STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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S.C. Supreme Court

Appeal from Charleston County
Honorable J.C. Nicholson, Jr., Circuit Court Judge

Opinion No. 5313 (S.C. App. filed April 22, 2015)

The State — Petitioner,

v.

RaheemD. King, — Respondent.

APPENDIX

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v.

Rakeem D. King, Appellant.

Appellate Case No. 2012-213405

Appeal From Charleston County
J. C. Nicholson, Jr., Circuit Court Judge

Opinion No. 5313
Heard November 18, 2014 – Filed April 22, 2015

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Jenny L. Barwick, of Greenville, and Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Senior Assistant Deputy Attorney General Deborah R.J. Shupe, both of Columbia; and Solicitor Scarlett Anne Wilson, of Charleston, for Respondent.

FEW, C.J.: Rakeem D. King appeals his convictions for attempted murder, armed robbery, and possession of a firearm during the commission of a violent crime. We find the trial court erred by (1) charging the jury that a specific intent to kill is not an element of attempted murder and (2) allowing hearsay testimony as to the number of shots King fired. These errors require reversal of King's conviction for

attempted murder. However, we find the court's errors caused King no prejudice as to his convictions for armed robbery and possession of a firearm during the commission of a violent crime, and we affirm those convictions. We remand for a new trial for attempted murder.

I. Facts and Procedural History

On November 26, 2010 at 4:06 a.m., a customer called Yellow Cab requesting to be picked up at 1808 Carlton Street in North Charleston. The operator recorded the customer's telephone number from Yellow Cab's caller identification. At 4:11 a.m., Yellow Cab dispatched Dario Brown to that location. Brown was familiar with the Carlton Street area because his aunt had lived at 1809 Carlton—directly across the street from 1808 Carlton.

Brown testified he expected the customer to be his cousin because he lived in the area, and Brown had picked him up at the same location and time of night in the past. Brown saw a person coming from the yard of 1809 Carlton—his aunt's old house, which was abandoned at the time. When the person got into the back of the cab, Brown realized it was not his cousin. Brown turned around, looked the man in the face, and asked why he came from the abandoned house. Brown and the man began to argue about whether the man lived at 1809 Carlton.

Brown testified he drove toward the dead-end of Carlton Street so he could make a U-turn and take the man to his destination. Brown stated that before he reached the end of the street, "I heard his cocking a pistol. When I looked back he had raised the gun to my face and told me to give him the money." Brown handed the man "give away money." The man told Brown it was not enough, however, and pointed the gun at the back of Brown's head. Brown testified, "I made an attempt to move [the gun] with my elbow and my forearm trying to move it out of the way telling him he doesn't have to rob me." The man demanded more money. Brown opened the door to the cab and had "one foot on the ground and [his] other foot on the brake." Brown testified the gun was "[s]till placed at the back of my neck." With his hands over his head, Brown "gave him a look in his eye" and testified the man "looked as if he was going to shoot me." When Brown tried again "to move the gun away from [his] face," the man shot Brown in the arm.

Brown testified he jumped from the cab and ran toward the dead-end of Carlton Street. "I look[ed] back and I [saw] him in pursuit behind me"—"maybe two steps behind me." Brown explained he tried to jump over a fence at the end of the street, "but my arm gave out so I kind of flipped head first over [the fence] and landed on

my back." Brown testified, "When I hit the ground . . . he was . . . holding the gate with one hand and reaching over with his other hand with the gun in it." Brown testified the man fired another shot at him. Brown crawled behind a van, and the man fired more shots. Brown testified the man was "[s]till outside the gate saying that he is not going to shoot me anymore if I just give him the money." Brown stated, "I want to say in all I heard maybe six or seven shots but I can't be exact."

Brown eventually called the police from his cell phone. Officer Jennifer Butler testified she arrived at 4:21 a.m. and saw Brown's empty cab "that had run into a pole on the side of the road." Shortly thereafter, she made contact with Brown and called emergency medical services. She did not see anyone else. After Brown was taken to the hospital, Officer Butler and a detective walked door-to-door "in the immediate area . . . to speak with the people to see if they heard anything or happened to see anything." Over King's hearsay objection, Officer Butler testified she "learned there was more than one shot"—"[a]pproximately three or four shots" were fired.

Kelly Murphy—a crime scene technician—testified she found "a .25 auto shell casing" in the cab. Murphy also testified she and four other officers searched the Carlton Street area for two hours and found no other shell casings. Murphy conceded on cross-examination that "if there were shells there [I] needed to find them," and "if there were any of those anywhere [I] would have collected those."

Three days later, officers showed Brown a photographic lineup without a photograph of King, and Brown did not identify anyone from the lineup. Officers then traced the number recorded by the Yellow Cab operator and learned the phone was registered to a person who had given a falsified address. Using DMV records, officers located King, who had the same date of birth and a very similar address to those used to register the phone. Officers then prepared a second photographic lineup with a photograph of King, and Brown identified King as the man who shot and robbed him.

The jury found King guilty of attempted murder, armed robbery, and possession of a firearm during the commission of a violent crime. The trial court sentenced King to thirty years in prison for armed robbery and five years for possession of a firearm, with those sentences to run consecutive. For the attempted murder conviction, the trial court sentenced King to ten years in prison, concurrent with the other sentences.

II. Jury Charge

King argues the State must prove as an element of attempted murder that King acted with specific intent to kill Brown. We agree, and thus we find the trial court erred when it charged the jury, "A specific intent to kill is not an element of attempted murder but it must be a general intent to commit serious bodily harm."

Section 16-3-29 of the South Carolina Code (Supp. 2014) defines attempted murder: "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." Because the crime is defined by statute, we first look to the language of the statute to determine what the Legislature intended the elements of the crime to be—including the level of intent required. *See Guinyard v. State*, 260 S.C. 220, 227, 195 S.E.2d 392, 395 (1973) ("The power of the Legislature to declare what acts shall constitute crimes . . . includes the power to make the commission of the act criminal without regard to the intent or knowledge of the accused . . . . Therefore, whether knowledge and intent are necessary elements of a statutory crime must be determined from the language of the statute . . . ." (citing *State v. Manos*, 179 S.C. 45, 49-50, 183 S.E. 582, 584 (1936))).

If the language of a statute is "unambiguous and conveys a clear meaning," the court must determine the intent of the Legislature exclusively from that language, and other "rules of statutory interpretation are not needed." *State v. Elwell*, 403 S.C. 606, 612, 743 S.E.2d 802, 806 (2013) (internal punctuation omitted). The phrase "with intent to kill" in section 16-3-29 does not clearly indicate what level of intent the Legislature meant to require the State to prove because the word "intent" can mean anything from purpose to negligence. *See State v. Jefferies*, 316 S.C. 13, 18, 446 S.E.2d 427, 430 (1994) ("The required [intent] for a particular crime can be classified into a hierarchy of culpable states of mind in descending order of culpability, as purpose, knowledge, recklessness, and negligence."). Therefore, we must look beyond the words of the statute and use our rules of statutory construction to determine what the Legislature intended. *Cf. State v. Gaines*, 380 S.C. 23, 33, 667 S.E.2d 728, 733 (2008) ("Whenever possible, legislative intent should be found in the plain language of the statute itself. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed . . . .").

Section 16-3-29 was enacted in 2010 as part of the Omnibus Crime Reduction and Sentencing Reform Act. *See* Act No. 273, 2010 S.C. Acts 1947. Before 2010, our courts held attempt crimes require the State to prove the defendant had specific

intent to complete the attempted crime. *See, e.g., State v. Sutton*, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000) (stating "[a]ttempt is a specific intent crime" and "[t]he act constituting the attempt must be done with the intent to commit that particular crime" (first alteration in original) (quoting 21 Am. Jur. 2d *Criminal Law* § 176 (1998))); *State v. Thompson*, 374 S.C. 257, 262, 647 S.E.2d 702, 705 (Ct. App. 2007) ("A person is guilty of attempted armed robbery if the person has a specific intent to commit armed robbery."); *State v. Nesbitt*, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001) ("Attempt crimes are generally ones of specific intent such that the act constituting the attempt must be done with the intent to commit that particular crime. In the context of an 'attempt' crime, specific intent means that the defendant consciously intended the completion of acts comprising the [attempted] offense. In other words, the completion of such acts is the defendant's purpose." (citations omitted)).

In *Sutton*—decided before the Legislature enacted section 16-3-29—our supreme court faced the question "whether attempted murder [was] an offense in this state." 340 S.C. at 396, 532 S.E.2d at 285. To answer the question, the court compared the elements of assault and battery with intent to kill (ABWIK) and the elements of attempted murder. 340 S.C. at 396-98, 532 S.E.2d at 285-86. Though the court "decline[d] to recognize a separate offense of attempted murder," 340 S.C. at 398, 532 S.E.2d at 286, it stated, "Attempted murder would require the specific intent to kill," and "specific intent means that the defendant consciously intended the completion of acts comprising the [attempted] offense." 340 S.C. at 397, 532 S.E.2d at 285.

With this history of our courts requiring the State to prove specific intent as an element of attempt crimes, the Legislature chose to include the phrase "with intent to kill" in section 16-3-29. The Legislature is presumed to know how the terms and phrases it uses in a statute have been interpreted in the past. *See State v. Bridgers*, 329 S.C. 11, 14, 495 S.E.2d 196, 197-98 (1997) ("The General Assembly is presumed to be aware of the common law, . . . and where a statute uses a term that has a well-recognized meaning in the law, the presumption is that the General Assembly intended to use the term in that sense." (citation omitted)); *see also Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 570, 743 S.E.2d 778, 783 (2013) (stating "this Court must presume the legislature knew of and contemplated [existing legislation] in enacting [an act]"); *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012) (stating "Congress presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind" (citation and internal quotation marks omitted)); *Wigfall v.*

Tideland Utils., Inc., 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003) ("The Legislature is presumed to be aware of this Court's interpretation of its statutes."); *State v. McKnight*, 352 S.C. 635, 648, 576 S.E.2d 168, 175 (2003) ("There is a presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects."); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 320 (2012) ("[W]ords undefined in a statute are to be interpreted and applied according to their common-law meanings.").

The Legislature's use of the phrase "with intent to kill," considered in light of our courts' prior rulings that specific intent is required for attempt crimes—particularly the supreme court's statement in *Sutton*, "Attempted murder would require the specific intent to kill"[1]—indicates the Legislature intended to require the State to prove the specific intent to kill as an element of attempted murder. *See also Elwell*, 403 S.C. at 612, 743 S.E.2d at 806 (stating "penal statutes will be strictly construed against the state"); Jeffrey F. Ghent, Annotation, *What Constitutes Attempted Murder*, 54 A.L.R.3d 612, 622 (1973) (describing "the general rule that the . . . elements of . . . attempted murder [include] a specific intent to commit murder" (footnote omitted)).

The State argues, however, the Legislature intended to codify the common law crime of ABWIK when it enacted section 16-3-29, and because a specific intent to kill was not an element of ABWIK, the Legislature did not intend to require a specific intent to kill as an element of attempted murder. To support its argument that section 16-3-29 is a codification of ABWIK, the State points to the following language in the Omnibus Crime Reduction and Sentencing Reform Act: "The common law offenses of [ABWIK and others] are abolished," and, "[W]herever in the 1976 Code reference is made to [ABWIK], it means attempted murder as defined in Section 16-3-29." Act No. 273, 2010 S.C. Acts 1949-50.

We disagree with the State's argument. First, the statement that ABWIK is "abolished"—with no reference to the abolished crime being codified as attempted murder—is inconsistent with the State's position. Second, we find the Legislature included the statement "[ABWIK] . . . means attempted murder" to avoid any confusion as to how the new crime of attempted murder affects the operation of other statutes that contain the phrase "assault and battery with intent to kill." For example, subsection 17-30-70(A)(1) of the South Carolina Code (2014) authorizes

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[1] 340 S.C. at 397, 532 S.E.2d at 285.

a circuit judge to sign "an order authorizing or approving the interception of wire, oral, or electronic communications" for the investigation of certain crimes, including "assault and battery with intent to kill." The language relied on by the State simply makes clear that a judge may sign such an order for the investigation of attempted murder even though that crime is not specifically listed in the subsection. Similarly, section 17-19-40 of the South Carolina Code (2014) provides that in indictments for certain crimes such as murder and ABWIK, "when the crime is charged to have been committed with a deadly weapon . . . , there shall be a special count in the indictment for carrying concealed weapons." The language relied on by the State simply makes clear that section 17-19-40 also applies to attempted murder.

We find the Legislature intended to require the State to prove specific intent to commit murder as an element of attempted murder, and therefore the trial court erred by charging the jury that attempted murder is a general intent crime.

III. Hearsay Testimony

King argues the trial court erred in admitting Officer Butler's testimony that she "learned there was more than one shot" and "[a]pproximately three or four shots" were fired. We agree the testimony contained hearsay and should have been excluded.

After Officer Butler described going door-to-door to speak to neighbors, the assistant solicitor asked, "Did you make contact with anyone in the area?" She initially answered, "[W]e were able to speak to I believe it was two people and they were able to confirm . . . ." At that point, King objected on the basis of hearsay, and the trial court sustained the objection. The assistant solicitor rephrased the question, asking, "What did you learn as you [talked to those neighbors]?" King again objected, but the trial court overruled the objection, stating, "I'll -- she can testify to what she learned." Officer Butler answered, "I learned there was more than one shot"—"[a]pproximately three or four shots."

Officer Butler did not see or hear any shots, and thus she did not have personal knowledge of the number of shots fired. Rather, her knowledge was based exclusively on statements made to her by neighbors when she walked the area after Brown was taken to the hospital. By testifying to the number of shots fired, Officer Butler testified to the content of the neighbors' out-of-court statements. The State offered her testimony to prove the truth of the neighbors' statements. Therefore, her testimony as to the number of shots fired was hearsay. *See* Rule

801(c), SCRE ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.").

The State argues the testimony was not hearsay because, "Testimony of a police officer regarding [her] conclusions from an investigation is not hearsay." The State contends "Officer Butler merely testified about what her investigation . . . revealed," and, "She did not repeat any specific statements made by the people she interviewed." The State relies on *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013) and *State v. Weaver*, 361 S.C. 73, 602 S.E.2d 786 (Ct. App. 2004), *aff'd as modified*, 374 S.C. 313, 649 S.E.2d 479 (2007). Neither opinion supports the State's position.

In *Kromah*, two State witnesses "testif[ied] regarding the actions they took as a result of hearsay statements made by the three-year-old Child." 401 S.C. at 354, 737 S.E.2d at 497. Kromah asserted one witness "was permitted to testify that following her conversation with the child, she turned the information over to law enforcement," and the second witness—the arresting officer—"was permitted to testify that following his conversation with the child, he arrested petitioner the next day." *Id.* Kromah argued the trial court erred in admitting the officer's testimony because it revealed the content of the child's hearsay statements, and thus the live testimony itself "constituted inadmissible hearsay." 401 S.C. at 355, 737 S.E.2d at 498.

The supreme court found the testimony was not hearsay. *Id.* The court stated the officer "testified in detail about his investigative process and the numerous individuals he spoke to, including the Child, and that he made his decision to arrest Kromah based on *all* of this information." *Id.* The court found the officer's "testimony referencing his interview of the Child . . . was only one part of the information he recited in his investigative process leading up to his [decision] to arrest Kromah, and we find his testimony . . . did not repeat what the Child said to him." *Id.*

This case is distinguishable from *Kromah*. There, the officer had an entire "investigative process" on which to base his decision to make an arrest, and the child's out-of-court statements were "only one part of the information" the officer obtained in that investigation. *Id.* Because the officer might have relied on any part of his investigation in deciding to arrest Kromah, his testimony did not necessarily reveal the content of the child's statements. Officer Butler, however, had only the neighbors' out-of-court statements on which to rely as the basis of her

testimony. Therefore, her testimony was based exclusively on hearsay statements, and she necessarily revealed the content of those statements when she testified as to the number of shots fired.

The State also relies on *Weaver*, where an investigating officer testified, "All of the witnesses that I talked to led me to believe . . . [the defendant] was the only suspect that really was involved . . . ." 361 S.C. at 85, 602 S.E.2d at 792. Weaver argued the testimony was inadmissible because it "was based on what witnesses told" the officer, and thus was hearsay because it revealed the content of their out-of-court statements. *Id.* This court found the testimony was not hearsay for two reasons. First, we stated the officer "never repeated statements made to him." 361 S.C. at 86, 602 S.E.2d at 792. Second, we explained that the "testimony was in response to the questions asked on cross-examination as to why [the officer] did not perform a gunshot residue test on everyone at the crime scene." 361 S.C. at 86, 602 S.E.2d at 792-93. Therefore, the evidence was not offered to prove the truth of the matter asserted, but "was offered to explain this part of his investigation." 361 S.C. at 86, 602 S.E.2d at 793.

The *Weaver* court found the officer's live testimony was not hearsay because it was not offered to prove the truth of the out-of-court statements, and the *Kromah* court found the officer's live testimony was not hearsay because it did not necessarily reveal the content of out-of-court statements. But both courts recognized live testimony—such as Officer Butler's—can be hearsay under certain circumstances. Numerous other courts have reached the same conclusion. In *Weems v. State*, 501 S.E.2d 806 (Ga. 1998), for example, the Supreme Court of Georgia considered an objection to testimony from an "investigating detective [who] testified . . . that a police canvass of the area where the shooting took place resulted in police learning 'that a possible suspect was Fernando.'" 501 S.E.2d at 808. The court found the officer's live testimony was hearsay because the officer "testif[ied] . . . to what other persons related to [him] during the investigation."[2] *Id.*

Similarly, in *United States v. Baker*, 432 F.3d 1189 (11th Cir. 2005), the Eleventh Circuit considered an objection to testimony from an officer who "testified that his investigation . . . 'revealed' [the identity of] the gunman." 432 F.3d at 1206. The

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[2] *Weems* was decided under former Official Code of Georgia Annotated section 24-3-2. *Id.* Section 24-3-2 was part of the Georgia Code that defined hearsay. *See Momon v. State*, 294 S.E.2d 482, 484 (Ga. 1982) (explaining "Code [section] 38-302 [predecessor to section 24-3-2] should be understood not as an exception to the rule against hearsay but as an explanation of what is not hearsay").

court held the officer's live testimony was hearsay "even though [the testimony did] not explicitly paraphrase the words of others, [because] the only conceivable explanation for how [the officer] discovered this information is through listening to the statements of others." *Id.* (citing *United States v. Shiver*, 414 F.2d 461, 463 (5th Cir. 1969) (finding a detective's testimony that his investigation "revealed" a certain car was stolen was "pure hearsay, since he could not have known the facts of his own knowledge")).

The Tenth Circuit addressed a situation similar to ours in *United States v. Hinson*, 585 F.3d 1328 (10th Cir. 2009). A police detective "testified . . . she began investigating [another person] based on her suspicion that he was selling drugs." 585 F.3d at 1336. She explained the other person's "initial interview . . . confirm[ed her] earlier investigation that [his] source of supplies was a person by the name of Kevin," and "the 'Kevin' she had heard about earlier was Kevin Hinson, the defendant." *Id.* (first alteration in original). The Tenth Circuit found the detective's live testimony "violated the hearsay rules." *Id.* Like this court did in *Weaver*, the Tenth Circuit analyzed the purpose for which the government offered the evidence. 585 F.3d at 1336-37. The court noted, "Testimony which is not offered to prove the truth of an out-of-court statement, but is offered instead for *relevant* context or background, is not considered hearsay." 585 F.3d at 1336 (quoting *United States v. Becker*, 230 F.3d 1224, 1228 (10th Cir. 2000)). The court then found "the only purpose [the detective]'s hearsay testimony served was to [prove] . . . that Hinson was, in fact, [the] drug supplier." 585 F.3d at 1337. The court held, "That purpose is impermissible, and this evidence should not have been admitted." *Id.*

Here, the State had no purpose for offering Officer Butler's testimony except to prove the truth of the neighbors' statements that more than one shot was fired. The State did not argue at trial or on appeal that her testimony on this subject was necessary to explain her conduct or to give context to other testimony. *Cf. State v. Brown*, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994) (explaining "an out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken" and "these statements were not entered for their truth but rather to explain why the officers began their surveillance");[3] *see also Caprood v. State*, 338 S.C. 103, 111, 525 S.E.2d 514, 518 (2000) (stating

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[3] *Brown* was tried before we adopted the Rules of Evidence. *See* Rule 1103(b), SCRE ("These rules shall become effective September 3, 1995."). However, our definition of hearsay did not change with the adoption of the Rules. *See* Rule 801, SCRE, "Notes" (stating "[s]ubsection (c) is consistent with South Carolina law").

"officers' statements . . . were similar to those in *Brown* in that . . . the officers were explaining their actions . . . and the statements were not offered for their truth"). The State appears to concede it offered the testimony to prove the number of shots King fired by arguing "Officer Butler merely testified about what her investigation . . . revealed." We find Officer Butler's testimony was hearsay because it was based exclusively on what other witnesses told her—thereby necessarily revealing the content of out-of-court statements—and the State offered her testimony to prove the truth of those statements. Therefore, the trial court erred by admitting the testimony.

IV. Prejudice and Harmless Error

The State contends the trial court's errors did not prejudice King and were harmless beyond a reasonable doubt. *See State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) ("Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial." (citations and internal quotation marks omitted)); 398 S.C. at 389-90, 728 S.E.2d at 475 ("Engaging in this harmless error analysis, we . . . question . . . whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict."); *State v. Belcher*, 385 S.C. 597, 611, 685 S.E.2d 802, 809 (2009) ("Errors, including erroneous jury instructions, are subject to harmless error analysis."); *State v. Weston*, 367 S.C. 279, 288, 625 S.E.2d 641, 646 (2006) ("The improper admission of hearsay is reversible error only when the admission causes prejudice.").

We find the trial court's errors prejudiced King as to his attempted murder conviction, affected the result of his trial on that charge, and thus were not harmless beyond a reasonable doubt. One of the key issues at trial was whether King continued to shoot at Brown after they exited the cab. Brown testified "six or seven" shots were fired, all but one of which were fired outside the cab. However, there are specific facts in this case that could lead a jury to find King fired only one shot. In particular, Brown was dispatched to Carlton Street at 4:11 a.m. He testified it took him "[a] minute, two minutes" to get there. Officer Butler testified she arrived on the scene at 4:21 a.m. Officers searched the area for hours and found only one shell casing. Under these circumstances, it seems highly unlikely King could have robbed and shot Brown in the cab, chased him down Carlton Street while shooting at him, and then retrieved all the shell casings in the dark before Officer Butler arrived.

Brown's testimony that he repeatedly pushed King's gun away supports the inference that when King shot Brown in the cab, he did so in a struggle and did not intend to kill Brown. It is more difficult to imagine, however, that King could have chased Brown down Carlton Street while shooting at him unless he specifically intended to kill Brown. Thus, the State presented a stronger case for attempted murder from the shots fired during the chase. These circumstances made Officer Butler's testimony as to the number of shots fired critical to the State's ability to prove King continued to shoot at Brown after they exited the cab, and thus made her testimony important to the State's ability to prove King guilty of attempted murder.

Therefore, we find Officer Butler's inadmissible testimony as to the number of shots King fired affected the jury's verdict on attempted murder, and we cannot say that either the admission of the evidence or the erroneous jury charge are harmless beyond a reasonable doubt.

We find beyond a reasonable doubt, however, the trial court's errors did not prejudice King as to his armed robbery and possession of a firearm convictions because the errors did not affect the result of his trial on those charges. Obviously, the jury charge on attempted murder did not affect King's conviction for armed robbery. As to the armed robbery itself, there is no evidence contradicting Brown's testimony that King shot Brown *in* the cab during an attempt to rob him. Brown testified he handed "give away money" to King while they were still in the cab. Thus, King has not shown that either the jury charge on attempted murder or the admission of Officer Butler's testimony as to the number of shots fired had any effect on the armed robbery or the possession of a firearm charges. Because King failed to demonstrate prejudice from the trial court's errors as to those convictions, we affirm. *See State v. Black*, 400 S.C. 10, 16-17, 732 S.E.2d 880, 884 (2012) ("To warrant reversal [for the admission of evidence], an error must result in prejudice to the appealing party."); *Gaines*, 380 S.C. at 31, 667 S.E.2d at 732 ("To warrant reversal, a trial court's . . . jury charge must be both erroneous and prejudicial to the defendant.").

V. Other Issues On Appeal

We affirm as to King's remaining issues pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to the trial court's charge to the jury that "[m]alice may be inferred . . . when the deed is done with a deadly weapon": *see Belcher*, 385 S.C. at 612, 685 S.E.2d at 810 (holding "where evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon"); *id.* ("The permissive inference charge concerning the use of a deadly weapon remains a correct statement of the law where the only issue presented to the jury is whether the defendant has committed [attempted] murder . . . ."). We find no basis for reducing, mitigating, excusing, or justifying King's conduct. *See State v. Smith*, 391 S.C. 408, 415, 706 S.E.2d 12, 16 (2011) ("Because [the defendant] was acting unlawfully, he was not entitled to an accident charge.").

2. As to the trial court allowing the State to publish King's detention center phone call: *see* Rule 403, SCRE (stating "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice"); *State v. Gray*, 408 S.C. 601, 616, 759 S.E.2d 160, 168 (Ct. App. 2014) ("Prejudice that is 'unfair' is distinguished from the legitimate impact all evidence has on the outcome of a case."); *id.* ("Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." (citation omitted)); *State v. Dickerson*, 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011) ("The admission of evidence is within the [trial] court's discretion and will not be reversed on appeal absent an abuse of that discretion."); *State v. Lee*, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012) ("A trial court has particularly wide discretion in ruling on Rule 403 objections.").

3. As to the trial court's admission of King's cell phone records: *see State v. Robinson*, 410 S.C. 519, 527, 765 S.E.2d 564, 568 (2014) (stating "the Fourth Amendment is not triggered unless a person has an actual and reasonable expectation of privacy"); *Smith v. Maryland*, 442 U.S. 735, 743-44, 99 S. Ct. 2577, 2582, 61 L. Ed. 2d 220, 229 (1979) ("This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."); *United States v. Miller*, 425 U.S. 435, 443, 96 S. Ct. 1619, 1624, 48 L. Ed. 2d 71, 79 (1976) ("This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.").

VI. Conclusion

We find the trial court erred in charging the jury that a specific intent to kill is not an element of attempted murder and in admitting Officer Butler's hearsay testimony. Because we find these errors prejudiced King as to his conviction for attempted murder, we reverse and remand for a new trial. We affirm King's convictions for armed robbery and possession of a firearm.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

LOCKEMY, J., concurs.

WILLIAMS, J., concurs in result only.

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,

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May 12, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

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:

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

This 12th day of May, 2015.

Sally B. Ellison

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The South Carolina Court of Appeals

The State, Respondent,

v.

Raheem D. King, Appellant.

Appellate Case No. 2012-213405

ORDER

After careful consideration of Appellant's and Respondent's respective petitions for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, both petitions for rehearing are denied.

_____ C.J.

_____ J.

_____ J.

Columbia, South Carolina

cc:
Robert Michael Dudek, Esquire
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Jenny L. Barwick, Esquire
Deborah R.J. Shupe, Esquire

Scarlett Anne Wilson, Esquire
The Honorable J. C. Nicholson, Jr.