STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

GERALD RUDELL WILLIAMS,

APPELLANT

APPELLATE CASE NO. 2013-002304

Appeal from Saluda County

Honorable J. Michael Baxley, Circuit Court Judge

Opinion No. 5540

PETITION FOR REHEARING

Appellant Gerald Rudell Williams petitions this Court for rehearing on both issues. Respectfully, the Court's opinion overlooks and misapprehends points of law and fact that, if corrected, require the reversal of appellant's convictions. Rule 221(a), SCACR. On Issue One, the Court's harmless error analysis improperly weighs the evidence and fails to recognize that credibility is an issue for the jury. On Issue Two, the Court erred in holding that specific intent can be transferred and that the trial judge's charge was proper.

Issue One

The Court correctly found that the trial judge erred in refusing to charge the lesser included offense of first-degree assault and battery, but incorrectly found this error to be harmless. To reach this conclusion, the Court only uses O.J. Charley's testimony during his cross-examination and discards his testimony during his direct-examination. Op. at 9. In doing so, the Court makes its own credibility finding and improperly weighs the evidence. Op. at 9. This usurps the jury's function and fails to recognize that inconsistencies in a witness's testimony must be resolved by the jury. See State v. Light, 378 S.C. 641, 648-49, 664 S.E.2d 465, 468-69 (2008). In Light, the defendant gave "inconsistent stories," but the trial court erred in refusing to give a lesser included offense instruction and the Supreme Court reversed. Id.

The jury was entitled to decide which parts of O.J. Charley's testimony were true. The jury was also free to discard O.J. Charley's testimony entirely. Credibility determinations are not made on appeal and when a case hinges on credibility, an error cannot be harmless. See State v. Stukes, 416 S.C. 493, 500, 787 S.E.2d 480, 483 (2016) (holding that an error could not be harmless because the "case hinged on credibility"). The Court's opinion says "the facts of this case fit" the lesser included offense, but does not state which facts necessitate giving the charge. Op. at 7. As argued in appellant's brief, these facts necessarily include O.J. Charley's testimony during direct-examination. Br. App. at 9-10. The Court's opinion is therefore inconsistent in using part of O.J. Charley's testimony to find that a lesser included offense charge was warranted but another part of O.J. Charley's testimony to find the error harmless. Picking and choosing which parts of O.J. Charley's testimony to believe is a jury function, and the error requires reversal so that a jury can weigh credibility and decide between the greater and lesser offenses.

Issue Two

The Court erroneously concluded that specific intent can be transferred under South Carolina's attempted murder statute and under the Supreme Court's opinion in State v. King, ___ S.C. ___, ___ S.E.2d ___, 2017 WL 4800004 (Oct. 25, 2017). First, the Court's statutory analysis is flawed. Op. at 14. The Court relies on the statute's use of "another person" to find that the intent to kill a specific person is not required. Op. at 14. See S.C. Code Ann. § 16-3-29. Had the Legislature intended the result found by the Court, it would have used the more general, "any person" or "persons." "Another person" is singular and means one person—a specific person. Further compelling this result is the Rule of Lenity, which the Court failed to address in its opinion. See State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) ("Finally, when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant.").

Second, the Court's analysis, which relies primarily on State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000), is flawed. Fennell dealt with a conviction under the old ABIK law. Fennell at 270-76, 531 S.E.2d at 514-518. The Court applied the transferred intent doctrine under the ABIK law, **which did not require specific intent to kill.** Id. citing State v. Foust, 325 S.C. 12, 16, 479 S.E.2d 50, 52 (1996) ("Here, Foust sought only a specific intent to kill charge. As that is not the law of this State, the charge was properly refused."). The reasoning of Fennell cannot apply to attempted murder, which is a specific intent crime.

The Fennell Court also applied the transferred intent doctrine because, as it said, the criminal laws regarding assault and battery, **as they existed at the time**, made it "necessary." Fennell at 274, 531 S.E.2d at 516. Those laws have changed. The Legislature completely rewrote the assault and battery laws, adding attempted murder and degrees of assault and battery.

See S.C. Code Ann. § 16-3-29; S.C. Code Ann. § 16-3-600. The rationale for Fennell's decision no longer exists.

In King, the Court rejected the State's claim that the Legislature "merely codified ABIK." King at * 7. The King Court's recognition that attempted murder is not ABIK means the Fennell Court's use of the transferred intent doctrine does not apply to attempted murder. Respectfully, this Court erred in extrapolating from Fennell that our new attempted murder statute, which after King unquestionably requires specific intent, allows (or needs) the doctrine of transferred intent.

A close reading of King further supports that the doctrine of transferred intent does not apply to a specific intent crime like attempted murder. The Court favorably quotes a Nevada decision that malice cannot be implied in an attempt crime. King at *5 quoting Keys v. State, 766 P.2d 270 (1988). If malice cannot be implied, it follows that it cannot be transferred. As this Court recognized in its opinion, multiple jurisdictions hold that specific intent in an attempted murder case cannot be transferred. Op. at 12 and n.11, citing Harrison v. State, 855 A.2d 1220, 1237 (Md. 2004) (citing cases from many jurisdictions to support its decision rejecting transferred intent for attempted murder). See also People v. Smith, 124 P.3d 730, 739-40 (Cal. 2005) ("The mental state required for *attempted* murder is further distinguished from the mental state required for murder in that the doctrine of 'transferred intent' applies to murder but not to attempted murder."); State v. Hinton, 630 A.2d 593, 600-02 (Conn. 1993) ("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."). Our Supreme Court, as evidenced by its reasoning in King, would likely follow these jurisdictions and decline to apply the doctrine of transferred intent to attempted murder.

King also states the Court's belief that without express malice or specific intent, a "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." King at *8 n.5. Nothing in King supports the Court's decision to apply the transferred intent doctrine. This Court should reexamine its opinion in light of King, grant rehearing, and reverse appellant's convictions.

Respectfully Submitted,

DAVID ALEXANDER
Appellate Defender

This 13th day of March, 2018.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon William F. Schumacher, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Gerald R. Williams, #279073, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 13th day of March, 2018.

David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 13th day of March, 2018.

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