STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

MAY 26 2016

SC SUPREME COURT

Certiorari to Charleston County

J. C. Buddy Nicholson, Jr., Circuit Court Judge

THE STATE,

PETITIONER/RESPONDENT,

V.

RAHEEM D. KING,

RESPONDENT/PETITIONER

APPELLATE CASE NO. 2015-001278

BRIEF OF RESPONDENT

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR RESPONDENT-PETITIONER.

INDEX

INDEX i

TABLE OF AUTHORITIES iii

STATE'S QUESTIONS PRESENTED

1.

The Court of Appeals erred in finding the circuit court erroneously charged the jury attempted murder was a general intent crime, and the charge as given was not harmless error 1

2.

The Court of Appeals erred in finding a police officer's testimony regarding what she learned during a neighborhood canvass after the shooting was inadmissible hearsay, and the admission of her testimony was not harmless error 1

COUNTER QUESTIONS PRESENTED

1.

Did the Court of Appeals correctly hold the trial court erred in charging the jury that attempted murder is a general intent crime, since attempt crimes require a specific intent, and murder does not 1

2.

Did the Court of Appeals correctly hold the trial court erred in allowing a witness to testify as to the amount of shots that non-testifying witnesses allegedly heard, since this hearsay testimony was highly prejudicial 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

The fare 3

Robbery attempt 3

Cab driver flees 4

Officer Butler dispatched 5

Single shell casing found 5

No identification 5

Subsequent identification procedure 6

ARGUMENTS

1.

The Court of Appeals correctly held the trial court erred in charging the jury that attempted murder is a general intent crime, since attempt crimes require a specific intent, and murder does not 7

Attempted Murder is not a general intent crime, but a specific intent crime 7

The error was not harmless especially where a lesser-included offense was clearly in play 11

2.

The Court of Appeals correctly held the trial court erred in allowing a witness to testify as to the amount of shots non-testifying witnesses allegedly heard, since this hearsay testimony was highly prejudicial 15

Relevant Facts 15

Court of Appeals 16

Discussion 17

CONCLUSION 19

TABLE OF AUTHORITIES

Cases

State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) 14

Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000) 17

State v. Blassingame, 271 S.C. 44, 244 S.E.2d 528 (1978) 12

State v. Brown, 317 S.C. 55, 451 S.E.2d 888 (1994) 17

State v. Dinkins, 339 S.C. 597, 529 S.E.2d 557 (Ct. App. 2000) 18

State v. Heyward, 350 S.C. 153, 564 S.E.2d 379 (Ct. App. 2002) 13

State v. King, 412 S.C. 403, 772 S.E.2d 189 (2015) 2, 11

State v. Martin, 292 S.C. 437, 357 S.E.2d 21 (1987) 18

State v. Mouzon, 231 S.C. 655, 99 S.E.2d 672 (1957) 9, 10, 11

State v. Nesbitt, 346 S.C. 226, 550 S.E.2d 864 (Ct.App.2001) 10

State v. Reid, 393 S.C. 325, 713 S.E.2d 274 (2011) 9

State v. Sutton, 340 S.C. 393, 532 S.E.2d 283 (2000) 9, 10, 11

United States v. Baker, 432 F.3d 1189 (11th Cir.2005) 16

United States v. Becker, 230 F.3d 1224 (10th Cir.2000) 16

United States v. Hinson, 585 F.3d 1328 (10th Cir. 2009) 16

United States v. Shiver, 414 F.2d 461 (5th Cir.1969) 16

Weems v. State, 269 Ga. 577, 501 S.E.2d 806 (1998) 16

Statutes

S.C. Code Ann. § 16-23-490 2

S.C. Code Ann. § 16-3-10 9

S.C. Code Ann. § 16-3-29 .... 2, 8, 10

S.C. Code Ann. §16-3-620 8

Other Authorities

U.S. Const. amend. VI 18

Rules

Rule 801, SCRE 15

Rule 802, SCRE 15

STATE'S QUESTIONS PRESENTED

1.

The Court of Appeals erred in finding the circuit court erroneously charged the jury attempted murder was a general intent crime, and the charge as given was not harmless error.

2.

The Court of Appeals erred in finding a police officer's testimony regarding what she learned during a neighborhood canvass after the shooting was inadmissible hearsay, and the admission of her testimony was not harmless error.

COUNTER QUESTIONS PRESENTED

1.

Did the Court of Appeals correctly hold the trial court erred in charging the jury that attempted murder is a general intent crime, since attempt crimes require a specific intent, and murder does not?

2.

Did the Court of Appeals correctly hold the trial court erred in allowing a witness to testify as to the amount of shots that non-testifying witnesses allegedly heard, since this hearsay testimony was highly prejudicial?

STATEMENT OF THE CASE

On December 4, 2010, the state arrested Respondent-Petitioner Raheem King on the charges of attempted murder in violation of S.C. Code Ann. § 16-3-29, armed robbery in violation of S.C. Code Ann. § 16-11-330(A), and possession of a firearm during the commission of a violent crime in violation of S.C. Code Ann. § 16-23-490. The respondent was tried on November 5, 2012 through November 7, 2012 before the Honorable J.C. Nicholson, Jr. and a jury. The respondent was convicted of all three crimes.

Judge Nicholson sentenced Respondent King to thirty years on the armed robbery, five years consecutive on the possession of a firearm during the commission of a violent crime, and ten years concurrent on the attempted murder charge. The Court of Appeals affirmed respondent's convictions in part, and reversed in part, and remanded. See State v. King, 412 S.C. 403, 772 S.E.2d 189 (2015). App. 1-14.

Petitioner and Respondent both sought rehearing. Rehearing was denied for both parties. App. 15-28. Both sides sought certiorari from this Court on the losing issues. Certiorari was granted for both parties.

STATEMENT OF FACTS

The fare

During the early morning hours of November 26, 2010, Dario Brown, a driver for the Yellow Cab Company, responded to a dispatch call to 1808 [redacted] Street. R. p. 53, ll. 2-17. Cabdriver Brown testified that it took him between one and two minutes to arrive to that address. R. p. 58, ll. 1-12. When Brown arrived at the address, the fare came from the yard of the residence across the street, which is 1809 [redacted] Street. R. p. 60, ll. 8-11. Brown was familiar with the street. He used to live there. He aunt also lived on the street. R. p. 53, ll.18-24. After the fare got into the back seat and because of Brown's familiarity with the street, Brown began questioning the fare why he was coming out of the yard of an abandoned residence. R. p. 60, ll. 14-24; R. p. 61, ll. 13-17. The fare responded that it was his yard. R. p. 61, ll. 6-7. Because the street was a dead-end, Brown proceeded to make a U-turn in the road. R. p. 62, ll. 16-18; R. p. 63, ll. 8-11.

Robbery attempt

At this time, Brown heard a pistol cocking, turned around and saw a gun raised, and heard the fare demand money. R. p. 62, ll. 18-21. Brown gave the fare "give away money," which Brown described as a stack of ones that is carried by cab drivers just in case they are robbed. R. p. 64, ll. 4-10. Brown estimated that there were between fifteen and twenty ones. R. p. 97, l. 10. Brown had already made eighty-three dollars in fares earlier in his shift. R. p. 89, ll. 17-19.

When the fare demanded more money, Brown tried to move the gun away from the back of his head by moving the gun with his elbow and forearm, telling the fare "he doesn't have to rob me." R. p. 64, ll. 23-25; R. p. 65, ll. 2-4. Brown testified that he tried to move the gun three

different times and that his hands were up. R. p. 96, ll. 14-15; ll. 19-20. The gun went off and Brown was struck in the elbow, while his arm was back. R. p. 67, ll. 15-19. Brown described the gun as a .25 caliber automatic, with a clip that ejects shells upon firing. R. p. 95, l. 20-p. 96, l. 5.

Cab driver flees

Brown then got out of the cab, ran towards the dead-end, and hopped over a three or four foot chain-link fence, landing on his back, causing a fractured vertebra. R. p. 69, l. 15-p. 70, l. 5; R. p. 78, ll. 22-23; R. p. 102, ll. 1-2. Brown testified that while he was running towards the dead-end, the fare was about two steps behind him and fired another shot. R. p. 68, ll. 24-25; R. p. 101, ll. 20-22. Brown claimed after hopping the fence and while Brown was lying on his back, the fare fired another round. R. p. 70, ll. 10-14. Brown then claimed that he was able to crawl behind a van in the yard, at which point the fare tried to shoot Brown by firing six or seven rounds. R. p. 70, ll. 16-19. Brown estimated the van to be about five to ten feet away from the fence. R. p. 104, ll. 3-4. Brown testified that as he was behind the van, the fare said that "he is not going to shoot me anymore if I just give him the money." R. p. 73, ll. 9-13. Brown offered that the fare knew he went behind the van. R. p. 73, ll. 23-25. Brown then was able to use his cell phone to call law enforcement. R. p. 74, ll. 16-19. It took sixty seconds for law enforcement to arrive. R. p. 104, ll. 18-19. Brown had only been shot once, which was the shot to the arm he received while inside the cab. R. p. 79, ll. 1-3.

The Yellow Cab operator testified that the call came in requesting a cab at 4:06:06 a.m. and that the dispatcher dispatched the cab driver out at 4:11:46 a.m. R. p. 44, l. 5-p. 45, l. 12. The operator testified that the number that showed on his caller I.D. was XXX-4849. R. p. 45, 24-p. 46, l. 3.

Officer Butler dispatched

Jennifer Butler, on patrol with the North Charleston Police Department, was the first responding officer. R. p. 114, ll. 10-12; R. p. 120, ll. 3-4. Officer Butler was dispatched to the scene at approximately 4:20 a.m. and arrived at approximately 4:21 a.m. R. p. 110, ll. 12-17. Officer Butler did not see the shooter on scene, did not see anyone running away, and did not see anybody picking up shell casings off the ground. R. p. 113, ll. 1-7; R. p. 119, ll. 11-18. However, a shell casing was found inside the cab. R. p. 115, l. 25-p. 116, l. 7.

Single shell casing found

Kelly Murphy, the crime scene technician was called out to the scene at approximately 4:30 a.m. She had responded to over a thousand crimes scenes in five years. R. p. 123, ll. 8-11; R. p. 125, l. 19. Officer Murphy also testified that a shell casing, which was "just kind of laying [sic] there on the rear seat" was retrieved from the cab. R. p. 127, ll. 16-19; R. p. 137, ll. 14-15. She and her supervisor were able to follow a blood trail through a yard at the end of [redacted] Street. Despite a thorough search, which took a little over two hours, Officer Murphy and three to four other officers were unable to find any other shell casings than the one found in the cab. R. p. 130, ll. 6-9; R. p. 132, ll. 1-2; R. p. 139, ll. 7-13; R. p. 140, ll. 4-23.

No identification

On November 29, 2010 Brown was presented with a photo lineup, but was unable to identify any of the photographs as the fare. R. p. 169, ll. 14-16; R. p. 173, ll. 20-21.

Because no identification was made in the first photo lineup, North Charleston Police Department focused on investigating the number that called the Yellow Cab Company to request a dispatch to [redacted] Street on the November 26, 2010. R. p. 193, ll. 1-21. Detectives used internet sources to determine the number belonged to Cricket Wireless cell phone company. R.

p. 193, ll. 12-16. The detectives found the name of the subscriber was Kevin King, that the subscriber's date of birth was X/X/91, and that the address of the subscriber was listed as 3440 Elliott Street. R. p. 193, l. 19-p. 194, l. 3. The state, during the respondent's pretrial search warrant suppression hearing, explained to the trial court that detectives found out the above information when they went to Cricket Wireless store and asked for the information, which they obtained without a search warrant. R. p. 10, ll. 8-p. 11, l. 5.

The detectives were not able to find a Kevin King living at 3440 Elliott Street, but were able to research the name King with the date of birth provided by the cell phone company and came up with the name Raheem King, date of birth X/X/91. R. p. 194, l. 23-p. 195, l. 5. Detectives then looked up Raheem King's driver's license and discovered that his listed address was 3440 Osceola Street. R. p. 195, ll. 10-12.

Subsequent identification procedure

Based on this information, detectives compiled a photo line-up and presented it to Brown on December 3, 2010. R. p. 195, ll. 23-24; R. p. 13, ll. 11-14. Brown selected Raheem King as the person who robbed and shot him. R. p. 196, ll. 21-23. That photo-lineup identification completed the investigation and warrants were taken out on Raheem King the next day. R. p. 197, l. 25-p. 198, l. 2. *It is undisputed that the only evidence presented placing the respondent at the scene is Brown's photo identification made a week after the incident.* Although fingerprints and DNA were found at the scene, the fingerprints and DNA did not belong to the respondent. R. p. 133, l. 11-p. 135, l. 21.

ARGUMENT

1.

The Court of Appeals correctly held the trial court erred in charging the jury that attempted murder is a general intent crime, since attempt crimes require a specific intent, and murder does not.

Attempted Murder is not a general intent crime, but a specific intent crime.

During its closing, the state argued to the jury the following: "The Judge will tell you, *you do not have to intent to kill* in order to be guilty of this offense [of attempted murder]. You must have the requisite [m]alice. The Judge will tell you that; don't just take it from me." R. p. 238, ll. 19-22. (emphasis added). At this point, the defense objected based on the charge conference, and the objection was overruled. R. p. 238, l. 25-p. 239, l. 5.

The trial court instructed the jury that attempted murder occurs when "a person with the intent to kill attempts to kill another person with [m]alice [a]forethought[,] whether expressed or implied[,] commits the crime of Attempted Murder. R. p. 259, ll. 3-6. The trial court went on to instruct the jury that "*[a] specific intent to kill is not an element of Attempted Murder but it must be a general intent* to commit serious bodily harm." R. p. 260, ll. 22-24. (emphasis added). The trial court went even further in instructing that "[i]ntent may also be inferred when it is demonstrated the respondent voluntarily and willfully commits and act in a natural tendency which is to destroy another's life." R. p. 261, ll. 8-11. The defense took exception to the charge on attempted murder, stating that it was a specific intent crime. R. p. 268, ll. 10-13; ll.18-25. The trial court ruled that attempted murder is a general attempt crime requiring only a showing of malice. R. p. 270, ll. 9-21.

During deliberations, the jury came back with a question stating: "We'd like further clarification of the difference between attempted murder and assault and battery of a high and aggravated nature." R. p. 312. The hypotheticals presented by the jury in Court's Exhibit 2 clearly demonstrate that the jury struggled with general intent (malice) versus specific intent (intent to kill): "If someone points a gun at a person's head, but does not fire, does that fulfill the definition of attempted murder?" R. 312.

The Court explained to the jury that "[t]he basic difference between attempted murder and assault and battery of a high and aggravated nature is assault and battery of a high and aggravated nature *does not require malice*. Malice is a hatred, ill will or hostility towards another person and is *the intentional doing of a wrongful act without just cause or excuse* and with the intent to inflict injury or under circumstances that the law would infer as evil intent." R. p. 273, ll. 10-17. (emphasis added). The trial court had previously instructed the jury that "[a] person commits the offense of Assault and Battery of a High and Aggravated Nature if the person unlawfully injures another and great bodily injury to another person results when the act is accomplishe[d] by means likely to produce death or great bodily injury." R. p. 261, ll. 13-18. The defense objected to the trial court's answer to the jury and was again overruled. R. p. 274, l. 14-p. 275, l. 4. The charge book was in the possession of the jury during the entire length of deliberations. R. p. 275, ll. 5-7.

Attempted murder is defined by statute as: "A person who, ***with intent to kill***, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." S.C. Code Ann. § 16-3-29 (emphasis added). This statute became effective on June 2, 2010 and replaced the former common law statute of assault and battery with intent to kill, formerly S.C. Code Ann. §16-3-620 (see legislative history of S.C. Code Ann. § 16-3-29).

"To prove attempt, the state must prove that the respondent had **the specific intent** to commit the underlying offense, along with some overt act, beyond mere preparation, in furtherance of the intent." State v. Reid, 393 S.C. 325, 329, 713 S.E.2d 274, 276 (2011). (emphasis added). "In the context of an attempt crime, specific intent means the respondent intended to complete the acts comprising the underlying offense." Id. According to S.C. Code Ann. § 16-3-10, "'Murder' is the killing of any person with malice aforethought, either express or implied." It follows from the logic in State v. Reid, that in order to attempt to kill someone, one must intend the killing of that person. By contrast, murder does not require an actual intent to kill or injure. State v. Mouzon, 231 S.C. 655, 99 S.E.2d 672 (1957) (The actions of the defendant are so wanton and grossly negligent as to evidence a total indifference for human life – now commonly called Mouzon malice).

Also, when the trial court gave the charge for the **attempted armed robbery**, the court instructed the jury that "[a]n attempt includes a ***specific intent*** to do a particular criminal act along with the act falling short of the act intended." R. p. 258, ll. 19-21. (emphasis added). The trial court went further in explaining to the jury that "[i]ntent means intending the results which actually occurred not accidentally or involuntarily." R. p. 258, ll. 23-25. *By the trial court's own instruction on the law of attempt, attempt is a specific intent crime where the result (death) must be intended.*

In State v. Sutton, the defendant was convicted of assault and battery with intent to kill [ABIK], attempted murder, and possession of a firearm during the commission of a violent crime. 340 S.C. 393, 532 S.E.2d 283 (2000). This Court affirmed the Court of Appeals decision to vacate the defendant's attempted murder conviction, but expressly declined to follow the Court of Appeals reasoning that ABIK and attempted murder are the same offense. Sutton, 340

S.C. at 396, 532 S.E.2d at 285. This Court held that "*[a]ttempted murder would require the specific intent to kill and conduct towards that end.* ABIK requires an unlawful act of violence to the person of another with malice. Clearly, each offense has an element the other does not. However, simply because convictions for both offenses would not violate double jeopardy, we are not constrained to recognize the offense of attempted murder." This Court held that the "common law offense[] of ABIK . . . adequately cover[s] the conduct which attempted murder would include." Sutton, 340 S.C. at 397, 532 S.E.2d at 285 (emphasis added). The state's argument that because the offense of attempted murder was not an offense at the time, and only ABIK was, that the language in Sutton should be disregarded as dictum, and that it would be illogical for Mouzon malice to be possible for murder but not attempted murder, misses the point

Since the holding in Sutton, the South Carolina Legislature enacted the attempted murder statute. S.C. Code Ann. § 16-3-29 (*effective* June 2, 2010) which greatly reinforces the point this Court made in Sutton on a specific intent to kill being necessary. S.C. Code Ann. § 16-3-29 states that: "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**." (emphasis added). The legislature surely meant that an intent to kill was necessary for this attempt crime also.

Moreover, Sutton was not the only case relied on by the Court of Appeals on attempt crimes. The Court of Appeals noted:

> ("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.

State v. King, 412 S.C. 403, 409, 772 S.E.2d 189, 192 (2015). (emphasis added).

The state attempts to make too much of the fact that "the attempted murder statute imposes a **more** culpable intent requirement than required for murder itself." Brief of Petitioner at 12. (emphasis by petitioner). Even if it mattered, respondent fails to see anything illogical about the fact a person could be guilty of murder under the doctrine of Mouzon malice, and a statute for an attempt crime, here attempted murder, requiring a "specific intent" to kill.

In State v. Mouzon, 231 S.C. 655, 662, 99 S.E.2d 672, 675 (1957), the Court found the actions of the defendants in causing the death of the victim constituted "such recklessness and wantonness as to indicate a depravity of mind and disregard for human life, from which a jury could infer malice."

The error was not harmless especially where a lesser-included offense was clearly in play

Brown testified that he tried to move the gun away from the back of his head by moving the gun with his elbow and forearm three different times and that Brown's hands were up. R. p. 64, ll. 23-25; R. p. 96, ll. 14-15; ll. 19-20. The gun went off and Brown was struck in the elbow, while his arm was back. R. p. 67, ll. 15-19. The defense, in its closing argument, made a very probable argument that the fare was merely using the gun as a scare tactic to successfully receive money from Brown, that the fare never intended the gun to fire, and that the gun only fired when

Brown was trying to move the gun with his elbow and forearm. R. 246, ll. 10-24. If the gun was accidently fired, this certainly reduces or mitigates Brown being shot in the arm.

The jury could quite possibly have not believed Brown when he testified there were additional shots fired after he left the cab. Other than Brown's testimony, there is no admissible evidence that the fare fired more than the one time inside the cab (*see Issue two infra*, on improperly allowing a witness to testify as to the amount of shots non-testifying witnesses heard). In fact, it may be inferred from the jury's hypotheticals in its questions to the trial court **regarding the difference between attempted murder and assault and battery of a high and aggravated nature** that one or more jurors did not believe any other shot was fired other than the one inside the cab: "If someone points a gun at a person's head, but does not fire, does that fulfill the definition of attempted murder?" R. p. 312. See State v. Blassingame, 271 S.C. 44, 244 S.E.2d 528 (1978) (Jurors focusing critical attention on an issue). There was evidence presented that gun was only fired once. *Only one shell casing was discovered, despite a thorough search for more (two hour search with four to five trained officers searching).* R. p. 127, ll. 16-19; R. p. 140, ll. 4-23. The state tried to justify the absence of any shell casings by pointing out that it was dark outside during the search and the shell casings were small. R. p. 139, ll. 7-13; R. p. 140, ll. 4-23. However, Officer Murphy was able to locate a blood trail under the same conditions. R. p. 130, ll. 6-9.

On the issue of real logic, it would be illogical to think that the fare was able to pick up the additional seven to eight shell casings before law enforcement responded. The Yellow Cab Company's phone operator testified that the cab driver was not dispatched until 4:11:46 a.m., Brown testified that it took him between one and two minutes to drive to the location, the first responding officer, Officer Butler, testified that she was dispatched at approximately 4:20 a.m.

and arrived at approximately 4:21 a.m. R. p. 44, l. 25-p. 45, l. 12; R. p. 58, ll. 1-12; R. p. 110, ll. 12-17. Officer Butler testified that when she arrived, she did not see the shooter, did not see anyone running away, and did not see anyone picking up shell casings. R. 113, ll. 1-7; R. p. 119, ll. 11-18. The entire incident, from the time Brown arrived on scene to the time the first responding officer was dispatched, *took only seven minutes*. It would be unreasonable to believe that the fare was able to locate seven to eight shell casings in the dark within mere minutes. If the fare was going to attempt to hide the shell casings, he would have gone to the cab first, where the casing was "just kind of laying [sic] there on the rear seat." R. p. 137, l. 14. Therefore, there was evidence presented that Brown was only shot at once, and that that only shot could have been accidental. From this evidence and the jury question it is apparent they were focused on the incident inside the cab with a sound basis in the record to disregard Brown's version of the chase.

The trial court gave two lesser-included charges for assault and battery of a high and aggravated nature and also assault and battery 1st degree. R. p. 261, ll. 12-15; R. p. 262, ll. 1-14. When the defense requested that the trial court also charge on assault and battery 2nd degree, the trial court refused, reasoning that a gunshot wound is not moderate bodily injury. R. p. 269, ll. 5-10; R. p. 270, ll. 9-12. "A trial judge must charge a lesser-included offense if there is any evidence from which it can be inferred that the respondent committed the lesser included of the crime charged." State v. Heyward, 350 S.C. 153, 157, 564 S.E.2d 379, 381 (Ct. App. 2002). The trial court must have found evidence of the lesser-included crimes of assault and battery of a high and aggravated nature and assault and battery 1st degree, otherwise the lesser included offenses would not have been charged. Therefore, the trial court must have found evidence that could reduce, mitigate, excuse, or justify the crime of attempted murder in the jurors' minds. The

respondent in Belcher argued that when "a jury is asked to consider a lesser included offense . . . the permissive inference charge violates our common law . . . against charging juries on the facts." Belcher, 385 S.C. at 602, 685 S.E.2d at 804. This Court, in agreeing with Belcher's argument, stated that 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 respondent has committed murder (or assault and battery with intent to kill)." Belcher, 385 S.C. at 612, 685 S.E.2d at 810. Because lesser-included charges were given, the permissive inference malice charge should not have been given, as it was a charge on the facts.[1] For these reasons, the Court of Appeals holding that a specific intent to kill was required pursuant to the attempted murder statute should be affirmed.

[1] The Belcher error is addressed in Mr. King's brief at pp. 5-15 filed in this Court on April 27, 2016 following the grant of certiorari.

2.

The Court of Appeals correctly held the trial court erred in allowing a witness to testify as to the amount of shots non-testifying witnesses allegedly heard, since this hearsay testimony was highly prejudicial.

Relevant facts

When the solicitor asked Officer Jennifer Butler, the first responding officer, whether she made contact with anyone in the area during her "knock and talks", Officer Butler replied: "Yes sir, we were able to speak to I believe it was two people and they were able to confirm---." R. p. 115, ll. 4-5. At this point, the defense objected on hearsay grounds and the solicitor volunteered to rephrase the question, which the trial court permitted. R. p. 115, ll. 6-10. The solicitor then asked: "What did you learn as you did those knock and talks?" R. p. 115, ll. 11-12. Officer Butler began to answer, again drawing a defense objection based on hearsay. R. p. 115, l. 14. The trial court ruled that "she can testify to what she learned" and overruled the objection. R. p. 115, ll. 15-16. Officer Butler testified that she **learned that approximately three of four shots were fired**. R. p. 115, l. 22. (emphasis added).

The solicitor maximized the prejudice in closing argument, telling the jurors that "there were **other witnesses** at the scene ***that said*** they heard **three, four or more shots**." R. p. 234, ll. 19-20. (emphasis added). Again, the defense objected and was overruled. R. p. 234, ll. 21-25.

Under Rule 801(c) of the South Carolina Rules of Evidence, hearsay is defined as "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." Hearsay is not admissible except as provided by the rules of evidence, by statute, or by rule prescribed by the S.C. Supreme Court. Rule 802, SCRE.

Court of Appeals

The Court of Appeals held Officer Butler's testimony was prejudicial hearsay, and explained its well thought out reasoning:

> In Weems v. State, 269 Ga. 577, 501 S.E.2d 806 (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."
>
> 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 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"); also Caprood v. State, 338 S.C. 103, 111, 525 S.E.2d 514, 518 (2000) (stating "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.

App. 9-11. (emphasis added).

Discussion

The Court of Appeals correctly held that Officer Butler's testimony was prejudicial hearsay. The fact Officer Butler changed her wording from "we were able to speak to . . . two people and they were able to confirm" to "I learned" from the knock and talks, does not change the fact that what was admitted into evidence was inadmissible hearsay. The only way Officer Butler was able to "learn" from her knock and talks that there were allegedly three of four gunshots was from speaking with two people during the knock and talks who told her this

information. The statement was introduced to show that there was more than one gunshot, *which would confirm Brown's testimony and strengthen the state's argument for the existence of malice.* This intent to introduce statements made by non-testifying witnesses for the truth of the matter asserted was made clear in the state's closing argument: "**there were other witnesses at the scene *that said* they heard three, four or more shots**." R. p. 234, ll. 19-20. (emphasis added).

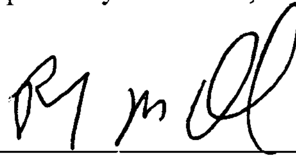
"The Sixth Amendment guarantees a criminal respondent the right "'to be confronted with the witnesses against him.' The right of confrontation 'is essential to a fair trial in that it promotes reliability in criminal trials and insures that convictions will not result from testimony of individuals who cannot be challenged at trial.'" State v. Dinkins, 339 S.C. 597, 601, 529 S.E.2d 557, 559 (Ct. App. 2000) (citing U.S. Const. amend. VI; State v. Martin, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987)). By introducing this hearsay evidence, the respondent's right to confrontation has been violated.

The well-reasoned opinion of the Court of Appeals on this issue was correct, and it should be affirmed.

CONCLUSION

By reason of the foregoing arguments, Respondent King's convictions should be reversed, and this case remanded to the Charleston County Court of General Sessions for a new trial on all of the charges. The findings of reversible error by the Court of Appeals regarding the two issues addressed in this brief should be affirmed.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR RESPONDENT-PETITIONER.

This 26th day of May, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

J. C. Buddy Nicholson, Jr., Circuit Court Judge

THE STATE,

PETITIONER/RESPONDENT,

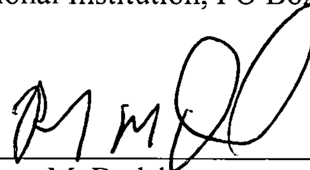
V.

RAHEEM D. KING,

RESPONDENT/PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of respondent, in this case has been served on Deborah R.J. Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Raheem D. King, #353110, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 26th day of May, 2016.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR RESPONDENT-PETITIONER

SWORN TO BEFORE ME this 26th day of May, 2016.

______________________(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.