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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Cherokee County

Honorable R. Keith Kelly, Circuit Court Judge

Opinion No. 2021-UP-204 (S.C. Ct. App. Filed June 9, 2021)

THE STATE,

RESPONDENT,

V.

ALLEN CHARRON WILLIAMS, JR.

PETITIONER.

APPELLATE CASE NO. 2019-000123

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on June 29, 2021.

QUESTION PRESENTED

Did the Court of Appeals err in finding unpreserved petitioner's argument that the trial court erred by denying his motion for directed verdict where the state failed to introduce substantial circumstantial evidence showing he was the shooter because petitioner's argument on appeal encompasses the argument made at trial, that the state failed to put forth evidence of all of the elements of attempted murder?

STATEMENT OF THE FACTS

Procedural history

On November 16, 2017, a Cherokee County grand jury indicted petitioner for three counts of attempted murder and three counts of possession of a weapon during commission of a violent crime. R. 147.

Petitioner's case was called to trial on January 15, 2019, before the Honorable R. Keith Kelly and a jury. R. 1. Travis Moore represented petitioner. R. 1. Assistant solicitor George Kendell and assistant solicitor Kimberly Leskanic represented the state. R. 1.

On January 16, 2019, the jury found petitioner guilty of assault and battery of a high and aggravated nature, two counts of first-degree assault and battery, and possession of a weapon during the commission of a violent crime. R. 137-38. Judge Kelly sentenced petitioner to twenty years' and two five-year terms of imprisonment to run consecutively and a concurrent term of five years' imprisonment. R. 145-46; R. 149.

The Court of Appeals affirmed petitioner's convictions in *State v. Williams*, 2019-UP-204 (S.C. Ct. App. filed June 9, 2021). Petitioner sought rehearing which was denied on June 29, 2021.[1]

This petition for a writ of certiorari follows.

Introduction

One evening, two young men, Caleb and Wesley, and their stepfather were driving their truck around a neighborhood. Caleb rode in the bed of the truck, and Wesley and their stepfather rode in the cab. R. 13, ll. 3-23; R. 26, l. 8-R. 27, l. 15. They drove around the same loop

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[1] Pursuant to the Supreme Court's amended order RE: Operation of the Appellate Courts During the Coronavirus Emergency (As Amended May 29, 2020), subsection (e), an appendix containing the above referenced documents has not been e-filed with this petition because that requirement has been suspended.

multiple times until a woman, out on her porch, yelled at them, "why [do] y'all keep driving by." They stopped the truck, and shortly after a shot was fired at the truck, injuring Caleb. R. 17, ll. 10-14; R. 29, l. 12-R. 30 l. 2. When police arrived, petitioner's neighbor, Sierra Mckinney, and her sister, Christa Hall, told police they saw petitioner with a gun at some point before hearing the gunshot. R. 40, l. 22-R. 43, l. 17; R. 65, ll. 8-11. Petitioner was detained, his hands were tested for gunshot residue (GSR), and his residence and the surrounding area were searched. R. 80, ll. 5-9; R. 85, ll. 1-18. The results of the GSR kit showed a single particle of GSR on petitioner's left palm. No physical evidence related to the shooting was found during the search of petitioner's home or the surrounding area. R. 85, ll. 2-9; R. 90, l. 18-R. 91, l. 11; R. 115, ll. 13-21; R. 117, ll. 1-25; R. 122, l. 11-R. 123, l. 16; R. 126, ll. 11-20. Petitioner was indicted on three counts of attempted murder and three counts of possession of a weapon during the commission of a violent crime. R. 147.

Relevant facts

At trial, Caleb and Wesley testified a woman yelled at them from a porch and neither saw who fired the gun. R. 17, ll. 10-14; R. 21, ll. 12-25; R. 22, l. 18-R. 23, l. 3. Wesley claimed he saw a man right before the truck turned on the street where the shot was fired but he did not see a gun. R. 32, ll. 3-5. Sierra testified she was out on her porch that evening with Christa and they were concerned because the truck drove by multiple times. R. 39, l. 18-R. 40, l. 13. Sierra admitted they called out to the truck, "what are you doing." R. 49, ll. 3-10. Sierra and Christa claimed they saw petitioner acting "aggravated." R. 40, l. 22-83, l. 9; R. 63, ll. 21-25. Both women allegedly saw petitioner carrying a gun before they heard a gunshot, but neither could recall exactly how much time passed between seeing petitioner and hearing the gunshot. R. 41, l. 22-R. 43, l. 22; R. 52, l. 12-R. 53, l. 9. On direct, Sierra seemed unsure about the timeline of

events. She first testified that she saw petitioner with a gun ten or fifteen minutes before she heard a gunshot. Sierra later said it may have been less than ten or fifteen minutes. R. 43, ll. 14-17. Then, on cross-examination, Sierra admitted she did not remember much of what happened that night. R. 53, ll. 6-13. On direct, Christa claimed she saw petitioner run off with a gun seconds before hearing a gunshot. R. 67, ll. 6-17. During cross-examination, Christa grudgingly admitted she told police she saw petitioner walk away before hearing the gunshot. R. 73, l. 18-R. 74, l. 16.

No one testified that they saw petitioner shoot at the truck. R. 52, ll. 6-7; R. 72, ll. 6-7. The results from the GSR kit administered on petitioner revealed a single particle on his left palm, which the SLED (South Carolina Law Enforcement Division) expert admitted could have been the product of transfer. R. 115, ll. 13-21; R. 117, ll. 1-25; R. 122, l. 11-R. 123, l. 16; R. 126, ll. 11-20. Police did not find a gun, shells, or any other physical evidence of the shooting during their search of petitioner's residence or the surrounding area. R. 85, ll. 2-9; R. 90, l. 18-R. 91, l. 11.

Petitioner made a motion for directed verdict as to all three counts of attempted murder, asserting that there was no evidence presented by the state to satisfy an element of the crime. Specifically, petitioner argued the state did not put forth evidence that showed "the defendant had the specific intent to murder" anyone and that there was no testimony or evidence regarding two of the alleged victim's injuries. R. 133, ll. 1-20. The court denied the motion. R. 186, ll. 2-7.

ARGUMENT

The Court of Appeals erred in finding unpreserved petitioner's argument that the trial court erred by denying his motion for directed verdict where the state failed to introduce substantial circumstantial evidence showing he was the shooter because petitioner's argument on appeal encompasses the argument made at trial, that the state failed to put forth evidence of all of the elements of attempted murder.

Preservation

The Court of Appeals cited *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-694 (2003) for the proposition that "[i]n order for an issue to be preserved for appellate review it must have been raised to and ruled upon by the trial [court]." Issues not raised and ruled upon in the trial court will not be considered on appeal. Additionally, the court cited *Dunbar* for the proposition "a party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground" and "a party may not argue one ground at trial and an alternate ground on appeal." *State v. Williams*, 2019-UP-204 (S.C. Ct. App. filed June 9, 2021).

"Imposing ... preservation requirement[s] on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). "The requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve – intentionally or by

chance – in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." Toal, Walker, Baker, Appellate Practice in South Carolina (2016) 184.

"There are four basic requirements to preserving issues at trial for appellate review. ... In order to preserve an issue for appellate review, the issue must have been (1) raised to and ruled upon by the lower court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the lower court with sufficient specificity." *Id.* at 184. The issue on appeal is whether the trial court erred as a matter of law in denying appellant's motion for directed verdict. The record demonstrates this issue was raised by petitioner and ruled upon by the trial judge. While petitioner could have better articulated the basis for his motion at trial, he made a motion for a directed verdict and the motion was erroneously denied. *See State v. Hepburn*, 406 S.C. 416, 429, 753 S.E.2d 402, 409 (2013) (stating if the state fails to present any direct evidence or any substantial circumstantial evidence reasonably tending to prove guilt of the accused, the appellate court must reverse the lower court's denial of the directed verdict motion).

It is true petitioner did not use the specific phrase "substantial circumstantial evidence" in his motion for a directed verdict. However, he did argue there was insufficient evidence to support one of the elements of the charge of attempted murder. *See State v. James*, 362 S.C. 557, 562-63, 608 S.E.2d 455, 457-58 (Ct. App. 2004); *State v. Russell*, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001) (holding argument that defendant was entitled to a directed verdict on the ground that state failed to establish the *corpus deliciti* of DUI was preserved even though the defendant did not use the exact words where the ground for the motion was apparent from a review of the record).

Petitioner's argument on appeal that there was insubstantial circumstantial evidence showing he was the shooter where he was charged with attempted murder includes the argument made at trial, that the state did not put forth any evidence that petitioner had the specific intent to murder the alleged victims. Specific intent is an element of attempted murder, and the state's failure to put forth evidence of that element, any direct evidence or substantial circumstantial evidence, should have resulted in a directed verdict in favor of petitioner.

Merits

At trial, the state offered scant circumstantial evidence that petitioner was the perpetrator of this crime. The evidence showed petitioner was present, in the neighborhood where he lived, at the time the incident occurred, and petitioner was seen with a gun at some point before the gunshot was heard. However, the evidence did not show who shot at the truck that night.

In *State v. Mitchell*, 341 S.C. 134, 535 S.E.2d 126 (2000), the South Carolina Supreme Court held the lower court erred in failing to direct a verdict where the only evidence presented against defendant was his fingerprint at the scene of the burglary. Similarly, in *State v. Lollis*, 343 S.C. 580, 541 S.E.2d 254 (2001), the South Carolina Supreme Court directed a verdict of acquittal in defendant's favor where the state presented no direct evidence that defendant was involved in setting fire to his home. The circumstantial evidence against defendant was that his wife admitted to the arson, defendant had placed valuables in storage prior to the fire, defendant possessed a key to the storage unit, and defendant allegedly had financial troubles. In that case the court found the evidence insufficient. *Lollis*, at 585, 541 S.E.2d at 257.

In *State v. Martin*, 340 S.C. 597, 533 S.E.2d 572 (2000), the South Carolina Supreme Court directed a verdict of acquittal in defendant's favor where the state failed to meet the "any substantial evidence" standard. In that case, the state presented evidence that a car resembling

the one defendant was driving was seen parked at the victim's apartment complex on the night of the murder. *Martin*, at 600, 533 S.E.2d at 573. The state also presented evidence defendant and co-defendant were late picking up defendant's girlfriend from work and when his girlfriend asked why they were late defendant replied, "some shit happened" and co-defendant added "somebody may have died tonight." *Id.*

In *State v. Odems*, 395 S.C 582, 720 S.E.2d 48 (2012), the South Carolina Supreme Court held defendant was entitled to a directed verdict based upon a lack of substantial circumstantial evidence that defendant was involved in the burglary. Although defendant was in a car with other individuals who admittedly burglarized a home, the state failed to provide substantial circumstantial evidence that defendant was present during the home invasion. The witness who saw individuals at the home claimed she saw two, not three as were found in the car. *Odems*, at 584, 720 S.E.2d at 49. Fingerprints collected from the stolen goods did not match defendant's but matched the other individuals in the car. Id. at 588, 720 S.E.2d at 51. One of the individuals who admitted his involvement claimed defendant was picked up after the burglary at a gas station. *Id.*

In *State v. Bostick*, 392 S.C. 134, 141, 708 S.E.2d 774, 778 (2011), the South Carolina Supreme Court held the state failed to present substantial circumstantial evidence of defendant's guilt. Rather, the state's evidence could produce only a suspicion of defendant's guilt. *Id.* Although the police found items belonging to the victim in a burn pile behind the home of defendant's mother, the court held no evidence linked defendant to the evidence in the burn pile and the prosecution presented no testimony that defendant had control over the burn pile. *Id.* at 137-141, 708 S.E.2d at 775-778. The only other evidence presented against defendant was that he had a chemical pattern that matched gasoline on his shoes and gasoline was used to start the

fire at the victim's home, and DNA from blood on defendant's jeans excluded ninety-nine percent of the population, but the expert could not testify the DNA matched the victim. *Id.* at 142, 708 S.E.2d at 778.

The case at bar has less circumstantial evidence than the cases mentioned above where the Court found the lower court should have directed a verdict in defendants' favor. In *Martin*, there was evidence presented that could be construed as an admission of guilt, as well as a car matching the description of the car defendant was driving seen at victim's apartment on the night of the murder. *Martin*, at 600, 533 S.E.2d at 573. In *Bostick*, the victim's belongings were found in a burn pile behind defendant's mother's home and defendant had blood on his jeans.

Here, when the state closed its case, only the following pieces of circumstantial evidence had been presented, Sierra and Christa claimed they saw petitioner with a gun and one particle of GSR was found on petitioner's hand.

Conversely, the state offered no evidence that anyone saw petitioner shoot at the truck and police did not find a gun or shells during their search of petitioner's home or the surrounding area. Certainly, petitioner was in the area at the time of the incident but so were the two neighborhood witnesses that testified at trial. Police did no investigation into either Sierra or Christa, who claim they saw petitioner with a gun before the gunshot. Sierra and Christa are the same individuals Caleb and Wesley heard yelling at them right before their truck was shot at. Christa gave a written statement the night of the incident and then changed it when she testified at trial. Additionally, police did not search Sierra's residence where she, admittedly, had guns, and police did not perform GSR testing on anyone other than petitioner. R. 53, l. 20-R. 54, l. 4.

Perhaps, had there been additional investigation into the incident, more would be known about exactly what happened that night. All that is known is Sierra and Christa were out on the

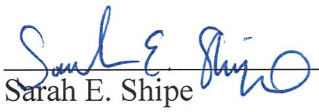
porch and noticed a truck kept driving by, they both claim they saw petitioner with a gun, either Sierra or Christa yelled at the truck, the truck stopped, and someone shot at the truck injuring Caleb. The state presented zero direct evidence and insubstantial circumstantial evidence that petitioner committed this crime. Thus, the trial judge should have directed a verdict in petitioner's favor because the evidence presented only raised a suspicion of guilt. The judge's error requires reversal.

This Court should grant certiorari to review the Court of Appeals' erroneous decision regarding preservation and, after determining the issue is properly preserved for appellate review, petitioner respectfully requests this Court consider the merits of his issue on appeal and reverse the trial court and grant his motion for directed verdict.

CONCLUSION

By reason of the foregoing arguments, a writ of certiorari should be issued to allow full briefing on this issue.

Respectfully Submitted,



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ATTORNEY FOR PETITIONER

This 29th day of July, 2021.