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Robert M. Dudek, Chief Appellate Defender
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June 5, 2018

VIA EMAIL and HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, S.C. 29201
jkitchings@sccourts.org

RECEIVED
JUN 05 2018
SC Court of Appeals

Re: State v. Michael Juan Smith, Appellate Case No. 2015-001905

Dear Ms. Kitchings:

The above-referenced case is scheduled for oral argument on Thursday, June 7, 2018, at noon. This letter is pursuant to Rule 208(b)(7) SCACR, and counsel would respectfully draw the Court's attention to the following additional authority bearing on the issues before the Court. Relating to Issue 1 (the application of the felony murder rule) and Issue 2 (the element of specific intent), counsel submits State v. Robinson, 883 P.2d 764 (Kan. 1994). Relating to Issue 2, counsel submits State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017); State v. Brady, 903 A.2d 870 (Md. 2006); and Cockrell v. State, 890 So.2d 174 (Ala. 2004). Copies of these cases are attached.

By copy of this letter, I am notifying opposing counsel, William M. Blicht, Jr., of this submission of additional authority.

Sincerely,

David Alexander
Appellate Defender

- c. Client
William M. Blicht, Jr., Esq. (via email and hand delivery)

256 Kan. 133
Supreme Court of Kansas.

STATE of Kansas, Appellee,
v.
Adrian ROBINSON, Appellant.

No. 70,111.
|
Oct. 28, 1994.

Synopsis

Defendant was convicted of aggravated robbery, and attempted first-degree murder after jury trial in the Wyandotte District Court, Philip L. Sieve, J., and defendant appealed. The Supreme Court, Six, J., held that: (1) crime of attempted felony murder is not recognized; (2) fact that victim survived shooting during robbery barred application of the felony-murder doctrine; and (3) attempted felony-murder instruction erroneously diminished burden of proof required for attempted first-degree murder.

Reversed and remanded.

West Headnotes (10)

[1] **Criminal Law**

⚡ Necessity of Objections in General

Clearly erroneous standard of review applies where trial court did not have an opportunity to rule on the objections advanced on appeal. K.S.A. 22-3414(3).

2 Cases that cite this headnote

[2] **Homicide**

⚡ Attempt

Kansas does not recognize crime of attempted felony murder.

8 Cases that cite this headnote

[3] **Homicide**

⚡ Attempt

Fact that victim of robbery survived shooting barred application of the felony-murder doctrine in defendant's attempted murder trial.

2 Cases that cite this headnote

[4] **Homicide**

⚡ Attempt

Requisite specific intent necessary to prove attempted murder is not satisfied by trying to prove attempted felony murder, as felony murder is not a specific intent crime.

5 Cases that cite this headnote

[5] **Homicide**

⚡ Attempt

Attempted felony-murder instruction erroneously diminished the burden of proof required for attempted first-degree murder, where jury was instructed that it could convict defendant of attempted first-degree murder if it found shooting was intentional, deliberate, premeditated, and with intent to kill, or if shooting occurred during commission or attempted commission of an aggravated robbery; to establish crime of attempted first-degree murder, state was required to prove specific intent, but under crime of felony murder, defendant could have a less culpable mental state, short of specific intent to kill, and thus, commission of felony could not supply requisite intent for attempted first-degree murder.

13 Cases that cite this headnote

[6] **Constitutional Law**

⚡ Degree of Proof; Reasonable Doubt

Due process requires the state to prove every element of a crime beyond a reasonable doubt. U.S.C.A. Const. Amend. 14.

3 Cases that cite this headnote

[7] **Criminal Law**

⚡ Attempts

The essential elements of an attempt are the intent to commit the crime, an overt act toward the perpetration of the crime, and a failure to consummate the crime. K.S.A. 21-3301.

3 Cases that cite this headnote

[8] **Criminal Law**

⚙ Attempts

Under attempt statute, state, to convict a defendant of a crime, must show the commission of an overt act plus the actual intent to commit that particular crime. K.S.A. 21-3301.

4 Cases that cite this headnote

[9] **Criminal Law**

⚙ Attempts

An attempted crime requires specific intent, as opposed to general intent.

2 Cases that cite this headnote

[10] **Homicide**

⚙ Attempt

Transferred intent rationale behind the felony-murder rule does not apply when the murder is not completed.

Cases that cite this headnote

****765 *133 Syllabus by the Court**

1. Kansas does not recognize the crime of attempted felony murder. The application of the felony-murder doctrine in Kansas always has depended on the existence of an actual homicide. Under the facts of this case, the attempted felony-murder instruction unconstitutionally diminished the State's burden of proof as to the elements of attempted first-degree murder.

2. The transferred intent rationale behind the felony-murder rule does not apply when the murder is not completed.

3. Attempted murder is a specific intent crime. Felony murder is not a specific intent crime. The requisite specific intent necessary for attempted murder is not satisfied by trying to prove attempted felony murder.

Attorneys and Law Firms

B. Kay Huff, Sp. Appellate Defender, Lawrence, argued the cause, and Jessica R. Kunen, Chief Appellate Defender, Topeka, was with her on the brief for appellant.

Michael Grosko, Asst. Dist. Atty., argued the cause, and Nick A. Tomasic, Dist. Atty., and Robert T. Stephan, Atty. Gen., were with him on the brief for appellee.

Opinion

****766** SIX, Justice:

This criminal case addresses whether Kansas recognizes the crime of attempted felony murder. Adrian Robinson was convicted of aggravated robbery (K.S.A. 21-3427) and attempted first-degree murder (K.S.A.1992 Supp. 21-3301 and K.S.A.1992 Supp. 21-3401). Our jurisdiction is under K.S.A.1992 Supp. 22-3601(b)(1) (a direct appeal upon imposition of a maximum sentence of life imprisonment).

We reverse the attempted first-degree murder conviction and remand for a new trial on this charge. Robinson does not question his conviction of aggravated robbery.

***134 Facts**

Officer Conchola found Yvonne Slater, the victim, on the living room couch in Slater's apartment. She had been shot several times. Slater told the officer that two men confronted her in the hallway, demanding her purse. She did not give them the purse, and they shot her. At trial, Slater identified Robinson as the shooter.

A surgeon at the Kansas University Medical Center operated on Slater the evening of the shooting. He testified that upon checking for bullet damage, the surgical team discovered that none of the bullets had tracked in through the subcutaneous fat. Slater had no internal injuries. During redirect examination, the prosecutor asked, "Doctor, would it be fair to say that Yvonne

Slater did not suffer even more serious injury or possibly death because she's pretty overweight and the underlying tissue absorbed the bullets?" The doctor replied, "That's correct."

Attempted Felony Murder

[1] "The standard of review applied to jury instruction error requires an objection before the jury retires, stating distinctly the matter objected to and the grounds for the objection, unless the instruction or the failure to give the instruction is clearly erroneous. K.S.A. 22-3414(3)." *State v. Thomas*, 252 Kan. 564, Syl. ¶ 6, 847 P.2d 1219 (1993). Defense counsel objected to the attempted murder instruction. The stated objection, however, did not set forth the specific grounds advanced on appeal: (1) that the crime of attempted felony murder does not exist, and (2) that the instruction diminished the State's burden of proof. Instead, defense counsel said the instruction would confuse the jury and later argued that the attempted premeditated murder instruction more precisely fit the facts. Because the trial court did not have an opportunity to rule on the objections advanced on appeal, the clearly erroneous standard of review applies.

The trial court instructed the jury concerning alternate theories of attempted premeditated first-degree murder and attempted felony murder. Robinson and a codefendant, Mario Spivey, were tried together.

**135 The State's Contention*

Robinson robbed Slater at gunpoint. He and Spivey took Slater's property, and one of them then said, "Pop the bitch." She was shot several times. These facts are reflected in the information, which alleged the overt act in support of the attempt charge. ("Robinson did knowingly and willfully commit an overt act, to-wit: after robbing one Yvonne Slater, they shot her four times in the abdomen and once in the arm, toward the perpetration of the crime of First Degree Murder, as defined by K.S.A. 21-3401, with the intent to commit said crime, but failed or was prevented or intercepted in the execution of said crime.") The information charged Robinson specifically with shooting Slater after the robbery.

The jury was instructed that it could convict Robinson of attempted first-degree murder if it found the shooting was intentional, deliberate, premeditated, and with intent to kill, or if the shooting occurred during the commission or attempted commission of an aggravated robbery. In closing argument, the State explicitly directed the jury's attention to the felony-murder aspect of the murder instruction. The jury returned a general verdict of guilty to attempted first-degree murder, leaving no indication whether it relied on the premeditation or felony-murder theory.

***767 Discussion*

We held in *State v. McCowan*, 226 Kan. 752, 759, 602 P.2d 1363 (1979), *cert. denied* 449 U.S. 844, 101 S.Ct. 127, 66 L.Ed.2d 53 (1980): "[P]remeditated murder and felony murder are not separate or different offenses. The statute merely provides alternate methods of proving the deliberation and premeditation required for a conviction of first degree murder under K.S.A. 21-3401." "

The State acknowledges that no Kansas cases have directly addressed the question of whether attempted first-degree felony murder is a crime. It observes, however, that a similar factual situation occurred in *State v. Turbeville*, 235 Kan. 993, 686 P.2d 138 (1984), a case in which a person was shot during an attempted robbery. The defendant in *Turbeville* was convicted of attempted first-degree murder.

**136* The State's reliance on *Turbeville* is misplaced. The issue in *Turbeville* was whether attempted murder and aggravated battery convictions were multiplicitous. We held that they were and set aside *Turbeville*'s conviction and sentence for aggravated battery. 235 Kan. at 995, 686 P.2d 138.

[2] [3] Kansas does not recognize the crime of attempted felony murder. The application of the felony-murder doctrine in Kansas always has depended on the existence of an actual homicide. The fact that Slater survived the shooting bars application of the felony-murder doctrine. See, e.g., *State v. Underwood*, 228 Kan. 294, 302, 615 P.2d 153 (1980) ("[T]he elements of malice, deliberation and premeditation which are required for murder in the first degree are deemed to be supplied by felonious conduct alone if a homicide results.").

[4] The State has cited no authority to support its claim that attempted felony murder is a crime. We have recognized that attempted murder is a specific intent crime. See *State v. Falke*, 237 Kan. 668, 683, 703 P.2d 1362 (1985). On the contrary, felony murder is not a specific intent crime. *State v. Walker*, 252 Kan. 279, 298, 845 P.2d 1 (1993). We held in *State v. Lucas*, 243 Kan. 462, Syl. ¶¶ 1 and 2, 759 P.2d 90 (1988), *aff'd on rehearing* 244 Kan. 193, 767 P.2d 1308 (1989), that the purpose of the felony-murder doctrine is to deter those engaged in felonies from killing negligently or accidentally and the doctrine should not be extended beyond the rational function which it was designed to serve. *Lucas* implicitly recognized that a homicide must occur for the felony-murder rule to apply. We have declined to extend the doctrine beyond its legislative rationale of deterring foreseeable deaths that occur during an inherently dangerous felony. The State cannot invoke the felony-murder doctrine and transferred intent without first proving a homicide.

[5] [6] [7] [8] [9] Moreover, the attempted felony-murder instruction erroneously diminished the burden of proof required for attempted first-degree murder. Due process requires the State to prove every element of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072-73, 25 L.Ed.2d 368 (1970). The attempted felony-murder instruction given in the instant case diminished *137 the State's burden to prove specific intent to kill. K.S.A.1992 Supp. 21-3301 establishes three essential elements for an attempt: (1) the intent to commit the crime; (2) an overt act toward the perpetration of the crime; and (3) a failure to consummate it. The State, to convict a defendant of a crime, must show the commission of an overt act plus the actual intent to commit that particular crime. *State v. Garner*, 237 Kan. 227, 238, 699 P.2d 468 (1985). Consequently, an attempted crime requires specific intent, as opposed to general intent. See *State v. William*, 248 Kan. 389, 401, 807 P.2d 1292, *cert. denied* 502 U.S. 837, 112 S.Ct. 120, 116 L.Ed.2d 89 (1991) ("One element of an attempt is intent to commit the crime." "It is the intent of the accused to attempt to commit the crime that is at issue.").

To establish the crime of attempted first-degree murder, the State would have to prove specific intent to commit first-degree murder. By contrast, under the crime of felony murder a defendant can have a less culpable mental state, short of specific intent to kill (*i.e.*, recklessness, negligence, or an accident). Felony murder in Kansas depends upon

transferred intent to supply the malice, deliberation, and premeditation elements. **768 One cannot intend to commit an accidental, negligent, or reckless homicide. The specific intent to commit a crime is a more culpable mental state than negligence or recklessness. Once the State alleged that Robinson attempted first-degree murder, it assumed the burden of proving that he specifically intended to cause the victim's death. The State sought to avoid this burden of proof by arguing that the commission of the underlying felony supplied the requisite intent.

[10] We have relied on the transferred intent rationale as a basis for the propriety of recognizing the crime of felony murder. See *State v. Wilson*, 220 Kan. 341, Syl. ¶ 2, 552 P.2d 931 (1976), *overruled on other grounds* 226 Kan. 308, 597 P.2d 1108 (1979). The transferred intent rationale does not apply, however, when the murder is not completed.

Other jurisdictions that have addressed the question reject the notion that attempted felony murder is a crime. *People v. Viser*, 62 Ill.2d 568, 581, 343 N.E.2d 903 (1975); *138 *Head v. State*, 443 N.E.2d 44 (Ind.1982); *People v. Burress*, 122 App.Div.2d 588, 505 N.Y.S.2d 272, *lv. to appeal denied* 68 N.Y.2d 810, 507 N.Y.S.2d 1027, 499 N.E.2d 876 (1986); *State v. Bell*, 785 P.2d 390 (Utah 1989). See *State v. Huff*, 469 A.2d 1251 (Me.1984); *Keys v. State*, 104 Nev. 736, 740, 766 P.2d 270 (1988).

The instruction and general verdict form did not require the jury to unanimously find that Robinson intended to commit premeditated murder. The jury returned a general verdict of attempted first-degree murder. In *Stromberg v. California*, 283 U.S. 359, 367-68, 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931), the Supreme Court recognized that a general verdict of guilt could not stand if the jury relied on two or more independent grounds, one of which was insufficient. See *Zant v. Stephens*, 462 U.S. 862, 881, 103 S.Ct. 2733, 2744-45, 77 L.Ed.2d 235 (1983). See also *State v. Garcia*, 243 Kan. 662, 670-71, 673, 763 P.2d 585 (1988) (reversing conviction where one of two alternate theories advanced by the State was not supported by sufficient evidence).

The general verdict form makes it impossible to tell on which ground the jury relied. A legally erroneous ground for the conviction may have been the basis for the jury's finding of guilt. The attempted felony-murder instruction was clearly erroneous. The conviction and sentence for attempted first-degree murder are set aside.

Robinson briefed the contention that the jury panel was not properly put under oath before voir dire. During oral argument, counsel for Robinson withdrew the jury panel issue.

Reversed and remanded with directions to grant Robinson a new trial on the charge of attempted first-degree murder.

All Citations

256 Kan. 133, 883 P.2d 764

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422 S.C. 47
Supreme Court of South Carolina.

The STATE, Petitioner/Respondent,
v.
Raheem D. KING, Respondent/Petitioner.

Appellate Case No. 2015-001278

Opinion No. 27744

Heard September 7, 2016

Filed October 25, 2017

Rehearing Denied March 9, 2018

Synopsis

Background: Defendant was convicted in the Circuit Court, Charleston County, J. C. Nicholson, Jr., J., of attempted murder, armed robbery, and possession of firearm during commission of violent crime. Defendant appealed. The Court of Appeals, 412 S.C. 403, 772 S.E.2d 189, reversed conviction for attempted murder, but otherwise affirmed, and remanded. Defendant and State filed cross-petitions for certiorari review.

Holdings: The Supreme Court, Beatty, C.J., held that:

[1] attempted murder required proof that defendant had specific intent to kill;

[2] error in instruction that specific intent to kill was not element of attempted murder could not be deemed harmless;

[3] officer's testimony that, in course of canvassing neighborhood where victim was shot, she learned from two people that multiple shots were fired, was inadmissible hearsay;

[4] trial court abused its discretion in admitting entirety of 15-minute recording of telephone call that defendant made while incarcerated; and

[5] error in admission of recording of telephone call was harmless.

Judgment of Court of Appeals affirmed as modified.

Kittredge, J., specially concurred, with opinion.

Pleicones, J., concurred in result only.

West Headnotes (9)

[1] Criminal Law

➡ Scope of Inquiry

Criminal Law

➡ Questions of Fact and Findings

In criminal cases, the appellate court sits to review errors of law only and is bound by factual findings of the trial court unless an abuse of discretion is shown.

Cases that cite this headnote

[2] Criminal Law

➡ Discretion of Lower Court

An "abuse of discretion" occurs when the trial court's decision is unsupported by the evidence or controlled by an error of law.

Cases that cite this headnote

[3] Homicide

➡ Intent or mens rea

Attempted murder required proof that defendant had specific intent to kill. S.C. Code Ann. § 16-3-29.

1 Cases that cite this headnote

[4] Criminal Law

➡ Elements and incidents of offense; definitions

Trial court's error in charging jury that specific intent to kill was not element of attempted murder could not be deemed harmless. S.C. Code Ann. § 16-3-29.

1 Cases that cite this headnote

[5] **Criminal Law**

⚡ Particular determinations, hearsay inadmissible

Police officer's testimony that, in course of canvassing neighborhood where victim was shot, as part of investigation, she talked to two people and learned that "there were approximately three or four shots fired" was inadmissible hearsay, in trial for attempted murder, armed robbery, and possession of firearm during commission of violent crime, where testimony was based exclusively on what persons told her during neighborhood canvas and it was offered to prove truth of matter asserted that defendant fired more than one gunshot. S.C. R. Evid. 801(c), 802.

Cases that cite this headnote

[6] **Criminal Law**

⚡ Hearsay in General

Criminal Law

⚡ Written statements

"Hearsay" is a statement, which may be written, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted, and it is not admissible unless there is an applicable exception. S.C. R. Evid. 801(c), 802.

Cases that cite this headnote

[7] **Criminal Law**

⚡ Evidence as to fact of making declarations and not as to subject-matter

While investigative information gathered by a police officer may be couched in terms of explaining an officer's conduct during an investigation, it may not be used to offer the substance of an out-of-court statement that would otherwise violate the rules against hearsay. S.C. R. Evid. 801(c), 802.

Cases that cite this headnote

[8] **Criminal Law**

⚡ Evidence calculated to create prejudice against or sympathy for accused

Criminal Law

⚡ Prejudicial effect and probative value

Trial court abused its discretion in admitting entirety of 15-minute recording of telephone call that defendant made while incarcerated, which was offered to prove defendant's ownership of cell phone used to call for taxi, in trial for attempted murder of taxi driver, armed robbery, and possession of firearm during commission of violent crime; trial court had adamantly refused to listen to recording before ruling on its admissibility, and therefore did not consider whether probative value of entirety of recording was outweighed by danger of unfair prejudice, it did not require State to produce transcript for defendant's review, recording was not only evidence available to prove defendant's ownership of cell phone, and limited probative value of call was substantially outweighed by danger of unfair prejudice, given that it was laced with profanity, racial slurs, and references to prior bad acts. S.C. R. Evid. 403.

Cases that cite this headnote

[9] **Criminal Law**

⚡ Arrest and identification, evidence relating to

Error in admission of 15-minute recording of telephone call that defendant made while incarcerated, which was offered to prove defendant's ownership of cell phone used to call for taxi, was harmless beyond reasonable doubt, in trial for attempted murder, armed robbery, and possession of firearm during commission of violent felony, where recording was very difficult to understand, and therefore, it was not clear whether jury in fact was influenced by it, and with respect to charges for armed robbery and firearm offense, victim had positively identified defendant as suspect and testified in detail that he gave defendant money in

response to defendant pointing gun at his head.

Cases that cite this headnote

****19 ON WRIT OF CERTIORARI TO THE COURT OF APPEALS**

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

Attorneys and Law Firms

Attorney General Alan Wilson and Senior Assistant Deputy Attorney General Deborah R. J. Shupe, both of Columbia; Solicitor Scarlett A. Wilson, of Charleston, all for Petitioner/Respondent.

Chief Appellate Defender Robert M. Dudek, of Columbia, for Respondent/Petitioner.

Opinion

CHIEF JUSTICE BEATTY:

***50** A jury convicted Raheem D. King of the attempted murder¹ and armed robbery of a Charleston cab driver and the related charge of possession of a firearm during the commission of a violent crime. The trial judge sentenced King to an aggregate term of thirty-five years' imprisonment for armed robbery and the weapon charge, and a concurrent term of ten years' imprisonment for attempted murder.

On appeal, the Court of Appeals affirmed King's convictions for armed robbery and possession of a firearm during the commission of a violent crime, but reversed and remanded King's conviction for attempted murder. *State v. King*, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015). In so ruling, the Court of Appeals found the trial judge: (1) erred in charging 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"; (2) erred in admitting the hearsay testimony of an investigating officer; (3) correctly charged the jury the permissive inference of malice from the use of a deadly weapon; and (4) did not abuse his discretion in allowing the State to publish to the jury a recording of a phone call made by King while he was incarcerated. The Court of Appeals concluded the trial judge's errors warranted reversal of

King's ****20** conviction for attempted murder, but found no prejudice as to his convictions for armed robbery and possession of a firearm during the commission of a violent crime.

After the Court of Appeals denied the parties' petitions for rehearing, this Court granted their cross-petitions for a writ of certiorari to review the rulings of the Court of Appeals as outlined above. For reasons that will be discussed, we affirm as modified.

***51 I. Factual / Procedural History**

On November 26, 2010, at 4:06 a.m. a customer, who identified himself as "Kevin," 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, but noted that the number did not match the telephone number verbally identified by the customer. At 4:11 a.m., Dario Brown was dispatched to the address. Brown was familiar with the Carlton Street area because he had lived on the street for several years and his aunt had lived at 1809 Carlton Street, which was located directly across the street from 1808 Carlton Street. Brown expected his cousin to be the customer since he lived in the area and Brown, in the past, had picked up his cousin at the same location and time of night.

When he arrived at the pick-up location, Brown saw a man crossing the yard of 1809 Carlton Street, the location of his aunt's home which was abandoned at that time. As the man got into the backseat of the cab, which was illuminated by the dome light, Brown noticed the man was not his cousin. Brown then turned around, looked at the man directly in his face, and asked why he came from the abandoned house. The man replied that it was his yard. The two men argued as Brown continued to question the customer about whether he lived at 1809 Carlton Street.

As Brown began to drive toward the dead-end of Carlton Street to make a U-Turn, he heard the man "cocking a pistol." Brown testified that when he turned around the man had raised the gun to his face and demanded money. Brown stated that he gave the man his "give away" money, which is a stack of small bills cab drivers keep readily available in the event they are robbed, then placed his hands in the air. Brown testified the man demanded more

money and pointed the gun at the back of Brown's head. At that point, with his hands in the air, Brown attempted to move the gun with his elbow and forearm. According to Brown, he tried to reason with the man, stating "[you] [don't] have to do this." Brown testified the man ignored his pleas and demanded more money.

Brown then opened his cab door and attempted to flee but was too scared to move because the gun was still placed at the *52 back of his neck. When Brown looked into the man's eyes, he believed the man was going to shoot him. As Brown tried again to move the gun away from his face, the man shot Brown in the elbow. The shot entered Brown's elbow and exited through his forearm.

After being shot, Brown jumped out of the cab and ran toward the dead-end of Carlton Street. Brown testified, at one point, he looked behind him and the man was "two steps behind [him]." Brown then ran toward a yard and attempted to jump over the fence, but ended up flipping over the fence due to his injured arm. When he fell over the fence, he landed on his back fracturing a vertebra in the process.

According to Brown, the man reached over the fence with a gun and shot at Brown "maybe six or seven" times. Brown testified that none of the bullets hit him and he was able to crawl behind a nearby van at which point he used his cellphone to call police.

At 4:20 a.m., Officer Jennifer Butler with the North Charleston Police Department was dispatched to 1808 Carlton Street and arrived within one minute of the call. When she arrived, Officer Butler saw an empty cab with the engine still running "that had run into a pole on the side of the road." Officer Butler then saw Brown and called EMS. During that time, several other officers and a canine unit responded to the scene.

As part of their investigation, Officer Butler and a detective canvassed the surrounding neighborhood. As a result of this "knock-and-talk," Officer Butler testified, over defense counsel's objection, that she talked to **21 two people and learned that there were "[a]pproximately three or four shots" fired that night. Despite a two-hour search of the area, the officers did not find the suspect and only recovered one bullet casing inside the cab.

Three days later, officers showed Brown a six-person photographic lineup that did not include a photograph of King. Brown, however, did not identify anyone from the lineup. Officers then contacted the cellphone company, Cricket Wireless, to determine who subscribed to the cellphone number used to contact the cab company on the night of the robbery. Cricket Wireless informed investigators that the phone number *53 was registered to "Kevin King" with a 1991 date of birth and address listed as 3440 Elliott Street. By cross-referencing DMV records, investigators located Raheem King, who had the same date of birth and a similar residence address as the Cricket Wireless subscriber.

Based on this information, the police compiled a second photographic lineup that contained King's photograph. When Brown viewed this lineup, he immediately identified King and expressed that he was "100 percent sure" of his identification. The next day, King was arrested and charged with attempted murder, armed robbery, and possession of a firearm during the commission of a violent crime.

From the detention center, King made sixty-three calls in one month to the cellphone number used to call the cab company on the night of crime. During the first phone call, which was made immediately following his arrest, King provided an unidentified person with a pin number to the cellphone. Over the objection of defense counsel, the trial judge permitted the State to publish to the jury the entire fifteen-minute recording.

As part of the instructions to the jury, the trial judge explained the offenses of armed robbery, attempted armed robbery, attempted murder, assault and battery of a high and aggravated nature ("ABHAN"), assault and battery in the first-degree, and possession of a firearm during the commission of a violent crime.

With respect to attempted armed robbery, the judge instructed, in part, that:

An attempt is an effort to accomplish a crime which does not succeed. 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.

The judge then instructed that a person commits the offense of attempted murder if the “person with the intent to kill *54 attempts to kill another person with Malice Aforethought either expressed or implied.” As part of his instruction, the judge charged that “[m]alice may be inferred from conduct showing a total disregard for human life.” Further, over the objection of defense counsel, the judge charged that: (1) “[i]nferred malice may also arise when the deed is done with a deadly weapon”; and (2) “[a] specific intent to kill is not an element of Attempted Murder but it must be a general intent to commit serious bodily harm.”

During deliberations, the jury sent a note to the trial judge expressing confusion over the difference between the definition of attempted murder and ABHAN. In response, the judge gave a supplemental instruction indicating that ABHAN does not require malice. Ultimately, the jury found King guilty of attempted murder, armed robbery, and possession of a firearm during the commission of a violent crime.

On appeal, the Court of Appeals affirmed King's convictions for armed robbery and possession of a firearm during the commission of a violent crime, but reversed and remanded King's conviction for attempted murder. *State v. King*, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015). After the Court of Appeals denied the parties' petitions for rehearing, this Court granted, in part, the parties' cross-petitions for a writ of certiorari **22 to review the decision of the Court of Appeals.

II. Standard of Review

[1] [2] “In criminal cases, this Court sits to review errors of law only and is bound by factual findings of the trial court unless an abuse of discretion is shown.” *State v. Laney*, 367 S.C. 639, 643, 627 S.E.2d 726, 729 (2006). An

abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law. *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012).

III. Discussion

A. Requisite *Mens Rea* for the Statutory Crime of Attempted Murder

[3] The State contends the Court of Appeals erred in holding that attempted murder, as defined by section 16-3-29 of the South Carolina Code, is a specific-intent crime. In *55 support of this contention, the State claims the Court of Appeals incorrectly based its conclusion on common law “attempt” cases and dicta from this Court's decision in *State v. Sutton*, 340 S.C. 393, 532 S.E.2d 283 (2000), stating that a common law attempted murder charge “would require the specific intent to kill.”

In contrast to the authorities cited by the Court of Appeals, the State directs this Court's attention to case law involving the common law crime of assault and battery with intent to kill (“ABWIK”), which held that ABWIK does not require a specific intent to kill. Because the attempted murder statute “uses language virtually identical to common law ABWIK,” the State reasons that the General Assembly effectively codified the common law offense of ABWIK. As a result, the State avers the statutory offense of attempted murder does not require a specific intent to kill but, rather, a general intent will suffice.

Alternatively, even if the Court determines that attempted murder is a specific-intent crime, the State maintains any jury instruction error was harmless beyond a reasonable doubt. Given the judge instructed the jury on “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,” the State claims all elements of attempted murder were in fact charged and, thus, effectively negated the judge's charge that attempted murder was a general-intent crime.

We agree with the Court of Appeals that “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.” *King*,

412 S.C. at 411, 772 S.E.2d at 193. Because the phrase “with intent to kill” in section 16-3-29 does not identify what level of intent is required, the Court of Appeals properly looked to the legislative history of section 16-3-29 and appellate decisions holding that “attempt crimes require the State to prove the defendant had specific intent to complete the attempted crime.” *Id.* at 409, 772 S.E.2d at 192. Further, while we agree with the State that the statement referenced from *Sutton* constitutes dicta, it *56 is still an accurate statement of law. *Id.* (“ ‘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.’ ” (quoting *Sutton*, 340 S.C. at 397, 532 S.E.2d at 285)).

Nevertheless, despite our agreement with the conclusion reached by the Court of Appeals, we find it necessary to expand on the analysis. Specifically, because the Court of Appeals did not sufficiently parse section 16-3-29, it neglected to address the implications of the phrase “malice aforethought, either express or implied.”

While it may seem counterintuitive for the attempt of a crime to require a higher level of *mens rea* than that of the completed crime, this is the majority rule and a rule that our appellate courts and General Assembly have followed. Consequently, as will be discussed, we hold that a specific intent to kill is an element of attempted murder as codified in section 16-3-29.

“The highest possible mental state for criminal attempt, specific intent, is necessary because criminal attempt focuses on the dangerousness **23 of the actor, not the act.” 22 C.J.S. *Criminal Law: Substantive Principles* § 156, at 221-22 (2016). Thus, “[a]s the crime of attempt is commonly regarded as a specific intent crime and as it is logically impossible to attempt an unintended result, prosecutions are generally not maintainable for attempts to commit general intent crimes, such as criminal recklessness, attempted felony murder, or attempted manslaughter.” *Id.*

Based on these general principles, the majority of courts in other jurisdictions have concluded that attempted murder requires the specific intent to kill. *See generally* Jeffrey F. Ghent, Annotation, *What Constitutes Attempted Murder*, 54 A.L.R.3d 612, §§ 3, 12.5 (1973 & Supp. 2017) (collecting state and federal cases identifying what constitutes the

crime of attempted murder, including whether specific intent is a requisite element). In reaching this conclusion, these courts have differentiated between the required mental states for attempted murder and murder.

For example, in *Keys v. State*, 104 Nev. 736, 766 P.2d 270 (1988), the Supreme Court of Nevada found that it was error *57 for the trial court to refuse to instruct the jury that the specific intent to kill is an essential element of the crime of attempted murder. Recognizing that this issue presented “a continuing source of confusion,” the court sought to clarify this area of criminal law by distinguishing the crime of attempted murder from murder by analogizing express malice to a specific intent to kill. *Id.* at 272-73. The court explained:

Attempted murder can be committed only when the accused's acts are accompanied by *express malice*, malice in fact. One cannot attempt to kill another with implied malice because there “is no such criminal offense as an attempt to achieve an unintended result.” An attempt, by nature, is a failure to accomplish what one *intended* to do. Attempt means to try; it means an effort to bring about a desired result. Thus one cannot *attempt* to be negligent or *attempt* to have the general malignant recklessness contemplated by the legal concept, “implied malice.” One cannot be guilty of attempted murder by implied malice because implied malice does not encompass the essential specific intent to kill.

An attempt to kill with express malice is, on the other hand, completely consistent with the specific intent requirement of the crime of attempt. Express malice is the “deliberate intention unlawfully” to kill a human. Attempted murder, then, is the attempt to kill a person with express malice, or more completely defined: Attempted murder is the performance of an act or acts which tend, but fail, to kill a human being, when such acts are done with express malice, namely, with the deliberate intention unlawfully to kill.

Id. at 273 (citations omitted) (second emphasis added).

Although our appellate courts have not issued an expository opinion like that of the Supreme Court of Nevada, we believe the decisions, when viewed as a whole, reach the same conclusion. Like other jurisdictions, South Carolina has not been immune from conflicting case law regarding levels of criminal intent. However, this

confusion appears to have arisen out of the relationship between the crimes of murder and ABWIK. See 23 S.C. Jur. *Homicide* § 34, at 215 (1994) (recognizing ambiguity in case law regarding whether a specific intent to kill is required for the crime of ABWIK); see also *State v. Jefferies*, 316 S.C. 13, 18, 446 S.E.2d 427, 430 (1994) (“At *58 common law, crimes generally were classified as requiring either ‘general intent’ or ‘specific intent.’ This venerable distinction, however, has been the source of a good deal of confusion.” (citation omitted)).

Significantly, the two crimes were originally designated as one offense. See *State v. Jones*, 133 S.C. 167, 172, 130 S.E. 747, 749 (1925) (recognizing that offense of “assault and battery with intent to kill and murder” contained “all the elements of murder except the death of the party assailed”), overruled by *State v. Foust*, 325 S.C. 12, 479 S.E.2d 50 (1996). Yet, while the offenses of ABWIK and murder ultimately evolved into two discrete crimes, courts assigned conflicting mental states to each offense. See, e.g., *State v. Mouzon*, 231 S.C. 655, 662, 99 S.E.2d 672, 675 (1957) (concluding evidence was sufficient to sustain conviction for murder although **24 there was “no actual intent to kill or injure another, there [was] evidence of such recklessness and wantonness as to indicate a depravity of mind and disregard of human life, from which a jury could infer malice”); *State v. Hilton*, 284 S.C. 245, 248, 325 S.E.2d 575, 576 (Ct. App. 1985) (“Assault and Battery with intent to kill requires a finding of a specific intent to kill.”), overruled by *State v. Foust*, 325 S.C. 12, 479 S.E.2d 50 (1996); *State v. Fennell*, 340 S.C. 266, 531 S.E.2d 512 (2000) (affirming defendant's convictions for murder of intended victim and ABWIK of unintended victim; noting that the required mental state for ABWIK, like murder, is malice aforethought and concluding that ABWIK conviction was supported by the doctrine of transferred intent).

Not until this Court's decision in *Foust* was there any attempt at clarity. *State v. Foust*, 325 S.C. 12, 479 S.E.2d 50 (1996). In *Foust*, the Court was tasked with determining what level of intent is necessary to sustain a conviction for ABWIK. *Id.* Initially, the Court noted that “South Carolina caselaw on the requisite intent to commit [ABWIK] is ambiguous.” *Id.* at 14, 479 S.E.2d at 51. The Court attributed this ambiguity to “the fact that [ABWIK] has been defined as the unlawful act of a violent nature to the person of another with malice aforethought, either express or implied.” *Id.* As a result,

the Court noted that “[a] number of cases since *Jones* have reiterated that [ABWIK] requires both an intent to kill and malice.” *Id.* at 15, 479 S.E.2d at 51. While the Court acknowledged *59 that these “cases indicate that some intent must be demonstrated before an accused may be convicted of [ABWIK],” it did “not believe they stand for the proposition that a specific intent to kill must be shown.” *Id.* Accordingly, the Court held that “it is sufficient if there is shown some general intent, such as that heretofore applied in cases of murder in this State.” *Id.* The Court then instructed that “in charging juries the law of [ABWIK], South Carolina trial judges should give a standard ‘intent’ charge, but need not advise the jury that the defendant must have a specific intent to kill before he may be convicted of [ABWIK].” *Id.* at 16, 479 S.E.2d at 52 (footnote omitted).

In 2000, ten years prior to the statutory enactment of the crime of attempted murder, this Court declined to adopt the common law crime of attempted murder. *State v. Sutton*, 340 S.C. 393, 398-99, 532 S.E.2d 283, 286 (2000). In *Sutton*, the defendant was convicted of ABWIK, attempted murder, and possession of a firearm during the commission of a violent crime. *Id.* On appeal, the Court of Appeals vacated Sutton's attempted murder conviction and sentence, finding ABWIK and attempted murder are, in essence, the same offense. *Id.* at 395, 532 S.E.2d at 284. This Court affirmed as modified the decision of the Court of Appeals. *Id.* at 399, 532 S.E.2d at 286.

Citing *Foust*, this Court noted that “a specific intent is not required to commit [ABWIK].” *Sutton*, 340 S.C. at 396, 532 S.E.2d at 285. Premised on this principle, the Court distinguished the common law offense of attempted murder from the common law offense of ABWIK by concluding that attempted murder requires a specific intent to kill, while ABWIK does not require a specific intent. *Id.* at 397, 532 S.E.2d at 285 (“Although a murder may be committed without an intent to kill, an attempt to commit murder requires a specific intent to kill.” (citation omitted)). Instead, the Court explained that ABWIK requires the same general intent as murder and is often described as follows: “if the victim had died from the injury, the defendant would have been guilty of murder.” *Id.* at 396, 532 S.E.2d at 285. The Court concluded there was no need to adopt the common law offense of attempted murder because South Carolina's “common law offenses of [ABWIK] and [AWIK] (assault with intent to kill) adequately cover the *60 conduct

which attempted murder would include.” *Id.* at 398-99, 532 S.E.2d at 286.

While *Sutton* has continued to be cited, as evident by the Court of Appeals' decision in the instant case, the underlying basis for the Court's statement regarding attempted murder has never really been challenged. *See, e.g., State v. Wilds*, 355 S.C. 269, 584 S.E.2d 138 (Ct. App. 2003) (citing *Foust* and *Sutton*, discussing express and implied malice, and concluding permissive inference of malice, which arose out of defendant's reckless use **25 of automobile, was sufficient to support ABWIK conviction).

In 2007, the Court of Appeals in *State v. Kinard*, 373 S.C. 500, 646 S.E.2d 168 (Ct. App. 2007), initiated a challenge by pointing out the inconsistencies in our state's case law regarding “malice aforethought.” In *Kinard*, the defendant was convicted of first-degree burglary and ABWIK. *Id.* On appeal, Kinard, contended the trial judge erred in refusing to explicitly charge the jury on the general intent required to convict for ABWIK. *Id.* at 502, 646 S.E.2d at 168. The Court of Appeals disagreed, finding the judge's charge on “malice aforethought” was sufficient as it implicitly included the required mental state for ABWIK. *Id.* at 503, 646 S.E.2d at 169-70. In so ruling, the court recognized that “malice aforethought encompasses both the specific and general intent to commit murder.” *Id.* at 504, 646 S.E.2d at 169. Thus, because ABWIK encompasses each of the required elements of murder except for the death of the victim, the court found that “it is axiomatic that malice aforethought be the mental state to commit [ABWIK].” *Id.*

However, despite this conclusion, the court recognized the confusion in our state's jurisprudence concerning the requisite mental state for murder and ABWIK. The court stated:

While we are mindful of previous opinions from the appellate courts of this state which have treated intent to kill and malice as separate requirements, we, much like both parties and the trial judge below, fail to discern any significant difference between general intent to kill and malice aforethought as they pertain to ABIK. Since the definition of malice aforethought

encompasses general intent to kill, we find it difficult to reconcile a manner in which one could *61 find malice aforethought and yet not find general intent to kill. Further, we read the *Foust* opinion as the elimination of this artificial distinction. In stating that some general intent such as that heretofore applied in murder cases in this state was sufficient to prove ABIK, the *Foust* court was establishing malice aforethought as the necessary general intent. Since malice aforethought undoubtedly has been established as the intent required in murder cases, we necessarily arrive at the above conclusion. Moreover, our state Supreme Court reaffirmed malice aforethought as the required mental state for ABIK in an opinion decided four years subsequent to *Foust*. *Fennell*, 340 S.C. at 275, 531 S.E.2d at 517. Accordingly, we find the trial court's jury instruction, which properly charged the jury regarding malice aforethought, to be without error. The jury was given a proper “intent” charge.

Id. at 505, 646 S.E.2d at 170.

Kinard identifies what is missing from the Court of Appeals' analysis of section 16-3-29 of the South Carolina Code. Specifically, the Court of Appeals focused on the phrase “with intent to kill” in isolation and did not consider the remainder of the statute concerning “malice aforethought.” Had the court done so, the decision would have been much clearer as to why attempted murder requires a specific intent to kill.

Additionally, it is necessary to address both parts of section 16-3-29 as it demonstrates that the General Assembly created the offense of attempted murder by purposefully adding the language “with intent to kill” to “malice aforethought, either express or implied” to require a higher level of *mens rea* for attempted murder than that of murder. Moreover, the addition of the “with intent to kill” language effectively negates the State's

claim that the General Assembly merely codified ABWIK. Because our case law, particularly *Foust*, establishes “malice aforethought” as the required mental state for ABWIK, the additional language of “with intent to kill” clearly elevates the required mental state above a general-intent crime.²

62** While we are convinced that this is the correct interpretation, we also acknowledge *26** the ambiguity created by the language in section 16-3-29 as aptly noted by the author of the concurring opinion. However, unlike the concurring opinion, we find the legislative history, when read in its entirety, supports our conclusion.³

Section 16-3-29 is part of the “Omnibus Crime Reduction and Sentencing Reform Act of 2010 (the “Act”),” which was enacted in response to a report submitted to the General Assembly by the South Carolina Sentencing Reform Commission (the “Commission”). *South Carolina Sentencing Reform Commission Report* (Feb. 1, 2010).⁴ This Commission was established by the General Assembly in 2008 to address the “[r]ising recidivism rates, increasing prison populations, limited sentencing alternatives and re-entry programs, and mounting correctional costs for both state and local governments.” *Id.* at 1. In its report, the Commission offered numerous recommendations to address these issues. Of significant import, the Commission recommended that the General Assembly:

Enact legislation to restructure by statute the degrees of assault and battery, including the existing common law and statutory offenses, so that the common law offense of “Assault and Battery of a High and Aggravated Nature” is ***63** abolished, and the statutory offense of “Assault and Battery with Intent to Kill” (Section 16-3-620), is repealed. In the legislation, establish graduated offenses of “Assault and Battery,” to include “Attempted Murder,” “Aggravated Assault and Battery,” and “Assault and Battery,” with commensurate penalties.

Id. at 21-22.

The General Assembly followed this recommendation as evident by the language in the Preamble to the Act. Specifically, the Preamble states that the Act: (1). adds section 16-3-29 “so as to create the offense of attempted murder and provide a penalty”; (2). “create[s] various

levels and degrees of assault and battery offenses”; (3). amends section 16-3-610, relating to assault with a concealed weapon, “so as to reference *the new offenses of attempted murder* and assault and battery”; (4). is enacted “to repeal sections 16-3-312, 16-3-620, 16-3-630, and 16-3-635 all dealing with various assault and battery offenses”; and (5). is enacted “to repeal certain common law assault and battery offenses.” Act No. 273, 2010 S.C. Acts 1937 (emphasis added).

In turn, these directives were codified in sections 16-3-29 and 16-3-600. *See State v. Middleton*, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014) (“Through the passage of the [Omnibus Crime Reduction and Sentencing Reform Act of 2010] the legislature abolished all common law assault and battery offenses and all prior statutory assault and battery offenses. In place of these offenses, the Act codifies attempted murder in section 16-3-29 and four degrees of assault and battery in section 16-3-600.”). Notably, a person convicted of attempted murder faces a potential sentence of thirty years’ imprisonment in contrast to the potential twenty-year sentence previously provided for ABWIK. S.C. Code Ann. § 16-3-29 (2015) (providing for offense and penalty of attempted murder); *Id.* at § 16-3-620 (2003) (identifying offense and penalty of ABWIK), repealed by Act No. 273, 2010 S.C. Acts 1937.

[4] Considering the legislative history as a whole, we conclude that section 16-3-29 is not a codification of the offense of ABWIK. We find the General Assembly expressly repealed the offense of ABWIK and purposefully created the new offense of attempted murder, which includes a “specific intent ***64** to ****27** kill” as an element.⁵ Accordingly, we agree with the Court of Appeals that the trial judge erred in charging the jury that a specific intent to kill is not an element of attempted murder. Further, we agree that this error cannot be deemed harmless.

B. Admissibility of Officer's Statements Regarding Investigation

[5] The State argues the Court of Appeals erred in ruling Officer Butler's testimony regarding what she learned during her investigation of the crime scene constituted inadmissible hearsay. Contrary to the Court of Appeals' interpretation, the State asserts that *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013),⁶ and *State v. Weaver*, 361 S.C. 73, 602 S.E.2d 786 (Ct. App. 2004),

aff'd as modified by 374 S.C. 313, 649 S.E.2d 479 (2007),⁷ *65 support the admission of Officer Butler's "limited testimony." Specifically, the State claims that Officer Butler's testimony, like that of the investigators in *Kromah* and *Weaver*, did not impermissibly repeat statements made by individuals she interviewed. Rather, her testimony merely relayed what she learned as part of her investigation of the crime scene.

Further, the State contends that, even if Officer Butler's testimony constituted inadmissible hearsay, any error in its admission was harmless beyond a reasonable doubt. Unlike the Court of Appeals, the State believes Officer Butler's testimony regarding multiple shots fired did not affect the jury's determination that King was guilty of attempted murder. According to the State, the Court of Appeals' conclusion was based on the incorrect assumption that "the only way the jury could find attempted murder was to believe multiple shots were fired." In contrast, the State asserts the undisputed testimony that King fired one shot inside the cab was sufficient for the jury to find King possessed the requisite intent to kill, including a specific intent to kill.

We agree with the Court of Appeals that the trial judge erred in admitting the testimony of Officer Butler. We find the Court of Appeals correctly distinguished Officer Butler's testimony from that found admissible in *Kromah* and *Weaver*. Further, we agree with the Court of Appeals that any error in the admission of the testimony would have only affected the jury's determination of the attempted murder charge. Additionally, like **28 the Court of Appeals, we conclude that the error, if combined with the erroneous attempted murder jury instruction, was not harmless as to the attempted murder charge.

*66 However, despite our agreement with the ultimate conclusion of the Court of Appeals, we decline to rely on the supporting authority cited in the opinion. Specifically, the Georgia case cited by the Court of Appeals is now of questionable value as a state statute has been enacted to address this issue.⁸ Moreover, the Eleventh Circuit case has since been abrogated.⁹ Accordingly, given the subsequent history of these cases, we modify the Court of Appeals' analysis.

[6] We find the disposition of this issue involves a straightforward hearsay analysis. "Hearsay is a statement,

which may be written, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted." *State v. Brockmeyer*, 406 S.C. 324, 351, 751 S.E.2d 645, 659 (2013) (quoting *In re Care & Treatment of Harvey*, 355 S.C. 53, 61, 584 S.E.2d 893, 897 (2003)); Rule 801(c), SCRE. "Hearsay is not admissible unless there is an applicable exception." *Brockmeyer*, 406 S.C. at 351, 751 S.E.2d at 659; Rule 802, SCRE.

Here, as correctly recognized by the Court of Appeals, Officer Butler's testimony was hearsay as it was based exclusively on what the witnesses told her during the neighborhood canvas and was offered to prove that King fired more than one gunshot. Further, we do not discern, nor has the State cited, any exception to the hearsay rule that would provide for the admissibility of the testimony.

Nonetheless, even with this straightforward analysis, we believe it is necessary to caution prosecutors against using "investigative information" as it appears this is an attempt to *67 circumvent the rules against hearsay. *See, e.g., Lewis v. State*, 80 So.3d 442, 444 (Fla. Dist. Ct. App. 2012) (concluding that investigating officer's testimony that he developed a suspect and, in turn, a photographic lineup, after speaking with two non-testifying witnesses constituted inadmissible hearsay; stating, "[w]here the implication from in-court testimony is that a non-testifying witness has made an out-of-court statement offered to prove the defendant's guilt, the testimony is not admissible" (citation omitted)); *State v. Magee*, 143 So.3d 532, 537 (La. Ct. App. 2014) ("The fact that an officer acted on information obtained from an informant may be relevant to explain his conduct, *but may not be used as a passkey to bring before the jury the substance of the out-of-court information that would otherwise be barred by the hearsay rule.*" (emphasis added)).

We are persuaded by the explanation offered by the Supreme Court of Kentucky. *Ruiz v. Commonwealth*, 471 S.W.3d 675 (Ky. 2015). In *Ruiz*, the court attempted to dispel any misconception that testimony from an investigating officer regarding the content of out-of-court statements was admissible. Specifically, the court explained:

An out-of-court statement made to a police officer is judged by the same rules of evidence that govern any out-of-court statement by any out-of-court declarant. If it is relevant and probative *only* to prove the truth of the

matter asserted by the out-of-court declarant, then the statement is hearsay, and its admission into evidence is governed by the traditional hearsay rule. And, as any other statement, if the out-of-court statement made to a police officer has relevance and probative value that is *not* dependent upon its truthfulness, and it is *not* offered into evidence as proof of the matter asserted, then by definition the evidence is *not* hearsay.

* * *

****29** In such circumstances, because the out-of-court statement would not be subject to the hearsay rule, its admissibility would be determined by application of other rules of evidence. So-called “investigative hearsay” is still, fundamentally, hearsay. There is no special kind of evidence known as “investigative hearsay;” we have no rule of evidence called the “investigative hearsay rule.” Use of the term imparts no ***68** meaningful information to the analysis that is not otherwise supplied by the word “hearsay.”

Ruiz, 471 S.W.3d at 680-82 (citations and footnote omitted).

[7] Based on this reasoning, we caution against the use and admission of “investigative information.” While it may be couched in terms of explaining an officer’s conduct during an investigation, it may not be used to offer the substance of an out-of-court statement that would otherwise violate our state’s rules against hearsay.

C. Admissibility of Detention Center Phone Call

[8] King argues the Court of Appeals erred in summarily affirming the judge’s decision permitting the State to publish to the jury a recording of a fifteen-minute phone call King made while incarcerated. Because the State’s purpose in introducing the recording was to establish King’s ownership of the cellphone number used to contact the cab company, King asserts this could have been accomplished by introducing detention center phone logs. Further, King maintains that any probative value of the recording was outweighed by the danger of unfair prejudice created by the recording, which contained a profanity-laced conversation between King and another individual that inferred King had been charged with prior crimes similar to those for which he was currently on trial.

For several reasons, we agree with King that the trial judge abused his discretion in admitting the recorded phone conversation. *See State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) (“The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” (citation omitted)).¹⁰

First, the judge adamantly refused to listen to the recording prior to publishing it to the jury. By failing to listen to the ***69** recording or requiring the State to produce a transcription of the recording for his review, we find the judge abused his discretion. *See State v. Smith*, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) (stating that “[i]t is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly”).

Second, without listening to the recording, the judge was unable to determine whether the probative value outweighed any unfair prejudice. *See State v. Dial*, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013) (“A trial [court’s] decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances.” (internal quotation marks omitted)); Rule 403, SCRE (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.”). While the recording was relevant to the State establishing King’s ownership of the cellphone that called the cab company, it was not the only evidence that could have served this purpose. Rather, the testimony of Sergeant Kevia Heyward, who was employed at the detention center, and the detention center call logs clearly established that King called this number sixty-three times in one month. Further, the State could have agreed to the request that it stipulate to King’s ownership of the cellphone.

Third, the limited probative value of the recording was outweighed by the unfair prejudice ****30** to King. The fifteen-minute recording is riddled with profanity, racial slurs, and impermissible references to King’s prior bad acts. *See State v. Cheeseboro*, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001) (“Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one.”).

[9] Taking all of these factors into consideration, we find the Court of Appeals erred in affirming the admission of the recording. However, we conclude that this error does not warrant reversal of all convictions as advocated by King. While this serves as another basis to reject the State's position that any error with respect to the attempted murder charge was harmless, it does not have the same significance for the charges of armed robbery and possession of a firearm during *70 the commission of a violent crime. *See State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) (“Engaging in this harmless error analysis, we note that our jurisprudence requires us not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict.”).

Because the recording is very difficult to understand, we question whether the jury in fact was influenced by it. In any event, it was not enough to affect the jury's determination of the armed robbery and related weapon charge as the emphasis of King's defense was focused on the requisite level of intent for attempted murder, in particular the conflict over the number of shots fired. Further, there was no real dispute over the charge of armed robbery as Brown positively identified King as the suspect and testified in detail that he gave King the “give away” money in response to King pointing the weapon at his head. Consequently, we conclude that the admission of the recording does not warrant reversal of King's convictions for armed robbery and possession of a firearm during the commission of a violent crime. *See State v. Black*, 400 S.C. 10, 16-17, 732 S.E.2d 880, 884 (2012) (“To warrant reversal, an error must result in prejudice to the appealing party.”).

IV. Conclusion

In conclusion, we agree with the Court of Appeals' decision to affirm King's convictions for armed robbery and possession of a firearm during the commission of a violent crime and to reverse and remand King's conviction for attempted murder. Yet, we clarify that the offense of attempted murder, as codified in section 16-3-29 of the South Carolina Code and viewed in its entirety, requires a specific intent to kill. Further, we conclude, based on our state rules of evidence, that Officer Butler's testimony should not have been admitted as it

constituted inadmissible hearsay regardless of the fact that it was offered by the State to explain Officer Butler's investigation. However, like the Court of Appeals, we find the admission of this testimony constituted harmless error. Finally, in contrast to the Court of Appeals, we hold that the trial judge erred in admitting the recording of King's detention center *71 phone call. Nevertheless, we conclude the admission of the recording constituted harmless error.

Accordingly, the decision of the Court of Appeals is

AFFIRMED AS MODIFIED.

Acting Justices DeAndrea Gist Benjamin and J. Mark Hayes, II, concur.

Acting Justice Costa M. Pleicones concurring in result only. KITTREDGE, J., concurring in a separate opinion.

JUSTICE KITTREDGE:

I concur in result. I write separately because I construe section 16-3-29 of the South Carolina Code¹¹ differently than the majority.

Before addressing the attempted murder statute, I note my complete agreement with the majority's analysis and conclusion concerning the error in the admission of the challenged portions of Officer Jennifer Butler's testimony. While the admission of this evidence was harmless as to the armed robbery **31 and firearm possession charges, the evidence was not harmless beyond a reasonable doubt as to the attempted murder charge. I similarly agree with the majority that the trial court abused its discretion in admitting the entirety of Raheem King's jail telephone call recording. Nevertheless, for the reasons persuasively advanced by the majority, I find the error in the admission of the telephone call recording harmless as to the armed robbery and weapon charges.

I turn now to what I view as the primary issue before the Court, for our construction of the attempted murder statute will have significant implications, at least until the legislature responds and clarifies the ambiguity in section 16-3-29. The question is easily stated—whether the section 16-3-29 offense of attempted murder is a specific intent crime—but not easily answered. I commend Chief

Justice Beatty on a well-reasoned, scholarly opinion, but I respectfully reach a different conclusion. *72 I do so on the basis that our singular focus is to determine the legislative intent expressed in section 16-3-29.

Section 16-3-29 provides 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.” S.C. Code Ann. § 16-3-29 (2015) (emphasis added). For conduct to fall within the scope of the statute requires an “intent to kill,” as well as malice aforethought, which may be “either expressed or implied.” *Id.* Each of these phrases on its own is clear, but when they are combined, the intent of the legislature is not.

The majority and I agree that the statutory language creates an ambiguity—“with intent to kill” speaks to a specific intent crime while “malice aforethought, either expressed or implied” points to a general intent crime. I would resort to legislative history to resolve the tension between the two phrases. At this point, however, the majority “expand[s] on the analysis” and reviews the majority rule that attempt crimes generally require a specific intent. We are further presented with case law from other jurisdictions that follow the general rule. But as I see it, our *sole* task is to discern what the South Carolina General Assembly intended in section 16-3-29.¹²

South Carolina's common law offense of “assault and battery with intent to kill” (ABWIK) does not follow the general rule discussed by the majority. For many years, there was confusion as to the intent requirement in the offense of ABWIK. In 1996, this Court definitively answered the question and held the common law offense of ABWIK requires only a showing of general intent, as encompassed by the requirement of “malice aforethought, either express or implied.” *State v. Foust*, 325 S.C. 12, 14–15, 479 S.E.2d 50, 51 (1996) (“As this Court has recognized that a specific intent is not required to commit murder, the logical inference is that, likewise, a specific intent is not required to commit [ABWIK].” (footnote omitted)).

*73 Thereafter, in 2010, the legislature repealed the common law offense of ABWIK and replaced it with the statutory offense of attempted murder in section 16-3-29. As a matter of statutory construction, we are to presume the legislature knew the law on ABWIK when it repealed the common law offense and replaced it with the attempted murder statute. *See, e.g., Grier v. Amisub*

of S.C., Inc., 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012) (“In ascertaining the meaning of language used in a statute, we presume the General Assembly is ‘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.’ ” (quoting *State v. Bridgers*, 329 S.C. 11, 14, 495 S.E.2d 196, 198 (1997))). If ever there was any doubt as to the legislature's intent, the act that created section 16-3-29 surely removed it, stating that, with two exceptions not applicable here, “wherever in the 1976 Code [of Laws] reference is made to assault and battery with intent to kill, it means attempted murder as defined in Section 16-3-29.” Act No. 273, § 7.C, 2010 S.C. Acts 1937, 1950.

**32 At this point in my analysis, I conclude that section 16-3-29 represents the codification of the common law offense of ABWIK. In this regard, I am persuaded by the legislature's use of the verbatim definition of ABWIK in the section 16-3-29 offense of attempted murder. I resolve the ambiguity in the “with intent to kill” language and the seemingly contradictory “with malice aforethought, either expressed or implied” language by resorting to our case law defining the elements of ABWIK, especially the requisite level of intent. We know from *Foust* that “it is sufficient if there is shown some general intent, such as that heretofore applied in cases of murder in this State.” *Foust*, 325 S.C. at 15, 479 S.E.2d at 51. If the legislature intended to create a specific intent crime, why did it use verbatim the language of the repealed common law offense of ABWIK that had a settled understanding as a general intent crime? I would therefore conclude that a specific intent to kill is not an element of the offense of attempted murder found in section 16-3-29, notwithstanding that the phrase “with intent to kill” is included in the statute. Similarly, I know with certainty that a specific intent to kill is not an element of ABWIK, although the phrase “with intent to kill” is *74 included in the name of the common law crime. For these reasons, I would affirm the trial court's finding and related jury instruction 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.”¹³ *State v. King*, 412 S.C. 403, 407, 772 S.E.2d 189, 191 (Ct. App. 2015). While the majority's analysis of the general law concerning attempt and specific intent is enlightening, I respectfully do not believe it reflects our legislature's intent in enacting section 16-3-29—and here, that's the only intent that matters.

Because my view of the evidentiary challenges is in line with the majority, I concur in the remand for a new trial on the attempted murder charge. Accordingly, I concur in result.

All Citations

422 S.C. 47, 810 S.E.2d 18

Footnotes

- 1 The offense of attempted murder, as codified in section 16-3-29 of the South Carolina Code, is defined as follows: "[a] person who, *with intent to kill*, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." S.C. Code Ann. § 16-3-29 (2015) (emphasis added).
- 2 We note that our interpretation of section 16-3-29 is consistent with other attempt statutes that require a "specific intent." See, e.g., S.C. Code Ann. § 25-1-2895 (2007) (defining "attempts" in Military Code as "An act, done with specific intent to commit an offense under this code, amounting to more than mere preparation and tending even though failing to effect its commission, is an attempt to commit that offense.").
- 3 In support of its position, the concurring opinion references a single provision of the legislative history. See Act No. 273, § 7.C, 2010 S.C. Acts 1937, 1950 (stating, in relevant part, that "whenever in the 1976 Code [of Laws] reference is made to assault and battery with intent to kill, it means attempted murder as defined in Section 16-3-29"). We believe the concurring opinion misconstrues this phrase. Like the Court of Appeals, 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'." *King*, 412 S.C. at 411, 772 S.E.2d at 193.
- 4 This Report may be found at:
<http://www.scstatehouse.gov/Archives/CitizensInterestPage/SentencingReformCommission/CombinedFinalReport020110SigPage.pdf>.
- 5 In an argument related to the State's attempted murder charge issue, King posits, as an additional sustaining ground, the Court of Appeals erred in summarily affirming the trial judge's decision to instruct the jury that malice may be inferred from the use of deadly weapon. Because we affirm the decision of the Court of Appeals regarding the requisite *mens rea* for attempted murder, we decline to address King's additional sustaining ground. See *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (citing Rule 220(c), SCACR and stating, "The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment" (emphasis added)). While we find it unnecessary to address King's additional sustaining ground, we would respectfully suggest to the General Assembly to re-evaluate the language following "malice aforethought" as the inclusion of the word "implied" in section 16-3-29 is arguably inconsistent with a specific-intent crime. See *Keys v. State*, 104 Nev. 736, 766 P.2d 270, 273 (1988) (stating, "[o]ne cannot attempt to kill another with implied malice because there is no such criminal offense as an attempt to achieve an unintended result" (citation and internal quotation marks omitted)). Moreover, if there is no evidence that one charged with attempted murder had express malice and a specific intent to kill, we believe the crime would involve a lower level of intent and, thus, would fall within the lesser degrees of the assault and battery offenses codified in section 16-3-600. See S.C. Code Ann. § 16-3-600 (2015 & Supp. 2016) (identifying levels and degrees of assault and battery offenses).
- 6 See *State v. Kromah*, 401 S.C. 340, 737 S.E.2d 490 (2013) (concluding that investigator's testimony about actions he took after conversations he had with three-year-old victim was admissible as the investigator did not directly relate to the jury any statements made by the child and the defense had an opportunity to cross-examine the investigator).
- 7 See *State v. Weaver*, 361 S.C. 73, 602 S.E.2d 786 (Ct. App. 2004) (holding that investigator's statement that "all of the evidence led to" or pointed to defendant did not constitute inadmissible hearsay given the investigator never repeated statements made to him by individuals at the crime scene and the testimony was in response to questions asked on cross-examination), *aff'd as modified* by 374 S.C. 313, 649 S.E.2d 479 (2007) (affirming but modifying Court of Appeals' analysis that police had probable cause for warrantless search of defendant's vehicle).
- 8 The Court of Appeals noted that *Weems v. State*, 269 Ga. 577, 501 S.E.2d 806 (1998) was decided under a former provision of the Georgia Code. *King*, 412 S.C. at 414 n.2, 772 S.E.2d at 195 n.2. However, in 2013, the Georgia legislature substantially revised the state's rules of evidence. See *Parker v. State*, 296 Ga. 586, 769 S.E.2d 329 (2015) (recognizing that Georgia's new Evidence Code took effect on January 1, 2013).

- 9 *United States v. Baker*, 432 F.3d 1189 (11th Cir. 2005), *abrogated in part by Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) (concluding that victim's statements, during 911 phone call "interrogation," identifying her assailant were non-testimonial under *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)).
- 10 We reject the State's contention that King waived this issue because he declined the trial judge's offer to redact the recording prior to publication to the jury. King presented an "all or nothing" objection to the recording as it would have been futile to redact the objectionable language and content from the recording. Had a redaction been possible, the recording would have been of no value to the State.
- 11 "A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." S.C. Code Ann. § 16-3-29 (2015).
- 12 Because the heart of this case lies at the intersection of legislative and criminal intent *in South Carolina*, in my view, decisions of other states' courts interpreting their own particular laws are of little help.
- 13 For the same reasons, I would affirm the trial court's "permissive inference of malice from the use of a deadly weapon" instruction, an issue the majority does not reach. See *State v. King*, 412 S.C. 403, 418, 772 S.E.2d 189, 197 (Ct. App. 2015). Given that I am in the minority in believing that the attempted murder statute requires only a general intent, I would caution against any implied malice instruction in a future prosecution under section 16-3-29. For the reasons pointed out by the majority, it seems to me that the concept of implied malice has no place in a prosecution for a specific intent crime. The majority has wisely suggested that the General Assembly reevaluate the implied malice language in the statute in light of the Court's holding that attempted murder requires a specific intent to kill. The necessity of legislative action, of course, depends on the legislature's acceptance or rejection of this Court's determination of legislative intent.

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Distinguished by Yates v. State, Md.App., December 22, 2011
393 Md. 502
Court of Appeals of Maryland.

STATE of Maryland

v.

Terrell BRADY.

No. 27, Sept. Term, 2004.

July 28, 2006.

Synopsis

Background: Defendant was convicted, after a jury trial in the Circuit Court, Baltimore City, John C. Themelis, J., of two counts of attempted first-degree murder, and related handgun charges. Defendant appealed. The Court of Special Appeals reversed. Certiorari was granted.

Holdings: The Court of Appeals, Bell, C.J., held that:

[1] plain error review of jury instruction on transferred intent was warranted, and

[2] if a defendant intends to kill a specific victim and instead wounds an unintended victim without killing either, the defendant can be convicted only of the attempted murder of the intended victim, and transferred intent does not apply.

Court of Special Appeals affirmed.

West Headnotes (9)

[1] Criminal Law

⚡ Plain or Fundamental Error

Appellate courts have the discretion to recognize plain error in jury instructions. Md.Rule 4-325(e).

Cases that cite this headnote

[2] Criminal Law

⚡ Necessity of Objections in General

In order for an appellate court to exercise plain error review, there must be an error, it must be plain, and it must be material to the rights of the defendant. Md.Rule 4-325(e).

8 Cases that cite this headnote

[3] Criminal Law

⚡ Necessity of Objections in General

Instances when appellate court should take cognizance of unobjected-to error, under plain error rule, are instances that are compelling, extraordinary, exceptional, or fundamental to assure defendant a fair trial and those that vitally affect defendant's right to fair and impartial trial, thus excluding the exercise of discretion as a matter of course and errors that are purely technical, product of conscious design or trial tactics, or result of bald inattention. Md.Rule 4-325(e).

11 Cases that cite this headnote

[4] Criminal Law

⚡ Objections in General

Premise for appellate court to recognize error in trial judge's instructions, even when there has been no objection at trial, is that a jury is able to follow trial court's instructions when articulated fairly and impartially; it follows, therefore, that when instructions are lacking in some vital detail or convey some prejudicial or confusing message, however inadvertently, ability of jury to discharge its duty of returning true verdict based on the evidence is impaired. Md.Rule 4-325(e).

2 Cases that cite this headnote

[5] Criminal Law

⚡ Duty of Judge in General

In the instructions, the trial judge must advise the jury on every matter stemming from the evidence which is vital to the jury's determination of the issues before the jury.

Cases that cite this headnote

[6] **Criminal Law**

☞ Elements of Offense and Defenses

Plain error review of jury instruction, which was not objected to at trial, that doctrine of transferred intent applied to attempted murder when unintended victim is injured but not killed, was warranted. Md.Rule 4-325(e).

9 Cases that cite this headnote

[7] **Homicide**

☞ Killing One Person with Intent to Kill or Injure Another; Transferred Intent

The doctrine of transferred intent acts as a substitute for the willfulness, deliberation, and premeditation required to make out a case of first-degree murder.

Cases that cite this headnote

[8] **Homicide**

☞ Killing One Person with Intent to Kill or Injure Another; Transferred Intent

Although the doctrine of transferred intent typically applies where a defendant, intending to kill one victim, shoots and misses that victim but kills an unintended victim, the intent to kill is not rendered non-transferable when the shot actually hits and wounds the intended victim and also kills an unintended victim.

8 Cases that cite this headnote

[9] **Homicide**

☞ Intent or Mens Rea

If a defendant intends to kill a specific victim and instead wounds an unintended victim without killing either, the defendant can be convicted only of the attempted murder of the intended victim, and transferred intent does not apply, i.e., defendant cannot be convicted of attempted murder of the unintended victim, based on transferred intent.

5 Cases that cite this headnote

Attorneys and Law Firms

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Julia Doyle Bernhardt, Asst. Public Defender (Nancy S. Forster, Public Defender, on brief), Baltimore, for Respondent.

Argued before BELL, C.J., and RAKER, WILNER, CATHELL, HARRELL, BATTAGLIA and GREENE, JJ.

Opinion

BELL, Chief Judge.

***504** In this case, we address whether the doctrine of transferred intent applies to attempted murder when an unintended victim is injured, but not killed. The Court of Special Appeals, in an unreported opinion, held that the doctrine does not apply in that situation. We agree and, therefore, shall affirm.

A.

Several shootings occurred on May 3, 1998, in the 5600 block of Lothian Drive in Baltimore City. James Jones ("James"), and Gregory White ("White") were inside ****872** the residence at 5649 Lothian Drive, while JoAnn Lee ("Lee") and Jonathan Jones ("Jonathan") were seated in a car outside the residence. The shots were fired into the first floor apartment and also into the car in which Lee and Jonathan were seated. Broken glass from the shattered car windows injured Jonathan, and White, a teenager who was watching television in the apartment, was shot in the legs as he attempted to run upon observing James running through the apartment, followed by two men, who were shooting at him. Witnesses identified the respondent, Terrell Brady (Brady) as one of the individuals involved in the shootings. Consequently, Brady was arrested and charged, *inter alia*, with two counts of ***505** attempted first degree murder, one as to James, the intended victim, and the other as to White, the unintended victim. He

was subsequently tried by a jury in the Circuit Court for Baltimore City and convicted of those, and related handgun, charges.

At the conclusion of the case and after instructing the jury with respect to attempted murder, the trial court gave the following instruction on transferred intent:

“If there is an intent to kill one victim, in the course of the attack on that victim-strike that. If there is an intent to kill a specific person or victim, in the course of an attack on that intended victim, another person is injured instead, the intent to kill the intended victim may be transferred to the act committed against another victim. It's known as transferred intent. Let me give you an example of that. I'm a terrible shot, and I intend to kill my court clerk. I aim, fire, miss her, strike Mr. Walker, the intent to kill my court clerk is transferred from her to Mr. Walker. But ... the intent must be triggered toward a specific person, and the act must be triggered toward a specific person at that time.”

During its deliberations, the jury sent the court a note seeking clarification on that issue. Acknowledging that it was “having difficulty with the ‘TRANSFER,’ ” the jury wanted to know, “if one is not the intended victim but becomes the victim, does the law demand the transference of the charge?”

The trial judge responded to the question with the following instruction:

“The doctrine of transfer intent applies to specific intent to murder. Transfer intent means that if one specifically intends injury to another person, and in an effort to accomplish the injury or harm upon a person, other than-strike that. Transfer intent means that if one specifically intends injury to another person, and in an effort to accomplish the injury, or harm upon

another person, someone other than the person intended to be injured, he is guilty of the same kind of crime as if his aim had been more accurate. The *506 fact that a person actually was killed instead of [the] intended victim is immaterial and the only question is what would have been [the] intended victim is immaterial and the only question is what would have been [the] degree of guilt. If the result intended actually had been accomplished, the intent to transfer to the person whose death or harm has been caused. Now that is [the] law in the murder case. Remember, your [sic] are dealing with an attempt to murder. As to attempt to murder, intent to murder, same principle applies.”

Neither the State nor defense counsel objected to this instruction.

As indicated, Brady was convicted of the attempted murder charges and the related handgun charges. He was sentenced to consecutive terms of twenty and twenty-five years imprisonment for the attempted murder convictions and five and fifteen **873 years imprisonment for the two handgun convictions. Brady noted an appeal to the Court of Special Appeals, which, in an unreported opinion, held that the Circuit Court committed reversible error by instructing the jury that the doctrine of transferred intent applied to the attempted murder of White. We granted the State's petition for writ of certiorari. *State v. Brady*, 381 Md. 674, 851 A.2d 594 (2004). We shall affirm.

B.

[1] [2] [3] [4] [5] Appellate courts have the discretion to recognize plain error in jury instructions. *See Maryland Rule 4-325(e)*, which provides:

“(e) *Objection*. No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury,

stating distinctly the matter to which the party objects and the grounds of the objection. Upon request of any party, the court shall receive objections out of the hearing of the jury. An appellate court, on its own initiative or on the suggestion of a party, may however take cognizance of any *507 plain error in the instructions, material to the rights of the defendant, despite a failure to object."

Pursuant to this Rule, in order for an appellate court to exercise plain error review, there must be an "error," it must be "plain," and it must be "material to the rights of the defendant." Maryland Rule 4-325(e).

Interpreting Rule 757 h,¹ a predecessor Rule to Rule 4-325, this Court characterized the instances when an appellate court should take cognizance of unobjected to error as "compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial," *State v. Hutchinson*, 287 Md. 198, 202, 411 A.2d 1035, 1038 (1980), and as those "which vitally affect [] a defendant's right to a fair and impartial trial," *State v. Daughton*, 321 Md. 206, 211, 582 A.2d 521, 523 (1990), citing *Hutchinson*, 287 Md. at 202, 411 A.2d at 1037-38, thus excluding the exercise of the discretion "as a matter of course," *id.*, and errors that are "purely technical, the product of conscious design or trial tactics or the result of bald inattention." *Id.* at 203, 411 A.2d at 1038. This Court has further explained:

"[T]he appellate courts of this State have often recognized error in the trial judge's instructions, even when there has been no objection, if the error was likely to unduly influence the jury and thereby deprive the defendant of a fair trial. The premise for such appellate action is that a jury is able to follow the court's instructions when articulated fairly and impartially. It follows, therefore, that when the instructions are lacking in some vital detail or convey some prejudicial or confusing message, however inadvertently, the ability of the jury to discharge its duty of returning a true verdict based on the evidence is impaired. The responsibility for avoiding such circumstance rests with the trial judge who must advise the jury on every matter stemming from the *508 evidence which is vital to its determination of the issues before them."

Id. at 204, 411 A.2d at 1039. See *Sims v. State*, 319 Md. 540, 549, 573 A.2d 1317, 1321 (1990); *Dawkins v. State*, 313 Md. 638, 642, 547 A.2d 1041, 1043 (1988); *Squire v. State*, 280 Md. 132, 134, 368 A.2d 1019, 1020 (1977); *Dempsey v. State*, 277 Md. 134, 142, 355 A.2d 455, 459 (1976). **874 See also *Jones v. State*, 379 Md. 704, 713, 843 A.2d 778, 784 (2004) (holding, citing *Hutchinson*, 287 Md. at 202, 411 A.2d at 1038, that there is no fixed formula for determining when discretion should be exercised, and there are no bright line rules to conclude that discretion has been abused).

Brady argues in this Court, as he did in the Court of Special Appeals, that the flawed jury instruction was an "error" in that it misstated the doctrine of transferred intent, it was "plain" in that it is "obvious" or "clear," *United States v. Olano*, 507 U.S. 725, 734, 113 S.Ct. 1770, 1777, 123 L.Ed.2d 508, 519 (1993), and it was "material" because it went directly to the essence of the crime of attempted murder. The Court of Special Appeals agreed, opining:

"The error in this case was clearly one of commission. In responding to the jury's question, the circuit court instructed, in part, that the doctrine of transferred intent that applies in a murder case applies to the crime of attempted murder. In light of the jury's direct question, we are persuaded that appellant's right to a fair trial on the charge of attempted murder of White was fundamentally compromised.

* * * *

"Based on the verdict, it is apparent that the jury discredited [the] appellant's explanation about what occurred at [the] apartment. Although the State did not argue that the intent to kill James was transferred to White, we cannot conclude beyond a reasonable doubt that the jury did not transfer the intent to murder James in finding the appellant guilty of the attempted murder of White. Indeed, the jury sent a note asking: '[I]f one is not the intended victim but *509 becomes a victim, does the law demand a transference of the charge?' The circuit court should not have instructed the jury that the doctrine of transferred intent applied to attempted murder."

The State argues that the exercise of plain error review by the Court of Special Appeals was inappropriate. It contends that, because Brady did not, at trial, object to the jury instruction at the time, his claim is unpreserved.

See *Conyers v. State*, 354 Md. 132, 167, 729 A.2d 910, 928-929 (1999). Moreover, it argues that even if the trial court erred in its instruction, plain error is not warranted because, while discretionary review of plain error may be exercised by the appellate courts if the circumstances are “compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial,” 354 Md. at 171, 729 A.2d at 931, there is nothing compelling or exceptional in this case to justify such exercise. To support this argument, the State explains that Brady's conviction was supportable without resorting to transferred intent, and that the prosecutor did not, in his case, rely on the theory of transferred intent. Furthermore, the State argues that because the judge also instructed the jury on attempted first and second degree murder, and the Court of Special Appeals found that Brady's conviction of attempted first degree murder was sufficient, the instruction on transferred intent did not prejudice Brady in any way.

[6] As the intermediate appellate court recognized and held, and Rule 4-325 confirms, it is fully within the power of the intermediate appellate court to exercise plain error review when there are circumstances that are “compelling, extraordinary, exceptional or fundamental to assure the defendant a fair trial.” *Conyers*, 354 Md. at 171, 729 A.2d at 931. We agree with the Court of Special Appeals that the circumstances in the case *sub judice* meet those requirements, and reject the State's arguments that, because the conviction was supportable on other grounds, the additional **875 instruction did not prejudice Brady. We have held previously that the accused is prejudiced when a trial court inaccurately supplies or *510 omits, in a jury instruction, an element of a charged offense. See *Richmond v. State*, 330 Md. 223, 623 A.2d 630 (1993) (holding that plain error existed where trial court instruction on malicious wounding with intent to disable omitted a specific intent instruction); *Franklin v. State*, 319 Md. 116, 571 A.2d 1208 (1990) (holding that plain error existed where trial court instructed jury that a specific intent to kill was not required to establish assault with intent to murder); *Dawkins v. State*, 313 Md. 638, 547 A.2d 1041 (1988) (holding that plain error existed when the trial court omitted the essential element of knowledge from its instruction defining possession of a controlled substance). See also *Vincent v. State*, 82 Md.App. 344, 571 A.2d 874 (1990) (instructing the jury that the offense of malicious shooting with intent to disable was a “crime of violence” that could be used as a predicate offense for the crime of use of a handgun in the commission of a crime

of violence was plain error). This approach has also been used by federal appellate courts. See, e.g., *United States v. Perez*, 43 F.3d 1131 (7th Cir.1994) (holding that the district court's instruction to the jury on assault with intent to commit murder that it could convict without finding a subjective specific intent to kill, as long as it found reckless and wanton conduct, was plain error); *United States v. Stansfield*, 101 F.3d 909 (3rd Cir.1996) (holding that omission from jury instruction of a substantial element was plain error).

C.

Having determined that the plain error review exercised by the Court of Special Appeals was not an abuse of discretion, we now consider whether the doctrine of transferred intent applies to the crime of attempted murder.

[7] It has been well settled in this State since *Gladden v. State*, 273 Md. 383, 330 A.2d 176 (1974), that the doctrine of “transferred intent” is the law in Maryland, and that it acts as a substitute for the willfulness, deliberation, and premeditation required to make out a case of murder in the first degree. In that case, the defendant, in an attempt to kill his intended *511 victim, shot and killed a twelve-year old bystander. The question this Court had to decide was whether the defendant, in that circumstance, was guilty of first degree murder; whether, in other words, the intent he harbored for his intended victim would carry over and attach to the death of his unintended victim. We held that he was and that it did, 273 Md. at 404-405, 330 A.2d at 188, joining, in so doing, the “singular unanimity” of the majority of state decisions on the subject, in holding:

“that such a homicide ‘partakes of the quality of the original act, so that the guilt of the perpetrator of the crime is exactly what it would have been had the blow fallen upon the intended victim instead of the bystander.’ Under this rule the fact that the bystander was killed instead of the victim becomes immaterial, and the only question at issue is what would have been the degree of guilt if the result intended had been accomplished.”

273 Md. at 391-392, 330 A.2d at 180-181. Focusing specifically on the facts of Gladden's case and rejecting Gladden's argument that his intent as to his intended victim could not be transferred, the Court stated:

“Where, as here, there was evidence that the conduct of the petitioner, Gladden, in a reprobated state of mind, was willful, deliberate and premeditated toward Siegel, the *mens rea* for murder in the first degree was established, notwithstanding that the decedent was an unintended victim. All the elements of **876 an intentional first degree killing were present. His responsibility for the ... conduct proscribed by the law cannot extenuate the offense because he did not kill his supposed enemy. The purpose and malice with which the shots were fired are not changed in any degree by circumstances showing that they did not take effect—because of bad aim—upon Siegel. Gladden’s culpability under the law and the resultant harm to society is the same as if he had accomplished the result he intended when he caused the death of the innocent youngster. The punishment is imposed in accordance with the culpability of the accused under the law and justice is served by punishing him for a *512 crime of the same seriousness as the one he undertook to commit.”

273 Md. at 404-405, 330 A.2d at 188.

The doctrine of transferred intent was expanded to include the offense of attempted first-degree murder in *State v. Wilson*, 313 Md. 600, 546 A.2d 1041 (1988). In that case, the defendant shot at Marvin Brown, 313 Md. at 601, 546 A.2d at 1042, but the bullet struck a third person instead, as a result of which that unintended victim was paralyzed. 313 Md. at 602, 546 A.2d at 1042. Wilson was convicted of two counts of attempted first degree murder; specifically, attempted murder of both Brown, the intended victim, and of the unintended, now-paralyzed, victim. 313 Md. at 602, 546 A.2d at 1042.

This Court reversed the Court of Special Appeals, which had refused to apply the doctrine of transferred intent,

believing it applied only to crimes involving or requiring a general intent. 313 Md. at 602, 546 A.2d at 1042. Noting that *Gladden* had established the doctrine of transferred intent in Maryland, *id.* at 603, 546 A.2d at 1043, and that “the very crime to which the doctrine was applied in *Gladden* was first degree premeditated murder, unquestionably a specific intent crime,” *id.* at 604, 546 A.2d at 1043, it rejected the intermediate appellate court’s rationale. Accordingly, this Court opined that the doctrine’s applicability “extended to all situations where a defendant’s intended act (which in all other respects constitutes a crime) ‘affects’ or ‘inflicts harm upon’ an unintended victim.” *Id.* In so doing, we aligned ourselves with numerous other jurisdictions holding that the transferred intent doctrine applies to attempted murder. *Id.* at 607-609, 546 A.2d at 1045, citing *People v. Neal*, 97 Cal.App.2d 668, 218 P.2d 556 (1950), *People v. Humes*, 78 Ill.App.3d 255, 33 Ill.Dec. 797, 397 N.E.2d 130 (1979), *Norris v. State*, 275 Ind. 608, 419 N.E.2d 129 (1981), *State v. Thomas*, 127 La. 576, 53 So. 868 (1910), *State v. Gillette*, 102 N.M. 695, 699 P.2d 626 (1985).

Thus, this Court concluded that it was unnecessary for the State to show that the defendant’s malice was directed against *513 the injured party in order to prove an attempted murder charge. It explained, referencing *Gladden*:

“In Maryland, criminal attempt requires a specific intent to commit the crime attempted. The Court of Special Appeals interpreted this requirement to mean that the crime of attempted murder requires a specific intent to kill the victim named in the indictment. We disagree. To be sure, attempted murder is a specific intent crime. However, the intent required is merely the intent to kill *someone*. ...

“[I]t is clear that the only difference between the crime of attempted murder and completed first degree (specific intent to kill) murder is that in the former the victim survived whereas in the latter the victim died. Moreover, the criminal conduct required to constitute an attempt to commit murder must be defined in terms of the conduct required to **877 constitute the completed crime. In other words, a defendant such as Wilson, in order to be guilty of an attempted first degree (premeditated) murder, must harbor the same *mens rea* as that required for a completed murder.

"Murder is homicide committed with malice aforethought. *Gladden, supra*, 273 Md. at 403, 330 A.2d at 187. In Wilson's case, the State proved the malice element by establishing Wilson's specific intent to kill Marvin Brown. Therefore, since under our decision in *Gladden*[,] Wilson would have been guilty of premeditated murder had the unintended victim ... died, the elements of attempted murder were satisfied when [the victim] survived."

313 Md. at 605-606, 546 A.2d at 1043-1044 (footnote and some citations omitted).

The *Wilson* holding was called into question with the filing of our decision in *Ford v. State*, 330 Md. 682, 625 A.2d 984 (1993). In *Ford*, this Court, albeit in dictum,² stated that *514 *Wilson* should not have applied transferred intent to attempted murder. 330 Md. at 714, 625 A.2d at 999. Ford was convicted in the Circuit Court for Prince George's County of, *inter alia*, eleven counts of assault with intent to disable, resulting from his participation in a scheme whereby traffic on the Capital Beltway was caused to slow and large rocks were thrown at cars, which resulted in sever damage to the cars and injury to the occupants of the cars. 330 Md. at 689, 625 A.2d at 987.

At trial, the judge instructed the jury that if it found that Ford had assaulted with an intent to disable the drivers of the cars, then this intent could be transferred to the passengers. 330 Md. at 708-709, 625 A.2d at 996-997. Ford did not object to this instruction, and this Court concluded that the instruction, as given, was not reversible error. 330 Md. at 709, 625 A.2d at 997. Nevertheless, because the Court of Special Appeals addressed at some length the issue of transferred intent and its inapplicability to assault with intent to disable and related crimes, one of the reasons for which "may be inconsistent with prior indications by this Court that transferred intent applies to attempted murder and assault with intent to murder," *id.*, this Court perceived the need to comment on the intermediate appellate court's discussion, with which this Court agreed, and to clarify the issue. *Id.*

Although it agreed with the Court of Special Appeals that the statute pursuant to which Wilson was charged precluded the applicability of the transferred intent doctrine,³ a matter it *515 discussed at some **878 length, *see* 330 Md. at 709, 625 A.2d at 997, our primary

focus was on the underlying nature of the crime of assault with intent to disable, which we also concluded precluded the applicability of the doctrine:

"It is a fundamental tenet of criminal law that a completed crime requires the concurrence of a *mens rea*, a guilty mind, and an *actus reus*, a bad act. The purpose of transferred intent is to link the mental state directed towards an intended victim, i.e., the intent to kill, maim, or disable that person, with the actual harm caused to another person. In effect, transferred intent makes a whole crime out of two component halves.... *Gladden* traced transferred intent back to its English common law heritage and the early cases it cited support the view that the doctrine was intended to enable conviction of a defendant of the crime he intended to commit only when that crime was not committed upon the intended victim.

* * *

"The underlying rationale for the doctrine ... suggests that transferred intent should apply only when, without the doctrine, the defendant could not be convicted of the crime at issue because the mental and physical elements do not concur as to either the intended or the actual victim.

* * *

"... [T]ransferred intent makes a whole crime out of two halves by joining the intent as to one victim with the harm *516 caused to another victim. Transferred intent does *not* make two crimes out of one. Where the crime intended has actually been committed against the intended victim, transferred intent is unnecessary and should not be applied to acts against unintended victims."

330 Md. at 710-712, 625 A.2d at 997-998 (citations omitted).

The Court gave, as an example, *People v. Birreuta*, 162 Cal.App.3d 454, 208 Cal.Rptr. 635 (1984), in which the California intermediate appellate court opined:

"The function of the transferred intent doctrine [in first degree murder cases] is to insure the adequate punishment of those who accidentally kill innocent bystanders, while failing to kill their intended victims. But for the transferred intent doctrine, such people

could escape punishment for murder, even though they deliberately and premeditatedly killed—because of their “lucky” mistake. The transferred intent doctrine is borne of the sound judicial intuition that such a defendant is no less culpable than a murderer whose aim is good. It insures that such a defendant will not be allowed to defend against a murder charge by claiming to have made a mistake of identity, a poor aim or the like.

“ ‘When the intended victim is killed, however, there is no need for such an artificial doctrine. The defendant’s premeditation, deliberation, intent to kill and malice aforethought are all directly employable in the prosecution for murdering his intended victim. The accidental killing may thus be prosecuted as a manslaughter or second degree murder without ignoring the most culpable mental elements of the situation. There is no danger that a premeditated killing will go unpunished or be treated as a ****879** manslaughter because the murder of the intended victim will presumably be the subject of prosecution.’ ”

330 Md. at 712-713, 625 A.2d at 998-999, *citing Birreuta*, 162 Cal.App.3d at 460, 208 Cal.Rptr. at 638-639.

This Court, explaining that although the crime alluded to in *Birreuta* was first degree murder, its analysis was applicable to Ford’s circumstances, adopted the rationale presented by ***517** the California Court of Appeal. 330 Md. at 713, 625 A.2d at 999. It opined that because transferred intent was the “intent following the bullet” to make a completed crime,

“the doctrine has no application when the bullet’s terminus is irrelevant and the crime at issue is complete without invoking transferred intent. In *Birreuta*, where the defendant managed to complete the crime of murder against his intended victim, the court properly refused to transfer his intent to murder to another, unintended, victim. *Transferred intent is equally inapplicable to other circumstances where the subject crime is already completed as to an intended victim, such as attempts or other crimes that can be completed*

without the necessity of physical contact. Such crimes have one thing in common—where the ‘bullet’ ends up is superfluous to the crime, so there is no need for the intent to ‘follow the bullet’ to link the crime’s mental and physical elements. The crime at issue here, assault with intent to disable, is such a crime. Because the elements of an assault with intent to disable are (1) an assault and (2) an intent to disable, the crime is complete regardless of whether the projectile reaches its target. The requisite intent has already been formed and the requisite assault has already been committed; no intent need be transferred to complete a crime.”

330 Md. at 713, 625 A.2d at 999 (emphasis added).

Noting that the result seemed contrary to the holding in *Wilson*, the Court observed:

“We believe *Wilson* should not have applied transferred intent to attempted murder.^[4] First, as we have noted, the purpose of transferred intent is not to multiply criminal liability, but to prevent a defendant who has committed all the elements of a crime (albeit not upon the same victim) from escaping responsibility for that crime. If the defendant charged with attempted murder, shot at but missed the ***518** intended victim, *the defendant may still be convicted of attempted murder of that victim.* The completed crime has been committed on the intended victim, and the fiction of transferred intent would not so much transfer the intent as replicate it and apply it to another victim, thus making multiple specific intent crimes from one single act intended to injure one person.

“A related reason why transferred intent cannot properly apply to attempted murder derives from the fact that the crime of attempted murder requires no physical injury to the victim. Although in *Wilson* the bystander was in fact injured, injury is not an essential element of attempted murder. Assuming

an attempted murder scenario where the defendant fires a shot at an intended victim and no bystanders are physically injured, one sees that it is virtually impossible to decide to whom the defendant's intent should be transferred. Is the intent to murder transferred to everyone **880 in proximity to the path of the bullet? Is the intent transferred to everyone frightened and thereby assaulted by the shot? There is no rational method for deciding how the defendant's intent to murder should be transferred."

330 Md. at 714-716, 625 A.2d at 999-1000 (emphasis added).

The *Ford* dicta transformed into holding in *Poe v. State*, 341 Md. 523, 671 A.2d 501 (1996). In that case, an unintended victim was killed when the bullet intended to kill the intended victim passed through her arm and struck the unintended victim. *Id.* at 526, 671 A.2d at 502. We held that the doctrine of transferred intent applied in that situation. *Id.* at 530-531, 671 A.2d at 504-505.

[8] Noting the rationale explained in the *Ford* dicta, that the purpose the doctrine of transferred intent was to prevent a defendant from escaping liability for a murder in which every element had been committed, but there was an unintended victim, *Ford*, 330 Md. at 710, 625 A.2d at 997, the Court was clear and firm: "the doctrine of transferred intent *519 does not apply to attempted murder when there is no death." 341 Md. at 529, 671 A.2d at 504. That holding did not benefit the defendant, however, for the Court rejected his argument that, because he in fact shot the intended victim and therefore was convicted of her attempted murder, there was no intent left to transfer to the unintended victim. It explained:

"The defendant fails to recognize ... that his intent was to murder, not to attempt to murder. Since Mr. Poe killed Kimberly, his intent to murder was 'transferred' from Ms. Poe to Kimberly. We agree with the State that the passing of the bullet through the arm of the intended victim before killing the unintended victim does not alter or negate the application of the doctrine of transferred intent. *A fortiori*, this is a classic case of transferred intent."

341 Md. at 528-529, 671 A.2d at 503. Thus, although the doctrine of transferred intent typically applies where a defendant, intending to kill A, shoots and misses A but kills unintended victim B, the intent to kill is not rendered non-transferable when the shot actually hits and wounds the intended victim and also kills an unintended victim. 341 Md. at 530, 671 A.2d at 504. That is so, the Court said, because the relevant inquiry is, not what the crime is denominated, but "what could the defendant have been convicted of had he accomplished his intended act?" 341 Md. at 530-531, 671 A.2d at 504.

The Court continued:

"Petitioner tries to unduly stretch our holding in *Ford* that the doctrine of transferred intent is inapplicable to attempted murder. We reject Poe's argument that because he completed the crime of attempted murder of his intended victim, the doctrine of transferred intent does not apply to the death of another person. In *Ford*, we made clear that if a defendant intends to kill a specific victim and instead wounds an unintended victim *without killing either*, the defendant can be convicted only of the attempted murder of the intended victim and transferred intent does not apply.... This is not true where, as in the case *sub judice*, the defendant intends to murder one victim and instead kills an *520 unintended victim. Here, transferred intent applies because there is a death and the doctrine is necessary to impose criminal liability for the murder of the unintended victim in addition to the attempted murder of the intended victim.... In *Ford*, this Court asserted that the doctrine is used when the defendant fails to commit the crime intended upon the targeted victim and completes **881 it upon another.... Thus, the doctrine should be applied to the instant case."

341 Md. at 529-530, 671 A.2d at 504 (footnotes and citations omitted).

This issue was most recently considered by this Court in *Harrison v. State*, 382 Md. 477, 855 A.2d 1220 (2004). We characterized the issue in *Harrison* as “almost identical to the one debated in *Wilson*, *Ford*, and *Poe*: whether ‘transferred intent’ may apply in an attempted murder case, where a bystander has received a non-fatal injury.” 382 Md. at 506, 855 A.2d at 1237. In *Harrison*, the defendant and a friend shot at their intended target, 382 Md. at 483, 855 A.2d at 1223-1224, but struck, instead, Cook, an unintended victim, in the neck. 382 Md. at 483, 855 A.2d at 1224. *Harrison* was convicted of the attempted second degree murder of Mr. Cook, under three separate theories-concurrent intent, transferred intent, and depraved-heart recklessness. 382 Md. at 485, 855 A.2d at 1225. The Court of Special Appeals rejected the “transferred intent,” rationale, reasoning that, under *Ford*, the doctrine only applies when a defendant shoots at his target, misses, and an unintended victim receives a fatal injury. *Harrison v. State*, 151 Md.App. 648, 658, 828 A.2d 249, 254-255 (2003), citing *Ford*, 330 Md. at 714, 625 A.2d at 999. We agreed. 382 Md. at 506, 855 A.2d at 1237.

In so concluding, the *Harrison* court reviewed and summarized *Gladden*, *Wilson*, *Ford*, and *Poe*, and noted the numerous jurisdictions that had rejected the doctrine of transferred intent as applied to attempted murders of unintended victims. See, e.g., *Ramsey v. State*, 56 P.3d 675 (Alaska App.2002); *Jones v. State*, 159 Ark. 215, 251 S.W. 690 (1923); *People v. Bland*, 28 Cal.4th 313, 121 Cal.Rptr.2d 546, 48 P.3d 1107 (2002); *State v. Hinton*, 227 Conn. 301, 630 A.2d 593 (1993); *521 *State v. Brady*, 745 So.2d 954 (Fla.1999); *State v. Williamson*, 203 Mo. 591, 102 S.W. 519 (1907); *People v. Fernandez*, 88 N.Y.2d 777, 650 N.Y.S.2d 625, 673 N.E.2d 910 (1996); *State v. Shanley*, 20 S.D. 18, 104 N.W. 522 (1905).

It opined:

“The most compelling reason why we reject the doctrine of transferred intent as applied to crimes of attempt is that it is not necessary to make ‘a whole crime out of two halves by joining the intent as to one victim with the harm caused to another victim,’ the purpose for which it was conceived. *Ford*, 330 Md. at 712, 625 A.2d at 998. When the unintended victim has not suffered a fatal injury, the defendant already has committed a

completed crime against the intended victim, and the seriousness of that crime is as great as if the intent were transferred to the unintended victim.

“Further, although not in this case, a defendant may be convicted of a crime against an unintended victim with the use of ‘concurrent intent’ and without the use of ‘transferred intent.’ Such a defendant also may be convicted of criminal battery, and as Judge Moylan suggested in *Harvey v. State*, 111 Md.App. 401, 430, 681 A.2d 628, 643 (1996), ‘the crime of reckless endangerment is also available to pick up much of the slack and to make resort to the transferred intent doctrine less compelling.’ There is little, if any, utility in extending the doctrine of ‘transferred intent’ to inchoate crimes such as attempted murder.”

382 Md. at 508, 855 A.2d at 1238.

The State argues that numerous states courts have applied transferred intent where the third party has been injured, but not killed. See *State v. Rodriguez-Gonzales*, 164 Ariz. 1, 790 P.2d 287, 288 (Ct.App.1990); *People v. Ephraim*, 323 Ill.App.3d 1097, 257 Ill.Dec. 291, 753 N.E.2d 486, 496-497 (2001); **882 *Blanche v. State*, 690 N.E.2d 709, 712 (Ind.1998); *Ochoa v. State*, 115 Nev. 194, 981 P.2d 1201, 1204-1205 (1999); *State v. Gillette*, 102 N.M. 695, 699 P.2d 626, 635-636 (Ct.App.1985); *State v. Andrews*, 154 N.C.App. 553, 572 S.E.2d 798, 802-803 (2002); *Short v. State*, 980 P.2d 1081, 1098 (Okla.Crim.App.1999); *522 *State v. Fennell*, 340 s.c. 266, 531 S.E.2d 512, 517 (2000). We find these cases to be unpersuasive. Moreover, our own case law is clear and well established and, thus, controlling.

The State also argues that *Ford*'s discussion of the application of transferred intent to inchoate offenses is mere dictum. While this may be true, this Court transformed that dictum into precedent when it decided *Poe*. As the Court of Special Appeals stated in *Harvey v. State*, 111 Md.App. 401, 426-427, 681 A.2d 628, 641-642 (1996), which, like *Poe*, crystallized the dicta expressed in *Ford*:

“In *Poe v. State*, 341 Md. 523, 529, 671 A.2d 501 (1996), the Court of Appeals summarized its earlier statement in *Ford*:

“We stated in *Ford* that transferred intent does not apply to attempted murder. *Id.* (disapproving

application of the doctrine of transferred intent to attempted murder in *State v. Wilson*, 313 Md. 600, 546 A.2d 1041 (1988)).... [T]he doctrine of transferred intent does not apply to attempted murder when there is no death.'

"*Poe* made clear, 341 Md. at 530, 671 A.2d 501, that when the unintended victim is *not* killed, the transferred intent doctrine will not apply:

'In *Ford*, we made clear that if a defendant intends to kill a specific victim and instead wounds an unintended victim *without killing either*, the defendant can be convicted only of the attempted murder of the *intended* victim and transferred intent does not apply. This is not true where, as in the case *sub judice*, the defendant intends to murder one victim and instead kills an unintended victim. (Emphasis in original; footnote and citation omitted).'

"We are not bound, of course, by a three-judge dissent nor by the *dicta* of even a four-judge majority. We are persuaded, however, that the majority's bottom-line conclusion is the sounder position. It is, after all, only with respect to *consummated homicide* that the law necessarily must concern itself with a notion like transferred intent. There is a *523 necessity principle at work that is not present when no death has resulted."

The State finally argues that basic notions of justice require that a person who, without justification or excuse, undertakes to kill another human being must pay the full

price for his act, even though by happenstance, or bad aim, he shoots the wrong person. We are not convinced. As our cases make clear, even demonstrate, there are other theories of liability, such as concurrent intent and depraved-heart recklessness, that are available to insure that the appropriate sanction is imposed in each case.

Based on the foregoing, we are satisfied that there are no good reasons for altering the treatment this Court has given the doctrine of transferred intent. We have arrived at the place where we are over time and after full, exhaustive, and sometimes heated, debate. We are satisfied, moreover, that the position we have adopted is sound.

[9] Brady intended to, but did not, kill James. The record reflects that his shots and pursuit were committed in furtherance of this desire. White was an unintended victim, who was wounded during the attempt on James. As articulated in *Poe*, if a defendant intends to kill a specific victim **883 and instead wounds an unintended victim without killing either, the defendant can be convicted only of the attempted murder of the intended victim and transferred intent does not apply. 341 Md. at 529-530, 671 A.2d at 504. We accordingly affirm the judgment of the Court of Special Appeals.

JUDGMENT AFFIRMED, WITH COSTS.

All Citations

393 Md. 502, 903 A.2d 870

Footnotes

- 1 Maryland Rule 757 h provided that an appellate court may, in its discretion, "take cognizance of and correct any plain error in the instructions, material to the rights of the defendant even though the error was not objected to as provided by section f".
- 2 We recognized the discussion of transferred intent as dictum, characterizing it as "an important, albeit somewhat collateral issue." *Ford v. State*, 330 Md. 682, 708, 625 A.2d 984, 996 (1993).
- 3 When *Ford* was charged, Md. Code (1957, 1987 Repl. Vol.), Article 27, § 386 provided, in full:
 "§ 386. Unlawful shooting, stabbing, assaulting, etc., with intent to maim, disfigure or disable or to prevent lawful apprehension.
 "If any person shall unlawfully shoot at any person, or shall in any manner unlawfully and maliciously attempt to discharge any kind of loaded arms at any person, or shall unlawfully and maliciously stab, cut or wound any person, or shall assault or beat any person, with intent to maim, disfigure or disable such person, or with intent to prevent the lawful apprehension or detainer of any party for any offense for which the said party may be legally apprehended or detained, every such offender, and every person counselling, aiding or abetting such offender shall be guilty of a felony and, upon conviction thereof, be punished by confinement in the penitentiary for a period not less than eighteen months nor more than ten years."

A 1991 amendment removed the minimum term of punishment and increased the maximum term to fifteen years. Chapter 234 of the Acts of 1991 (codified at Md. Code (1957, 1992 Repl. Vol.), Art. 27, § 386). The Court relied on *Commonwealth v. Morgan*, 74 Ky. 601, 602 (1876) for this proposition, concluding, "[t]he analogy could not be more direct; the plain statutory language of § 386 precludes the application of transferred intent." *Ford v. State*, 330 Md. 682, 710, 625 A.2d 984, 997 (1993).

- 4 This Court explained that Wilson's conviction could have been upheld under the theory of concurrent intent. *Ford*, 330 Md. at 716-718, 625 A.2d at 1000-1001.

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890 So.2d 174
Supreme Court of Alabama.

Ex parte State of Alabama
(In re Christopher COCKRELL

v.

STATE of Alabama).

1021997.

|

May 7, 2004.

Synopsis

Background: Defendant was convicted by jury in the Circuit Court, Jefferson County, No. CC-02-551, Gloria Bahakel, J., of attempted murder, for which he received a sentence of life imprisonment. Defendant appealed. The Court of Criminal Appeals, 890 So.2d 168, reversed and remanded.

Holding: Upon grant of state's petition for writ of certiorari, the Supreme Court, Lyons, J., held that, in a matter of first impression, doctrine of transferred intent did not apply to charge of attempted murder of unintended victim.

Affirmed.

Johnstone and Harwood, JJ., filed specially concurring opinions.

Brown, J., dissented.

Stuart, J., filed dissenting opinion, in which See, J., joined.

West Headnotes (1)

[1] Homicide

⇒ Intent or mens rea

Doctrine of transferred intent did not apply to defendant who had been charged with attempted murder of unintended victim; statute defining "attempt" did not clearly evince legislative intent to apply doctrine of

transferred intent, which was applicable only to completed crime of murder, to punish as attempted murder the consequences of an unintended, nonfatal result. Code 1975, §§ 13A-4-2, 13A-6-2(a)(1).

Cases that cite this headnote

Attorneys and Law Firms

*174 William H. Pryor, Jr., atty. gen., and Elizabeth Ray Butler, asst. atty. gen., for petitioner.

Craig Izard, Birmingham, for respondent.

Opinion

LYONS, Justice.

The State appeals from the reversal by the Court of Criminal Appeals of Christopher Cockrell's conviction for attempted murder. We affirm.

The following statement of the facts was taken from the opinion by the Court of Criminal Appeals:

"On October 1, 2001, following a previous disagreement over the theft of some money from Carlos Ivey's car, Cockrell was seen hiding in some bushes next to the neighborhood grocery store. Ivey pulled up in his car to a stop sign close *175 to the store. Cockrell, following Ivey's car, ran from the bushes down the street. Cockrell fired several shots into Ivey's car. One of the shots struck 12-year-old Jerome Fails, who was standing on his grandmother's front porch eating a sucker, in the head. Although Jerome survived, he suffered severe brain damage and [is] unable to move or talk.

"Cockrell testified that Ivey fired at him first, that he fired at Ivey in self-defense, and that he did not intend to shoot Jerome Fails."

Cockrell v. State, 890 So.2d 168, 169 (Ala.Crim.App.2003).

Cockrell was charged with the attempted murder of Fails, the unintended victim. Cockrell was not charged with the attempted murder of Ivey, the intended victim. The jury found Cockrell guilty of attempted murder, and the trial court sentenced Cockrell to life imprisonment. Cockrell

appealed his conviction to the Court of Criminal Appeals. The Court of Criminal Appeals reversed Cockrell's conviction, holding that there was insufficient evidence to support a conviction of attempted murder as to Fails because there was no evidence indicating that Cockrell intended to murder Fails. The Court of Criminal Appeals rejected the State's argument that the doctrine of transferred intent applied to Cockrell's case; that court stated that the doctrine was usually reserved for crimes of general, as opposed to specific, intent, e.g., assault. According to the Court of Criminal Appeals, attempted murder is a specific-intent crime, and a conviction for attempted murder cannot be obtained unless the accused intended to murder the person who was actually harmed. The Court of Criminal Appeals remanded the case to the trial court for that court to sentence Cockrell for the offense of first-degree assault with a deadly weapon, a lesser offense included within the offense of attempted murder.

The State petitioned this Court for a writ of certiorari on the basis that the issue presented in this case is a question of first impression in this Court. This Court granted the writ to address the issue whether transferred intent is applicable where the defendant has been charged with attempted murder but the actual victim was not the victim the defendant intended to kill.

Cockrell does not dispute that the doctrine of transferred intent applies to a murder charge. Cockrell concedes that he intended to murder Ivey. Cockrell committed an overt act toward murdering Ivey by shooting into Ivey's automobile. During that act, Fails was injured by one of the bullets intended for Ivey. However, the issue to be decided, which is one of first impression to this Court, is whether the doctrine of transferred intent is applicable to an *attempted*-murder charge.

The Court of Criminal Appeals relied on a case decided by the Supreme Court of California, *California v. Bland*, 28 Cal.4th 313, 48 P.3d 1107, 121 Cal.Rptr.2d 546 (2002), when formulating its holding that transferred intent does not apply to the offense of attempted murder. The Court in *Bland* interpreted the California murder statute to mean that "[t]o be guilty of murder, the defendant must intend to kill the alleged victim, not someone else." 28 Cal.4th at 328, 48 P.3d at 1117, 121 Cal.Rptr.2d at 558. The California court used the theory of concurrent intent—"where the means employed to commit the crime

against a primary victim create a zone of harm around that victim, the fact finder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone"—to uphold Bland's conviction, because Bland's victim fell within *176 that zone. 28 Cal.4th at 330, 48 P.3d at 1118, 121 Cal.Rptr.2d at 560.

The State contends that the Court of Criminal Appeals' reliance on *Bland* is misplaced because California's murder statute, unlike § 13A-6-2, Ala.Code 1975, does not include language incorporating the doctrine of transferred intent into the offense. The California murder statute, § 189, Cal.Penal Code (2004), reads:

"All murder which is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder in the first degree."

Section 13A-6-2, Ala.Code 1975, provides:

"(a) A person commits the crime of murder if:

"(1) With the intent to cause the death of another person, he causes the death of that person *or of another person.*"

(Emphasis added.) Thus, in contrast to the California murder statute, the doctrine of transferred intent has been codified into Alabama's murder statute. In *Carter v. State*, 843 So.2d 812, 814 (Ala.2002), this Court stated:

"... Alabama appellate courts have repeatedly held that 'the defendant's liability for the unintended consequences of a criminal act is in the same degree as it would have been had his aim been true and the intended target been injured or killed.' *Carter v. State*, 843 So.2d 807, 810 (Ala.Crim.App.2000)] (opinion on remand).... Section 13A-6-2(a)(1), Ala.Code 1975, reiterates the doctrine [of transferred intent] in its definition of murder. The statute provides in pertinent part, that '[a] person commits the crime of murder if ... [w]ith the intent to cause the death of that person or another person, he causes the death of that person or of another person' (Emphasis added [in *Carter*])."

See also *Mathis v. State*, 497 So.2d 231, 232 (Ala.Crim.App.1986).

This distinction is problematic. Cases taking a similar view to the one taken in California (rejecting the doctrine of transferred intent when the charge is attempted murder) can be found in jurisdictions, like Alabama, where the doctrine of transferred intent has been codified into the statute defining the offense of murder. See, e.g., *People v. Fernandez*, 88 N.Y.2d 777, 783, 673 N.E.2d 910, 913-14, 650 N.Y.S.2d 625, 628-29 (1996) ("[B]ecause an attempt charge always involves an uncompleted crime, the transferred intent doctrine is ordinarily not implicated.... Since the focus of the doctrine of transferred intent under Penal Law § 125.25(1) is the identity of the person whose death actually resulted, this doctrine has no relevance in an attempt case, where an actual death is not an element."); *Ramsey v. State*, 56 P.3d 675, 682 (Alaska Ct.App.2002) ("Accordingly, we conclude that Judge Wood erred in instructing the jury and allowing the State to argue that it could convict Ramsey of attempted murder of S.M. if Ramsey intended to kill Palacios and simultaneously injured S.M. We conclude that the proper instruction would have required the jury to find Ramsey had the specific intent to kill S.M. before it could *177 convict Ramsey of the attempted murder of S.M."); and *State v. Hinton*, 227 Conn. 301, 315-18, 630 A.2d 593, 601-02 (1993) (applying the rule of lenity in construing a criminal statute and concluding that it was not clear that the legislature intended to apply the doctrine of transferred intent to an attempt crime whenever the statute defining the crime allows the transfer of intent for the completed offense).

A Florida District Court of Appeals in *Bell v. State*, 768 So.2d 22, 28 (Fla.Dist.Ct.App.2000), provides a helpful collection of authorities rejecting the applicability of the doctrine of transferred intent to the offense of attempted murder of an unintended victim, as follows:

"A number of jurisdictions have rejected the doctrine of transferred intent in relation to the crime of attempted murder of the unintended victim. See, e.g., *Jones v. State*, 159 Ark. 215, 251 S.W. 690 (1923); *People v. Chinchilla*, 52 Cal.App.4th 683, 60 Cal.Rptr.2d 761, 765 (1997); *People v. Calderon*, 232 Cal.App.3d 930, 283 Cal.Rptr. 833 (1991); *State v. Hinton*, 227 Conn. 301, 630 A.2d 593, 602 (1993); *Ford v. State*, 330 Md. 682, 625 A.2d 984 (1993); *State v. Williamson*, 203 Mo. 591, 102 S.W. 519 (1907); *State v. Mulhall*, 199 Mo. 202, 97 S.W. 583 (1906); *People v. Fernandez*, 88 N.Y.2d 777, 650 N.Y.S.2d 625, 673 N.E.2d 910, 914 (1996); *State v. Shanley*, 20 S.D. 18, 104 N.W. 522 (1905)."

The *Bell* court continued:

"As several of these cases reason, transferred intent is inapplicable where no death results and the defendant is charged with attempted murder of the intended victim, because *the defendant committed a completed crime at the time he shot at the intended victim regardless of whether any injury resulted to the unintended victim*. See *Chinchilla*, 60 Cal.Rptr.2d at 764-65; *Calderon*, 283 Cal.Rptr. at 836-37; *Fernandez*, 650 N.Y.S.2d 625, 673 N.E.2d at 914."

768 So.2d at 28 (emphasis added).

Professor Perkins in his treatise on criminal law states:

"If, without justification, excuse or mitigation D with intent to kill A fires a shot which misses A

but unexpectedly inflicts a non-fatal injury upon B, D is guilty of an attempt to commit murder—but the attempt was to murder A whom D was trying to kill and not B who was hit quite accidentally. And so far as the criminal law is concerned there is no transfer of this intent from one to the other so as to make D guilty of an attempt to murder B. Hence, an indictment or information charging an attempt to murder B, or (under statute) an assault with intent to murder B, will not support a conviction if the evidence shows that the injury to B was accidental and the only intent was to murder A.”

Rollin M. Perkins, *Perkins on Criminal Law* 826 (2d ed.1969) (footnote omitted). In *Harvey v. State*, 111 Md.App. 401, 432, 681 A.2d 628, 644 (1996), the court, after quoting the foregoing passage from Professor Perkins's treatise, concluded:

“Consummated criminal homicide is, in the last analysis, *sui generis*. Many of its complexities, such as the transferred intent doctrine, simply do not travel well to other criminal climes. There is, moreover, no reason of necessity for making the transferred intent doctrine travel to climes other than that of actual, consummated criminal homicides. For the rest, the actuality of the real *mens rea* properly combined with its precisely related *actus reus* is enough to establish guilt at the appropriate level without any necessary resort to an intention-shifting legal fiction. The inchoate criminal *178 homicides are in no need of such a device.”

Other jurisdictions, however, have applied the doctrine of transferred intent to an attempted murder. The Arizona Court of Appeals reached such a conclusion in *State v. Rodriguez-Gonzales*, 164 Ariz. 1, 790 P.2d 287 (Ariz.Ct.App.1990). Rodriguez-Gonzales shot outside a

local bar with the intent to kill two security guards. Bullets struck and injured the security guards as well as another bystander, but no one was killed. Rodriguez-Gonzales was convicted of the attempted murder of all three victims. Arizona's attempt statute, like Alabama's, in addition to the element of intent, requires only that the offender make an overt act toward the commission of the offense. Arizona also has a transferred-intent statute that allows intent to be transferred from one victim to another if the resulting harm to the unintended victim is the same type of harm contemplated for the intended victim. The court stated: “Under our statute, criminal intent ‘follows the bullet’ from anticipated to unanticipated victims.... *Intent to murder is transferable to each unintended victim once there is an attempt to kill someone.*” 164 Ariz. at 2, 790 P.2d at 288 (emphasis added).

Courts in Minnesota, Illinois, Nevada, Indiana, and New Mexico, applying murder statutes comparable to Alabama's, have reached a result similar to the result reached by the Arizona Court of Appeals. See *Minnesota v. Ford*, 539 N.W.2d 214, 229 (Minn.1995) (holding that the trial court properly allowed the application of the doctrine of transferred intent in an attempted-murder case); *Illinois v. Hill*, 276 Ill.App.3d 683, 688, 658 N.E.2d 1294, 1298, 213 Ill.Dec. 273, 276 (1995) (noting that “the doctrine of transferred intent is applicable in attempt[ed] murder cases”), *appeal denied*, 166 Ill.2d 546, 664 N.E.2d 644, 216 Ill.Dec. 7 (1996); *Ochoa v. Nevada*, 115 Nev. 194, 199–201, 981 P.2d 1201, 1205 (1999) (holding that the doctrine of transferred intent was appropriate to support an attempted-murder conviction where the unintended victim was shot but not killed and the intended victim was killed); *Tucker v. Indiana*, 443 N.E.2d 840, 842 (Ind.1983) (holding that intent was properly transferred from the person against whom it was directed to the person actually injured to support a jury charge on attempted voluntary manslaughter); *New Mexico v. Gillette*, 102 N.M. 695, 704–05, 699 P.2d 626, 634–35 (N.M.Ct.App.1985), *rev'd on other grounds*, *Gillette v. Tansy*, 17 F.3d 308 (10th Cir.1994) (holding that appellant's intent to poison a mother was transferred to the children in the family who were also exposed to the poison so as to support a charge of attempted murder of the children).

The South Carolina Supreme Court in *State v. Fennell*, 340 S.C. 266, 276, 531 S.E.2d 512, 518 (2000), rejected the Maryland case of *Harvey v. State* and similar cases, holding that

“[a] person who, acting with malice, unleashes a deadly force in an attempt to kill or injure an intended victim should anticipate that the law will require him to answer fully for his deeds when that force kills *or injures* an unintended victim. Accordingly, we hold that the doctrine of transferred intent may be used to convict a defendant of ABIK [assault and battery with intent to kill] when the defendant kills the intended victim and also injures an unintended victim.”

(Emphasis added.)

The reprehensibility of a malicious intent to kill an individual amply justifies the application of the doctrine of transferred intent when an innocent bystander dies at *179 the hand of the perpetrator. *State v. Fennell* well illustrates the force behind the rationale of those cases holding that the doctrine of transferred intent applies to the offense of attempted murder—it draws upon the moral outrage that justifies expanding the applicability of the doctrine of transferred intent to an attempt that merely injures the innocent bystander, calling that offense attempted murder. The court in *Fennell* justified its conclusion by noting that the wrongdoer “should anticipate that the law will require him to answer fully for his deeds.” 340 S.C. at 276, 531 S.E.2d at 518.

On the other hand, the logic of the Maryland court in *Harvey v. State* underlies the rationale of those cases rejecting the applicability of the doctrine of transferred intent to the offense of attempted murder. As previously noted, the court in *Harvey* viewed consummated murder as *sui generis* or unique and pointed out that the offense of attempted murder does not require the fiction of transferred intent in order to secure a conviction. Similarly, as the Florida court observed in *Bell v. State*, “the defendant committed a completed crime at the time he shot at the intended victim regardless of whether any injury resulted to the unintended victim.” 768 So.2d at 28.

The Alaska Court of Appeals in *Ramsey v. State* criticized the application of the doctrine of transferred intent to an attempted-murder case by pointing out that under such a rule, a defendant could be found guilty of attempting to

kill everyone in a crowded building when a defendant fires multiple shots at the intended victim. The court reasoned:

“The jury certainly found that Ramsey intended to cause the death of Palacios [the intended victim]. And because his actions would have placed almost any reasonable person in the school in fear of serious physical injury, it is hard to say where the State's attempted murder theory would stop. A defendant can be found guilty of attempted murder whether or not he actually injures his intended victim. Therefore, the State's argument, carried to its logical extension, would allow it to convict Ramsey of the attempted murder of everyone in the building.”

56 P.3d at 681–82.

However, if that result is the natural consequence of the legislative scheme, it is not within the province of this court to reject that scheme on grounds of differing views as to sound public policy. See Art. III, § 43, Ala. Const.1901, providing, in pertinent part, “[T]he judicial [branch of government] shall never exercise the legislative and executive powers, or either of them....” Whether Alabama's legislative scheme embraces application under the attempt statute (§ 13A–4–2, Ala.Code 1975) of the doctrine of transferred intent as codified in § 13A–6–2 is the crux of the question.

Section 13A–4–2 provides that “[a] person is guilty of an attempt to commit a crime if, *with the intent to commit a specific offense*, he does any overt act towards the commission of such offense.” In *Free v. State*, 455 So.2d 137, 148 (Ala.Crim.App.1984), the Court of Criminal Appeals, discussing the offense of attempted murder, stated:

“It is well settled that intent may be presumed from the use of a deadly weapon and the character of the assault. *Chaney [v. State]*, 417 So.2d 625 (Ala.Crim.App.1982)]. However, this evidence must be sufficient to allow the jury to conclude, by fair inference, that

the appellant was shooting at the person (named in the indictment) in particular with the intent to murder him.”

*180 Under this formulation, Cockrell could clearly have been indicted for the attempted murder of Ivey.

The question before us is whether the attempt statute evidences a legislative intent to apply the doctrine of transferred intent to an attempted crime when the statute defining the crime allows the transfer of intent for the completed offense. If such legislative intent can be found, then the doctrine of transferred intent is implicit in an attempted murder and Cockrell can be charged with attempted murder as to Fails. If it cannot be found, Cockrell's conviction must be reversed.

The Connecticut attempt statute at issue in *State v. Hinton*¹ required that the defendant act “with the kind of mental state required for commission of the crime....” Conn. Gen.Stat. § 53a-49. In *Hinton*, the court, after quoting the foregoing from the attempt statute, concluded, “It is not clear from this language whether the legislature meant the doctrine of transferred intent to apply to an attempt crime whenever the statute defining the crime allows the transfer of intent for the completed offense.” 227 Conn. at 316, 630 A.2d at 601.

Section 13A-4-2, the Alabama attempt statute, refers to “the intent to commit a *specific offense*” (emphasis added). This reference is comparable to the reference to “the kind of mental state required for commission of the crime.” Alabama's murder statute, § 13A-6-2(a), Ala.Code 1975, provides that “[a] person commits the crime of murder if ... [w]ith the intent to cause the death of another person, he causes the death of that person *or of another person*.” The phrase “another person” appears twice in the foregoing quote from § 13A-6-2(a). The only reference to intent in § 13A-6-2(a) is tied directly to the first reference to “another person,” providing “[w]ith the intent to cause the death of another person.” This first reference to “another person” clearly applies to the *intended* victim. The second reference to the death of “another person,” clearly applies to a person other than the intended victim. Section 13A-6-2(a) does not link the reference to “another person” with intent in the context of an unintended victim because, indeed, it could not possibly be so linked. Any “intent” as to the innocent victim is nonexistent; the death

of the innocent victim is an *unintended* result. Intent is imputed as the result of a legal fiction adopted to prevent wrongdoers from escaping the consequences of killing without specific intent by the fluke of bad aim.

In applying this feature of Alabama's murder statute to the attempt statute we are guided by rules governing the construction of criminal statutes. We recently restated those rules in *Ex parte Bertram*, 884 So.2d 889 (Ala.2003):

“ ‘ “[I]t is well established that criminal statutes should not be ‘extended by construction.’ ” ’ *Ex parte Mutrie*, 658 So.2d 347, 349 (Ala.1993) (quoting *Ex parte Evers*, 434 So.2d 813, 817 (Ala.1983), quoting in turn *Locklear v. State*, 50 Ala.App. 679, 282 So.2d 116 (1973)).

“ ‘ A basic rule of review in criminal cases is that *criminal statutes are to be strictly construed in favor of those persons sought to be subjected to their operation, i.e., defendants*. *Schenher v. State*, 38 Ala.App. 573, 90 So.2d 234, *cert. denied*, 265 Ala. 700, 90 So.2d 238 (1956).

“ ‘ Penal statutes are to reach no further in meaning than their words. *181 *Fuller v. State*, 257 Ala. 502, 60 So.2d 202 (1952).

“ ‘ One who commits an act which does not come within the words of a criminal statute, according to the general and popular understanding of those words, when they are not used technically, *is not to be punished thereunder, merely because the act may contravene the policy of the statute*. *Fuller v. State*, supra, citing [*Young v. State*], 58 Ala. 358 (1877).

“ ‘ No person is to be made subject to penal statutes by implication and *all doubts concerning their interpretation are to predominate in favor of the accused*. *Fuller v. State*, supra.’

“ *Clements v. State*, 370 So.2d 723, 725 (Ala.1979) (quoted in whole or in part in *Ex parte Murry*, 455 So.2d 72, 76 (Ala.1984), and in *Ex parte Walls*, 711 So.2d 490, 494 (Ala.1997)) (emphasis added).

“ ‘ “Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to apply to cases not covered by the words used” *United States v. Resnick*, 299 U.S. 207, 209, 57 S.Ct. 126, 127, 81 L.Ed. 127 (1936). See also, *Ex parte Evers*, 434 So.2d

813, 816 (Ala.1983); *Fuller v. State*, 257 Ala. 502, 60 So.2d 202, 205 (1952).’

“*Ex parte Jackson*, 614 So.2d 405, 406 (Ala.1993) (emphasis added). ‘[T]he fundamental rule [is] that criminal statutes are construed strictly against the State. See *Ex parte Jackson*, 614 So.2d 405 (Ala.1993).’ *Ex parte Hyde*, 778 So.2d 237, 239 n. 2 (Ala.2000) (emphasis added). The ‘rule of lenity requires that “ambiguous criminal statute[s] ... be construed in favor of the accused.” ’ *Castillo v. United States*, 530 U.S. 120, 131, 120 S.Ct. 2090, 147 L.Ed.2d 94 (2000) (paraphrasing *Staples v. United States*, 511 U.S. 600, 619 n. 17, 114 S.Ct. 1793, 128 L.Ed.2d 608 (1994)).”

884 So.2d at 891–92.

Applying the foregoing rules of construction, we conclude that the statute defining “attempt” does not clearly evince a legislative intent to apply the doctrine of transferred intent—applicable only to the completed crime of murder—to punish as attempted murder the consequences of an unintended, nonfatal result. To hold otherwise would be to rewrite the attempt statute so as to imbue an attempt with not only the intent to commit the specific offense attempted, but also *such other intent as would be imputed to a defendant by operation of law only upon consummation of the offense solely by reason of harboring the specific intent necessary to commit such offense*. Likewise, a contrary holding would ignore the fact that an attempt is complete upon the doing of “any overt act towards the commission of the offense,” an act that of necessity always precedes the event required to bring into play the doctrine of transferred intent—the death of an innocent bystander. It is indeed tempting to be energized by a combination of moral outrage that justifies the Legislature’s application of the doctrine of transferred intent to the completed crime of murder and the fact of the horrific injury to Fails,² and thereby to read into the attempt statute the words necessary to affirm Cockrell’s conviction for the attempted murder of Fails. That extrapolation, however, is within the exclusive purview of the Legislature.

*182 Under the attempted-murder statute as it is currently written, and given the record before it, including an indictment charging Cockrell with the attempted murder of Fails, not Ivey, the Court of Criminal Appeals correctly reversed the judgment of the trial court.

The judgment of the Court of Criminal Appeals is affirmed.

AFFIRMED.

HOUSTON and WOODALL, JJ., concur.

JOHNSTONE and HARWOOD, JJ., concur specially.

SEE, BROWN, and STUART, JJ., dissent.

JOHNSTONE, Justice (concurring specially).

I concur in the scholarly main opinion. I write specially only to add some supporting observations.

The undisputed facts are that the defendant, intending and trying to shoot his adversary Carlos Ivey to death, missed Ivey and wounded a bystander, Jerome Fails. Because the attempted-murder indictment against the defendant untruly alleged that the defendant intended to kill the bystander Fails and the State proved only that the defendant intended to kill his adversary Ivey, the State failed in its proof of the intent element alleged in the indictment. Therefore, the Court of Criminal Appeals necessarily reversed the defendant’s attempted-murder conviction. *Cockrell v. State*, 890 So.2d 168 (Ala.Crim.App.2003).

On certiorari review before us, the State urges an analogy between the attempted-murder statute, § 13A–4–2(a), Ala.Code 1975, and the murder statute, § 13A–6–2(a)(1), Ala.Code 1975, but the State misconstrues the murder statute in an invalid effort to establish that the State did not need to prove the allegations of its indictment. The murder statute, as it would apply to this case had either the intended victim or the unintended victim suffered a fatal wound, reads:

“A person [the defendant Cockrell] commits the crime of murder if[,] [w]ith intent to cause the death of another person [the adversary Ivey], he [the defendant Cockrell] causes the death of that person [the adversary Ivey] or of another person [the bystander Fails].”

§ 13A-6-2(a)(1). No provision of this statute relieves the State of its burden to prove the allegations of its indictment. Rather, this statute contemplates that, if the bullet were to have killed either the defendant's adversary Ivey or the bystander Fails, and if the State were accurately to allege the defendant's intent—his intent to kill his adversary Ivey—and if the State were to prove that allegation, as the State could since the allegation would be true, then the State would be entitled to a murder conviction for whichever death the bullet caused. The statute does not contemplate that the State could inaccurately allege an intent to kill the bystander Fails, prove only the intent to kill the adversary Ivey, and still obtain a valid conviction.

If the requirements for pleading and proof were so lax, the State could obtain one murder conviction by alleging the wrong intent but proving the correct, different intent and then, later, could obtain a second murder conviction for the same death by alleging and proving the correct intent, without violating the defendant's guarantee against double jeopardy under the *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), test, since the element of intent as alleged in the second indictment would be different *183 from the element of intent as alleged in the first indictment. Such laxity in pleading and proof would violate the long-established fundamental policies for specificity in indictments:

“The constitutional right of an accused to demand the nature and cause of the accusation against him is not a technical right, but is fundamental and essential to the guaranty that no person shall be deprived of his liberty except by due process of law, nor be twice put in jeopardy for the same offense.

“An indictment should be specific in its averments in four prime aspects to insure this guaranty: (a) to identify the accusation lest the accused should be tried for an offense different from that intended by the grand jury; (b) to enable the defendant to prepare for his defense; (c) that the judgment may inure to his subsequent protection and foreclose the possibility of being twice put in jeopardy for the same offense, and (d) to enable the Court, after conviction, to pronounce judgment on the record.”

Summers v. State, 348 So.2d 1126, 1132 (Ala.Crim.App.1977).

The doctrine of transferred intent does not change one specific intent into another. *Simpson v. State*, 59 Ala. 1, 12 (1877). The doctrine provides only that one specific intent supplies the mens rea to justify criminal liability for an unintended result. *Childress v. State*, 344 So.2d 799 (Ala.Crim.App.1977); *Tolen v. State*, 49 Ala.App. 353, 272 So.2d 279 (1972); *Harris v. State*, 46 Ala.App. 189, 239 So.2d 331 (1970); *Gettings v. State*, 32 Ala.App. 644, 29 So.2d 677 (1947). That is, the doctrine of transferred intent does not transform intent to kill A into intent to kill B, *Simpson, supra*, but only deems intent to kill A sufficient mens rea to justify murder liability for killing B, *Childress, Tolen, Harris, and Gettings*. Thus, the doctrine will not relieve the State of the necessity to prove whatever intent the State has alleged in the indictment.

Because the doctrine of transferred intent serves only to supply the mens rea necessary to punish a result, *see Childress, Tolen, Harris, and Gettings, supra*, it does not apply to the offense of attempt, *Simpson, supra*, which does not require any result, as the main opinion correctly observes. Indeed, as already explained, even when the doctrine of transferred intent does apply, it does not change the intent proved by the State.

In the case now before us, the State failed to prove its allegation that the defendant “attempted to intentionally cause the death of another person, JEROME FAILS.” (Capitalization original; emphasis added.) The State proved only an intent not alleged, that the defendant intended to cause the death of his adversary Ivey. The doctrine of transferred intent did not change this proof of intent to kill Ivey into proof of intent to kill Fails as alleged in the indictment.

Our precedents are unmistakable—the State must prove the intent alleged in the indictment in order to obtain a valid conviction for attempted murder. *Simpson, supra*, *Free v. State*, 455 So.2d 137 (Ala.Crim.App.1984), *Free v. State*, 495 So.2d 1147 (Ala.Crim.App.1986). Therefore, the Court of Criminal Appeals was correct in reversing the defendant's conviction, *Cockrell v. State, supra*, and the main opinion is correct in affirming the judgment of the Court of Criminal Appeals.

HARWOOD, Justice (concurring specially).

I concur in the main opinion. I write specially to explain that, given the rule of lenity governing construction of

criminal statutes, as set out in the main opinion, I *184 cannot conclude that the Legislature has manifested a clear intent to have the legal fiction of transferred intent, explicitly applicable in consummated homicides, applicable also to attempted murder. It is significant to me, in that regard, that the Legislature has otherwise “covered all the bases” for the results of Cockrell’s criminal activity. He clearly could have been (and still may be, for all that appears) indicted for the attempted murder of Ivey. He clearly could have been indicted also for assault in the first degree of Fails under § 13A–6–20, Ala.Code 1975.

Because Cockrell “concedes that he intended to murder Ivey” and attempted to do so by shooting at Ivey with a pistol, Cockrell necessarily, “[w]ith intent to cause serious physical injury to another person, [caused] serious physical injury to any person by means of a deadly weapon....” Section 13A–6–20(a)(1) (defining the offense of assault in the first degree). “Serious physical injury” is precisely that type of “[p]hysical injury which creates a substantial risk of death....” § 13A–1–2(14). There was, and apparently remains, no legal impediment to indicting Cockrell for the attempted murder of Ivey and there was no legal impediment to indicting Cockrell for assault in the first degree as to Fails. This complete allocation of criminal culpability under a comprehensive legislative scheme furnishes some insight concerning the legislative intent regarding the applicability of the doctrine of transferred intent to the offense of attempted murder.

STUART, Justice (dissenting).

I disagree with the majority’s holding that “the statute defining ‘attempt’ does not clearly evince a legislative intent to apply the doctrine of transferred intent—applicable only to the completed crime of murder—to punish as attempted murder the consequences of an unintended, nonfatal result.” 890 So.2d at 181.

The Alabama Legislature established that “[a] person is guilty of an attempt to commit a crime if, with the intent to commit a specific offense, he does any overt act towards the commission of such offense.” § 13A–4–2(a), Ala.Code 1975. The Legislature has also provided that “[a] person commits the crime of murder if ... [w]ith intent to cause the death of another person, he causes the death of that person or of another person.” § 13A–6–2(a)(1), Ala.Code 1975. The murder statute specifically

contemplates the concept of transferred intent. Therefore, the Legislature has provided that a person is guilty of attempted murder if with intent to commit a murder (defined as causing the death of a person, either the intended person or another person), he does any overt act (e.g., shoots a weapon) toward the commission of such offense. Unlike the majority, which concludes that such a holding “would ... rewrite the attempt statute,” 890 So.2d at 181, I conclude by a reading of the language of the attempt statute and the murder statute that the Legislature did intend for the offense of attempted murder to include situations involving transferred intent.

Indeed, the Legislature did not have to specifically incorporate the concept of transferred intent in our murder statute. Additionally, the Legislature, if it had wanted to establish special conditions regarding attempted murder, could have excluded the concept of transferred intent by its statutory language. Nothing in the wording of either the murder statute or the attempt statute prohibits the application of the concept of transferred intent to attempted murder. See *Ex parte Holladay*, 466 So.2d 956, 960–61 (Ala.1985) (holding that “[w]here a statute enumerates certain things on which it is to operate *185 ..., the statute must be construed as excluding from its effect all things not expressly mentioned”). I conclude the interaction of § 13A–4–2 with § 13A–6–2 is plain and unambiguous on its face; therefore, there is no room for judicial construction.

“When the language of a statute is plain and unambiguous, as in this case, courts must enforce the statute as written by giving the words of the statute their ordinary plain meaning—they must interpret that language to mean exactly what it says and thus give effect to the apparent intent of the Legislature.”

Ex parte T.B., 698 So.2d 127, 130 (Ala.1997).

As the New Mexico Court of Appeals reasoned when confronted with this same issue:

“[I]n *State v. Thomas*, 127 La. 576, 53 So. 868 (1910), the Supreme Court of Louisiana considered a case where defendant, in the midst of a quarrel, shot at his intended victim (Washington), and wounded both the intended victim and a third party (Alma Meyers) who was

standing nearby. Defendant was charged with shooting Alma Meyers ‘ “with intent to commit murder.” ’ Defendant argued on appeal that the shooting of Meyers was accidental and that he lacked the intent necessary to establish the crime of shooting Meyers with an intent to commit murder. The court in *State v. Thomas* affirmed the conviction. The court held ‘the allegations of the indictment [are] fully proved, if there is the shooting of any person,—no matter of what person,—and the shooting is done with a dangerous weapon and with intent to commit murder ... there is nothing in the terms of the statute requiring that the person who was shot [must] have been the person intended in fact to be murdered, or who was shot at.’ *Id.* at 869. *Since a murder conviction will be upheld even though the specific intent to kill was directed at someone other than the unintended victim, it follows that an attempted murder conviction may be upheld on the same grounds. ‘[I]t should not be necessary to prove the malice aforethought was directed toward the person actually shot just because*

injury, rather than death, resulted. An attempt to commit murder should not require proof of an intention not necessary to sustain a charge of murder.’ State v. Alford, 260 Iowa 939, 940, 151 N.W.2d 573, 574 (1967)....”

State v. Gillette, 102 N.M. 695, 703–04, 699 P.2d 626, 635 (N.M.Ct.App.1985)(some emphasis added).

Because I believe that this Court should apply the plain meaning of the language of the statutes and not mandate that an attempt to commit murder require proof of an intention not necessary to sustain a charge of murder, I must respectfully dissent.

SEE, J., concurs.

All Citations

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Footnotes

- 1 The Connecticut murder statute is similar to § 13A–6–2; it provides: “A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person *or of a third person*” Conn. Gen.Stat. § 53a–54a. (emphasis added).
- 2 Compare *State v. Fennell*, 531 S.E.2d at 518 (“A person who, acting with malice, unleashes a deadly force in an attempt to kill or injure an intended victim should anticipate that the law will require him to answer fully for his deeds when that force kills or injures an unintended victim.”).

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