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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Richland County
Hon. Robert E. Hood, Circuit Court Judge
Appellate Case Tracking No. 2018-002050

The State,

Respondent,

v.

Michael Juan Smith,

Petitioner.

Opinion No. 5591 (S.C. Ct. App. filed August 15, 2018)

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

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TABLE OF CONTENTS

STATEMENT OF QUESTIONS PRESENTED..... 1

STATEMENT OF THE CASE..... 2

ARGUMENT..... 7

 I. The Court of Appeals correctly found the trial court did not err in charging the jury on the “felony murder rule” based on the inherent dangerousness of the circumstances of this case. Further, any possible error is entirely harmless. Finally, portions of Petitioner’s argument were correctly found not to be preserved for review on appeal. 7

 II. The Court of Appeals correctly found the trial court did not err in denying Petitioner’s motion for a directed verdict as to the attempted murder charge..... 14

 III. The Court of Appeals correctly found the trial court did not err in denying Petitioner’s motion for a mistrial during the State’s closing argument when the trial court sustained Petitioner’s objection and properly issued a curative instruction which cured any possible prejudice..... 19

CONCLUSION..... 24

STATEMENT OF QUESTIONS PRESENTED

- I. The Court of Appeals correctly found the trial court did not err in charging the jury on the “felony murder rule” based on the inherent dangerousness of the circumstances of this case. Further, any possible error is entirely harmless. Finally, portions of Petitioner’s argument were correctly found not to be preserved for review on appeal.

- II. The Court of Appeals correctly found the trial court did not err in denying Petitioner’s motion for a directed verdict as to the attempted murder charge.

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STATEMENT OF THE CASE

Procedural History

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

Factual Background

On October 13, 2013, Petitioner, 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). Petitioner'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). Petitioner's bullet transected the spinal cord causing paralysis from the waist down. (T.611; R. 611).

Petitioner went to Five Points with a group of people, including: Petitioner, 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. Petitioner, 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). After an interaction with the other group, Petitioner is seen moving a gun from the inside pocket of his coat into an outer pocket, and then keeps his hand ready on 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 Petitioner

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, Petitioner'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 Petitioner's possession of the firearm. (T.293-294; R. 293-294). He then highlighted videos showing the shooting and Petitioner 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 Petitioner'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).

Every member of Petitioner's group testified at trial. They testified animosity or tension existed between Petitioner's group and the other group in Five Points, and they explained words were exchanged between the groups on several occasions. None of them saw anyone pull a weapon or fire a shot at Petitioner. Several of them specifically testified they did not see anyone with a weapon in Five Points that night, and several indicated Petitioner was the only one who fired a shot that night. (R.424-444; 460-464; 486-494; 531-550).

Petitioner 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). Petitioner testified several guys walked by and said "slob" because "they already figured out I was a gang member." (T.937; R. 937). Petitioner 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, Petitioner 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). Petitioner 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). Petitioner admitted drinking and smoking weed that night. (T.956; R. 956). Petitioner was asked about the direction he fired his gun and he responded: "I didn't aim in particular." (T.957; R. 957). Petitioner 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 Petitioner 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). Petitioner admitted he used another inmate's pin number for phone calls. Petitioner 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).

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 Petitioner, 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).

Petitioner'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 Petitioner'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: "[Petitioner] has really no regard for human life." (T.506; R. 506).

ARGUMENT

I. The Court of Appeals correctly found the trial court did not err in charging the jury on the “felony murder rule” based on the inherent dangerousness of the circumstances of this case. Further, any possible error is entirely harmless. Finally, portions of Petitioner’s argument were correctly found not to be preserved for review on appeal.

The Court of Appeals correctly found the trial court’s charge was appropriate and correct given the circumstances of this case. Further, the Court of Appeals correctly determined several of Petitioner’s arguments were not properly preserved for review. Finally, the Court of Appeals correctly determined any possible error was entirely harmless in light of the facts in the record and the findings of the jury.

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. Petitioner never contested the charge on the basis that it violated the tenets of Belcher. Further, once the charge was given, Petitioner 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).

Standard of Review

“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)).

Merits

South Carolina, unlike the majority of other jurisdictions, has not codified the “felony murder doctrine.” This 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 again 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). The trial court’s charge was a complete and correct statement of the law as taken from Norris. There was no reason to differentiate the type of felony as that is not required under South Carolina’s common law.

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.**”

In the instant case, the circumstances of the felony—possession of a weapon by a person convicted of a violent crime—being committed by Petitioner, 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 correctly 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 Petitioner 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. First, it is harmless because the jury found malice by finding Petitioner had the specific intent to kill, which it was required to find pursuant to the trial court's jury instructions. (R.1148). As noted by the Court of Appeals in State v. Kinard, 373 S.C. 500, 503, 646 S.E.2d 168, 169 (Ct. App. 2007), Black's Law Dictionary defines “express malice” as “The intent to kill . . . arising from a deliberate and rational mind.” Black's Law Dictionary 1043 (9th Ed. 2009). As a result, once the jury found Petitioner acted with a specific intent to kill, it also found he acted with express malice and any need to consider the judge's instruction on inferring malice was unnecessary.

Additionally, any error in the charge is 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 Petitioner was guilty of attempted murder.” Id. at 319, 755 S.E.2d at 436. As in Arnold v. State, “it is clear that the [erroneous jury charge] 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)).

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, Petitioner’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, Petitioner, a drunk and high gang member, illegally brought a weapon to the Five Points area of Columbia. He is seen shifting the weapon from an inside pocket to an outside pocket and then holding it at the ready with his hand in the pocket. As the Court of Appeals noted, this movement clearly exemplifies his preparation to use the weapon at a later time against one of the three men he has interacted with during the night. Then Petitioner 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). Petitioner’s actions, as shown by video and testimony, provided overwhelming evidence of malice, and the jury instruction, even if erroneous, did not contribute to the jury’s ultimate determination.

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 Petitioner’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. As a result, this Court should deny Petitioner’s Petition for Writ of Certiorari as to this Issue.

II. The Court of Appeals correctly found the trial court did not err in denying Petitioner's motion for a directed verdict as to the attempted murder charge.

The Court of Appeals correctly found the doctrine of transferred intent can still apply even after this Court's decision finding attempted murder required a specific intent to kill in State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017). Additionally, even if the doctrine of transferred intent does not apply, this Court should adopt the doctrine of concurrent intent and find a charge of attempted murder for the shooting of Martha Childress, an unintended victim within the "kill zone" of Petitioner's shot, still proper in this case.

Standard of Review

"On appeal from the denial of a directed verdict, [the Appellate] Court views the evidence and all reasonable inferences in the light most favorable to the State." State v. Butler, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014). As the South Carolina Supreme Court recently reiterated: "[W]hen ruling on a directed verdict motion, the trial court views the evidence in the light most favorable to the State and must submit the case to the jury if there is "any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced.'" State v. Bennett, 415 S.C. 232, 236-37, 781 S.E.2d 352, 354 (2016) (quoting State v. Littlejohn, 228 S.C. 324, 89 S.E.2d 924 (1955)).

"Therefore, although the jury must consider alternative hypotheses, the court must concern itself solely with the existence or non-existence of evidence from which a jury could reasonably infer guilt." Id. "Accordingly, in ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." Id.

Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements beyond a reasonable doubt. See State v. Robinson, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992) (finding “any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt” in affirming the denial of a motion for directed verdict and citing Jackson v. Virginia, 443 U.S. 307 (1979)).

Merits

First, the State need not rely on a theory of transferred intent to meet the required elements of attempted murder. Statutorily, our legislature has provided: “A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder.” S.C. Code Ann. § 16-3-29 (2015).

While King required Petitioner maintain and the State prove a specific intent to kill, it did not require a specific intent to kill the ultimate victim. The State was required to prove Petitioner acted with the intent to commit an act that would have the natural and probable consequence of another person being killed. Petitioner demonstrated his specific intent to kill by pulling the trigger of a loaded gun he kept his hand on while concealed in a pocket, firing in the direction of rival gang members, and admittedly not really aiming “in particular.” His actions clearly indicate an intent to kill another person, and the pulling of the trigger is certainly the overt act taking a step towards fulfilling that intent. As a result, he is guilty of the crime of attempted murder as set forth by section 16-3-29 and defined by this Court in King. See e.g., People v. Stone, 205 P.3d 272, 274 (Cal. 2009) (“Can a person who shoots into a group of people, intending to kill one of the group, but not knowing or caring which one, be convicted of attempted murder? Yes. The mental state required for attempted murder is the intent to kill a human being, not a *particular* human being.”) (italics in original); Commonwealth v. Palmer,

192 A.3d 85, 98–99 (Pa. Super. 2018) (“It does not matter whether Petitioner’s intent was generalized or specific with respect to his **target**. It matters only that he had a specific intent to inflict serious bodily injury upon someone.”) (bold in original).

Even if transferred intent is required, it should be applied in this case. In State v. Fennell, the South Carolina Supreme Court cited with approval the case of Ochoa v. State, 981 P.2d 1201 (Nev.1999) and its rationale. State v. Fennell, 340 S.C. 266, 276, 531 S.E.2d 512, 517-518 (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 used to convict a defendant of ABIK when the defendant kills the intended victim and also injures an unintended victim.”). 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. Petitioner 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.¹

¹ Petitioner’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 with Petitioner’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) for the gunshot to Ms. Childress. Petitioner is thereby requesting

Finally, even if this Court believes the rationale of Fennell no longer applies to the codified attempted murder charge, this Court can affirm under the theory of concurrent intent. This Court should adopt the theory of concurrent intent to find Petitioner liable for the attempted murder of Ms. Childress.

Under the theory of concurrent intent, Petitioner's intent to kill one of the rival gang members is not transferred to Ms. Childress. Instead, his intent, especially based on his own statement that he did not aim in particular but instead just fired at the group as a whole, was to kill someone in the group or what has been described by other courts as the "kill zone." See Ford v. State, 625 A.2d 984, 1001 (Md. 1993) ("The defendant has intentionally created a 'kill zone' to ensure the death of his primary victim, and the trier of fact may reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim."). As the Supreme Court of California explained: "Where the means employed to commit the crime against a primary victim create a zone of harm around that victim, the factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone." People v. Bland, 48 P.3d 1107, 1118 (Cal. 2002).

The Court of Appeals of Maryland explained the analysis as follows:

The essential questions, therefore, become (1) whether a factfinder could infer that the defendant intentionally escalated his mode of attack to such an extent that he or she created a "zone of harm," and (2) whether the facts establish that the actual victim resided in that zone when he or she was injured.

Harrison v. State, 855 A.2d 1220, 1230–31 (Md. 2004).

A similar case can be found in Hunt v. United States, 729 A.2d 322, 326 (D.C. 1999).

The defendant fired multiple "quick fire" shots to trying to hit his intended victim, Hayden, who

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.

was seated in a vehicle. Instead, he hit Gilchrist, a bystander standing beside the vehicle in which Hayden sat. The Court explained: “Hunt created a ‘kill zone’ that ensnared Gilchrist, and a jury could reasonably infer an intent to kill Gilchrist concurrent with the intent to kill Hayden.”

Id.

In the instant case, Petitioner intended to kill one of the three rival gang members. In seeking to ensure his intent was completed he fired multiple shots at the group of people standing near his intended victims. When he fired and “didn’t aim in particular,” he created a kill zone in which harm to any and all those standing in the vicinity was the natural and probable consequence of his actions. Accordingly, even if this Court finds transferred intent does not apply, it should apply the doctrine of concurrent intent and find Petitioner properly convicted of attempted murder because Ms. Childress’ near fatal injuries were the natural and probable consequences of Petitioner’s actions in creating a “kill zone” near the Five Points fountain.

The State presented sufficient evidence from which a jury could reasonably find Petitioner guilty of attempted murder. The evidence demonstrated Petitioner had a specific intent to kill another person with malice aforethought, and as a result, the State satisfied the elements of attempted murder. Even if the elements were not directly satisfied by Petitioner’s actions, the theories of transferred intent or concurrent intent satisfy any missing element and this Court should find the trial court properly denied the motion for a directed verdict. This Court should deny the Petition for Writ of Certiorari as to this issue.

III. The Court of Appeals correctly found the trial court did not err in denying Petitioner's motion for a mistrial during the State's closing argument when the trial court sustained Petitioner's objection and properly issued a curative instruction which cured any possible prejudice.

The Court of Appeals correctly found the trial court properly sustained Petitioner's objection and issued a curative instruction. This cured any error and the Court of Appeals correctly upheld the trial court's decision to deny the mistrial. 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 Petitioner guilty the State would "give him back all of his stuff and put him back out on the street." (T.1133; R. 1133). Petitioner 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). Petitioner 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, Petitioner 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 Petitioner raised his motion for a mistrial. During the motion, however, Petitioner 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.

Standard of Review

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).

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 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, Petitioner’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 Petitioner'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 Petitioner's conviction a denial of due process. This Court should deny the Petition for Writ of Certiorari as to this issue.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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January 9, 2019

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Richland County
Hon. Robert E. Hood, Circuit Court Judge
Appellate Case Tracking No. 2018-002050

The State,

Respondent,

v.

Michael Juan Smith,


Petitioner.

PROOF OF SERVICE

I, William M. Blich, Jr., certify that I have served the within Return to Petition For Writ of Certiorari to the Court of Appeals by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

David Alexander, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.
This 9th day of January, 2019.



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