STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Georgetown County
Honorable Steven H. John, Circuit Court Judge
Appellate Case No. 2018-000622

The State, Respondent,

vs.

Ty'Shun Mario Bessellieu, Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUES ON APPEAL

I. The trial court did not err in charging the doctrine of transferred intent. Further, the issue is not preserved for review on appeal.

II. The trial court did not err in denying Appellant's motion for a directed verdict because the State presented sufficient evidence that Appellant had a specific intent to kill another person as required.

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

On August 31, 2016, Danasha Anderson, Shaniqua Kennedy, Shaniqua McGirt, and Tysha Moultrie went to a couple of local hangouts. After the first location closed, the group went to Ming'z. Appellant, who appeared to be alone, also ended up at Ming'z.

Moultrie entered the building to get drinks and to play pool. As she entered, Appellant made a comment to her indicated he wanted Moultrie in a sexual way. (R.124-125). Moultrie tried to ignore him initially. However, when she left the building, she had further interactions with Appellant. He made further sexual remarks to her. Moultrie told Appellant to leave her alone, and after he said it again, she said to leave him alone because he was "gay." (R.125). Moultrie also called Appellant a "faggot" and told him to get away. (R.53). Appellant responded by getting angry and stating: "don't nobody want your ass anyway." (R.126; 128). The crowd outside all started watching and listening to the exchange, staring at Appellant. Appellant went back to his car, but before leaving pulled in front of the ladies and told them to meet him "at the ave." (R.55). Appellant was described as "deranged," "embarrassed," and "very angry." (R.91; 107). Appellant left in one direction and the ladies left in another.

The four ladies went back to McGirt's house and sat on her porch. (R.55-56; 108). While outside, they see Appellant's gold Lexus drive by and realize it is Appellant. (R.57). As he drives by, Appellant is staring at the ladies with an "upset expression." (R.59). The ladies go inside and several watch from the window. Appellant goes to the stop sign at the end of the street, but comes back by the house. (R.57; 109). The ladies stay inside for 10-20 minutes before going back out on the porch. (R.93; 109).

After being back outside for a while, the ladies saw a figure walking in the distance wearing a white t-shirt. He appeared to just be walking across a field from behind another building. (R.60;

112-113; 130-131). The person abruptly turns, pulls out a gun, and begins shooting directly at the ladies. (R.60; 110-111; 131). There were multiple shots fired at the ladies on the porch, with two ladies indicating about seven shots fired. (R.60; 131). Danasha was struck in the face by one of the bullets. (R.60).

At the scene, law enforcement collected one projectile and several spent cartridges. From Appellant, officers recovered a .40 caliber pistol, along with some drugs. The projectile from the scene was consistent with a .40 caliber and had consistent rifling even though the State's expert could not definitely state it came from Appellant's weapon. (R.298-300). He said the bullet recovered at the scene was also consistent with the unfired ammunition located with Appellant and the .40 caliber weapon. (R.301-302). However, the State's expert indicated he could match the spent casings recovered from the scene to the weapon recovered from Appellant. (R.303; 305).

ARGUMENT

I. The trial court did not err in charging the doctrine of transferred intent. Further, the issue is not preserved for review on appeal.

Appellant contends the trial court erred in charging the jury the doctrine of transferred intent. First, the issue is not preserved for review on appeal. Second, the doctrine was properly charged because transferred intent can apply when the charge is attempted murder. Finally, any error in charging was entirely harmless because the doctrine of transferred intent was not necessary to convict Appellant of attempted murder as it relates to all four counts of attempted murder.

Preservation

Initially, any issue related to the jury charge on transferred intent is not preserved for review on appeal. After a discussion about attempted murder, the State asked for "something saying that there is no requirement of an injury for the attempted murder statute." (R.327). Counsel for Appellant then stated:

> Well, Your Honor, my problem with it the whole time is that I do believe that a lot of the statements coming out of *Williams* arises out of the same confusion that led to the Court's decision on the other—on the attempted murder. I think it blends what would've been the common law attempted murder where there was a general intent requirement which would allow for these unintentional and consequences of the act itself. And here we're requiring a specific intent to kill and we're eluding to the components that normally would have arised out of the unintentional consequences or the—the general intent requirement as opposed to a specific intent requirement.

(R.327-328). The Court responds by stating:

> I'm not gonna add anything else. So, I'm going to charge the attempted murder as reflected, the attempt paragraph I read to you, what I just read to you regarding transferred intent; that's what I'm gonna charge. Okay?

(R.328). Significantly, Appellant's counsel did not respond to object to the transferred intent charge. (R.328).

The failure to object to the charge is further highlighted by the fact that after the trial court gave its charge to the jury, which included the transferred intent charge, the trial court asked: "Exceptions, deletions, additions to the charge from the defense?" Appellant's counsel responded: "None from the defense, Your Honor." (R.387).

There was no clear objection to transferred intent made. While you do not have to use any specific language to make an objection, it has to be understood by the court. In this case, the trial court clearly believed the commentary from Appellant's counsel related to the additional charges requested by the State and not directly related to transferred intent. When given the opportunity to further object by the trial court asking "Okay?" counsel failed to clarify. Therefore, the issue was not properly raised to the trial court. See State v. Sheppard, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011) (noting our courts have routinely held the plain error rule does not apply in South Carolina state courts, a party must make a contemporaneous and specific objection to preserve an issue for appellate review, and failure to properly object renders an issue unpreserved); State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) ("[T]o preserve for review an alleged error . . . an objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge.").

Additionally, after the charge was given, the judge asked him for any "[e]xceptions, deletions, additions" and counsel specifically responded: "None from the defense, Your Honor." (R.387). Appellant specifically waived any objection he may have had to the charge. See State v. Brown, 402 S.C. 119, 125, 740 S.E.2d 493, 496 (2013) (finding the appellant's argument unpreserved because he explicitly stated he had no objection to the jury instruction); State v.

Westmoreland, 421 S.C. 410, 425, 807 S.E.2d 701, 709 (Ct. App. 2017) (finding appellant conceded any objection he may have had to the jury instructions when counsel indicated no objection to the charge given).

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). "'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

On the merits, the trial court properly charged transferred intent and, even if it was not properly charged, it was unnecessary so any error was harmless. The State need not rely on a theory of transferred intent to meet the required elements of attempted murder. Additionally, this Court should find transferred intent is appropriate to consider for attempted murder.[1]

[1] Appellant spends a significant portion of his argument discussing State v. Smith, Op. No. 27958 (Refiled June 17, 2020). However, any reference to Smith is unnecessary and inapplicable because the South Carolina Supreme Court

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 State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017) required the State prove Appellant maintained a specific intent to kill, it did not require a specific intent to kill any specific person. The State was required to prove Appellant acted with the intent to commit an act that would have the natural and probable consequence of another person being killed. Appellant demonstrated his specific intent to kill by firing a gun multiple times—between four and seven times—directly at a group of women with whom he had a very recent confrontation.

Appellant's actions clearly indicate an intent to kill "another person," and the pulling of the trigger multiple times 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 the Supreme 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). Accordingly, the State need not rely on the transferred intent charge, and the charge was not reversible error.

Additionally, transferred intent should be applied in this case to the extent necessary and should be recognized regardless of the fact attempted murder is a specific intent crime. In State v.

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explicitly indicated it was not addressing the question of whether transferred intent applies in an attempted murder case. See Id. at n. 9 ("We need not address this issue because the prior issues are dispositive.").

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. Appellant intended to kill at least one of the women at the house, and instead shot an innocent, unintended victim while shooting in the direction of all four women. The appropriate charge in this case, as in Ochoa, was attempted murder, and the trial court properly charged the jury with the doctrine of transferred intent.

As a result, this Court should find the issue is not preserved for review on appeal. Even if preserved, the Court should find a transferred intent charge properly given. Finally, the Court should find transferred intent was unnecessary, and the trial court's charge did not result in reversible error.

II. The trial court did not err in denying Appellant's motion for a directed verdict because the State presented sufficient evidence that Appellant had a specific intent to kill another person as required.

Appellant maintains the trial court erred in denying his motion for a directed verdict because the State failed to present evidence of a specific intent to kill. The State presented sufficient evidence, especially when considering the actions taken by Appellant, that he had the specific intent to kill all four of the women present at McGirt's house. Further, the arguments made by counsel on appeal related to transferred intent were not raised below and are not preserved for review on appeal.

Preservation

Initially, any arguments related to the lack of proof of a specific intent to kill because of the inapplicability of transferred intent is not preserved for review because that issue was never raised below. Instead, he maintained the State's proof insufficient because the motive was "tenuous" and he was at a significant distance when he shot at the women. (R.306-307). As a result, the issue as raised on appeal is not preserved. See 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

"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

The State provided ample evidence of Appellant's specific intent to kill. First, the victims and Appellant were engaged in a confrontation and situation at Ming'z bar earlier the same night. One of the victims had a direct confrontation in which she challenged his sexuality in front of many other people, including the other three victims. All the victims indicated Appellant was "embarrassed" or "angry" or even "deranged" as a result of the confrontation. Before leaving the scene Appellant, even called out the victims and told him to meet somewhere. The jury could reasonably infer that was a threat by Appellant.

Prior to the shooting, Appellant is seen driving slowly past the house where all four victims are socializing. He drives by staring at the victims, goes to the end of the street, and then passes

back by the house. The women are so afraid, they go inside and watch through a window. After time has passed, they come back out only to see someone walking through a field. The person raises a gun and fires between four and seven shots directly at the four women on the porch, striking one of them.

Even assuming Moultrie was the only person involved in the verbal confrontation with Appellant, the jury would not be prevented from inferring he had a specific intent to kill all four women who were all present and part of the group when he was being embarrassed.[2] Certainly, a jury may fairly and logically deduce Appellant had the specific intent to kill all of the people on the porch when he raised a gun and pulled the trigger between four and seven times while aimed directly at the four victims on the porch.

Even if the Court finds Appellant only had a specific intent to kill Moultrie, the others were clearly within the "kill zone" Appellant created with his hail of bullets. 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 fact-finder 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] There is little doubt that the State presented sufficient evidence to send the attempted murder charge to the jury as it related to Moultrie. As a result, this Court certainly should affirm the conviction and sentence as it relates to the charge with her as a victim, notwithstanding any concern for the remaining charges.

> (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 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, Appellant obviously intended to kill at least one of the women who were together when he was embarrassed at Ming'z. In seeking to ensure his intent was completed, he fired multiple shots at the women on the porch. When he fired numerous shots, 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. Appellant's specific intent to kill should be attributable to all those in the "kill zone" based on his actions and the theory of concurrent intent.

As a result, this Court should find the majority of Appellant's argument not preserved for review on appeal. Additionally, there is little doubt that the State proved a specific intent to kill Moultrie as she was the main participant in the confrontation with Appellant. The State also presented evidence from which a rational trier of fact could reasonably conclude Appellant had the specific intent to kill all of the women in the group involved in his embarrassment at Ming'z. Finally, even if the evidence did not directly evince a specific intent to kill the women other than Moultrie, this Court should conclude based on the concurrent intent theory that Appellant created a "kill zone" and had the specific intent to kill any and all within the "kill zone" which would include all four women.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court be affirmed.[3]

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

August 20, 2020

[3] Appellant has not raised any issues related to the drug convictions, the unlawful possession conviction, or the discharging a firearm conviction so those convictions should not be reversed regardless of this Court's opinion regarding the attempted murder charges.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Georgetown County
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The State, Respondent,

vs.

Ty'Shun Mario Bessellieu, Appellant.

PROOF OF SERVICE

I, Caroline Collins, certify that I have served the within Brief of Respondent and Designation of Matter on Appellant by having a copy emailed to counsel of record, David Alexander, at the email address listed in AIS.

I further certify that all parties required by Rule to be served have been served.
This 20th day of August, 2020.

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Caroline Collins

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Subject: The State v. Ty'Shun Mario Bessellieu (2018-000622)
Attachments: BESSELLIEU Ty'shun - Brief of Respondent (02358184xD2C78).PDF

Follow Up Flag: Worldox

Good Afternoon Mr. Alexander,

Attached please find a copy of the Brief of Respondent in The State v. Ty'Shun Mario Bessellieu (2018-000622). This Brief will be submitted to the South Carolina Court of Appeals today via the AIS One Drive System.

If you will, please reply to confirm receipt of this email.

Thank you!

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