STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SALUDA COUNTY
Court of General Sessions
Honorable J. Michael Baxley, Circuit Court Judge

Appellate Case No. 2013-002304

THE STATE, ...RESPONDENT,

v.

GERALD RUDELL WILLIAMS,.....APPELLANT.

BRIEF OF RESPONDENT

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I. The trial judge's refusal to charge the jury on the lesser-included offense of first-degree assault and battery was harmless error as the only conclusion established by the evidence was Appellant attempted to kill the victims.

II. The trial judge properly charged the jury on the doctrine of transferred intent.

STATEMENT OF THE CASE

On July 9, 2013, the Saluda County Grand Jury indicted Appellant on three counts of attempted murder (2013-GS-41-257,-258,-259). On October 14–17, 2013, Appellant proceeded to a jury trial before the Honorable J. Michael Baxley. Bennett E. Casto, Esquire and Robert M. Madsen, Esquire, represented Appellant; Assistant Solicitors Ervin J. Maye, Esquire, and H. Franklin Young, III, Esquire, represented the State. The jury found Appellant guilty as indicted and the trial judge sentenced him to three concurrent terms of twenty years' incarceration.

Appellant filed a timely Notice of Appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

STATEMENT OF FACTS

On April 12, 2012, Investigator Robert Shorter with the Saluda County Sheriff's Office received information that Orienthal James Charley would potentially attack A.J. Young that night. Investigator Shorter advised officers to be on the lookout for a teal green Ford Windstar van, in which Charley would be an occupant, and that Charley would be armed and dangerous. Officers believed Charley would likely attack Young at his home in Shadow Ridge Court. (R.p.150, line 24–R.p.153, line 19).

That night, the sheriff's office received reports that a shooting incident occurred at Young's home. Officers Grenier and Morelli responded to the call and left for the crime scene. On their way, they discovered a vehicle matching the description of the teal green van parked on the grass on the side of the road. They inspected the vehicle and found it empty, but were fairly certain that was the vehicle for which they were searching. However, because the vehicle was empty and they still needed to respond to the incident, the officers asked Officer Brett Long with the city police department to guard the vehicle. Officer Long informed them he was just up the road, so the officers departed for the crime scene. (R.p.297, line 7–R.p.299, line 6).

When Officer Long arrived at the scene, he pulled up behind the van, turned on his blue lights, and put his headlamps on their bright setting. At that time, he noticed a person lying in the ditch. The person immediately stood up, and Officer Long directed the person to stop and raise their hands. However, the man ducked into the passenger door of the vehicle, and the van started to slowly drive off. Officer Long notified the other officers that someone was in the van and that it was leaving, and followed the van. Officers Grenier and Morelli returned to the scene and boxed the van in, forcing it to stop. Officers discovered Appellant and Charley in the

vehicle and took them into custody. (R.p.300, line 21–R.p.303, line 2; R.p.322, line 17–R.p.327, line 8).

Officers investigating the scene of the shooting discovered three individuals were inside Young's residence at the time the shootout began. In addition to Young himself, Ycedra Williams and her husband Joseph Wrighton were in the home. Officers found multiple bullet holes in the door to the home and its surrounding wall. Notably, the evidence showed bullets penetrated the door and wall from both directions, including a bullet lodged in the electrical box of the home. Numerous bullet casings were also found in the yard of the home. Young's gun was found in his room. In the early morning hours following the crime, two guns and two sets of rubber latex gloves—one complete set of gloves and one missing pieces—were found beside the driveway of a nearby house. (R.p.160, line 18–R.p.162, line 24; R.p.179, lines 2–7; R.p.180, line 16–R.p.183, line 6; R.p.184, line 18–R.p.189, line 12; State's Exhibit 21; State's Exhibit 22). Officers searching the van found two stocking hats, a bandana, a dark jacket, and a partially torn rubber latex glove. (R.p.339, line 21–R.p.340, line 25). At the Saluda County Detention Center, Officer Rhonda Adams was booking Appellant when she discovered two pieces of latex rubber gloves still attached to two of his fingers. Officer Adams recovered those pieces of gloves from Appellant's possessions, and gave them to Investigator Shorter. (R.p.208, line 15–R.p.212, line 22).

The sheriff's office ordered DNA testing of the pieces of latex gloves found near the driveway and in the van, and the tests found Appellant's DNA on both sets of items. Forensic testing found that eleven of the fifteen recovered bullet shell casings came from a .40 caliber gun, one of the two found with the rubber latex gloves. (R.p.384, line 3–R.p.387, line 25;

R.p.409, line 23–R.p.473, line 19; R.p.510, line 8–R.p.514, line 5; R.p.539, line 14–R.p.545, line 4).

At trial, Williams, Wrighton, and Young testified they were in the home at the time of the shooting.[1] They were sitting around the home when they noticed two men approaching. They turned off the lights, and Wrighton went to the door to get a better look at the men. The men began firing at Wrighton through the door and wall. Wrighton ran to the living room and pushed Williams to the ground. Young pulled out his gun and returned fire, shooting towards the men but firing through the door and wall. After a few moments, the gun battle ended, and all three remained in the home until police arrived. (R.p.231, line 4–R.p.235, line 1; R.p.255, line 4–R.p.257, line 8; R.p.275, line 3–R.p.276, line 24).

Charley also testified at trial. He admitted to driving to Young's home in an attempt to collect money. He claimed: (1) Appellant was his driver; (2) a man named Rico Riverez also followed them in a separate vehicle; (3) Appellant was unaware of the true purpose for the trip; (4) he disembarked from the vehicle some distance from Young's home, and told Appellant to wait for him with the vehicle; (5) he and Rico were the ones that approached the trailer; (6) he heard Young shout and then saw him come outside and fire two warning shots into the air; (7) he responded by firing one shot into the air; (8) Rico then shot at the house; (9) he fled without Rico, and had no idea whether Rico was arrested after the event; (10) he returned to Appellant at the vehicle, and within seconds of his return police pulled up to the vehicle. (R.p.585, line 24–R.p.595, line 23).

On cross-examination, Charley admitted he had pled to one count of attempted murder as a result of his participation in this crime and that the State had dropped two charges of attempted

[1] In addition to the three victims, six other individuals lived in the home: Mike and Felicia Barlow, their three children and Williams' stepbrother Frank Gonzalez. However, these six individuals were not in the home that night. R.p.219, line 5–R.p.220, line 8; R.p.225, line 23–R.p.226, line 5).

murder against him because he had agreed to cooperate with the police and in the State's case against Appellant. He admitted to telling Investigator Shorter about the crime and that Appellant, not Rico, was the second gunman. The solicitor reminded Charley that his sentencing hearing was deferred until after Appellant's trial. He conceded he was "double-crossing" the State and that he was lying about Appellant's involvement in the crime in an attempt to try and help him. He also admitted to speaking with Williams at the home during a previous attempt to try and locate Young, and that he only assumed Williams and the other occupants of the home were not present that night because she appeared scared during the previous attempt and he did not see a vehicle in the yard. Finally, Charley stated Appellant was in possession of the .40 caliber gun found with the gloves, he fired one shot in the air, and did not shoot at Young or the house, and conceded that Appellant was the person who fired numerous shots towards Young and the house. (R.p.603, line 21–R.p.607, line 23; R.p.612, line 1–R.p.618, line 20; R.p.624, line 17–R.p.627, line 18; R.p.631, line 21–R.p.633, line 24).

ARGUMENT

I.

The trial judge's refusal to charge the jury on the lesser-included offense of first-degree assault and battery was harmless error as the only conclusion established by the evidence was Appellant attempted to kill the victims.

Appellant argues the trial judge erred in refusing to charge the jury on the lesser-included offense of first-degree assault and battery because the jury could have inferred from the facts presented at trial that Appellant lacked malice in his attack. The State agrees the trial judge erred in failing to charge the jury on first-degree assault and battery, as Appellant's actions did meet the definition of that charge; however, such error was clearly harmless as the only conclusion established by the evidence was Appellant possessed malice aforethought and intended to kill the victims.

Section 16-3-600 provides:

> (C)(1)A person commits the offense of assault and battery in the first degree if the person unlawfully:
>
> (a) injures another person, and the act:
>
> (i) involves nonconsensual touching of the private parts of a person, either under or above clothing, with lewd and lascivious intent; or
> (ii) occurred during the commission of a robbery, burglary, kidnapping, or theft; or
>
> (b) offers or attempts to injure another person with the present ability to do so, and the act:
>
> (i) is accomplished by means likely to produce death or great bodily injury; or
> (ii) occurred during the commission of a robbery, burglary, kidnapping, or theft.

> (3) Assault and battery in the first degree is a lesser-included offense of assault and battery of a high and aggravated nature, as defined in subsection (B)(1), and attempted murder, as defined in Section 16-3-29.

S.C. Code Ann. § 16-3-600 (C) (Supp. 2011). Further, if there is evidence in the record from which the jury could infer the defendant is guilty of the lesser-included offense, rather than the crime charged, the trial judge must instruct the jury on the lesser-included offense. Dempsey v. State, 363 S.C. 365, 371, 610 S.E.2d 812, 815 (2005).

Even if improper, this Court can determine an improper charge to be entirely harmless. See Lowry v. State, 376 S.C. 499, 507, 657 S.E.2d 760, 764 (2008) ("an unconstitutional jury instruction will not require reversal of the conviction if the Court determines beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."); Arnold v. State/Plath v. State, 309 S.C. 157, 165, 420 S.E.2d 834, 838 (1992) (finding an improper malice charge harmless beyond a reasonable doubt); State v. Jefferies, 316 S.C. 13, 23, 446 S.E.2d 427, 433 (1994) (finding incorrect kidnaping charge which may have confused jury was harmless); State v. Kerr, 330 S.C. 132, 144–45, 498 S.E.2d 212, 218 (Ct. App. 1998) (holding improper and confusing jury charge on impairment in a DUI case was harmless error).

In determining whether an improper jury charge is harmless, this Court has stated: "in determining whether the error was harmless, we must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict." State v. Buckner, 341 S.C. 241, 247–48, 534 S.E.2d 15, 18–19 (Ct. App. 2000). As the South Carolina Supreme Court explained:

> Harmless error review looks to the basis on which the jury actually rested its verdict. From this perspective, in order to conclude that the error did not contribute to the verdict, the Court must "find that

> error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record."

Lowry, 376 S.C. at 508, 657 S.E.2d at 765 (quoting Yates v. Evatt, 500 U.S. 391, 403 (1991)) (internal citation omitted). The South Carolina Supreme Court has further explained: "In making a harmless error analysis, our inquiry is not what would the verdict have been had the jury been given the correct charge, but rather did the erroneous charge contribute to the verdict rendered." Jefferies, 316 S.C. at 22, 446 S.E.2d at 432 (citing Sullivan v. Louisiana, 508 U.S. 275 (1993)).

In State v. Middleton, 407 S.C. 312, 755 S.E.2d 432 (2014),[2] the defendant appealed his conviction for attempted murder, arguing the trial judge erred in refusing to charge the jury on first-degree assault and battery as the victim was uninjured when he fired 5-7 bullets into his vehicle and that his actions met the definition of first-degree assault and battery under S.C. Code Ann. § 16-3-600(C)(1)(b)(i). The South Carolina Supreme Court found the trial judge erred in failing to charge the jury on first-degree assault and battery, as it was undisputed that the

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[2] The full facts of the case, as stated by the South Carolina Supreme Court, are as follows:

> On September 28, 2010, Stephanie Mack was driving her vehicle in which Ryan Stephens was riding as a passenger. Mack stopped the vehicle at a school bus stop sign. They were 10–15 feet away from the school bus, facing the bus in the opposite lane, as kindergarten-aged children attempted to exit the bus. Appellant, driving a moped, approached Mack's stopped vehicle from the rear, and drove around to the passenger side. As he approached, he pulled out a gun and began firing into the passenger side of the vehicle, striking the vehicle repeatedly and shattering glass. He continued shooting into the vehicle as he rounded the front of the vehicle. Stephens testified that he and Mack were "laid back" in the seats at the time Appellant approached the vehicle, and he immediately jumped across Mack and into the driver's seat so that he could drive away. In the process, he struck Appellant with the vehicle. He stated these actions were the reasons that he and Mack were not shot and killed. Both Stephens and Mack testified that Appellant shot at them 5–7 times. None of the bullets struck Mack or Stephens. At trial, Mack testified that her only injuries were a few cuts from the broken glass. Stephens testified that he was upset by the incident but was not otherwise struck or injured in any way.
>
> Appellant was charged with two counts of attempted murder and one count of possession of a weapon during the commission of a violent crime. He requested a jury charge on the lesser-included offense of assault and battery in the first degree on both counts of attempted murder. The trial judge charged the jury on the lesser-included offense as to Mack but refused to charge the lesser-included offense as to Stephens.

407 S.C. at 314–15, 755 S.E.2d at 433–34.

defendant's actions met the elements of § 16-3-600(C)(1)(b)(i). However, the court found the trial judge's error was harmless, as the only evidence produced at trial showed the defendant attempted to kill the victim because he opened fire into the victim's vehicle and shot at least five times, and the only reason thw victim was not killed was because he jumped into the driver's seat and ran the defendant off the road. In the court's view, the error in failing to charge first-degree assault and battery did not contribute to the verdict beyond a reasonable doubt, as there was "no other way to construe the evidence" but that the defendant attempted to kill the victim. Middleton, 407 S.C. at 316–19, 755 S.E.2d at 434–36.

In the instant case, the only evidence presented at trial demonstrated Appellant attempted to murder the victims. The three witnesses testified Appellant and Charley shot at them numerous times through the door and walls of the house, with the attack only abating when Young returned fire. Even Charley's testimony,[3] which differed in various respects from the witnesses' testimonies, supported the attempted murder charge. He testified Young came outside and fired only a single warning shot into the air before Appellant fired eleven shots at Young and the house. Here, much like Middleton, the only evidence adduced at trial shows Appellant attempted to murder Charley. Thus, any error in failing to charge the lesser-included offense was harmless because the erroneous instruction did not contribute to the verdict beyond a reasonable doubt. See Middleton, 407 S.C. at 316–19, 755 S.E.2d at 434–36; Buckner, 341 S.C. at 247-248, 534 S.E.2d at 18-19.

[3] Admittedly, Charley initially testified Rico Riverez, not Appellant, was the gunman who shot the trailer. However, such testimony would only support a finding of Appellant's complete innocence, not that he was guilty of a lesser-included offense. See State v. Green, 397 S.C. 268, 289, 724 S.E.2d 664, 674 (2012) ("A trial judge is required to charge the jury on a lesser-included offense if there is evidence from which it could be inferred the lesser, rather than the greater, offense was committed."); State v. Drayton, 293 S.C. 417, 428, 361 S.E.2d 329, 335 (1987) (finding defendant was not entitled to a charge on a lesser included offense, as the only evidence presented at trial either supported a finding of guilt, or of complete innocence).

II.

The trial judge properly charged the jury on the doctrine of transferred intent.

Appellant argues the trial judge erred in charging the jury on the doctrine of transferred intent. Citing to this Court's decision in State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), He contends attempted murder requires specific intent, and that the facts show he had no knowledge of Williams's and Wrighton's presence in the home at the time of the crime. The State disagree with Appellant's allegation of error. Appellant possessed specific intent when he committed the crime, and that intent applied to all three victims because specific intent does not exclude crimes to other victims. Moreover, attempted murder is actually a general intent crime under the laws of the State.

ABWIK versus Attempted Murder

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

The common law offense of assault and battery with intent to kill ("ABWIK") was defined as an unlawful act of violence to the person of another, with either express or implied malice aforethought, and a specific intent to kill was **not** required. Id.[4] South Carolina Courts treated ABWIK as its version of attempted murder, instructing juries that if a defendant would have been found guilty of murder had the victim died as a result of the assault and battery, then the appropriate offense was ABWIK, not ABHAN. Id.

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

To prove ABWIK, the State had only to show the defendant possessed the same degree of general intent as required to prove murder. Foust, 325 S.C. at 15–16, 479 S.E.2d at 51–52. For purposes of murder and ABWIK, malice is the wrongful intent to injure with a wicked or depraved spirit intent on doing wrong, and doing the act intentionally, without just cause or excuse. Tate v. State, 351 S.C. 418, 570 S.E.2d 522, 527 (2002). As the South Carolina Supreme Court had recognized that a specific intent was not required to commit murder, it found the "logical inference" was that, similarly, specific intent was not required to commit ABWIK. Foust, 325 S.C. at 14–15, 479 S.E.2d at 52.

In State v. Sutton, 340 S.C. 393, 532 S.E.2d 283(2000), the South Carolina Supreme Court first addressed the issue of whether attempted murder was an offense in South Carolina. Declining to recognize the common law attempted murder offense, which required a specific intent to kill, as an offense separate from ABWIK, the Court specifically found the common law ABWIK and ABIK offenses "adequately cover the conduct which attempted murder would include." Id. at 388–89, 532 S.E.2d at 285–86. In short, unlike **common law** attempted murder, common law ABWIK did **not** require a specific intent to kill.

In 2010, as part of the Omnibus Crime Reduction and Sentencing Reform Act, the South Carolina Legislature enacted the attempted murder statute, and expressly abolished the common law offense of ABWIK, and stated: "[W]herever in the 1976 Code reference is made to [ABWIK], it means attempted murder as defined in § 16-3-29." Act. No. 273, 2010 S.C. Acts 1949–50. South Carolina Code §16-3-29 provides "[a] person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder."

In State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), this Court found attempted murder requires a specific intent to kill, and clarified that "specific intent means the defendant consciously intended the completion of acts compromising the [attempted] offenses." Id. at 409, 772 S.E.2d at 192 (quoting Sutton, 340 S.C. at 397, 532 S.E.2d at 285). In concluding the Legislature did not intend §16-3-29 to codify the common law ABWIK offense, which did not require a specific intent to kill, the Court of Appeals cited to statutory construction cases indicating the Legislature is presumed to know about judicial decisions interpreting its statutes. Significantly, in reaching this conclusion, the Court ignored multiple cases holding common law ABWIK, like murder, was a general intent rather than a specific intent offense, relying instead on the dicta in Sutton as case law the Legislature was presumed to know when it passed the attempted murder statute.[5] See, e.g., State v. Dennis, 402 S.C. 629, 742 S.E.2d 21, 27 (Ct. App. 2013) (ABWIK requires a general intent to kill, and South Carolina courts have recognized "the element that distinguishes ABWIK from ABHAN is not malice, but an intent to kill.")

Specific Intent is Not Isolated to Specific Victims

As an initial matter, the State contends Appellant possessed the specific intent to kill the victims. Notably, Appellant does not dispute the propriety of his conviction for the attempted murder of Young, including his specific intent to complete the crime. The crux of Appellant's argument is the mistaken belief that specific intent can only exist as to the specific, intended victim of attempted murder. Not only is there an absence of language requiring a specific victim in § 16-3-29, but this contradicts established state law. In State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000), the South Carolina Supreme Court found a defendant who killed his intended

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

target but also injured an unrelated third party in his shooting spree was guilty of murder of the intended victim and, using the doctrine of transferred intent, ABWIK of the third party. The court explained the defendant's mental state was like a "spotlight," which was not extinguished at the moment a bullet strikes and killed the intended victim, but in that case shined on both victims. The court noted it would be "[in]appropriate" to limit the defendant's punishment and penalty to maximum punishment of ten years' imprisonment provided under that version of the State's ABHAN statute. The court further found "[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 deed when that force kills or injures an unintended victim."

The State legislature has also taken steps to incorporate the doctrine of transferred intent into specific criminal statutes. S.C. Code Ann. § 16-3-1083 states a person who commits a violent crime that causes death of, or bodily injury to, a child who is in utero at the time that the violent crime was committed, is guilty of a separate offense, and is generally the "same as the punishment provided for had the death or bodily injury occurred to the unborn child's mother. Attempted murder is one such offense which falls under this statute. Notably, there is no requirement that the person who committed the offense had knowledge or should have had knowledge that the victim was pregnant or intended to kill or harm the unborn child.

Moreover, Appellant's contention that § 16-3-29 is only applicable against the targeted victim would lead to preposterous and unjust results in future criminal cases. To illustrate this point, the State presents the following hypothetical:

Intruder breaks into the home of Husband and Wife, intending to murder Husband. After searching the home, he hears a muffled voice from behind the closed bathroom door. Intruder, believing it to be Husband, throws open the door and immediately starts shooting.

If Husband is the person behind the door, and he hits and kills Husband, he is guilty of murder and can be punished by death or a mandatory prison term of thirty years to life, and is ineligible for parole or any early release program. If he only injures husband or completely misses, Intruder is guilty of attempted murder. Intruder could be sentenced up to a maximum of thirty years' imprisonment and would be ineligible for probation or a suspended sentence. Both offenses are classified as most serious offenses under the recidivist sentencing statute, S.C. Code Ann. § 17-24-45 (Supp. 2015), and the State may be able to pursue a sentence of life without the possibility of parole if Intruder had previously been convicted of serious or most serious offenses.

In both scenarios, Intruder "consciously intended the completion of actions compromising the [attempted] offense." However, if we adopt Appellant's position on specific intent only applying to the target of attempted murder, Intruder could face a drastically different sentence if the victim is Wife, not husband.

If Intruder shoots and kills Wife, he would still be guilty of murder and would face the same penalties referenced above. Yet, if Intruder shoots and only injures Wife, he would only be guilty of ABHAN. Pursuant to § 16-3-600(B), he would only face a maximum sentence of twenty years' imprisonment, without restrictions on the judge's ability to issue a suspended sentence or probation. Intruder would also eventually be eligible for early release programs. If Intruder missed Wife with his shots, he is now only guilty of first-degree assault and battery, and would face a maximum sentence of only ten years' imprisonment. Similarly, the judge could suspend a portion of Intruder's sentence or order probation, and he could later be eligible for an early release program. Additionally, convictions for ABHAN and first-degree assault and battery would also place additional limitations on the State's ability to pursue a sentence for life

without parole under § 17-25-45, because ABHAN is classified as only a "serious" offense and would require two or more prior convictions for a most serious offense or serious offense under the statute. Even worse, in the scenario in which Intruder shoots and misses Wife the State would be unable to seek life without parole against Intruder or consider the crime in a future LWOP-eligible conviction because first degree assault and battery is neither a most serious or serious offense.

As demonstrated in the above example, the only difference between the Husband's and Wife's scenarios was the identity of the person behind the door. In every situation, Intruder entered the home with the express purpose of killing Husband and made a clear attempt at accomplishing said task. There is no question that Intruder acted deliberately and intended his actions to culminate in Husband's murder. However, in the scenarios in which he encountered Wife and miraculously failed to kill her, he would only be guilty of lesser crimes with drastically reduced sentences.

The instant case possesses a comparable situation. The victims testified Appellant initially shot at Wrighton, not Young. While it could very well be true that Appellant had no knowledge that Young was not the only person in the home, the evidence shows his malice manifested when he opened fire on the silhouetted figure he saw at the door of the trailer. At that moment, he "consciously intended the completion of acts" constituting attempted murder. Accordingly, Appellant was guilty of attempted murder against all three victims.

General Intent is the Requisite Level of Intent for Attempted Murder

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

incorporate the same intent required for ABWIK,[6] which is only general intent. See William S. McAninch, W. Gaston Fairey, Lesley M. Coggiola, The Criminal Law of South Carolina 253–56 (6th ed. 2013) (common law ABWIK did not require specific intent to kill; attempted murder statute removed issues regarding the intent required by adopting definition mirroring the definition of murder, and limited the offense to actions that would be murder if the victim died).

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

In King, this Court supported its analysis by noting the Legislature abolished ABWIK with no reference to codifying it as attempted murder, and legislatively changing all statutory references to ABWIK to attempted murder was merely to avoid any confusion regarding the effect of the "new crime of attempted murder." 412 S.C. at 411, 772 S.E.2d at 193. This overlooks the fact the Legislature also abolished the common law offenses of assault and battery of a high and aggravated nature (ABHAN), simple assault and battery, assault of a high and

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

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

If the Legislature intended attempted murder to be a specific intent crime because common law attempt requires a specific intent to commit the underlying offense, the attempted murder statute is essentially superfluous. The 2010 Omnibus Crime Act did not repeal S.C. Code Ann. §16-1-80 (2003), which provides that a person committing the common law offense of attempt must be punished as for the principal offense, and all the case law regarding common law attempt prior to 2010 required the specific intent to commit the underlying offense. Thus, the Legislature could have simply abolished ABWIK and amended S.C. Code Ann. §16-3-20 (2003) (punishment for murder) to include the punishment for attempted murder (up to thirty years in prison pursuant to §16-1-80). The fact the Legislature enacted the attempted murder statute indicates it did not intend the common law specific intent requirement to apply to attempted murder.[7]

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

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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September 30, 2016

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GERALD RUDELL WILLIAMS,.....APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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September 30, 2016

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SALUDA COUNTY
Court of General Sessions
Honorable J. Michael Baxley, Circuit Court Judge

Appellate Case No. 2013-002304

THE STATE,

Respondent,

v.

GERALD RUDELL WILLIAMS,

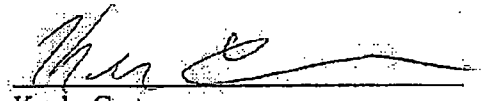
Appellant.

PROOF OF SERVICE

I, Keely Carter, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

David Alexander, Esquire
S.C. Commission on Indigent Defense - Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 30th day of September, 2016.



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