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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the South Carolina Supreme Court

APPEAL FROM RICHLAND COUNTY
The Honorable DeAndrea G. Benjamin, Circuit Court Judge

THE STATE,.....PETITIONER/RESPONDENT

v.

ROBERT XAVIER GETER,.....RESPONDENT/PETITIONER

BRIEF OF PETITIONER

Appellate Case No. 2018-001647

Opinion No. 5851(S.C. Ct. App. filed August 18, 2021)

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PETITIONER'S STATEMENT ON APPEAL

1. Did the trial court err in instructing the jury on transferred intent when there were sufficient evidence that victim Clarence Stone was injured due to the intentional actions of Geter?

STATEMENT OF THE CASE

On March 7, 2015, Robert Xavier Geter (Geter) and the victim Mr. James Lewis got into an altercation at Cullers Bar in Richland County, South Carolina. During this altercation Mr. Lewis beat Geter about his face causing swelling and a cut above one eye. A second victim Mr. Clarence Stone who was at times a peacekeeper in this establishment broke up this fight. He pulled Mr. Lewis out of the establishment onto a deck out back. (R. p. 138 lines 10-11) Once the fight ended the owner of the bar Ms. Deborah Culler told Geter that he had to leave. (R. p. 31 lines 18-19) Instead of going out of the front door Geter decided to go out of the back where the deck was located. While leaving the establishment a witness by the name of Michael Harkness overheard Geter stating "I'm gonna kill somebody tonight." (R. p. 75 lines 12-13)

Both victims were outside on the deck where Mr. Stone was attempting to calm Mr. Lewis down. Geter came outside and made both men think he was offering peace. (Tr. p. 139 lines 7-21) However, once he approached, he pulled out a knife and attacked Mr. Lewis. Mr. Stone in an attempt to stop the altercation was stabbed in the eye. (R. p. 141 lines 4-6) Bloodied and in pain Mr. Stone went back into the establishment for assistance. Geter and Mr. Lewis continue fighting, Geter stabbed Mr. Lewis twice, one stab in the chest punctured his heart. While Mr. Lewis lay bleeding Geter pulled the knife out of his chest and left the establishment. (R. p. 100 lines 7-12) Mr. Lewis was assisted back into the bar where he laid in the front doorway waiting on emergency medical services. Mr. Lewis was rushed to the hospital where he later died due to excessive bleeding. Mr. Stone was treated for his eye; he lost vision in that eye due to this injury. (R. p. 141 lines 23-24) Richland County Sheriff's Department later responded to the incident location. The lead investigator Joseph Clarke got statements from witnesses who informed him that "Boo" committed the murder. (R. p. 212 lines 18-21) "Boo" was a nickname

that everyone knew Geter by. At the completion of this investigation warrants were issued for Geter for the offenses of murder and attempted murder.

Geter was later told that Mr. Lewis died due to the stab wounds he inflicted. Geter was instructed by the Richland County Sheriff's Department to turn himself in. He turned himself in the next day and was arrested. At the time of his arrest Geter maintained he was "jumped" by five individuals and he stabbed Mr. Lewis in self-defense. (R. p. 219 lines 19-21)

On May 15, 2017, Geter's case was called for trial before Circuit Court Judge the Honorable Alexander S. Macaulay. Present were Assistant Solicitors Richard Cathcart and Jeremiah Shellenburg, representing Geter was his attorney Aimee Zmroczek. During pre-trial, the trial court denied Geter immunity pursuant to the Protection of Persons and Property Act.¹ Later two jurors informed the trial Court that they had prior knowledge of this case due to the fact they knew Mr. Lewis' mother. At that time the trial court decided to declare a mistrial.

This case was again called for trial on April 9, 2018 before Circuit Court Judge the Honorable Deandrea G. Benjamin. Present representing the state once again was assistant solicitors Richard Cathcart and Jeremiah J. Shellenburg, and representing Geter were attorneys Aimee Zmroczek and Ryan Schwartz. The trial concluded on April 12, 2018 with a jury of his peers finding Geter guilty of all charges. (R. p. 613 line 21 – p. 614 line 6). At the conclusion of this trial Geter appeared before the trial judge. He was sentenced to a forty year term of incarceration for the offense of murder and twenty years for the offense of attempted murder. The trial court ordered that these sentences were to be served concurrently. (R. p. 623 lines 19-24)

¹ A person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and is immune from criminal prosecution and civil action for the use of deadly force. S.C. Code Ann. §16-11-450 (2018).

Geter filed a timely notice of appeal before the Court of Appeals. During this appeal Geter argued that the trial court erred in instructing the jury on the doctrine of transferred intent. It was Geter's position that since attempted murder is a specific intent crime there has to be an intent to kill in order to be found guilty of attempted murder.

On June 7, 2021, all parties appeared before Judges Konduros, McDonald, and Geathers of the South Carolina Court of Appeals. The Court of Appeals issued an opinion affirming and reversing in part. *State v. Geter*, 434 S.C. 557, 864 S.E.2d 569 (2001). Judge Geathers issued a dissent stating that transferred intent should be applied to attempted murder. Both sides made a request for rehearing which was denied.

Petition for writ of certiorari was filed and granted by this Court. The State would respectfully request this Court reverse the Court of Appeals majority decision as it pertains to transferred intent being applied to attempted murder. The State's brief supporting this position follows.

STANDARD OF REVIEW

In criminal cases the appellate court sits to review errors of law only. *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The trial court has considerable discretion on the admissibility of evidence. *State v. Sheldon*, 344 S.C. 340, 342, 543 S.E.2d 585 (2001). On appeal, the trial court ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law. *State v. Smicklevich*, 268 S.C. 411, 234 S.E.2d 230 (1977). The doctrine of transferred intent applies only in the situation of intended harm inflicted on an unintended victim. *State v. Bryant*, 316 S.C. 216, 219, 447 S.E.2d 852, 854 (1994).

ARGUMENT

1. The trial court did not err in giving the jury instruction regarding the doctrine of transferred intent.

The issue of transferred intent as it applies to attempted murder has been before the Court of Appeals on numerous occasions with different outcomes. *State v. Williams*, 422 S.C. 525, 812 S.E.2d 917 (Ct. App. 2018)(transferred intent doctrine could be applied to attempted murder of intended and unintended victims, even though no victim was injured.); *State v. Smith*, 425 S.C. 20, 819 S.E.2d 187 (Ct. App. 2018)(defendant's intentional use of deadly force firing a pistol at rival gang members which resulted in injury to an unintended victim supported defendant's conviction for attempted murder); *State v. Williams*, 2021 WL 2944778 (Ct. App. 2021)(doctrine of transferred intent inapplicable to this charge of attempted murder); *State v. Bessellieu*, 2021 WL 5355632 (Ct. App. 2021)(the evidence overwhelmingly supports convictions for four counts of attempted murder and any error in charging transferred intent was harmless); *State v. Williams*, 437 S.C. 11, 876 S.E.2d 324 (2022)(A jury could infer that defendant had specific intent to kill a bystander, supporting conviction for attempted murder).

The State now request to have this Court answer the question existing in *State v. Williams*, 427 S.C. 148, 829 S.E.2d 917 (2019), whether the doctrine of transferred intent can be assessed in a case of attempted murder.

Geter was convicted of the offense of murder which is defined as the killing of any person with malice aforethought, either expressed or implied. S.C. Code Ann. §16-3-10 (2018). Geter was also convicted of the offense of attempted murder, which is defined as a person with the intent to kill attempts to kill another person with malice aforethought, either expressed or implied. S.C. Code Ann. §16-3-29 (2018). Malice is a major element for both the offenses of murder and attempted murder.

In the South Carolina Supreme Court case of *State v. Heyward*, 197 S.C. 371, 15 S.E.2d

669 (1941) malice was defined as:

“a wicked condition of the heart. It is a wicked purpose. It is a performed purpose to do a wrongful act, without sufficient legal provocation; and, in this case it would be an indication to do a wrongful act which resulted in the death of this man without sufficient legal provocation, or just excuse or legal excuse. In its proper sense term “malice” conveys the meaning of hatred, ill-will or hostility toward another. In its legal sense, however, as it is employed in the description of murder, it does not of necessity import ill-will toward the individual injured, but signifies rather general malignant recklessness of the lives and safety of others, or a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief; in other words, a malicious killing is where the act is done without legal justification, excuse, or extenuation, and malice has been frequently, substantially so defined as consisting of the intentional doing of a wrongful act toward another without legal justification or excuse.”

Heyward, 15 S.E.2d at 671, quoting, *State v. Gallman*, 79 S.C. 229, 60 S.E.2d 682, 686 (1908).

The difference is that attempted murder requires proving that the defendant had a specific intent to kill. *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017).

Geter was convicted of murder for the intentional killing of Mr. Lewis and of attempted murder for the stabbing of Mr. Stone. The conviction for attempted murder was accomplished through the doctrine of transferred intent. Transferred intent is where the actor’s intent to kill his intended victim is said to be transferred to his actual victim. *State v. Gandy*, 283 S.C. 571, 574, 324 S.E.2d 65, 67 (1984). Geter, while attacking Mr. Lewis, stabbed Mr. Stone who was attempting to break up the fight. After Mr. Stone went away due to the pain he endured after being stabbed in eye, Geter proceeded to kill Mr. Lewis. There is no doubt that the *mens rea* existed. The testimony of eyewitnesses showed that Geter followed both victims out of the bar onto a deck where he attacked the victims with a knife. This obviously reveals malice and an intent to kill. The trial court did not err in instructing the jury on the doctrine of transferred

intent. If the mental state exists then there exists an intent to kill, this intent can therefore be transferred to another victim.

In *State v. Fennell*, 340 S.C. 266, 531 S.E.2d 512 (2000), this Court stated that the word “transferred intent” is a bit misleading. In *Fennell* it states:

The defendant’s mental state, or *mens rea*, whatever it may be at the time he allegedly commits the criminal act is contained within the defendant’s brain when he commits the act. That mental state never leaves the defendant’s brain; it is not “transferred” from the defendant’s brain to another person or place. A more apt description might be that the mental state is like a spotlight emanating from its source – the defendant’s mind – to its target – the intended victim.

Nor is that mental state in limited supply. The mental state “spotlight” is not extinguished at the moment a bullet strikes and kills the intended victim, such that there is no mental state left upon which to convict an unintended victim who also is injured or killed.

Fennell, 340 S.C. at 271, 531 S.E.2d at 515.

The ‘spotlight’ of Geter existed with the two victims on the deck of Cullers bar. Geter attacked both individuals with a total disregard for human life. Geter even gave the victims the false sense of security by offering an olive branch and when they relaxed he attacked them both with a knife. If there was malice in the Geter’s heart he is guilty of the crime charged, it matters not whether he killed his intended victim or a third person by mistake. *Heyward*, 197 S.C. at 377, 15 S.E.2d at 672.

It was obvious that Geter had an intent to kill. He killed the intended target as well as severely injuring an innocent bystander doing the right thing by attempting to stop the fight. The actions of Geter should not be excused because Mr. Stone made an attempt to stop Geter’s aggression and suffered because of it. Geter argues that there should not be any transferred intent due to the fact there was no intent to kill Mr. Stone. However, Mr. Stone was struck due to

Geter's intentional malicious attack with a knife on both victims killing one and causing a permanent injury to the other.

According to eyewitness testimony Geter had an intent to kill. The question raised by the Geter is can that intent be transferred to a victim who was at the scene and injured but not killed? Geter argued that since there is a requirement as to a specific intent to kill, transferred intent cannot apply to an attempted murder, we disagree. Geter had malice and intent to kill. He stabbed Mr. James in the chest and he had other numerous cuts about his face and body. (R. p. 167 line 7 – p. 170 line 23) He was not convicted of another charge of murder due to the fact Mr. Stone was lucky enough not to die from this major injury. Where there is an intent to kill and act designed to bring about desired killing, accused is responsible for all natural and probable consequences of the act, regardless of intended victim. *U.S. v. Wills*, 46 M.J. 258 (1997). Geter argued that there cannot be transferred intent toward his actions against Mr. Stone due to there not existing a specific intent to kill. The doctrine of transferred intent is based upon a legal fiction that imposes criminal liability upon a person based upon his or her participation in a factual scenario which creates harm to persons or property. *Ochoa v. State*, 115 Nev. 194, 198 (1999). Punishment should follow the intent and not the crime. Direct proof of a particular element of a crime is not required because the requisite element is imputed from the conduct of the defendant. *Id.* Geter must be held responsible for all of the consequences that is a result of said act.

In *Williams*, the Court of Appeals ruled that the circuit court did not err in instructing the jury on transferred intent in a case involving attempted murder.² In *Williams*, the Court of

²This Court later decided, "Because the court of appeals treated the case as if it had been tried as a specific-intent crime, we vacate the portion of its opinion dealing with the issue of transferred

Appeals determined that “A person who, acting with malice, unleashes a deadly force in an attempt to kill. . . 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.” *Williams*, 422 S.C. at 543, 812 S.E.2d at 926, *quoting*, *Fennell*, 340 S.C. at 276, 531 S.E.2d at 517. The State would request this Court adopt the same logic.

Geter had a total disregard for human life. He attacked two people with a knife after being ordered by the owner of the establishment to leave the premises. He was specifically heard saying “I’m gonna kill somebody tonight.” That obviously reveals an intent to kill and he accomplished that by attacking both victims, killing one and severely injuring the other. Geter definitely perpetrated an act of malice, and the fact one of the victims did not also die due to these actions should not absolve or relieve Geter of any punishment he is due because of this intentional malicious act. It should not be excused that Mr. Stone was not the intended victim, he is a victim who was attacked and suffered a permanent injury. The fact he was lucky enough to survive should not absolve Geter of his actions.

The Court of Appeals decided the trial court erred in instructing the jury on the law regarding transferred intent. The State disagrees with that determination. This case should have been submitted to the jury with the jury making a determination as to whether or not transferred intent existed. The question of intent with which an act is done is one of fact and is ordinarily for jury determination. *State v. Tuckness*, 257 S.C. 295, 299, 185 S.E.2d 607, 608 (1971).

intent and leave for another day the determination of whether the doctrine applies to attempted murder.” *State v. Williams*, 427 S.C. 148, 157-158, 829 S.E.2d 702, 707 (2019)

In other jurisdictions it has been determined that transferred intent can apply to attempted murder. The elements of attempted murder in Illinois are very similar to that of South Carolina.³ The Illinois Appellate Court has decided that the doctrine of transferred intent is applicable in attempted murder cases, *People v. Swaney*, 2 Ill.App.3d 857, 276 N.E.2d 346 (1971); *People v. Burrage*, 269 Ill.App.3d 67, 645 N.E.2d 346 (1994); *People v. Hill*, 276 Ill.App.3d 683, 658 N.E.2d 1294 (1995); *People v. Carlisle*, 35 N.E.3d 649 (2015).

In *State v. Ross*, the Louisiana Court of Appeals decided;

The doctrine of transferred intent provides that “[w]hen a person shoots at an intended victim with specific intent to kill or inflict great bodily harm and accidentally kills or inflicts great bodily harm upon another person, if the killing or inflicting of great bodily harm would have been unlawful against the intended victim actually intended to be shot, then it would be unlawful against the person actually shot even though that person was not the intended victim.”

State v. Ross, 115 So.2d 616, 621 (2013), quoting, *State v. Stroger*, 814 So.2d 725, 728 (2002).

There was obviously an act of malice against both victims. When this occurs, transferred intent applies. It is insufficient to argue that due to the fact Mr. Stone was not the intended victim, that Geter should be absolved of all acts toward Mr. Stone, acts that caused his extensive injuries. Theoretically, the doctrine applies in any case where there is intent to commit a criminal act and the only difference between the actual result and the contemplated result is the nature of the personal or property injuries sustained. *Ochoa*, 115 Nev. At 198. If intent and malice exist, any person who has committed an act of violence should suffer the consequences of this act, regardless if the injured party was the intended victim or not. It was proper for the trial court to

³ An individual commits the offense of attempted murder when with, **specific intent to kill**, he does any act which constitutes a substantial step toward the commission of murder. *People v. Hill*, 276 Ill.App.3d 683, 687, 658 N.E.2d 1294, 1297 (1995)(emphasis added).

instruct the jury on the doctrine of transferred intent, especially since attempted murder was the only charge regarding Mr. Stone that Geter could have been convicted of committing.⁴

Petitioner submits that the Court of Appeals erred in its decision regarding how transferred intent cannot be applied to the offense of attempted murder. In *Fennell*, this Court determined that a person 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. *Fennell*, 340 S.C. at 276, 531 S.E.2d at 517-518. Within *Fennell*, this Court cited with approval, *Ochoa*. In *Ochoa*, the Nevada Court specifically applied “transferred intent” to all crimes where an unintended victim is harmed as a result of a defendant’s specific intent to harm an intended victim regardless of whether intended victim is injured. In that case, the Nevada Court found it was appropriate to charge the defendant who killed the intended victim and injured a bystander with a stray bullet with murder and attempted murder. *Ochoa*, 981 P.2d at 1205.

Statutorily, our legislature has provided, “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). While *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017) required the State to prove a specific intent to kill, it did not require a specific intent to kill any specific person. Here the State was required to prove Geter acted with the intent to commit an act that would have the natural and probable consequences of another person being killed. Geter demonstrated a specific intent to kill after being told to leave the premises and instead going to the deck and attacking both victims with a knife killing one and seriously injuring the other.

⁴ Geter refused a court instruction on the lesser-included offense of assault and battery of a high and aggravated nature. (Tr. p. 628 lines 22 – p. 629 line 10)

Geter's actions clearly indicate an intent to kill "another person" and the act of stabbing both victims is certainly an overt act taking a big step towards fulfilling that intent. As a result, he is guilty of the crime of attempted murder as set forth by Section 16-3-29 and defined by the Supreme Court in *King*. See e.g. *People v. Stone*, 205 P.2d 272, 274 (Cal. 2009) ("Can a person who shoots into a group of people, intending to kill one of the group, but not knowing or caring which one, be convicted of attempted murder? Yes. The mental state required for attempted murder is the intent to kill a human being, not a *particular* human being.") (emphasis in original); *Commonwealth v. Palmer*, 192 A.2d 85, 98-99 (Pa. Super. 2018) ("It does not matter whether Petitioner's intent was generalized or specific with respect to his **target**. It matters only that he had a specific intent to inflict serious bodily injury upon someone.") (emphasis in original) The trial court did not err in charging transferred intent, this was not a reversible error.

In the Court of Appeals opinion, the majority raised attention to this footnote in *State v. Smith*, 430 S.C. 226, 845 S.E.2d 495 (2020), where this Court stated,

Nonetheless we note the State indicated that – were the Court to reverse Smith's convictions – it intended to charge Smith with three counts of attempted murder for shooting at the rival group, and one count of assault and battery of a high and aggravated nature (ABHAN) for shooting the victim. ABHAN is a general-intent crime, and thus there would be no question on remand as to the applicability of the doctrine of transferred intent.

Smith, 430 S.C. at 234, 845 S.E.2d at 499 n.9

Because of the above referenced footnote, the Court of Appeals wrongfully made the interpretation that this Court ruled that ABHAN was not attempted murder and is the only sufficient charge that could be made regarding transferred intent. The State argues that this Court never recommended that ABHAN would be a more appropriate charge. This Court just stated that if the Appellant in *Smith* was convicted of ABHAN this issue could not be raised. As stated

by the dissent in the present case, “while our Supreme Court reversed our decision to affirm *Smith*’s attempted murder conviction on other grounds there is nothing to indicate that the court rejected our interpretation of its jurisprudence as to transferred intent.” *Geter*, 434 S.C. at 571, 864 S.E.2d at 576(Ct. App. 2021)(Geathers J. dissenting)⁵

The majority was also of the belief that this Court vacating the issue of transferred intent in *Williams* equates to a decision as to the legality of the issue of transferred intent as it applies to attempted murder. Petitioner disagrees. This Court has made no such decision. In *Williams*, the attempted murder was tried as a general intent crime, so this Court decided to “leave it for another day the determination of whether the doctrine applies to attempted murder.” *Williams*, 427 S.C. at 158, 829 S.E.2d at 707. The State will argue that the Court of Appeals erred in its decision that transferred intent cannot be applied to attempted murder. The State respectfully request this Honorable Court to reverse the decision of the Court of Appeals and allow the decision of the trial court as it pertains to this issue to remain.

⁵ “In sum I find nothing in *King*, *Gerald Williams II*, and *Smith II* to indicate our courts have concluded the doctrine of transferred intent is inapplicable to a charge of attempted murder. *Williams*, 2021 WL 2944778, 15 (Ct. App. 2021)(Huff J. dissenting).

CONCLUSION

The trial court made the proper decision regarding this matter, so the State respectfully request this court to reverse the decision of the Court of Appeals as it pertains to transferred intent being able to be applied to attempted murder.

Respectfully submitted,

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