STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of General Sessions
Hon. Clifton Newman, Circuit Court Judge

Appellate Case No. 2018-001852

THE STATE,

Respondent,

v.

JAMES KESTER,

Appellant.

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

BYRON GIPSON
Solicitor, Fifth Judicial Circuit

Post Office Box 192
Columbia, SC 29202
(803) 576-1800

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUES ON APPEAL

I.

Whether the trial court erred by granting Kester's motion to proceed pro se when Kester's unequivocal request was made after sufficient warnings and the court had no reason to doubt his competency.

II.

Whether the trial court erred by agreeing with Kester's pretrial assertion that he would have ten peremptory strikes, when in fact he had five, where the court corrected Kester's mistake when jury selection began, gratuitously struck a sixth juror for cause, gave Kester a clear opportunity to request to select a new jury, and there is no evidence that any of the seated jurors were biased against him.

III.

Whether the court's Allen charge was coercive when it urged the jurors to try to reach a verdict, but made it clear they were not required to do so.

IV.

Whether consecutive sentences violated the Eighth Amendment where Kester intentionally drove his car into a crowd of strangers and the trial court sentenced Kester within the statutory range.

STATEMENT OF THE CASE

On July 19, 2017, mourners gathered at Greenlawn Cemetery in Columbia for the graveside funeral service for Peggy Livingston. Appellant James Kester drove his 4,000 pound Cadillac DeVille to the gravesite, rolled down his window, and spoke to one of the attendees to confirm he was at Livingston's service. (Tr.p.79; 89; 245). He then deliberately backed up his car, positioned it so he was facing the gravesite, and plowed his car into the mourners. (Tr.p.89; 97; 102–03; 150; 164–70; 175; 218). Witnesses described hearing the roar of the engine as the car accelerated into the crowd. (Tr.p.81; 83; 91; 105; 147–49; 216). The car accelerated so quickly that it left track marks on the pavement. (Tr.p.233; State's Exhibit #4). Police examined the car's airbag control module and determined the car's throttle was 96% engaged in the seconds leading up to the collision and the brakes were never applied. (Tr.p.240–50; State's Exhibit #90). Kester struck twelve people, seriously and gruesomely injuring some, including children and senior citizens. (Tr.p.110; 124; 138–45; 154–55; 180; 192; 208–09; State's Exhibits 32–80). A responding paramedic testified some of the victims would have died without treatment. (Tr.p.125). Many victims described lingering physical disabilities and mental trauma. (Tr.p.146–47; 157; 190; 192; 370; 373–77; 382–87; 391–96).

Kester told police he was motivated by a grudge against the South Carolina Department of Mental Health (DMH), where he claimed his daughter was mistreated as a patient years before. (Tr.p.262–63; State's Exhibit #2). He did not know Peggy Livingston. The only reason he chose to attack her funeral was that he saw in her obituary that she had worked at DMH. (Tr.p.279. State's Exhibit #91). Kester told police he'd been "thinking about this stuff for a long time." (Tr.p.277). None of the victims had ever heard of Kester or his daughter. (Tr.p.98; 103; 107; 113; 145; 182).

A Richland County grand jury indicted Kester for twelve counts of Attempted Murder. Kester proceeded to jury trial before the Honorable Clifton Newman on October 8–10, 2018. Kester represented himself, but attorneys Bill Nettles and John Delgado (who were relieved as counsel pursuant to Kester's wishes) served as standby counsel. (October 4 Tr.p.4–29). Kester cross-examined witnesses and made legal arguments, but did not present a case. Kester was convicted of eight counts of First Degree Assault and Battery and one count of Third Degree Assault and Battery. He was acquitted of the three other counts. Characterizing the event as an act of terrorism, Judge Newman sentenced Kester to the maximum ten years' incarceration for each count of First Degree Assault and Battery and thirty days for Third Degree Assault and Battery, with the sentences to run consecutively. (Tr.p.403–409). This direct appeal follows.

ARGUMENT

I.

The trial court correctly granted Kester's motion to proceed pro se because Kester's unequivocal request was made after sufficient warnings and the court had no reason to doubt his competency.

Kester claims the trial judge erred by allowing him to proceed pro se because his behavior should have prompted the court to take additional steps to ensure he was competent and capable of intelligently waiving his right to counsel. His argument fails because Judge Newman had no reason to doubt Kester's competency. Kester had already been evaluated and found competent, and Judge Newman was required to honor his unequivocal request to exercise his constitutional right of self-representation. This Court should affirm.

Standard of review.

A trial court's decision whether to order a psychiatric examination to assess a defendant's competency to stand trial is reviewed under an abuse of discretion standard. State v. Locklair, 341 S.C. 352, 364, 535 S.E.2d 420, 426 (2000); State v. Bradshaw, 269 S.C. 642, 644, 239 S.E.2d 652, 653 (1977) (explaining the determination whether a defendant requires a competency exam "necessarily requires the exercise of discretion"). Great deference is given to trial judge because he sits in a better position to ascertain the defendant's faculties. State v. Colden, 372 S.C. 428, 441, 641 S.E.2d 912, 920 (Ct. App. 2007). An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007).

Applicable law.

A criminal defendant has a constitutional right to represent himself at trial. Faretta v. California, 422 U.S. 806, 830 and n.40 (1975) (explaining the history of the right to self-representation and citing Laws of the Province of South Carolina, 518–519 (Trott 1736)). His choice "must be honored" even though it will usually be "to his own detriment." Faretta, 422 U.S. at 834. The defendant should, however, "be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" Faretta, 422 U.S. at 835. His decision should be made "knowingly and intelligently." Faretta, 422 U.S. at 835.

When determining whether the decision to waive counsel is knowing and intelligent, the trial court should consider the defendant's mental capacity. A defendant who is competent to stand trial is competent to waive the right to counsel. Godinez v. Moran, 509 U.S. 389, 399 (1993). This includes the right to serve as one's own attorney at trial. State v. Barnes, 407 S.C. 27, 36, 753 S.E.2d 545, 550 (2014). A defendant's legal knowledge or technical "ability to represent himself has no bearing upon his competence to choose self-representation." Godinez, 509 U.S. at 400. However, a trial court has the discretion "take realistic account of the particular defendant's mental capacities" and appoint counsel over a defendant's objection if the court finds the defendant, due to "severe mental illness," is intellectually incapable of representing himself without the trial turning into a humiliating spectacle. Indiana v. Edwards, 554 U.S. 164, 177 (2008).

When the trial court has "reason to believe" a defendant is not competent to stand trial "because the person lacks the capacity to understand the proceedings against him or to assist in his own defense," the court should order the defendant to be evaluated by the state Department of Mental Health, or by a private evaluator. S.C. Code Ann. § 44-23-410(A) and (C) (2018).

The defendant bears the burden of proving his incompetence by a preponderance of the evidence. State v. Kelly, 331 S.C. 132, 149, 502 S.E.2d 99, 108 (1998).

Discussion.

The record supports the trial court's decision to grant Kester's motion to proceed pro se. Despite repeated and thorough warnings from Judge Newman, Kester was persistent and unequivocal in his request to represent himself. (Oct.4 Tr.p.5–29). Particularly given the overwhelming proof that Kester committed the alleged acts, Kester apparently believed he had nothing to lose from representing himself, and stood a better chance at acquittal by personally pleading his case to the jury on the theory that it would be unjust for the jury to convict him. See Faretta, 422 U.S. at 829, n.37 (discussing "William Penn's belief that an accused should go free if he could personally persuade a jury that it would be unjust to convict him"). As he told the court, "if I get ten years that's the same as me getting thirty or forty years at my age . . . ." (Oct.4 Tr.p.12). Kester clearly understood the dangers of self-representation, even paraphrasing (and rejecting) the maxim that "A man that represents himself has a fool for a client." (Oct.4 Tr.p.22). Despite his lack of legal knowledge, Kester was confident that he could do a better job than his lawyers. Indeed, Kester achieved an unexpectedly favorable result, escaping conviction for attempted murder and the lesser-included ABHAN.

Kester claims the court erred by "fail[ing] to conduct a competency hearing." But Judge Newman did conduct a lengthy hearing to address Kester's motion, a great deal of which was spent in a colloquy with Kester during which Judge Newman inquired about Kester's life history, including his mental health. Judge Newman learned that Kester graduated high school, attended three years of college as a math major, held several jobs, and spent years as a caretaker for his disabled daughter. (Oct. 4 Tr.p.6–7). Kester intelligently answered the court's questions and

told the court he completely understood the proceedings against him. (Oct.4 Tr.p.9). His complaints about his lawyers were rational, centering on his assertion that they had not been communicative with him leading up to trial and had not shared discovery with him in a timely manner. (Oct.4. Tr.p.13). He indicated he understood the elements of attempted murder. (Oct.4 Tr.p.12). Kester's responses demonstrated an understanding of the proceedings against him and the mental capacity to defend himself as well as could be expected for a non-lawyer. Judge Newman would have erred if he had denied Kester's request. See State v. Barnes, 407 S.C. 27, 36, 753 S.E.2d 545, 550 (2014).

Furthermore, Kester has not shown prejudice because the end result he asserts should have occurred—a competency exam—*has already occurred.* Kester was evaluated by a medical professional of defense counsel's choosing and found to be competent. (Oct.4 Tr.p.8). The court was aware of this and neither Kester, his attorneys, or the solicitor requested any further evaluation. Tellingly, Kester's lawyers represented to the court that he was competent and capable of self-representation. John Delgado told the court that he believed Kester had "been responsible enough that he can sit here and act and we can stay here as stand-by counsel for him." (Oct.4 Tr.p.5). Surely, if either of Kester's eminently qualified and experienced lawyers had any doubts about his competency, they would have informed the court.

This case illustrates the "damned if you do, damned if you don't" nature of pro se representation requests, where the trial court's decision will be raised on appeal no matter how he rules. It also illustrates the wisdom of the highly deferential standard of review in competency cases, because the trial judge sits in a much better position to ascertain the defendant's faculties and evaluate his mental capacity. State v. Colden, 372 S.C. 428, 441, 641 S.E.2d 912, 920 (Ct. App. 2007). Judge Newman had no reason to believe Kester was

incompetent, and he did not abuse his discretion by declining to sua sponte order any additional evaluation. Rather, Judge Newman correctly recognized he was required to honor Kester's unequivocal request to exercise his fundamental constitutional right to represent himself, as our state appellate courts and the United States Supreme Court have repeatedly instructed. See State v. Samuel, 422 S.C. 596, 813 S.E.2d 487 (2018), reh'g denied (May 25, 2018), cert. denied, 139 S. Ct. 791 (2019). Evidence supports the trial court's ruling. This Court should affirm.

II.

Kester's argument that the trial court erred by "advising" him on the number of jury strikes is not preserved for review because the issue was not raised or ruled on by the trial court. Even if preserved, Kester has not shown error because it was his responsibility to know the correct number of strikes. Finally, he suffered no prejudice because the court gratuitously struck a sixth juror for cause, and there is no evidence that any of the seated jurors were biased against him.

Kester claims the trial court erred by "advising" him during the pretrial hearing that he had ten peremptory jury strikes, when in fact he had five. Kester's argument is not preserved for review because he did not raise the issue at trial despite being given a clear opportunity. Furthermore, it is not the trial court's responsibility to "advise" a pro se defendant on the applicable law. Pro se litigants are held to the same standards as attorneys, and it was Kester's responsibility to know the correct number of strikes. Finally, Kester has not shown prejudice because the court gratuitously struck a sixth juror for cause, and there is no evidence that any of the seated jurors were biased against him. This Court should affirm.

Relevant facts.

Towards the end of the pretrial hearing held the week before trial, the court's colloquy with Kester briefly turned to jury selection. Seeking to demonstrate to the court that he understood the jury selection process, Kester asserted the prosecutor would have five strikes and "we'll have ten." (Oct.4 Tr.p.20). Apparently without giving it much thought, Judge Newman agreed that "you'll have ten," and continued to explain the trial process. At trial the following week, jury selection began but neither Kester, the prosecutor, nor stand-by counsel brought up the number of strikes. After Kester struck the first potential juror, the court interjected that "The strikes are actually five and five, not five and ten." (Tr.p.20). After Kester struck a second juror, the court reminded him that he had "Two down and three to go." (Tr.p.20). Kester then

responded, "I thought I had ten," to which the court responded, "Initially I did as well, but not for attempted murder." Kester accepted the court's response and continued with jury selection. (Tr.p.49).

Error Preservation.

This issue is not preserved for review. Kester's confusion about jury strikes became apparent after he struck a second juror. The trial court repeated that Kester had five strikes. (Tr.p.49). Kester indicated he thought he had ten strikes, and the court informed him that "Initially I did as well, but not for attempted murder." Kester responded only by saying "Okay." Judge Newman gave Kester a clear opportunity to raise the issue after jury selection, asking the parties whether they had "any matters of law regarding the jury selection." Kester responded, "No, your honor." (Tr.p.66). Thus, Kester both affirmatively accepted the trial court's ruling and failed to raise the issue when given a clear opportunity. State v. Morris, 307 S.C. 480, 486, 415 S.E.2d 819, 823 (Ct. App. 1992) (affirmatively accepting trial court's ruling waives issue on appeal); Stephens v. CSX Transportation, Inc., 400 S.C. 503, 514, 735 S.E.2d 505, 511 (Ct. App. 2012) (an issue not raised and ruled on by the trial court is not preserved for appeal because the trial court did not have an "opportunity to exercise its discretion"). Given Kester's statement that he had no complaints about jury selection, the court was justified in believing Kester was satisfied with the makeup of the jury and did not want to re-do the selection process. Kester should not be allowed to complain now on appeal after explicitly stating he had no objections at trial. Because Kester did not raise this issue at trial or ask the court for relief, he failed to preserve the issue for appeal.

Responsibilities of a pro se litigant.

Even if preserved, Kester has not demonstrated error on the part of the trial judge. While Judge Newman mistakenly agreed with Kester's pretrial assertion that he would have ten strikes, Kester had plenty of time to refer to the relevant statute and confirm this important procedural rule. He failed to do so. A pro se litigant who knowingly elects to represent himself assumes full responsibility for complying with substantive and procedural requirements of the law. State v. Burton, 356 S.C. 259, 266, 589 S.E.2d 6, 9, n. 5 (2003). It was not the trial court's responsibility to advise him of the applicable law before trial began.

In fairness to Judge Newman and the parties, the confusion about the number of strikes in an attempted murder case is an easy mistake to make, evidenced by the fact that neither standby counsel nor the prosecutor caught the mistake. The fact that defendants are given only five strikes instead of ten in attempted murder cases is an anomaly in our law compared to other comparably serious offenses. See S.C. Code Ann. § 14-7-1110. But even if the trial court mistakenly believed Kester was entitled to ten strikes, he did not have the discretion to give Kester more. Accordingly, this case is distinguishable from State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001), where the defendant relied on the court's assertion—made during trial— that he would give a certain jury charge. Judge Newman's only option was to start the selection process over again. Judge Newman gave Kester a clear opportunity to request this, asking the parties whether they had "any matters of law regarding the jury selection." Kester responded, "No, your honor." (Tr.p.66). The trial court was not required to make Kester's motion for him. See Martinez v. Court of Appeal of California, Fourth Appellate Dist., 528 U.S. 152, 162 (2000) ("A trial judge is under no duty to provide personal instruction on courtroom procedure or to perform any legal 'chores' for the defendant that counsel would normally carry out."). Kester has not demonstrated error on the part of the trial court.

Prejudice.

Even if the court erred, Kester suffered no prejudice. A defendant has no right to trial by a particular jury. State v. Evins, 373 S.C. 404, 416, 645 S.E.2d 904, 910 (2007). Kester has not identified any seated juror who had any bias against him. The jurors seated after Kester exhausted his strikes were a car salesman, a school principle, a worker at a pharmaceutical plant, a hospital support specialist, a quality assurance manager at an army hospital, a student, and an employee of Lexington Medical Center. (Tr.p.49–62). Kester raised no objections to any of these jurors, and there is no reason to believe they were any less favorable to him than others in the jury pool. See State v. Rayfield, 369 S.C. 106, 113, 631 S.E.2d 244, 248 (2006) (holding defendant was not prejudiced by improper Batson challenge because he was not denied legitimate strikes and there was no evidence jury was "tainted" by re-selection), abrogated on other grounds by State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016). The possibility that he "might have" used his strikes differently is not sufficient to show he was denied an impartial jury.

The one juror to whom Kester did object after exhausting his strikes was employed by the Public Safety Division of the Department of Mental Health. (Tr.p.59). Judge Newman (perhaps sensing the potential for unfairness) struck this juror for cause, even though the juror stated during voir dire that she had formed no opinion about the case and did not stand when the potential jurors were asked if there was any reason why any of them could not be fair and impartial. (Tr.p.36, line 15; 43–46). The juror did not know any of the witnesses, which included Livingston's friends and family. (Tr.p.38). Judge Newman did not strike a similarly situated juror for cause, even though her husband was a psychiatrist at DMH. (Tr.p.51–52). Thus, it appears the trial judge essentially gave Kester an extra strike to avoid any danger of

unfairness. The judge also gave Kester extra leeway to conduct voir dire, allowing him to ask specific questions of potential jurors. (Tr.p.55; 60–61). Accordingly, Kester has not demonstrated prejudice. See State v. Motley, 251 S.C. 568, 575, 164 S.E.2d 569, 572 (1968) (explaining that the burden is on the Appellant to satisfy the court that there was prejudicial error). This Court should affirm.

III.

The court's Allen charge was not coercive because it did not convey that the jurors were required to reach a verdict.

Kester claims the trial court's Allen charge was unconstitutionally coercive. This argument is not preserved for review because Kester did not object to the language of the charge at trial. Even if preserved, the charge was not coercive because it did not instruct the jurors that they were required to reach a verdict and was not directed at minority jurors. Instead, it correctly instructed the jurors to attempt to reach a unanimous verdict while at the same time not relinquishing their firmly-held beliefs merely for the sake of unanimity. This court should affirm.

Standard of review.

In reviewing a trial judge's jury instructions, an appellate court must view the jury charge as a whole and in light of the evidence and issues from trial. State v. Simmons, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009). A jury charge which is substantially correct and covers the law does not require reversal. State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996).

Error preservation.

Kester did not object at trial on the same specific ground he raises on appeal. At trial, he objected to the court giving an Allen charge at all, urging mistrial was the only proper solution when the jury indicated they had not come to a unanimous verdict "concerning all twelve counts." (Tr.p.351–54). He never claimed the charge itself was coercive, and never objected to the "hope you can arrive at a verdict" language he cites on appeal (or any other language in the charge). Accordingly, this issue is not preserved for review. State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) (explaining a party may not argue one ground at trial and

another on appeal); State v. Nichols, 325 S.C. 111, 120, 481 S.E.2d 118, 123 (1997) (objection must be entered on specific ground at trial to preserve an issue for appeal).

Discussion.

Even if preserved, the argument is meritless. A trial judge has a duty to urge a jury to make every reasonable effort to reach a verdict. Green v. State, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002); Allen v. United States, 164 U.S. 492, 493 (1896). As long as he does not coerce them into unanimity, such a charge is proper. When reviewing an Allen charge to determine if it was unconstitutionally coercive, the appellate court must judge the charge in the proper context and under the totality of the circumstances. Dawson v. State, 352 S.C. 15, 20, 572 S.E.2d 445, 447 (2002). Factors that may be considered include: (1) whether the charge was specifically directed at minority jurors; (2) whether the charge included any mandatory language about the necessity to return a verdict; (3) whether the trial judge made any inquiries into the jury's numerical division; and (4) how long the jury's deliberations lasted. Tucker v. Catoe, 346 S.C. 483, 493-494, 552 S.E.2d 712, 717-718 (2001).

None of those factors weigh against the State here. The trial court did not direct its comments towards the minority jurors, and it was not aware of the numerical division between them. Nor did the court instruct the jurors that they "must" arrive at a decision. See State v. Williams, 386 S.C. 503, 515, 690 S.E.2d 62, 68 (2010) (finding no error in the trial judge's charge in part because it did not include language such as "You have got to reach a decision in this case"). On the contrary, the court advised the jurors to "carefully consider and respect the opinion of each other and reevaluate your position, if necessary, for reasonableness, correctness, and impartiality," while also explaining that they "certainly should not give up [their] firmly held beliefs merely to be in agreement with [their] fellow jurors." (Tr.p.353). This is an appropriate

Allen charge. Finally, the jurors deliberated for another two hours after the charge was given, and gave Kester every benefit of the doubt by acquitting him of Attempted Murder and ABHAN on each charge. There was no coercion.

Kester relies on the Williams case to support his argument that the charge was coercive. However, the Williams court *affirmed* an almost identical charge, finding it "was not coercive." State v. Williams, 386 S.C. 503, 515, 690 S.E.2d 62, 68 (2010). While the court did express discomfort with the phrase "with the hope that you can arrive at a verdict" because it "could potentially be construed as being coercive," the court found the charge as a whole was proper. Id., 386 S.C. at 515, 690 S.E.2d at 68, n.7. This Court should affirm.

IV.

The trial court lawfully sentenced Kester within the statutory range.

Kester claims his sentence violates the Eighth Amendment prohibition against cruel and unusual punishment because it was grossly disproportionate to his crime. This contention is has no merit in light of the heinous nature of the crime. This Court should affirm.

Standard of review.

A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law. State v. Dawson, 402 S.C. 160, 163, 740 S.E.2d 501, 502 (2013). An appellate court has no jurisdiction to review a sentence, provided it is within the limits provided by statute for the discretion of the trial court, and is not the result of prejudice, oppression or corrupt motive. State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976).

Legality of consecutive sentences.

A trial judge generally has wide discretion in determining what sentence to impose. State v. Franklin, 267 S.C. 240, 246, 226 S.E.2d 896, 898 (1976). Our Supreme Court has "long

recognized the power to impose cumulative sentences on conviction for several offenses." Richards v. Crump, 260 S.C. 133, 138, 194 S.E.2d 575, 577 (1973). "A court's final judgment in a criminal case is the pronouncement of the sentence which includes the ability to designate whether sentences run concurrent or consecutive, subject to statutory restrictions." Major v. S.C. Dep't of Prob., Parole & Pardon Servs., 384 S.C. 457, 465–66, 682 S.E.2d 795, 799–800 (2009). Whether multiple sentences should run consecutively or concurrently is a matter left to the sound discretion of the trial judge. State v. Barton, 325 S.C. 522, 531, 481 S.E.2d 439, 444 (Ct. App. 1997).

Kester cites S.C. § 17-25-50 to support his argument that his sentences should have been ordered to run concurrently. That "three strikes" statute provides that, when determining the number of strikes for purposes of imposing a life without parole sentence, a trial court "shall treat as one offense any number of offenses which have been committed at times so closely connected in point of time that they may be considered as one offense . . . ." S.C. Code Ann. § 17-25-50 (2014). § 17-25-50 is a component of a multi-part recidivist sentencing statute, and must be construed as such. State v. Gordon, 356 S.C. 143, 153, 588 S.E.2d 105, 110 (2003), overruled by Bryant v. State, 384 S.C. 525, 683 S.E.2d 280 (2009) (adhering to relevant portion of Gordon opinion). It applies only for the purposes of sentencing repeat offenders. Id., citing State v. Muldrow, 259 S.C. 414, 417, 192 S.E.2d 211, 212 (1972) (holding predecessor recidivist statute applies "only for the purposes of sentencing under this statute").

Kester seems to concede that § 17-25-50 is not applicable to this case when he argues that the statute's "rationale" should apply "because Appellant is not a repeat offender." Brief of Appellant at 43. This argument does not make sense because the rationale of the recidivist statute (which encompasses both § 17-25-45 and -50) is to provide enhanced punishment *for*

repeat offenders. Its rationale does not apply to someone who is "not a repeat offender" and whose sentence is not being enhanced due to a prior conviction. Bryant v. State, 384 S.C. 525, 534–35, 683 S.E.2d 280, 285 (2009) (purpose of § 17-25-45 is "to serve as a legislatively sanctioned safeguard to ensure that a *life without parole sentence* is not imposed in cases where the multiple section 17–25–45 offenses are 'so closely connected in point of time that they may be considered as one offense'") (emphasis added). The applicable authorities are the above-cited cases which establish that the decision whether to impose concurrent or consecutive sentences is within the discretion of the trial judge.

When Kester decided to attack multiple victims, he committed "separate and distinct violations of law, punishable as separate and distinct offenses." Ex parte Klugh, 132 S.C. 199, 128 S.E. 882, 885 (1925). This is so "notwithstanding the transaction was one and the same." Id., 132 S.C. 199, 128 S.E. at 886; See also Thompson v. S.C. Dep't of Pub. Safety, 335 S.C. 52, 56, 515 S.E.2d 761, 763 (1999) (explaining where drunk driver injured multiple victims in a single car crash, it is "simply incorrect to assert that respondent committed only a single offense—he committed only one *type* of offense. . . . [W]e do not believe respondent is entitled to be rewarded by concurrent suspensions simply because he fortuitously seriously injured three people in one accident rather than injuring each in a separate accident"). Kester was lawfully given distinct sentences for his distinct crimes against distinct victims. It was within the trial court's discretion to order his sentences to run consecutively.

Proportionality.

Kester claims his sentence was grossly disproportionate to the crime he committed. Reading his brief, one might assume he committed a petty property offense instead of what the trial court accurately described as an act of terrorism. Cf. Solem v. Helm, 463 U.S. 277, 103 S.

Ct. 3001, 77 L. Ed. 2d 637 (1983) (finding life without parole sentence for check fraud violated Eighth Amendment). Just as he did at trial, Kester ignores the harm he caused and speaks exclusively to the punishment imposed. The facts of the case clearly justified the sentence.

Initially, the consecutive sentences imposed in this case are not as severe as Kester portrays them to be. First degree assault and battery is a parole-eligible offense. S.C. Code Ann. § 24-21-610 (providing the parole board may parole a prisoner for any non-violent crime where "the prisoner shall have served at least one-fourth of the term of a sentence"). Although Kester's sentence theoretically adds up to eighty years, he could end up serving as few as twenty, approximately what he would have served if given the maximum sentence for one count of ABHAN rather than A&B first degree, and substantially less than he would have served if sentenced to the maximum thirty-year sentence for one count of attempted murder.[1]

Regardless of his life expectancy, Kester's age does not mitigate his crimes. Quite the opposite—his age only serves to show he knew better. Kester is not entitled to unwarranted leniency because he committed his crimes as a senior citizen.

If there was ever a case warranting consecutive sentences, it is this one. Kester made an intentional choice to plow his car into a crowd of strangers, knowing he would injure or kill multiple people. Kester was motivated by a years-old grudge against the Department of Mental

[1] While the State recognizes that the jury did not convict Kester of attempted murder (a crime that carries perhaps the most demanding standard of criminal intent of any criminal offense in South Carolina), the facts clearly support the "great bodily injury" requirement for ABHAN, and there is no reason Kester should not have been convicted of ABHAN for those victims that suffered serious injuries. The State respectfully submits that the reason the jury convicted Kester of A&B 1st rather than ABHAN is simply because the solicitor did not devote any time during his closing argument to explain the distinctions between the two crimes, and the jury received only brief definitions of the offenses from the trial court. Some of the jurors were confused about the injuries suffered by the several victims, as evidenced by their first question to the court. (Tr.p.330; 342–43). If the jurors believed the victims only suffered "moderate bodily injury," they would have convicted Kester of A&B second degree. In any case, the fact that Kester was only convicted of A&B 1st instead of ABHAN does not change the repulsive nature of his crime.

Health, but he did not know Livingston or any of the victims. His acts resulted in gruesome injuries such as shattered bones and legs "hyper-extended backwards." (Tr.p.143; 164–65; State's Exhibits #32–86). All of his victims, even those that weren't injured, suffered severe mental trauma, as is laid out in excruciating detail in their victim impact statements during the sentencing hearing. (Tr.p.368–97). Kester was rightfully punished separately for each victim.

Furthermore, Kester showed an infuriating lack of remorse or concern for the victims, both on the day of the incident and at trial. (Tr.p.262; 269; 276; 390). At his sentencing hearing, the victims gave lengthy and emotional statements describing their severe physical and emotional injuries. Kester's first response was to complain that the jail had not provided him with a razor with which to shave. (Tr.p.398). Kester then cast himself as the victim, minimized his conduct, and asserted that the DMH workers who treated his daughter were the ones who should be "brought to justice." (Tr.p.408). He outrageously claimed that he "never harmed anybody in [his] life." (Tr.p.402). When Judge Newman confronted him with the fact that he had caused great physical and mental harm to his victims, he again shifted the focus back to himself, asserting that he, too, had PTSD. (Tr.p.405). He reasoned that no one cared about him or his daughter when she was being treated at DMH, but "now the shoe is on the other foot." (Tr.p.408). In his eyes, he didn't "deserve much time." (Tr.p.408). His staggering lack of remorse further justified a stern retributive sentence.

In light of these facts, the suggestion that Kester's sentence was grossly disproportionate to his crimes is outrageous and offensive to the victims. He was sentenced within the statutory range and Kester has not shown (or even alleged) that Judge Newman's sentence was motivated by oppression or any improper consideration. This Court should affirm.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General

BYRON GIPSON
Solicitor, Fifth Judicial Circuit

BY: _____
Joshua A. Edwards
Bar # 101188

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

August 26, 2019

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions
Clifton Newman, Circuit Court Judge

Appellate Case No. 2018-001852

THE STATE,

Respondent,

v.

JAMES KESTER,

Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to Dayne C. Phillips, Esquire, Price Benowitz LLP, 1614 Taylor St., Suite D, Columbia, SC 29201.

I further certify that all parties required by Rule to be served have been served.
This 26th day of August, 2019.

Anne Mueller

Anne A. Mueller
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL

August 26, 2019

Dayne K. Phillips, Esquire
Price Benowitz LLP
1614 Taylor St., Suite D
Columbia, SC 29201

RE: State v. James Kester
Appellate Case No. **2018-001852**

Dear Mr. Phillips:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Joshua A. Edwards
Assistant Attorney General
Bar # 101188

JAE/aam
Enclosures

cc: Honorable Jenny A. Kitchings (original and 1 enclosed)
Victim Advocacy Division