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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable J.C. Nicholson, Jr., Circuit Court Judge
Appellate Case No. 2012-213405

The State, Respondent,

v.

Raheem D. King, Appellant.

RESPONDENT'S PETITION FOR REHEARING

On April 22, 2015, this Court affirmed Appellant's convictions for armed robbery and possession of a firearm during the commission of a violent crime, but reversed his conviction for attempted murder, finding the circuit court erred in charging the jury attempted murder is not a specific intent crime and in allowing hearsay testimony. Respondent submits the Court misinterpreted and/or misapplied the applicable law regarding statutory interpretation, hearsay and harmless error. Further, the Court substituted its view of the evidence for the jury's determination. Accordingly, pursuant to Rule 221(a), SCACR, Respondent petitions for rehearing on the attempted murder and hearsay issues, and asks the Court to reinstate Appellant's conviction and sentence on that charge.

A. Jury Charge

Premised primarily on dicta from State v. Sutton, 340 S.C. 393, 532 S.E.2d 283, 285 (2000), stating a **common law** attempted murder charge "would require the specific intent to kill," this Court concluded the Legislature "intended to require the State to prove the specific

intent to kill as an element of attempted murder" under S.C. Code Ann. §16-3-29 (Supp. 2014). As further support for its conclusion, the Court cited to common law "attempt" cases, as well as cases holding the Legislature is presumed to be aware of the courts' interpretation of its statutes. The Court's reliance on Sutton, "attempt" cases, and statutory interpretation cases is misplaced, and ignores relevant case law and history leading to enactment of the attempted murder statute in 2010.

Murder is "the killing of any person with malice aforethought, either express or implied." S.C. Code §16-3-10 (2003). A specific intent to kill is not required for a murder conviction. State v. Foust, 325 S.C. 12, 479 S.E.2d 50, 51 (1996).

The common law offense of assault and battery with intent to kill ("ABWIK") was defined as an unlawful act of violence to the person of another, with either express or implied malice aforethought, and a specific intent to kill was **not** required. *Id.*.[1] For purposes of murder and ABWIK, malice is the wrongful intent to injure with a wicked or depraved spirit intent on doing wrong, and doing the act intentionally, without just cause or excuse. Tate v. State, 351 S.C. 418, 570 S.E.2d 522, 527 (2002).

In Sutton, the Supreme Court first addressed the issue of whether attempted murder was an offense in South Carolina. Declining to recognize the common law attempted murder offense, which required an specific intent to kill, as an offense separate from ABWIK, the Court specifically found the common law ABWIK and ABIK offenses "adequately cover the conduct

[1]In 1962, the Legislature made the common law ABWIK offense a felony punishable by up to twenty years incarceration. S.C. Code Ann. 16-3-620 (2003), *repealed by* 2010 Act No. 273, §7.A, effective June 2, 2010 (abolishing ABWIK, ABIK, ABHAN and other common law offenses). Therefore, the requisite common law general intent requirement still applied.

which attempted murder would include." 532 S.E.2d at 285-286. In short, unlike **common law** attempted murder, common law ABWIK did **not** require a specific intent to kill.

In 2010, as part of an omnibus crime bill, the South Carolina Legislature enacted the attempted murder statute, and expressly abolished the common law offense of ABWIK. Section 16-3-29 provides "[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."

In concluding the Legislature did not intend §16-3-29 to codify the common law ABWIK offense, which did not require a specific intent to kill, this Court cites to statutory construction cases indicating the Legislature is presumed to know about judicial decisions interpreting its statutes. Significantly, in reaching this conclusion, the Court ignored multiple cases holding common law ABWIK, like murder, was a general intent rather than a specific intent offense, relying instead on the dicta in Sutton as case law the Legislature was presumed to know when it passed the attempted murder statute.[2] *See, e.g.*, State v. Dennis, 402 S.C. 629, 742 S.E.2d 21, 27 (Ct. App. 2013) (ABWIK requires a general intent to kill, and South Carolina courts have recognized "the element that distinguishes ABWIK from ABHAN is not malice, but an intent to kill.")

Given the fact the attempted murder statute uses language virtually identical to common law ABWIK, and the Legislature is presumed to be aware of the ABWIK case law regarding the intent required for ABWIK, it is clear the Legislature intended the attempted murder statute to

[2]Notably, when the Legislature enacted §16-3-29 in 2010, there were no cases interpreting previous statutes regarding attempted murder because they did not exist. Thus, the Legislature's only point of reference when writing §16-3-29 and abolishing ABWIK was the case law interpreting "malice aforethought," and holding ABWIK, which also required "malice aforethought," was a general intent crime.

incorporate the same intent required for ABWIK.[3] *See* William S. McAninch, W. Gaston Fairey, Lesley M. Coggiola, The Criminal Law of South Carolina 253-256 (6th ed. 2013) (common law ABWIK did not require specific intent to kill; attempted murder statute removed issues regarding the intent required by adopting definition mirroring the definition of murder, and limited the offense to actions that would be murder if the victim died). As interpreted by the Court, however, the attempted murder statute imposes a more culpable intent requirement than required for murder itself.

If a defendant grievously injures someone with malice aforethought, and the victim dies, the defendant can be convicted of murder and sentenced to prison for thirty years to life, **without** any proof the defendant actually intended to kill the victim. Under the Court's interpretation of §16-3-29, if the same defendant acts with the **same** malice aforethought against the same victim, and inflicts the same grievous injuries, but the victim survives, the defendant cannot be convicted of attempted murder unless the State proves the defendant acted with the specific intent to kill the victim. That is an absurd result the Legislature could not have intended. *See* State v. Sweat, 386 S.C. 339, 688 S.E.2d 569, 575 (2010) ("Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention.").

In support of its analysis, the Court noted the Legislature abolished ABWIK with no reference to codifying it as attempted murder, and legislatively changing all statutory references to ABWIK to attempted murder was merely to avoid any confusion regarding the effect of the

[3]Contrary to the Court's rationale, the Legislature's use of the term "with intent to kill" in the statute does not obviate an intent to codify the common law ABWIK offense with the same general intent requirement. On its face, common law ABWIK included "with intent to kill," but courts consistently held proof of a specific intent to kill was not required.

"new crime of attempted murder." This overlooks the fact the Legislature also abolished the common law offenses of assault and battery of a high and aggravated nature (ABHAN), simple assault and battery, assault of a high and aggravated nature, aggravated assault, and simple assault, but did not reference the "new" crimes of ABHAN, and first degree, second degree and third degree assault and battery created by S.C. Code Ann. §16-3-600 (Supp. 2014), which incorporated the elements of those common law offenses.

If the Legislature intended attempted murder to be a specific intent crime because common law attempt requires a specific intent to commit the underlying offense, the attempted murder statute is essentially superfluous. The 2010 Omnibus Crime Act did not repeal S.C. Code Ann. §16-1-80 (2003), which provides that a person committing the common law offense of attempt must be punished as for the principal offense, and all the case law regarding common law attempt prior to 2010 required the specific intent to commit the underlying offense. Thus, the Legislature could have simply abolished ABWIK, and amended S.C. Code Ann. §16-3-20 (2003) (punishment for murder) to include the punishment for attempted (based on §16-1-80) murder (up to thirty years in prison). The fact the Legislature enacted the attempted murder statute indicates it did not intend the common law attempt specific intent requirement to apply to attempted murder.[4]

The Court's conclusion also overlooks the fact the Legislature was not bound by the dicta in Sutton regarding common law attempted murder when enacting the attempted murder statute. Rather, it was free to use the common law ABWIK elements in defining attempted murder.

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[4]Notably, the Legislature did not enact any other specific "attempt" crimes in 2010, and no other such crimes exist in the South Carolina criminal code, which is further indication the Legislature intended attempted murder to be different from common law attempt.

In this case, the circuit court charged the jury:

> **An attempt includes a specific intent to do a particular criminal act along with that act falling short of the act intended.** The State must show more than mere preparation and intent. It must be some overt act committed and the effort to commit the crime. **Intent means intending the results which actually occurred not accidentally or involuntarily.** Intent may be shown by acts and conduct of the defendant in other circumstances from which you may naturally and reasonably infer intent. **Attempted murder: a person with the intent to kill attempts to kill another person with [m]alice [a]forethought either expressed or implied commits the offense of attempted murder.** Malice is a hatred, ill will, or hostility towards another person is (sic) the intentional doing of a wrongful act without just cause or excuse with an intent to inflict an injury under circumstances that the law will infer as evil intent.

(R., pp. 258-259) (emphasis added).[5] The court subsequently stated "a specific intent to kill is not an element of [a]ttempted murder, but it must be a general intent to commit serious bodily harm," and correctly defined intent as "intending the results which actually occur, not accidentally or involuntarily." (R., pp. 260-261).

Appellant objected to the charge that attempted murder is a general intent crime, and requested the jury be charged it is a specific intent crime. Appellant acknowledged the attempted murder statute included "malice," but suggested the jury be charged attempted murder requires intent to kill, without a definition of malice.[6] The circuit court reviewed the attempted murder statute language, and found the Legislature intended the same general intent requirement for

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[5]While the court also referenced the "attempt" charge in connection with attempted armed robbery, the attempted murder charge was immediately after the attempt charge. Further, the charge given is almost verbatim the attempted murder charge in the suggested General Session jury charges found on the South Carolina Judicial Department website. *See* http://www.sccourts.org/whatsnew/displayWhatsNew.cfm?indexId=896, at pages 83-86.

[6]Such a charge would have been an incorrect statement of the law because malice is an element of attempted murder under §16-3-29, and the definition of malice is part of the standard jury charge used in murder and ABWIK. *See* State v. Fennell, 340 S.C. 266, 531 S.E.2d 512, 517, n. 2 (2000) (definition of malice for murder and ABWIK cases); State v. Kinard, 373 S.C. 500, 646 S.E.2d 168, 170 (Ct. App. 2007) (same).

attempted murder as for murder. The court logically reasoned that making attempted murder a specific intent crime would create a higher intent requirement for an attempted murder than murder, which could not have been the legislative intent when enacting the attempted murder statute. (R., pp. 268-270).

The circuit court's jury charge as a whole was substantially correct, adequately covered the applicable law, and included the statutory elements of attempted murder, including the "intent to kill" and "malice aforethought" language. Accordingly, the State submits the Court should reconsider its holding the circuit court erred in charging attempted murder under §16-3-29 is a general intent offense, and reversing Appellant's attempted murder conviction. The Court's holding is contrary to the legislative intent of the attempted murder statute, and leads to a ludicrous result the Legislature could not have intended.

B. Hearsay

The Court also found error in admitting the testimony of a police officer (Officer Butler) regarding what she learned during a neighborhood canvass immediately after the shooting. At that time, there was a real possibility an active shooter was still in the area, and learning what neighbors heard and/or saw was vital as officers tried to locate him and process the crime scene. In addition to Mr. Brown's account of multiple shots fired, the information provided further reasons to seek additional shell casings in the area.

Contrary to the Court's analysis, State v. Kromah, 401 S.C. 340, 737 S.E.2d 490, 498 (2013), and State v. Weaver, 361 S.C. 73, 602 S.E.2d 786, 792-93 (Ct. App. 2004), *aff'd as modified*, 374 S.C. 313, 649 S.E.2d 479 (2007), support admission of Officer Butler's limited testimony. In Kromah, an investigator testified about the investigation and numerous people he

interviewed, including the minor victim, and did not directly relate any statements made by the people he interviewed, but stated he made the decision to arrest the defendant based on all the information he received. The Supreme Court held his testimony was properly admitted, even if it was a form of indirect hearsay, because it was part of what the investigator considered in reaching his decision, and he did not repeat what the victim (or any other person he interviewed) said. 498 S.E.2d at 498 (officer's testimony that all the evidence gathered at the scene, including interviews with witnesses, led to the defendant was not inadmissible hearsay; officer never repeated statements made to him by individuals at the crime scene, or testified to any specific statements identifying the defendant).

In Weaver, the investigator testified on re-direct, over objection, that all the witnesses he interview implicating the defendant as the sole gunman in the murder, and this Court affirmed, finding the testimony was not inadmissible hearsay. The Court determined the testimony did not recite any statements made to the investigator, it was offered to explain why the investigator did not do gunshot residue tests on others at the scene, and the investigator did not testify about any specific statements identifying the defendant. 602 S.E.2d at 792-793.

Similar to the police officers in Kromah and Weaver, Officer Butler merely testified about what her part of the investigation at the crime scene revealed.[7] She did not repeat any specific statements made by the people she interviewed, and contrary to the investigator's testimony in Weaver, nothing she related about what she learned during the canvass identified

[7]Officer Butler was not the lead investigator on the case, but she was the first officer on the scene, and gave the information she gathered during the canvass to the officers conducting the crime scene investigation.

Appellant in any way. Further, the information she received provided an additional reason for investigators to search the area for additional shell casings.

C. Harmless Error

1. Jury Charge

Even if §16-3-29 created a specific intent offense, the circuit court's general intent charge was harmless when the charge is viewed in its entirety. The jury charge included common law attempt as a specific intent to commit the underlying offense, and the statutory elements of attempted murder, including "intent to kill" and "malice aforethought." Regardless of the circuit court's subsequent charge that attempted murder did not require a specific intent to kill, but a general intent to commit serious bodily harm, the jury was clearly instructed it had to find Appellant acted with "malice aforethought."

As this Court found in Kinard, there is no discernible difference between malice aforethought and intent to kill, and "[s]ince the definition of malice aforethought [in ABWIK cases] encompasses general intent to kill, [it is] difficult to reconcile a manner in which one could find malice aforethought and yet not find general intent to kill." 646 S.E.2d at 170. Thus, if the jury found Appellant acted with malice aforethought as defined by the circuit court, it had to find he acted with the intent to kill required by §16-3-29.

2. Hearsay

The Court found the circuit court's error in admitting Officer Butler's testimony was not harmless, speculating that but for her testimony, the jury "could" have found Appellant fired only one shot, which was fired during a struggle with no intent to kill Mr. Brown. The Court further speculated "it is more difficult to imagine, however that [Appellant] could have chased

Brown down Carlton Street while shooting at him unless he specifically intended to kill Brown," which made Officer Butler's testimony regarding the number of shots fired "critical to the State's ability to prove [Appellant] continued to shoot at Brown after they exited the cab." The Court's analysis overlooks the totality of the evidence presented, and assumes the only way the jury could find attempted murder was to believe multiple shots were fired.

The Court opined the fact the gun went off when Mr. Brown pushed the gun away supports an inference Appellant did not intend to kill Mr. Brown. This overlooks the undisputed evidence Appellant held a loaded, cocked handgun to the back of Mr. Brown's head, and brought it back to his head the first two times Mr. Brown pushed it away, from which the jury could easily infer an intent to kill (specific or general), even if it believed Appellant only fired one shot. It also overlooks the undisputed fact Appellant lured Mr. Brown to an abandoned home in the middle of the night, and immediately pulled the gun on Mr. Brown when he got into the cab.

Significantly, the jury's question during deliberations belies the Court's focus on the number of shots fired. The jury asked whether pointing a gun at someone's head and not pulling the trigger would be attempted murder. This question indicates the jury was focused on the one shot fired inside the cab, and what led up to it, not the number of shots fired, and establishes the harmless nature of Officer Butler's testimony.

Further, the Court overlooked the fact Officer Butler's testimony regarding the number of shots fired that night was cumulative to Mr. Brown's testimony Appellant fired six or seven shots that night. (R., pp. 69-70). *See* State v. Brockmeyer, 406 S.C. 324, 751 S.E.2d 645, 662 (2013) ("'Improperly admitted hearsay which is merely cumulative to other evidence may be viewed as harmless.'") (*quoting* State v. Jennings, 394 S.C. 473, 716 S.E.2d 91, 93–94 [2011]).

In addition, it was clear Officer Butler was not present during the shooting, and her information about the number of shots fired was based solely on information for neighbors, and Appellant had ample opportunity to cross-examine her on that issue. *See* State v. Price, 368 S.C. 494, 629 S.E.2d 363, 366 (2006) (admission of hearsay testimony from investigator regarding defendant's association with a gang was harmless because it was cumulative to other evidence in the record, and defendant impeached the testimony by eliciting admission it was based solely on information from informants).

Based on the foregoing, Respondent respectfully requests that this Court grant this Petition, and reinstate Appellant's attempted murder conviction.

Respectfully submitted,

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General

SCARLETT A. WILSON
Solicitor, Ninth Circuit
101 Meeting Street, Suite 400
OT Wallace Building
Charleston, SC 29401
(843) 958-1900

By: Deborah R.J. Shupe
DEBORAH R.J. SHUPE

P.O. Box 11549
Columbia, SC 29211
(803) 734-3797

ATTORNEYS FOR RESPONDENT

Columbia, SC

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The State, Respondent,

v.

Raheem D. King, Appellant.

PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Respondent's Petition for Rehearing on Appellant by depositing copies in the United States mail, postage prepaid, addressed to:

Jenny L. Barwick, Esquire (1 copy)
650 E. Washington Street
Greenville, South Carolina 92601

Robert M. Dudek, Esquire (1 copy)
Appellate Defender
Post Office Box 11589
Columbia, South Carolina 29201

I further certify all parties required by Rule to be served have been served.

This 12th day of May, 2015.

Sally B. Ellison

SALLY B. ELLISON
Legal Assistant

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-4156

ALAN WILSON
ATTORNEY GENERAL

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Jenny L. Barwick, Esquire
650 E. Washington Street
Greenville, South Carolina 29601

Robert M. Dudek, Esquire
Appellate Defender
South Carolina Commission on Indigent Defense
PO Box 11589
Columbia, SC 29211-1589

Re: The State v. Rakeem D. King
Appellate Case No. 2012-213405

Dear Ms. Barwick and Mr. Dudek:

Enclosed herewith and served upon each of you is a copy of Respondent's Petition for Rehearing, with proof of service, in the above-referenced case.

Sincerely,

Deborah R.J. Shupe
Senior Assistant Deputy Attorney General

DRJS/sbe

Enclosures

cc: The Honorable Jenny A. Kitchings (original and 7 copies)