of what Mr. Johnson is doing on the street, putting poison on the streets,’” constituted reversible error).

In this case, the solicitor’s assertion that she “misspoke” rings hollow because her words were accompanied by the theatrics of throwing the gun on top of appellant’s clothes. R. 1164, ll. 2 – 11. Such theatrics have been condemned by our Supreme Court. State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007). In Northcutt, the solicitor threatened the jury that it would be “on your heads” if the defendant killed anyone else, that it would be “open season on babies,” and conducted a funeral procession for the infant victim. Id. at 222-23, 641 S.E.2d at 881-82. The Court reversed because of the inflammatory closing argument. Id.

With the knowledge that the jury was afraid for their safety, the State chose to appeal directly to this fear with their “put him back on the streets” closing argument. The solicitor made this point not just with words, but with a frightening deed—tossing appellant’s clothing and the gun. Not only did the state misleadingly imply that appellant would be released, but that he would get back his gun. The prejudice is manifest,

especially when the jurors sent another note during its abbreviated hour-long deliberations telling the court they were afraid.

Furthermore, the trial judge's reasoning for denying the mistrial—blaming defense counsel for injecting gang affiliation into the case—was error. Unlike many cases where gang membership is irrelevant, it would have been impossible for defense counsel to try this case without explaining appellant's fear of gangs. Gang membership was simply the truth. Aggressive behavior by the rival gang members in the Samuel Group was necessary for appellant to explain his actions and to establish his self-defense case. Nothing about the defense case invited the State to appeal to the jury's extant personal fears. The solicitor also knew that no matter the verdict, appellant would not be "back on the streets" because of his guilty plea in federal court to the gun charges. This improper and misleading closing argument violated appellant's due process right to have the jury try him based on the evidence of his guilt, not fear. This Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's attempted murder conviction and remand for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander
Appellate Defender

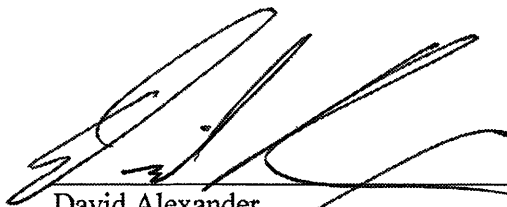
ATTORNEY FOR APPELLANT

This 6th day of February, 2017.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

February 6, 2017



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Honorable Robert E. Hood, Circuit Court Judge

THE STATE,

RESPONDENT,

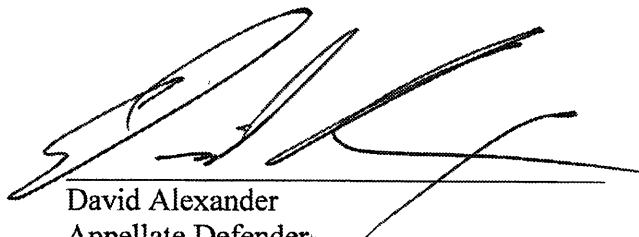
V.

MICHAEL JUAN SMITH,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William M. Blicht, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; this 6th day of February, 2017.



David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 6th day of February, 2017.

Karla Henderson (L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.

RECEIVED

DEC 10 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

S.C. SUPREME COURT

**Appeal from Richland County
Honorable Robert E. Hood, Circuit Court Judge
Appellate Case Tracking No. 2015-001905**

The State,

Respondent,

vs.

Michael Juan Smith,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. The trial court did not err in charging the jury based on the felony murder rule where the charge was correct and applicable. Further, any possible error is entirely harmless.
- II. The trial court did not err in denying Appellant's motion for a directed verdict on attempted murder because the State provided sufficient direct and circumstantial evidence of all the required elements to send the case to the jury. Further, the argument on appeal is not preserved for review.
- III. The trial court did not err in denying Appellant's motion for a mistrial during closing arguments because the court properly sustained Appellant's objection and issued a curative instruction which cured any possible prejudice.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

On October 13, 2013, Appellant, a known Gangster Killer Bloods gang member, fired a shot in the direction of a crowd of innocent persons. His bullet struck Martha Childress, a freshman at the University of South Carolina, in the chest. (T.233; 252-253; R. 233; 252-253). Appellant's bullet entered Ms. Childress' chest at the seventh rib, passed through the diaphragm and liver, and passed into the spinal canal. (T.610; R. 610). Appellant's bullet transected the spinal cord causing paralysis from the waist down. (T.611; R. 611).

Appellant went to Five Points with a group of people, including: Appellant, Ryan Ellison, Shante Bethel, Asia Bethel, and Taqayya White. (T.421; 424; 530; R. 421; 424; 530). Another group also visited Five Points that night. The group included Byron Tucker, Daquan Samuel, and Donnell Woodard. (T.500-501; R. 500-501). The two groups had several instances of interaction during the night in Five Points. (State's Exhibit 74).

Numerous video cameras are set up in and around Five Points in Columbia. The videos show the events of the night as they unfold. Appellant, dressed in a tan coat and tan pants, is seen throughout the videos with his girlfriend, Shante Bethel, who is wearing white pants, Ryan Ellison, a tall individual wearing a white "Aeropostale" t-shirt, and two other females. (T. 530; State's Exhibits 50; 58; 59; 74; R. 530). Appellant is seen moving a gun from one pocket of his coat into another, and then keeps his hand on the pocket with the gun throughout the videos. (T.293; State's Exhibit 74; R. 293). Several individuals are also seen in the video that appear to have multiple confrontations with Appellant and his group. (T.293; R. 293). They are Daquan Samuel, Byron Tucker, and Donnell Woodard. Daquan Samuel is wearing a white collared shirt. (T. 500-501; Defense Exhibit 2; R. 500-501). Byron Tucker is wearing a black t-shirt. (T.500;

Defense Exhibit 3; R. 500). Finally, Donnell Woodard is wearing a white t-shirt with "Bustin It." (T.501; Defense Exhibit 2; R. 501).

Captain Thorton testified the recorded video was important to the investigation into the shooting that changed Martha Childress' life. (T.289; R. 289). He traced the steps of the various groups, Appellant's group and Byron Tucker's group, through Five Points, highlighting their interactions and exchanges. (T.291-293; 296; 298-299; 302-303; State's Exhibit 59; State's Exhibit 70; State's Exhibit 74; R. 291-293; 296; 298-299; 302-303). He highlighted Appellant's possession of the firearm. (T.293-294; R. 293-294). He then highlighted videos showing the shooting and Appellant attempting to flee from the scene. (T.304-305; 307-308; State's Exhibit 60; State's Exhibit 63; State's Exhibit 64; State's Exhibit 65; State's Exhibit 70; State's Exhibit 74; R. 304-305; 307-308). State's Exhibit 74 ends as Martha Childress tragically falls to the pavement, shot by Appellant's bullet. (State's Exhibit 74).

Officer McLaughlin with the Columbia Police Department was on shift in the Five Points area in the early morning hours of October 13, 2013. While watching, he heard apparent gunshots come from the fountain area. He testified he heard one or two shots. (T.342; R. 342). After the shots, he saw a "young man running in the sidewalk dodging other students or people on the sidewalk." (T.342; R. 342). Officer McLaughlin indicated the individual "had his right hand in his right coat pocket, and it looked like he was holding something from bouncing. It was a heavy object." (T.343; R. 343). Officer McLaughlin caught up to the individual, and moved him into a doorway. Then, he felt the front pocket of the individual and felt the pistol. (T.344-345; R. 344-345). Officer McLaughlin pulled the individual's hand out of his pocket, which still held the gun, and took the pistol from him. (T.345; R. 345). Officer McLaughlin indicated the pistol was still warm to the touch. (T.346; R. 346).

Captain Vincent Goggins, the supervisor of the Midlands Gang Task Force, testified law enforcement keeps a "gang database." (T.858-859; R. 858-859). He testified Mr. Tucker, Mr. Samuel, and Mr. Woodard are not documented gang members. (T.860-861; R. 860-861). However, he testified Appellant is a "self-admitted gang member" since the age of fifteen. (T.861; R. 861). Further, Captain Goggins identified several pictures showing Appellant making known Gangster Killer Bloods gang signs. (T.861-862; State's Exhibit 79; State's Exhibit 80; R. 861-862).

Every member of Appellant's group testified at trial. None of them saw anyone pull a weapon or fire a shot at Appellant. Several of them specifically testified they did not see anyone with a weapon in Five Points that night and several indicated Appellant was the only one who fired a shot that night.

Ryan Ellison testified he and the other members of Appellant's group went down to Five Points to go to a club, but it was closed when they arrived. (T.424-426; R. 424-426). He indicated he saw no guns the whole night, and did not know Appellant had a gun. (T.426; R. 426). After stopping to talk with some girls, he walked to catch back up to the rest of the group who were about to leave. He saw several individuals, including one holding his hands up. He "felt like it was some animosity or some tension going on." (T.430-431; R. 430-431). He could not tell what they were doing, but again indicated he did not see any guns. (T.432; R. 432). He did indicate Appellant and the other group were not close to each other. (T.444; R. 444). As he was walking toward his group and the car, he heard gunshots, ducked, and ran. (T.433; R. 433). Appellant was running in front of Ellison, but was stopped by an officer. Ellison, with a "high odor of an alcoholic beverage about his breath and person and . . . unsteady on his feet," was detained and ultimately charged with disorderly conduct. (T.271; 434; 436; R. 271; 434; 436).

Asia Bethel, another member of Appellant's group and the niece of Shante Bethel, testified the group she was with wanted to go to one club, but it was closed. Instead, they went to Five Points. While there, she stated several guys were trying to talk to her and the other girls in her group. She said they kept walking and didn't want to engage them. (T.460; R. 460). She indicated that she said "they looked broke" and kept walking. The individuals then called her or others a "bitch." Asia explained she and Shante did not want to tell Appellant that the individuals called them a "bitch" because Appellant would get mad. (T.464-463; R. 463-464). Asia heard gunshots, but testified she did not know who fired a gun. (T.464; R. 464).

Taqayya White testified while she and the others in Appellant's group were in Five Points several "dudes approached" looking to talk to the girls. The girls would not respond and the individuals "got mad and started calling us names and stuff." (T.486; R. 486). She explained the guys called them "bitches." (T.487; R. 487). Ms. White stated Appellant "was amped" and asking whether the other guys were talking to the girls in his group. (T.487; R. 487). She then testified Appellant and the other individuals that tried to talk to the girls in Appellant's group exchanged words. (T.488; R. 488).

Significantly, Ms. White indicated she had been threatened through Facebook and text messages regarding her testimony in court. (T.492; R. 492). She explained Appellant's family threatened her. (T.493; R. 493). Ms. White gave a statement to law enforcement in which she indicated she saw Appellant shoot a gun the night in question in Five Points. (T.493; R. 493). She also explained no other person had a gun. During her testimony, she specifically identified Appellant as "the only person [she] saw with a gun shooting that night." (T.494; R. 494).

Shante Bethel, Appellant's girlfriend on the night Martha Childress was shot, testified she was aware Appellant had a gun when they went to Five Points. (T.531; R. 531). She stated it

upset her he had the gun with him and she knew he was not supposed to be carrying a gun. (T.532; R. 532). She indicated a group of guys tried talking with the girls in her group. Sometime after, her group with Appellant was near the Exxon in Five Points and the guys that tried talking with them were on the fountain side. She indicated the two groups got into an argument and that words were exchanged. (T.535; R. 535). She indicated none of the things being said to her group or Appellant were threatening, just disrespectful. (T.550; R. 550). Shante testified Appellant was the only person she saw with a gun that night. (T.536; R. 536). She admitted in her statement to police that she said she saw Appellant fire a gun. She also said in her statement that no one else fired a gun. (T.538; 542; R. 538; 542). However, in her testimony she said she did not see anyone shoot a gun. (T.542; R. 542).

Appellant admitted in his testimony to bringing a weapon and knowing it was wrong for him to have the gun. (T.936; R. 936). He further acknowledged he had the gun because of violence in Five Points. (T.936; R. 936). Appellant testified several guys walked by and said "slob" because "they already figured out I was a gang member." (T.937; R. 937). However, he later claimed he was not "beaten in" the Bloods gang but had a lot of friends in the gang. (T.937; R. 937). Appellant indicated he saw the guys again later as his group was trying to leave. He testified someone said they had a gun and he heard a shot. (T.937-938; R. 937-938). He admitted firing one shot back. (T.938; R. 938).

On cross-examination, Appellant stated he was a "friend of the Bloods." (T.943; R. 943). He stated he had to cock the gun to put a round in the chamber before he fired. (T.945; R. 945). Appellant admitted he had the gun even though they were originally not planning to go to Five Points, but instead planned to go to a club in a different location. (T.951; R. 951). Appellant admitted drinking and smoking weed that night. (T.956; R. 956). Appellant was asked about the

direction he fired his gun and he responded: "I didn't aim in particular." (T.957; R. 957). Appellant acknowledged he was "drunk and high," and admitted it was illegal for him to be carrying the gun. (T.963; R. 963).

The State also played some jail phone recordings, including ones in which Appellant used another inmates pin number in an attempt to avoid the calls being discovered. (State's Exhibit 89). During the phone calls, in addition to claiming Martha Childress was faking and not seriously injured, he also attempts to get several witnesses to testify in a specific way to help his case. (State's Exhibit 89; T.967-980; R. 967-980). Further, there appear to be multiple threats made during the course of the phone calls, threats to the victim's family and to other potential witnesses. (State's Exhibit 89; 967-968; 976-977; R. 967-968; 976-977). Appellant admitted he used another inmate's pin number for phone calls. Appellant was asked: "So you didn't want us to hear about how you were telling people what to say, what to do, threats, all that, right?" He responded: "Yes, ma'am, but they didn't say what I told them to say." (T.992; R. 992).

Byron Tucker, a member of the group who had interactions with Appellant's group in Five Points, testified he was in Five Points with Daquan Samuel and Donnell Woodard. (T.500-501; R. 500-501). Mr. Tucker made certain before they left for Five Points that no one had a gun because he did not need any drama because he was trying to get his commercial driver's license. (T.502; 512; R. 502; 512). He testified Mr. Samuel and Mr. Woodard attempted to talk to a group of girls—the girls from Appellant's group. (T.504; R. 504). According to Mr. Tucker, one of the girls made a comment about the guys not having enough money to talk to them. He indicated Mr. Samuel pulled some cash out of his pocket and the girls turned around. He indicated Appellant turned to walk back in their direction and "the first shot rang out." (T.504; R. 504). Mr. Tucker explained he did not shoot at anyone because he did not have a gun that night

in Five Points. (T.505; R. 505). Mr. Tucker admitted Mr. Woodard is in a gang that is a rival of the Bloods. He also admitted before they arrived in Five Points, which he stated was Blood territory, Mr. Woodard used the term "slob" which is disrespectful to Bloods. (T.509; R. 509). He reiterated no one in his group had a gun, and especially he did not have a gun. (T.512; 517; R.512; 517).

Michael Painter, a first-time visitor to Columbia and the Five Points area who did not know any of the individuals involved, was near the fountain in Five Points a little after 2:00 A.M. on October 13, 2013. He indicated a black male in a tan jacket and tan pants, who is identified by others as Appellant, was standing on the corner. Two black males walked up to him, and then he saw a muzzle flash. (T.363; R. 363). Mr. Painter testified the muzzle flash came from the man in the tan clothing. (T.364; R. 364). He indicated the muzzle flash came in the direction of the people at the fountain, and the man in tan that fired the shot ran in the opposite direction. (T.364; R. 364). Mr. Painter testified he did not see anyone else with a gun. (T.365; R. 365).

Ellison Dew, a long-time friend of Martha Childress came to Columbia to visit Ms. Childress and attend the State Fair and the Hunter Hayes concert. (T.243; R. 243). After the concert the two of them and some other friends went to Five Points in Columbia. After hanging out and getting something to eat, they were going to leave. (T.243-244; 256-257; R. 243-244; 256-257). While waiting near the fountain in Five Points for a cab to take them back to Ms. Childress' dormitory, Ms. Dew heard a gunshot, and Martha Childress "fell down." (T.244; 257; R. 244; 257). According to Ms. Dew, Martha "said she couldn't feel her legs and she was really scared." (T.245; R. 245).

Martha Childress testified after she and Ms. Dew went to the fair, they decided to meet some friends at another dormitory and then walk to Five Points. (T.256; R. 256). After eating and hanging out, they decided to go to the fountain where you put your name on a list and waited for a cab. (T. 257; R. 257). Ms. Childress "heard this really loud noise" and "just fell to the ground." (T.257; R. 257). She held out her hand to Ms. Dew to help her up, but she could not move her legs. (T.257; R. 257). It was only after she was placed into the ambulance that Ms. Childress learned she had been shot. (T.258; R. 258). Ms. Childress indicated it became really hard to breathe and she blacked out, not remembering anything until being in the hospital. (T.258-259; R. 258-259). She remained in ICU for about a week, couldn't sleep, in horrible pain, and having nightmares. (T.259; R. 259). After being released from the hospital, Ms. Childress went to the Shepherd Center in Atlanta, which specializes in rehabilitation for brain and spinal cord injuries. (T.259; R. 259).

Appellant's bullet is still lodged in Martha Childress' spine. (T.667; R. 667). In addition to being paralyzed from the waist down, Martha Childress has a nick in her lung and had to have her liver resected because of Appellant's bullet. (T.260; R. 260). Every four to six hours for the remainder of her life, Martha Childress will have to insert a tube into her bladder to drain the urine. She has to set a timer to wake at night to do the intermittent catheterizations. Additionally, after every meal for the remainder of her life she will have to use rectal clears to remove stool. (T.669; R. 669). "[T]he bottom half of her body no longer works." (T.669; R.669). As Mr. Tucker summed up the night in Five Points stating: "[Appellant] has really no regard for human life." (T.506; R. 506).

ARGUMENT

- I. The trial court did not err in charging the jury based on the felony murder rule where the charge was correct and applicable. Further, any possible error is entirely harmless.**

Appellant contends the trial court erred in charging the jury that it could infer malice if the jury concluded the attempted murder was the proximate direct result of the commission of a felony. He asserts the charge is improper when the underlying felony is the possession of a weapon by a person convicted of a felony. Additionally, he appears to contest the language of the charge given, as well as its ramifications after the Supreme Court's decision in State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). The charge given is entirely proper under the circumstances of this case. In addition, the arguments regarding the language of the charge given and the application of Belcher are clearly not preserved for review on appeal. Further, even if not proper, any error in giving the charge was entirely harmless when the evidence overwhelmingly establishes malice existed.

Preservation

Initially, the arguments raised by counsel related to the wording of the court's jury instruction on the "felony murder doctrine" and the application of the Supreme Court's decision in Belcher are not preserved for review on appeal. Appellant never contested the charge on the basis that it violated the tenets of Belcher. Further, once the charge was given, Appellant never objected to the wording of the charge as being an incorrect statement of the "felony murder doctrine." As a result, these issues are not preserved for review on appeal. See e.g., State v. Stahlnecker, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010) ("For an issue to be properly preserved it has to be raised to and ruled on by the trial court."); State v. Haselden, 353 S.C. 190,

196, 577 S.E.2d 445, 448 (2003) (holding a defendant may not argue one ground at trial and another on appeal).

Merits

“An appellate court will not reverse the trial judge’s decision regarding a jury charge absent an abuse of discretion.” State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)). “In general, the trial court is required to charge only the current and correct law of South Carolina.” Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). “A request to charge a correct statement of the law on an issue raised by the indictment and the evidence presented at trial should not be refused.” State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011) (quoting State v. Austin, 299 S.C. 456, 458, 385 S.E.2d 830, 831 (1989)).

“A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law.” Mattison, 388 S.C. at 478, 697 S.E.2d at 583 (citations omitted). “The law to be charged must be determined from the evidence presented at trial.” State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). “In reviewing jury charges for error, [the Court] must consider the court’s jury charge as a whole in light of the evidence and issues presented at trial.” Brandt, 393 S.C. at 549, 713 S.E.2d at 603 (quoting State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct.App.2013)).

South Carolina, unlike the majority of other jurisdictions, has not codified the “felony murder doctrine.” The South Carolina Supreme Court in Gore v. Leeke, 261 S.C. 308, 199 S.E.2d 755 (1973), discussed the doctrine and recognized its establishment in common law. While the Court in Gore spoke frequently of crimes *malum in se*, it did not place a restriction on application of the “felony murder doctrine” to only those crimes. Specifically, the Court

indicated in the case: “Under the facts of this case we are not called upon to decide whether or not the felony-murder rule should, or should not, be applied as to every homicide committed in connection with the commission of Any and Every felony whether or not inherently or foreseeably dangerous.” *Id.* at 318, 199 S.E.2d at 759. The Supreme Court had occasion to consider the appropriate jury charge for the “felony murder doctrine” in State v. Norris, 285 S.C. 86, 328 S.E.2d 339 (1985) *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) and State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). The Court explained:

The law says if one intentionally kills another during the commission of a felony, the implication of malice may arise. If facts are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive.

Id. at 92, 328 S.E.2d at 343 (emphasis added). The Court placed no restriction on the type of felony and did not require that it be a felony *malum in se*.

In South Carolina, both possession of firearm during commission of a violent crime under section 16-23-490 of the South Carolina Code and possession of a firearm or ammunition by a person convicted of a violent crime under section 16-23-500(B) of the South Carolina Code are classified as Class F felonies. See S.C. Code Ann. § 16-1-90(F) (Supp. 2015). Accordingly, the trial court in this case correctly explained to the jury:

Now, the law also allows you to infer malice if you conclude that the attempted murder was a proximate direct result of the commission of a felony. And for that regard, two of the gun charges, possession of a weapon by a person being convicted of a crime of violence and possession of a weapon by a person being convicted of a violent felony would be felonies under our law.

You can imply that malice existed if a person in the commission of a felony at the time of the attempted fatal blow, if

one attempts to kill another during the commission of a felony, the inference of malice may arise.

(T.1149; R. 1149).¹ The trial court's charge was a complete and correct statement of the law as taken directly Norris. There was no reason to differentiate the type of felony as that is not required under South Carolina's common law.²

Even if South Carolina were to distinguish some felonies from others and not apply the "felony murder doctrine" to any and every felony, the Court in Gore provided the best analysis for arriving at the determination of whether a particular felony in a particular case would provide the basis for the doctrine's application. In Gore, the Court quoted language from the North Carolina Supreme Court in analyzing its felony murder statute:

In our view, and we so hold, any unspecified felony is within the purview of G.S. s 14-17 if the commission or attempted commission thereof creates any substantial foreseeable human risk and actually results in the loss of life. This includes, but is not limited to, felonies which are inherently dangerous to life. Under this rule, any unspecified felony which is inherently dangerous to human life, or **foreseeably dangerous to human life due to the circumstances of its commission**, is within the purview of G.S. s 14-17.

State v. Thompson, 185 S.E.2d 666, 672 (1972) (emphasis added). The Court in North Carolina did not require a felony to be *malum in se*; instead, it required only the felony be "inherently dangerous to human life, or **foreseeably dangerous to human life due to the circumstances of its commission.**"

¹ The court previously charged: "If facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would simply be an evidentiary fact to be considered by you, the jury, along with the other evidence in the case. And you may give it the weight and credibility -- may give it the weight you decide it should receive." (T.1148; R. 1148).

² Appellant cites to courts around the country which have placed a limitation on the type of felony required for application of the "felony murder doctrine." It is significant to note that the vast majority of these cases arise from courts interpreting statutes defining the doctrine and not from a judicial based common law doctrine as in South Carolina.

In the instant case, the circumstances of the felony—possession of a weapon by a person convicted of a violent crime—being committed by Appellant, a member of the Gangster Killer Bloods gang, at the time he fired the gun into a crowd of innocent persons certainly made it foreseeably dangerous to human life. As the trial court concluded:

I believe that the carrying of a firearm in these conditions with the Defendant's criminal history **put everybody in an extreme risk of danger** that was present in the area that night.

...

So the difference in this situation is it's not like we have somebody in the community lawfully carrying a firearm that chooses to, you know, use it or to defend themselves. This is an individual who based upon his prior criminal history would not be allowed to carry a firearm period in state court or in federal court. And so I -- you know, I think the unlawful carrying of a pistol by a convicted felon in our community in a situation such as a crowd in Five Points and in a situation where, according to his own testimony, **he knew was violent**, he had been beaten up and assaulted rises to a different level, and I will charge the version of felony murder.

(T.1048-1049; R. 1048-1049) (emphasis added). The trial court clearly recognized that it is inherently dangerous for a convicted felon to be in possession of a firearm, especially in an area he knows can be violent. The circumstance is not the same as carrying a weapon after a law abiding citizen has received the training and instruction to obtain a concealed weapon permit. The circumstances of this case certainly bear out the judge's concern—a gang member with a violent criminal history, drunk and high, illegally carrying a gun, firing the illegally possessed weapon into a crowd of innocent persons while aiming in the direction of a member of a rival gang, in an area that Appellant himself has described as violent—and demonstrate that under the particular circumstances of this case the felony being committed was inherently dangerous.

Further, even if it were error to provide the “felony murder doctrine” charge to the jury, any error is entirely harmless in light of the evidence of malice in the instant case. “Errors, including erroneous jury instructions, are subject to harmless error analysis.” State v. Belcher,

385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009). “When considering whether an error with respect to a jury instruction was harmless, we must ‘determine beyond a reasonable doubt that the error complained of did not contribute to the verdict.’” State v. Middleton, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (citing State v. Kerr, 330 S.C. 132, 144–45, 498 S.E.2d 212, 218 (Ct. App. 1998)).

In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered. Thus, whether or not the error was harmless is a fact-intensive inquiry.

Id. (quotation marks and citation omitted). As the Court found in Middleton, “the only conclusion established by the evidence is that Appellant was guilty of attempted murder.” Id. at 319, 755 S.E.2d at 436. In Middleton, the defendant was firing a gun into a vehicle, while in this case, Appellant was firing a weapon directly at a crowd of people. As in Arnold v. State, “it is clear that the [erroneous jury charge]³ beyond a reasonable doubt did not contribute to the verdict in this case.” 309 S.C. 157, 170–171, 420 S.E.2d 834, 841 (1992).

“‘Malice’ is the wrongful intent to injure another and indicates a wicked or depraved spirit intent on doing wrong.” State v. Kelsey, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998). “It is the doing of a wrongful act intentionally and without just cause or excuse.” Tate v. State, 351 S.C. 418, 426, 570 S.E.2d 522, 527 (2002). Malice can be inferred from conduct which is so reckless and wanton as to indicate a depravity of mind and general disregard for human life. State v. Mouzon, 231 S.C. 655, 662, 99 S.E.2d 672, 675 (1957). In the context of murder, malice does not require ill-will toward the individual injured, but rather it signifies “a general malignant recklessness of the lives and safety of others, or a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief.” Id. at 662, 99 S.E.2d at 675–76 (quoting State v. Heyward, 197 S.C. 371, 375, 15 S.E.2d 669, 671 (1941)).

³ The State again asserts that the charge was a correct and proper statement of the law in South Carolina and only assumes, arguendo, that the charge in this case was erroneous.

In re Tracy B., 391 S.C. 51, 69, 704 S.E.2d 71, 80 (Ct. App. 2010). The South Carolina Supreme Court recognized long ago:

If one were to fire a loaded gun into a crowd, . . . **the law would infer malice from the wickedness** of the act: so also the law will imply that the prisoner intended the natural and probable consequences of his own act, as in the case of shooting a gun into a crowd, the law will imply, from the **wantonness** of the act, **that he intended to kill someone**

State v. Smith, 33 S.C.L. 77, 80–81, 2 Strob. 77 (S.C. App. L. 1847) (emphasis added).

In the instant case, Appellant's actions clearly demonstrate "a general malignant recklessness of the lives and safety of others" as well as "conduct which is so reckless and wanton as to indicate a depravity of mind and general disregard for human life." Again, Appellant, a drunk and high gang member, illegally brought a weapon to the Five Points area of Columbia, and then fired the weapon in the direction of a rival gang member and directly at a crowd of innocent individuals. He testified he "didn't aim in particular," and instead, just fired in the direction of a crowd of innocent people. (T.957; State's Exhibit 74; R. 957). Afterward, he fled the scene. (T.957-958; R. 957-958). Appellant's actions provided overwhelming evidence of malice, and the jury instruction, even if erroneous, did not contribute to the jury's determination he acted with malice. The testimony and video of Appellant's actions established malice well beyond any inference provided by the jury instruction.

Accordingly, this Court should find the jury instruction was a correct and proper statement of the law in South Carolina. Further, the Court should find the instruction applicable to the instant case because Appellant's actions as a felon in possession of a firearm under the circumstances of this case were inherently dangerous. Finally, even if error to give the charge, any error was entirely harmless in light of the overwhelming evidence of malice and the fact the jury instruction could not have contributed to the jury's determination.

II. The trial court did not err in denying Appellant's motion for a directed verdict on attempted murder because the State provided sufficient direct and circumstantial evidence of all the required elements to send the case to the jury. Further, the argument on appeal is not preserved for review.

Appellant maintains the trial court erred in denying his motion for a directed verdict because the State failed to prove Appellant had the specific intent to kill the victim and the transferred intent doctrine does not apply. Initially, this issue was never raised to the trial court and is not properly preserved for review on appeal. Even if preserved, the issue is without merit. The crime of attempted murder does not require specific intent. Even if it does require specific intent, it would only require a specific intent to kill someone and not a specific intent to kill the ultimate victim.

Preservation

First, the issue is not properly preserved for review on appeal. In making a motion for directed verdict after the State's case, the defense indicated: "we would move for a directed verdict on the charges under Rule 19 regarding the lack of evidence about the shooting, who was ultimately involved." (T.868; R. 868). The defense never mentioned an argument that transferred intent did not apply, nor did it argue the State failed to prove Appellant had the specific intent to kill the ultimate victim. After Appellant presented his case, he changed his argument for directed verdict, but still did not raise the particular issues being raised on appeal. Instead he maintained:

They've shown no -- this is a specific intent crime. They've shown no specific intent to kill their -- what I understand their theory to be is that he recklessly fired a weapon into a crowd. That's what I understand their theory to be. Your Honor, we would submit that that doesn't meet the specific intent to commit a murder under the statute.

(T.1036; R. 1036). The new argument does not maintain transferred intent should not be allowed, nor does it contend the charges should have been brought as attempted murder charges listing

others as the victim instead of Ms. Childress, the ultimate victim of Appellant's malicious actions. As a result, the issue as raised in Appellant's brief is not preserved for review on appeal. See State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("A party cannot argue one ground for a directed verdict in trial and then an alternative ground on appeal."); State v. Jordan, 255 S.C. 86, 93, 177 S.E.2d 464, 468 (1970) (stating issues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review).⁴

Merits

Initially, the crime of attempted murder should not be considered a specific intent crime, and, therefore, should only require a general intent to kill. The South Carolina Supreme Court is currently considering the issue of whether attempted murder requires a specific intent to kill or only a general intent to act with malice aforethought.⁵ When the South Carolina Supreme Court determines attempted murder, like its predecessor ABIK, does not require proof of a specific intent to kill, the State will only be required to prove a general intent and Appellant's issue is without merit. Additionally, once it is determined to be a general intent crime, the theory of "transferred intent" is certainly applicable as it was for a common law charge of ABIK. See State v. Fennell, 340 S.C. 266, 276, 531 S.E.2d 512, 517 (2000) ("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. Accordingly, we hold that the doctrine of transferred intent may be

⁴ Even if the second directed verdict motion could be found sufficient to raise any issue related to the specific intent to kill, the arguments were not raised during the initial motion for a directed verdict and should be considered waived by not raising known arguments at the first available opportunity.

⁵ At the time of this brief, the Supreme Court has held oral arguments in the case of State v. Raheem King, Appellate Case Number 2015-001278, and a decision is pending. The issue is whether by making attempted murder a statutory crime, did the legislature intend it to require proof of a specific intent to kill as opposed to retaining the common law requirements of ABIK, which only required a general intent to act with malice aforethought. See State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996).

used to convict a defendant of ABIK when the defendant kills the intended victim and also injures an unintended victim.”).

If the South Carolina Supreme Court upholds the Court of Appeals decision in King, and finds the statutory attempted murder charge requires proof of a specific intent to kill, it does not eliminate the applicability of the doctrine of “transferred intent.” In Fennell, the South Carolina Supreme 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. Appellant intended to kill one of three members of a rival gang, and instead shot an innocent, unintended victim. The appropriate charge in this case, as in Ochoa, was attempted murder.

The case relied upon primarily by Appellant to argue that the doctrine of “transferred intent” should not apply, State v. Hinton, 630 A.2d 593 (Conn. 1993), is clearly distinguishable based on the statutory scheme employed in Connecticut. In Hinton, the jury returned guilty verdicts against Hinton on the charges of attempted murder as well as assault in the first degree as it related to a single victim. Id. at 599. The Court found these verdicts were inconsistent based on the **statutory scheme** established in Connecticut. Specifically, the Court noted both the

intentional murder statute and the first two subsections of the assault in the first degree statute specifically provide for the doctrine of “transferred intent” to apply. The general attempt statute, under which attempted murder would be prosecuted in Connecticut as opposed to our specific statute for attempted murder, did not include an express provision allowing for the doctrine of “transferred intent” to apply. The Court found, based on statutory construction and the rule of lenity, that a provision allowing the doctrine of “transferred intent” should not be read into the attempted murder statute. Id. at 601-602. The analysis and reasoning of Hinton are therefore inapposite to the situation in South Carolina because we do not have statutory “transferred intent.”

In South Carolina, the reasoning of Ochoa is clearly more applicable. This Court should find the doctrine of “transferred intent” applicable under the attempted murder statute, find the State presented evidence demonstrating Appellant’s malicious intent, and find the trial court in this case properly allowed the charge of attempted murder of the victim Ms. Childress to be presented to the jury.⁶

⁶ Appellant’s alternative is for the State to charge him with three counts of attempted murder based on his firing of the weapon at the three individuals especially because it is unclear, even through Appellant’s testimony, at which individual he was shooting. The State would then also charge him with assault and battery of a high and aggravated nature under section 16-3-600(B)(1) (Supp. 2015). Appellant is thereby requesting to be subjected to a possible sentence of 110 years instead of 30 years as indicted by the State. This is unnecessary if the Court finds the doctrine of “transferred intent” applicable as the malice towards the three individuals would then apply to the victim in this case.

III. The trial court did not err in denying Appellant's motion for a mistrial during closing arguments because the court properly sustained Appellant's objection and issued a curative instruction which cured any possible prejudice.

Appellant contends the trial court erred in failing to grant a mistrial based on statements made by the assistant solicitor during closing arguments. The trial court sustained Appellant's objection and issued a curative instruction. This cured any error and the trial court correctly determined a mistrial was not necessary. Further, the issue is not preserved for review on appeal.

Preservation

During closing arguments, the assistant solicitor indicated to the jury that if they did not believe Appellant guilty the State would "give him back all of his stuff and put him back out on the street." (T.1133; R. 1133). Appellant immediately objected, and the objection was sustained. (T.1133; R. 1133). The trial court issued a curative instruction, explaining: "Disregard the last statement, ladies and gentlemen." (T.1133; R.1133). Appellant did not contemporaneously move for a mistrial. After the State completed closing argument, the court took a break to allow jurors to stand up and stretch prior to giving his charge. During this time, Appellant did not object to the curative instruction and did not move for a mistrial. (T.1134; R. 1134). It was only after the jury charge was given that Appellant raised his motion for a mistrial. During the motion, however, Appellant never indicated why the curative instruction was insufficient to cure any error and prejudice. (T.1163-1164; R.1163-1164).

As the Supreme Court has explained:

If the trial judge sustains a timely objection to testimony and gives the jury a curative instruction to disregard the testimony, the error is deemed to be cured. No issue is preserved for appellate review if the objecting party accepts the judge's ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial.

State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 911–12 (1996) (emphasis added); see also, State v. Greene, 330 S.C. 551, 561, 499 S.E.2d 817, 822 (Ct. App. 1997) (“A contemporaneous objection to the sufficiency of a curative charge must be made to preserve the issue for appellate review.”); State v. Moyd, 321 S.C. 256, 263, 468 S.E.2d 7, 11 (Ct. App. 1996) (“[I]f the objecting party accepts the ruling of the trial [court] and does not contemporaneously object to the sufficiency of a curative instruction or move for mistrial, the error is deemed cured, and the issue is not preserved for appeal.”). It is unlikely the issue is properly preserved for review on appeal.

Merits

Even if properly preserved, the trial court correctly determined any error in the closing argument did not warrant the extreme remedy of a mistrial. A trial judge’s ruling on a motion for a mistrial will not be disturbed absent an abuse of discretion amounting to an error of law. State v. Sparkman, 358 S.C. 491, 495, 596 S.E.2d 375, 377 (2004); State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000). This Court favors the exercise of wide discretion of the trial judge in determining the merits of such motion in each individual case. See State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 851 (Ct. App. 1999).

A mistrial should be declared only when absolutely necessary. In order to receive a mistrial, the defendant must show error and resulting prejudice. Harris, 340 S.C. at 63, 530 S.E.2d at 628; State v. Ward, 374 S.C. 606, 612, 649 S.E.2d 145, 148 (Ct. App. 2007). “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 (citing State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989); State v. Kirby, 269 S.C. 25, 236 S.E.2d 33 (1977) (power of court to declare mistrial ought to be used with greatest caution under urgent

circumstances, and for very plain and obvious causes)). Granting of a mistrial is a serious and extreme measure which should only be taken when the prejudice can be removed no other way. State v. Edwards, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007) (citing State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct. App. 2005)). “The granting of a motion for a mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way.” State v. Inman, 395 S.C. 539, 565, 720 S.E.2d 31, 45 (2011).

While the statement by the assistant solicitor may be improper, not all improper closing arguments, however, mandate reversal. “A new trial will not be granted unless the prosecutor’s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” State v. Huggins, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997). When making this determination, the Court must “review the alleged impropriety of argument in the context of the entire record.” State v. Linder, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981). Further, this Court “will defer to the discretion of the trial judge, whose ruling will not ordinarily be disturbed.” State v. South, 285 S.C. 529, 536, 331 S.E.2d 775, 779 (1985).

“Generally, a curative instruction is deemed to have cured any alleged error.” State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 850 (Ct. App. 1999); State v. Jones, 325 S.C. 310, 479 S.E.2d 517 (Ct. App. 1996); see also, State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998) (instruction to disregard inadmissible evidence is usually viewed as having cured the error in its admission); State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996) (if trial judge sustains timely objection to testimony and gives jury curative instruction to disregard testimony, error is deemed to be cured); State v. White, 371 S.C. 439, 445, 639 S.E.2d 160, 163 (Ct. App. 2006) (“A

curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission.”).

First, the curative instruction given by the trial court, especially when juxtaposed to the instructions he had previously given the jury, cured any prejudice such that a mistrial was not necessary. When the statement was made by the assistant solicitor, Appellant’s counsel immediately objected. The trial court immediately sustained the objection, told the solicitor to “move on,” and instructed the jury “[d]isregard the last statement, ladies and gentlemen.” (T.1133; R.1133).

The trial court made it abundantly clear to the jury that the arguments of counsel are not evidence in the case, and the jury should not consider any testimony he tells them to disregard. During his opening instructions to the jury he specifically told them:

First, the State will be given an opportunity to make an opening statement. **The opening statements that you will hear this morning are not evidence.**

....

Following the completion of the testimony, the attorneys will again have an opportunity to make what is called a closing statement or summation to you. This is an opportunity for the attorneys to summarize their respective points of view. **Again, these arguments are not evidence.**

(T.203-204; R.203-204) (emphasis added). The trial court continued by explaining what is not evidence for the jury to consider, and specifically instructed them that if he tells them to disregard testimony they are bound by their oath to disregard that information:

Some things that you will hear during this trial are not evidence, and you must not consider them as evidence. These are number one, **the statements and the arguments of the attorneys are not evidence.** Number two, the questions and the objections of the attorneys are not evidence. **Number three, any testimony that I tell you to disregard. So at the end of something, if I sustain an objection and I tell you to disregard that testimony, you are required by your oath to disregard that information.**

(T.206; R.206) (emphasis added).

Further, at the end of trial, almost immediately after the solicitor's comments, the trial court instructed the jury again:

You are to consider only the competent evidence before you. If there is anything that I ordered stricken from the record in this case, you must disregard it.

(T.1136; R.1136) (emphasis added). He continued:

Now, some things are not evidence, and you must not consider them as evidence. Number one, the statements and the arguments of the attorneys; number two, the questions and the objections of the attorneys; number three, anything that I've told you to disregard.

(T.1142; R.1142) (emphasis added). The curative instruction, especially in light of the court's instructions to the jury on what they may and may not consider cured any possible error in this case.

In reviewing the comments by the assistant solicitor, in light of the entire record, it is clear the comments were not so inflammatory as to render the trial unfair and require the extreme measure of a mistrial. There is overwhelming evidence in this case establishing Appellant's guilt. Further, the comments by the solicitor consisted of one two-line sentence out of about 25 pages of closing argument by the State. The single comment, beyond a reasonable doubt, did not infect this trial with unfairness as to make Appellant's conviction a denial of due process.

CONCLUSION

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

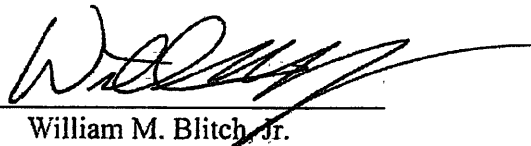
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January 25, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Honorable Robert E. Hood, Circuit Court Judge
Appellate Case Tracking No. 2015-001905

The State,

Respondent,

vs.

Michael Juan Smith,

Appellant.

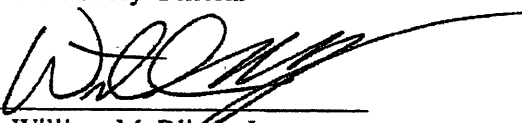
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled, "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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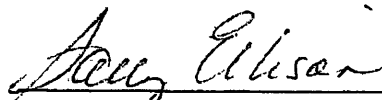
Appellant.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Final Brief of Respondent on Appellant by depositing copies of the same in the United States mail, postage prepaid, addressed to:

David Alexander, Esquire
S.C. Commission on Indigent Defense
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I further certify that all parties required by Rule to be served have been served.
This 25th day of January, 2017.



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