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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Richland County
DeAndrea G. Benjamin, Circuit Court Judge

THE STATE,

PETITIONER-RESPONDENT,

V.

ROBERT XAVIER GETER,

RESPONDENT-PETITIONER.

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

APPELLATE CASE NO. 2021-001408

BRIEF OF RESPONDENT

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STATE'S ISSUE PRESENTED

The trial court did not err in giving jury instructions regarding the doctrine of transferred intent as there exists an intent where there is sufficient evidence that the victim Clarence Stone was injured due to the intentional actions of Geter.

COUNTER ISSUE PRESENTED

Whether the Court of Appeals correctly held the "legal fiction" of transferred intent was not applicable to attempted murder which requires a specific intent to kill as an element of the crime, it is a specific intent crime and not a general intent crime, and where assault and battery of a high and aggravated nature (ABHAN) covers a crime involving injury to another person where there was no intent to kill that injured person?

STATEMENT OF THE CASE

Respondent Robert Geter was indicted by the Richland County Grand Jury for the offenses of murder and attempted murder. R. 661. His case came on for trial on April 9, 2018 before the Honorable DeAndrea G. Benjamin, and a jury. Aimee Zmroczek and Ryan Schwartz represented appellant. Richard Cathcart and Jeremiah Shellenberg were the assistant solicitors. R. 1.

On April 12, 2018, the jury found respondent guilty of both charges. R. 613, l. 21 – 614, l. 6. Judge Benjamin sentenced respondent to forty years imprisonment for murder, and she imposed a twenty-year concurrent sentence for attempted murder. R. 623, l. 19 – 624, l. 1.

The Court of Appeals affirmed in part, reversed in part, and remanded in State v. Robert Geter, 434 S.C. 557, 864 S.E.2d 569 (filed August 18, 2021). App. 1-13. Both Respondent Geter and the state sought rehearing. App. 14-33. The Court denied both rehearing petitions in its order dated November 5, 2021. App. 34-37.

Respondent Geter and the state both sought certiorari from this Court. This Court granted certiorari for Respondent Geter and the state in its order dated September 7, 2021.

This brief of respondent follows the state's brief of petitioner on the transferred intent jury instruction issue in this attempted murder case.

STATEMENT OF FACTS

Introduction

The state had correctly noted that "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 connects him to a person or property." Petition for writ of certiorari at 6, *citing* Ocoaa v. State, 115 Nev. 194, 198, 981 P.2d 1201, 1204 (1999), *quoting,* State v. Wilson, 71 Wash. App. 880, 863 P.2d 116 (1993). The state's argument in this case is anchored in this Court's opinion in State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000). See Brief of Petitioner at 6, 8 & 10. The state noted that: "[I]n 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. 340 S.C. at 276, 531 S.E.2d at 517-518." State's brief of petitioner at 10.

However, State v. Fennell involved the crime of assault and battery with intent to kill (ABIK), which was a general intent crime. As respondent will explain further below when enacting a crime of attempted murder, the legislature did away with the general intent crime of ABIK. For that and other reasons State v. Fennell does not control the outcome of this case, and the state's reliance on it is respectfully misplaced.

Relevant facts

This case involves an unfortunate altercation in Culler's Poolroom and Tavern in Richland County on March 7, 2015. The state contended that respondent was acting with malice aforethought when he attacked the decedent James Lewis, and Stone, who was injured in the fight. Brief of Petitioner at 1-3. However, respondent would testify in his own defense that he

was acting in self-defense while being beaten up by other men in the bar. Importantly, the trial court charged the jury on the law of self-defense. R. 595, l. 18- 599, l. 18.

During the bar fight, James Lewis was stabbed to death, and Clarence Stone, whom respondent maintained unnecessarily involved himself in a dispute between Lewis and respondent, was accidently stabbed and injured while respondent acted in self-defense. The facts, as is often the case, were in dispute, and the jury had to sort out the state's case or narrative of respondent acting with malice from respondent's defense of self-defense.

The state called Richland County Sheriff's Department investigator, Joseph Clarke, as a witness. R. 200, ll. 3-24. Clarke was the "primary homicide investigator on call" on the night of March 7, 2015. R. 201, ll. 5-22. Clarke offered that, after speaking to witnesses, "At that point they were saying, Boo [respondent] did it, Boo was the one responsible for it, et cetera. And I said, Fine." R. 212, ll. 12-25.

Clarke also testified that after he received word that Lewis had died, he secured a warrant for murder against respondent, and a second warrant for the attempted murder of Stone. R. 224, ll. 2-18. Respondent agreed to meet Clarke at the police station the next day, and Clarke told respondent this was "[h]is side to the story that we need to know about. And that was truly what I was interested in. This had happened in a bar. It happened early in the morning. And there had been a lot of people there. So we want to hear his side of this thing." R. 227, l. 2 – 228, l. 1.

Respondent gave Clarke the "bloody knife" at the police station, and he told Clarke "there was like five dudes there." R. 228, ll. 2-6. Clarke said he then advised respondent of his "Miranda[1] rights," took the knife from him, gave respondent the two arrest warrants, and "we transported him to Alvin S. Glenn Detention Center without further incident." R. 228, ll. 2-22.

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[1] Miranda v. Arizona, 384 U.S. 436 (1966).

On cross-examination, defense counsel showed Clarke some photographs showing respondent's injuries. Clarke acknowledged, "There appears to be some swelling to his face, no question." R. 238, l. 11 – 241, l. 17. Defense counsel asked Clarke about his experience in law enforcement and what he had done before taking out the arrest warrants. Clarke insisted, "I had probable cause for the arrest." R. 232, l. 23 – 237, l. 3. Clarke offered that "evidence is like money, you always want more of it," and he said that more investigation could lead to more corroboration of one side of the story or the other. R. 237, l. 1 – 244, l. 6.

On redirect examination, Clarke said, other than respondent telling him he was attacked by five men, there was no one else saying anything other than this was a "one-on-one" fight between respondent and the decedent, Lewis. R. 244, ll. 13-17. Clarke also said he was getting other statements that corroborated what the "the Cullers" told him had occurred. R. 246, ll. 5-15. The Cullers owned the pool room. This Court has also granted certiorari on respondent's broader issue of whether the Court of Appeals erroneously affirmed his murder conviction where Investigator Clarke was allowed to testify, over objection, that the opening statement by defense counsel to the jury was the "first time" he had heard of a self-defense case, and that Clarence Stone conversely had been totally consistent in his statements to law enforcement about what happened. See R. 247, l. 4 – 249, l. 23.

Clarke repeated on re-cross examination that "what y'all are putting together as defense, was that the first time I heard it that way. Yes, that was the first time I heard it since I been in court. The only thing Mr. Geter told me was it was like five dudes." R. 250, ll. 9-16.

The state's case was that respondent got into an altercation with James Lewis, and that "[M]r. Lewis beat the respondent about the face causing swelling and a cut above one eye." It was undisputed that "Lewis was getting the best" of respondent in this fight which respondent

said started because Lewis was angry about respondent accidently stepping on his foot. The state maintained that Clarence Stone was only attempting to "keep peace in the establishment" at the time.

After the initial fight was over, Deborah Culler, the owner of the bar, told respondent he had to leave. The state maintained respondent then made a false attempt to make peace with Lewis by offering a handshake, and that another fight ensued with respondent pulling out a knife. Lewis was stabbed and killed, and Stone was stabbed in the eye during this fight. See State's brief of petitioner at 1-3.

Respondent testified in his own defense at trial, and countered the state's narrative of what allegedly occurred. As stated, not guilty by reason of self-defense was a jury option at the end of the trial. Respondent told the jurors that on the day of the poolroom-bar incident, "I had the day off" and "I was selling t-shirts, pocket books, pants, things like that . . . on Monticello Road, right across the street from Culler's Pool Hall." R. 349, ll. 5-20. That evening, respondent left his girlfriend's house after she got home from working at the Babcock Center. He walked to a friend's house where "we played video games and chilled for a minute." They then went to Culler's Pool Hall around eight or nine p.m. that evening. There was a good crowd -- between thirty and forty people – at the pool hall. R. 350, l. 8 – 351, l. 23.

Respondent knew the decedent, James Lewis. He remembered that night he had purchased a beer and was putting money in the juke box when the decedent told him that he had stepped on his foot. "And I was like, Oh, my bad, my bad, my bad, you know what I'm saying. I'm having a good time. I'm like, my bad." R. 356, l. 20 – 357, l. 16.

Respondent testified that Clarence Stone then tried to intervene as if there was a problem. Respondent told Clarence, "Man, you ain't got nothing to do with this. You ain't got nothing to

do with this." R. 357, ll. 11-23. Respondent recalled that after he apologized to the decedent for stepping on his foot that "Clarence [Stone] hit me from behind. He hit me in the back of my head. So I turned around and I grabbed Clarence's hand to stop him from hitting me, and that's when James [Lewis] jumped in." R. 358, ll. 10-23.

Respondent admitted that the decedent was beating him badly. As he tried to defend himself, "Clarence come and kicked me in the face." Respondent continued to fight, and the decedent Lewis ended up getting stabbed during the fight. R. 362, l. 5 – 364, l. 25.

Respondent remembered, "My eyes were shut, both my eyes were shut, and it was blurry. All I seen was blur, like two people at the same time. And I still got the knife. So everybody came up to me, like, Man, what happened, what happened, Boo? I was like, Man, they just jumped me, they just jumped me." Respondent recalled the decedent "come out the back door" saying, "Mother fucker, you just stabbed me." R. 365, ll. 1-14.

Respondent told the solicitor on cross-examination that there were a number of men "stomping me, but my only focus was on Clarence and James because they was the closest. They was getting the most licks in. They was the closest." Respondent confirmed he thought there were about five men beating him that evening. R. 401, ll. 1-12.

The jury instruction

The judge ultimately charged transferred intent over objection:

> Ladies and gentlemen, we'll next talk about the doctrine of transferred intent. If the Defendant with malice aforethought attempts to kill another person, but by mistake injures or kills a different person, the law considers that the Defendant still had the intent to kill. Intent to kill is a mental state. It exists in the mind. *So if the State proves that a Defendant acting with malice had the intent to kill one person, but mistakenly injured another, the intent to kill is merely transferred from the original person the Defendant attempted to kill to the actual person injured.* Pursuant to the transfer intent doctrine, if one person intends to harm a second

> person, but instead unintentionally harms a third, the first person's criminal intent towards the second applies to the third as well.

R. 593, l. 11 – 594, l. 3. (emphasis added).

After the judge charged the jury, defense counsel renewed her objections to the jury charge, noting "specifically to the renewed objection to transferred intent." R. 605, ll. 11 – 17. After the verdict, defense counsel moved for a new trial based on her objection to charging the jury on transferred intent as to attempted murder. R. 615, l. 6 – 616, l. 1. The judge denied the motion for a new trial for charging transferred intent over objection. R. 616, l. 25 – 617, l. 2.

Court of Appeals

The Court of Appeals agreed with respondent that the circuit court erred in charging the jury on the doctrine of transferred intent to support the attempted murder charge. That Court in this case tracked recent Court of Appeals cases on transferred intent, and this Court's subsequent handling of them. These cases included State v. Smith, 425 S.C. 20, 32, 819 S.E.2d 187, 193 (Ct. App. 2018), *rev'd and remanded*, 430 S.C. 226, 845 S.E.2d 495 (2020), and the Court of Appeals reviewed the split among other jurisdictions over whether transferred intent can be applied in attempted murder cases, and concluded thusly:

> After considering South Carolina jurisprudence, as well as that from other jurisdictions, we conclude the circuit court erred in charging transferred intent as to the attempted murder charge. To support that charge, the State must demonstrate Geter attempted to kill Stone, and that was not the State's theory of the case. So long as attempted murder is a specific intent crime, transferring the intent to kill does not satisfy the necessary mens rea to convict a defendant of the attempted murder of an unintended victim. Furthermore, from a public policy standpoint, the supreme court has strongly suggested in both Williams[2] and Smith[3] that the

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2 State v. Williams, 427 S.C. 148, 158 n.9, 829 S.E.2d 702, 707 n. 9 (2019).

3 State v. Smith, *Id.* at 234, 845 S.E.2d at 499 (2020).

> lesser offense of ABHAN in cases such as this would serve as an appropriate punishment for the accused.

State v. Geter, 434 S.C. 557, 567-68, 864 S.E.2d 569, 574-75 (Ct. App. 2021)

STANDARD OF REVIEW

"In criminal cases an appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id.

ARGUMENT

The Court of Appeals correctly held the "legal fiction" of transferred intent was not applicable to attempted murder which requires a specific intent to kill as an element of the crime, it is a specific intent crime and not a general intent crime, and where assault and battery of a high and aggravated nature (ABHAN) covers a crime involving injury to another person where there was no intent to kill that injured person.

The state successfully had the trial judge instruct the jury on transferred intent where its theory of the case was that respondent killed the decedent during a fight by stabbing him in the chest, and that Clarence Stone was "collateral damage" or accidentally stabbed in the eye while attempting to break-up the fight. The state wanted the jury to transfer respondent's alleged intent to kill the decedent to Stone's injuries thereby finding respondent guilty of the attempted murder of Stone. Given the judge's instruction on transferred intent above there was respectfully no way the jury could not have convicted respondent of attempted murder for Stone getting stabbed in the same fight in which the decedent was killed.

Attempted murder requires a specific intent to kill as an element of the crime. State v. King, 422 S.C. 47, 810, S.E.2d 18 (2017). In Cockrell v. State, 890 S0.2d 174 (2004), the Alabama Supreme Court held that the doctrine of transferred intent did not apply to the charge of the attempted murder as to an unintended victim. The Cockrell court cited Rollin M. Perkins, Perkins on Criminal Law 826 (2d ed.1969) (footnote omitted) with the following example:

"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." Cockrell v. State, 890 So.2d 174, 177 (2004). (emphasis added).

In an even easier example, if A shoots at B intending to kill him, and misses and hits nothing, A is still guilty of attempted murder because he shot at B intending to kill him. There is simply no windfall to the wrongdoer as the state appears to urge in its certiorari petition for the wrongdoer being "a lousy shot," or grossly negligent in handling a dangerous instrumentality, or however hitting the mistaken target is classified. Further, and importantly, it is conceded that if respondent was found by the jury not to be acting in self-defense he would have been guilty of ABHAN as to the unintended victim, Stone. ABHAN carries a potential substantial prison sentence of twenty years. See, S.C. Code §16-3-600(B)(2). That is not a windfall for the "wrongdoer" if a properly instructed jury found the defendant was not acting in self-defense.

Further, in State v. Smith, 430 S.C. 226, 234, 845 S.E.2d 495-499, n. 9 (2020), the state erroneously indicted Smith for attempted murder of the *unintended victim*, and not the rival gang members Smith was actually shooting at in the Five Points District in Columbia. The state indicated to this Court that if it reversed Smith's convictions, which it did, that it would indict Smith for three counts of attempted murder as to the rival gang members Smith was actually shooting at, and one count of ABHAN for shooting the *unintended* victim. "[T]hus, there would be no question on remand as to the applicability of the doctrine of transferred intent. See State v. Williams, 427 S.C. 148, 157, 829 S.E.2d 702, 707 (2019) (It is well-settled in South Carolina that the doctrine of transferred intent applies to general-intent crimes.)." State v. Smith, 430 S.C. 226, 234, 845 S.E.2d 495-499, n. 9 (2020).

Similarly, the Court of Appeals of Alaska in Ramsey v. State, 56 P.3d 675 (2002), held that Ramsey could only be found guilty of the attempted murder of a bystander at the time he shot and killed a fellow high school student if he had the specific intent to kill the bystander. In Ramsey, the sixteen-year-old defendant went to Bethel High School with a twelve-gauge shot gun hidden under his jacket. The defendant was angry at a fellow student, Joshua, and he shot him in the stomach. Joshua later died from his wounds. Two other students sitting near Joshua were also hit by pellets from the shotgun blast and wounded. The Court in Ramsey noted that the defendant could be found guilty of attempted murder, *whether or not he actually injures his intended victim* but to be guilty of attempted murder he must have had the specific intent to kill the victim, not someone else.

The Supreme Court of Connecticut similarly held in State v. Hinton, 630 A.2d 593, 600-602 (Conn. 1993), "a defendant can still be prosecuted for his intent to kill and conduct aimed at killing the intended victim, whether a third party is killed or no one is even injured. The doctrine of transferred intent, generally considered a necessary fiction, is therefore not necessary to prosecute for attempted murder a defendant whose aim was poor."

The Court of Appeals in this case also correctly noted, as respondent conceded, that respondent could be convicted of ABHAN for the injuries to Clarence Stone in the future if that jury determines respondent did not have a specific intent to kill Stone. Again, the legal fiction of the doctrine of transferred intent was simply not necessary, and it was inapplicable to the facts of this case.

The proper charge or jury verdict for the injury to Clarence Stone, where the evidence showed respondent had no intent to kill Stone, was ABHAN. The state's apparent position that there was no error in charging transferred intent because "there was sufficient evidence that

victim Clarence Stone was injured due to the intentional actions of Geter" is respectfully untenable. Brief of petitioner at iv. Self-defense is an intentional action – and it was a viable jury option in this case – that would have caused those same injuries to Stone. Doing an action intentionally is not same as possessing an intent to kill while engaged in that action.

Here, the erroneous instruction on the doctrine of transferred intent was extremely confusing given the fact that respondent's defense was self-defense, and where there was strong evidence that -- even if the jury found respondent was not acting in self-defense -- the injuries to Stone, most respectfully, were collateral to respondent's intent regarding the decedent. As stated, given the erroneous instruction on transferred intent above, respondent's false conviction for the attempted murder of Stone was a foregone conclusion.

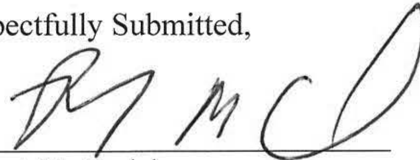
Regardless, and finally, as argued above, the state argument that State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000) is controlling in this case is incorrect. State's brief of petitioner at 6,8, and 10. State v. Fennell involved the crime of ABIK, which was a general intent crime, before our General Assembly enacted attempted murder as a crime to replace it. Attempted murder is conversely a specific intent crime which requires a specific intent to kill. State v. King, supra.

The Court of Appeals opinion was correct in reversing respondent's attempted murder conviction as to the erroneous transferred intent instruction, and it should be affirmed.

CONCLUSION

This Court should affirm the opinion of the Court of Appeals reversing respondent's conviction for attempted murder.

Respectfully Submitted,



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This 14th day of November, 2022.