STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals

Honorable J. Michael Baxley, Circuit Court Judge

Opinion No. 5540 (S.C. Ct. App. Filed February 28, 2018)

11-GS-41-00257, 00258, 00259

THE STATE,

RESPONDENT,

V.

GERALD RUDELL WILLIAMS,

PETITIONER

APPELLATE CASE NO. 2018-000994

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on May 1, 2018.

QUESTIONS PRESENTED

1.

Whether the Court of Appeals erred in affirming the trial court's charge of transferred intent for attempted murder?

2.

Whether the Court of Appeals erred in finding harmless the trial court's erroneous refusal to charge the lesser included offense of first-degree assault and battery?

STATEMENT OF THE CASE

On July 9, 2013, a Saluda County grand jury indicted appellant Gerald Rudell Williams for three counts of attempted murder. R. 762 – R. 767. On October 14, 2013, appellant was tried before the Honorable J. Michael Baxley and a jury. R. 1. Ervin J. Maye represented the State. R. 1. Bennett E. Casto and Robert M. Madsen represented appellant. R. 1. The jury convicted appellant. R. 722, l. 23 – 723, l. 17. Judge Baxley sentenced appellant to concurrent terms of twenty years' imprisonment. R. 738, ll. 4 – 11. The Court of Appeals affirmed. State v. Williams, ___ S.C. ___, 812 S.E.2d 917 (2018). After the denial of rehearing below, this petition for certiorari follows.

STANDARD OF REVIEW

The standard of review on Issue One is *de novo*. Whether the attempted murder statute allows intent to be transferred is a purely legal question and legal questions are reviewed *de novo*. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). The standard of review on Issue Two is whether the trial court's error was harmless beyond a reasonable doubt. State v. Middleton, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014).

ARGUMENT

1.

The Court of Appeals erred in affirming the trial court's charge of transferred intent for attempted murder.

Reasons for Granting Certiorari

This Court should grant certiorari because the legal issue is novel and the decision of the Court of Appeals conflicts with a prior decision of this Court. See Rule 242(b)(1) and (3), SCACR. The Court of Appeals' opinion on transferred intent acknowledges the issue is one of first impression in South Carolina. Williams, 812 S.E.2d at 924-25. The court wrote that it was "unaware" of South Carolina authority addressing a factual scenario similar to this case. Id. at 925. The court reviewed cases from other jurisdictions. Id. at 925, n.11. No case in South Carolina addresses the question of the applicability of transferred intent after the Legislature enacted the attempted murder statute. The need for this Court to address the issue is particularly important after its decision in State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017), which held that attempted murder requires specific intent.

The Court of Appeals' reasoning also conflicts with this Court's reasoning in King. The Court of Appeals' decision, if left intact, would render the requirement of showing specific intent virtually meaningless. Further, King also states this Court's observation 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 26-27, n.5, 810 S.E.2d at 63-64, n.5. The dissent in King agreed with the majority that, after its ruling, the notion of implied malice for specific intent crimes would be problematic. Id. at 73-74, n.9, 810 S.E.2d at 32, n.9. See also State v. Shands, ___ S.C. ___, ___ S.E.2d ___, Op. No.

5569, 2018 WL 2944992 at *10 (Ct. App. June 13, 2018) ("Therefore, we question whether an implied malice instruction is proper in any attempted murder trial."). This part of the Court's King decision indicates that transferring intent for attempted murder is not required by South Carolina law as the Court of Appeals held in petitioner's case. Williams, 812 S.E.2d at 924-26 (stating "we recognize South Carolina's criminal laws require the imposition of the doctrine of transferred intent."). This Court should grant certiorari to resolve these important questions.

Factual and Procedural Background

Al Jerome Young ("Young") was a drug dealer. R. 270, ll. 18 – 22. He had a prior conviction for giving a false name to law enforcement. R. 270, l. 23 – 271, l. 1. Young testified that in April 2012, he met a man named Orienthal James Charley ("Charley") concerning a drug deal. R. 272, ll. 18 – 24. Charley gave him $26,000.00 in cash. R. 272, l. 25 – 273, l. 1. Young never intended to deliver drugs and agreed with the solicitor that his intention was "to rip [Charley] off." R. 273, ll. 2 – 13.

Young testified that on the night of April 13, 2012, he was at home when he heard the dog barking. R. 275, ll. 3 – 9. Also in Young's house were Ycedra Williams ("Ycedra") and Joseph Wrighton ("Joseph"). R. 275, ll. 3 – 22. According to Young, Ycedra "saw two guys running in the yard and that's when she yelled out." R. 275, ll. 3 – 9. Young grabbed his money and .40 caliber pistol and told Ycedra to turn off all the lights. R. 275, ll. 10 – 14. Ycedra called the police. R. 275, ll. 15 – 18. As Joseph walked to the door, "shots rang out." R. 275, l. 19 – 276, l. 5. Young returned fire. R. 276, ll. 1 – 5. When the police arrived, Young told Joseph and Ycedra to tell them he was not there because he had a probation warrant. R. 276, l. 19 – 277, l. 15. Both Ycedra and Joseph admitted pleading guilty to giving false

information to police for lying about Young not been being present. R. 237, ll. 3 – 7. R. 258, ll. 1 – 19.

Young claimed he never went outside during the exchange of gunfire, but said that he had fired his weapon in his backyard on a previous occasion. R. 274, ll. 1 – 12. R. 276, ll. 16 – 18. Multiple .40 caliber shell casings were found in the yard. R. 513, l. 9 – 514, l. 5. R. 369, ll. 14 – 21. Three different firearms were collected from the scene. R. 373, l. 17 – 374, l. 8. No one was injured and none of the people in the house identified petitioner as one of the shooters.

Ycedra testified that a few days before the gunfight, she saw people come to Young's trailer looking for him in a van. R. 221, l. 5 – 222, l. 17. Ycedra saw five people in the van. R. 221, ll. 19 – 24. Petitioner was Ycedra's second cousin and she did not identify petitioner as being with the people in the van. R. 217, l. 22 – 218, l. 3. R. 240, ll. 18 – 20.

The night of the gunfight, the police were looking for Charley and his green van. R. 151, l. 18 – 153, l. 9. When the 911 call came, police officer Jerry Grenier ("Grenier") was on patrol and answered the call. R. 296, l. 1 – 297, l. 17. On the way to the call, he noticed a minivan parked on the side of the road. R. 297, l. 18 – 299, l. 13. Officer Grenier and his partner checked the van and called Officer Brett Long ("Long") to ask him to watch the vehicle for them so they could respond to the scene of the shooting. R. 297, l. 18 – 299, l. 13.

Officer Long found a green colored minivan by the side of the road. R. 323, ll. 5 – 11. He pulled behind the van. R. 324, l. 5 – 326, l. 10. He turned on his bright headlights and his blue lights. R. 324, ll. 14 – 16. He saw a person who "undoubtedly was laying in the ditch beside the van" stand up and face him. R. 324, ll. 14 – 18. Officer Long got out of his car and ordered the person to stop and show him his hands. R. 324, ll. 14 – 21. The person then got into the passenger side of the van and it slowly drove away. R. 324, l. 14 – 325, l. 17.

Officer Long got in his car to follow the van and notified the other officers. R. 325, ll. 1 – 17. Officer Grenier pulled his car in front of the van to box it in. R. 325, ll. 18 – 23. The van stopped. R. 325, ll. 18 – 25. The police testified they found petitioner driving the van and Charley on the passenger side. R. 326, l. 23 – 327, l. 8.

Charley testified for the defense and, as the Court of Appeals noted, his direct-examination and cross-examination contradicted. R. 578, ll. 1 – 10. Williams at 920, n.4. On direct-examination, Charley testified that he told petitioner he would pay him to drive Charley and a man named Rico that night. R. 586, l. 5 – 587, l. 11. Charley told petitioner he was "going to see some girls." R. 587, ll. 23 – 25. Charley never told petitioner anything about a shooting, or guns, or his dispute with Young. R. 588, ll. 1 – 13.

While petitioner waited in the van, Charley and Rico went to Young's trailer. R. 592, l. 3 – 593, l. 7. Charley heard Young shout. R. 593, ll. 14 – 21. Young opened the door of the trailer and fired two shots in the air. R. 594, ll. 2 – 6. Charley then fired one shot in the air and his gun jammed. R. 594, ll. 9 – 21. Charley ran. R. 594, ll. 24 – 25. Charley said Rico "had to shoot." R. 594, l. 17 – 18. When Charley got into the van, he said the police pulled up "within five seconds." R. 595, ll. 16 – 23. Petitioner was still in the van when Charley returned. R. 595, ll. 16 – 18.

On cross-examination, the solicitor immediately confronted Charley with the fact that he had already pled guilty but had not yet been sentenced. R. 603, l. 21 – 606, l. 14. Charley responded that he believed he was going to receive a sentence of eight years. R. 606, ll. 4 – 6. The solicitor accused Charley of "double-crossing the State." R. 606, ll. 15 – 19.

After the solicitor accused Charley of a double-cross and mentioned his plea deal, Charley recanted his direct-examination testimony and implicated petitioner in the shooting. R.

607, l. 13 – 633, l. 24. Under intense questioning from the solicitor, Charley said petitioner was with him at the scene of the shooting and that there was no "Rico." R. 607, l. 13 – 613, l. 25.

However, Charley was adamant that Ycedra and her brother were not in the house at the time of the shooting. R. 617, ll. 8 – 23. Charley testified that he knew they were not there because the van that Ycedra drove was not in the yard. R. 617, ll. 8 – 23. Charley testified he had no "beef" with Ycedra and no "beef" with Joseph. R. 617, l. 24 – 618, l. 5. When asked why he would have "shot the whole house up not caring about whether they lived or died," Charley responded, "I can't say I was not caring about whether they lived or died. He shot, so I shot in the air, that's how it happened." R. 618, ll. 6 – 11. Charley claimed petitioner shot, but did not know the direction that petitioner fired. R. 620, ll. 9 – 13. When shown a picture of the trailer, Charley explained that some of the bullet holes could have come from inside the trailer. R. 629, ll. 4 – 21.

The Trial Court's Charge, the Objection Below, and the Court of Appeals' Decision

Petitioner objected to the trial court's charge on transferred intent. R. 715, l. 18 – 716, l. 7. The State requested the charge. R. 716, ll. 8 – 21. Petitioner argued:

> We object to the transfer[red] intent charge. Generally speaking, transferred intent is, is—I understand it is shooting at a specific person and missing and hitting another. I don't believe that the facts of this case support that charge. You know, here I think it's stated that the theory of malice just because there is a shooting. And we would respectfully object to the transfer[red] intent charge, Your Honor.

R. 715, l. 23 – 716, l. 7. The trial court granted the State's request to charge transferred intent over petitioner's objection, noting that, even giving him the benefit of the facts of the case, petitioner was accused of shooting into a house with people "he did not know were there." R. 716, ll. 8 – 21. The trial judge explained that "the Court was concerned that the jury may

believe, after charging that intent is necessary, that the defendant had no intent to harm those individuals." R. 716, ll. 8 – 21.

The Court of Appeals recognized that King held that attempted murder requires specific intent, but nevertheless ruled that the doctrine of transferred intent applied. Williams, 812 S.E.2d at 924-26. The court used cases from before the enactment of the attempted murder statute to conclude that "South Carolina's criminal laws require the imposition of the doctrine of transferred intent." Id. As will be seen below, the court's reasoning on this novel issue is not compelled by prior decisions of this Court and contradicts both King and the sound reasoning from other jurisdictions that the legal fiction of transferred intent is completely unnecessary for attempted murder.

The Issue of Transferred Intent for the Statutory Crime of Attempted Murder is Novel

While the Court of Appeals correctly realized that the legal issue presented by petitioner's case is novel, it relied on cases whose applicability after the Legislature's passage of the attempted murder statute is questionable. Attempted murder did not exist in South Carolina prior to its creation by the Legislature in 2010. See State v. Sutton, 340 S.C. 393, 398-99, 532 S.E.2d 283, 286 (2000) ("We decline to recognize a separate offense of attempted murder."); S.C. Code Ann. § 16-3-29; King at 62, 810 S.E.2d at 25-26 (noting that the attempted murder statute was part of legislation passed in 2010). The Court of Appeals' decision is the first in South Carolina to address whether transferred intent applies to statutory attempted murder with the element of specific intent.

The primary case the court relied on, State v. Fennell, was decided in 2000 and dealt with the question of transferred intent under the abolished crime of assault and battery with intent to kill ("ABIK"). State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000). ABIK did not require

specific intent. King at 57-64, 810 S.E.2d at 23-27, analyzing, *inter alia,* State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996), Sutton, and State v. Kinard, 373 S.C. 500, 646 S.E.2d 168 (Ct. App. 2007). Because petitioner was charged with a statutory crime did not exist in 2000, and that this Court expressly declined to recognize under the common law, cases like Fennell do not compel the conclusion that because transferred intent applied to ABIK it must also apply to attempted murder. Especially after this Court's decision in King that attempted murder is a specific intent crime, the question of transferred intent's applicability remained an open question until the Court of Appeals' decision in petitioner's case.

The Court of Appeals also correctly recognized that jurisdictions around the country differ on whether to apply transferred intent to specific intent and attempt crimes. Williams, 812 S.E.2d at 925 n.11. Petitioner submits that, considering the careful analysis given to the Legislature's intent in King, South Carolina would adopt the rationale of a jurisdiction like Alabama, which declined to read transferred intent into its statutory crime of attempted murder. Cockrell v. State, 890 So.2d 174 (Ala. 2004). The Alabama Supreme Court's decision in Cockrell is well-researched and cites the differing points of view around the nation, including South Carolina law as it existed under ABIK. Id. at 175-82. After analyzing the various rules adopted by other jurisdictions and the intent of the Alabama legislature, the court applied the rule of lenity and determined that it would not adopt transferred intent for attempted murder. Id. at 180-82.

Particularly helpful from Cockrell is the concurrence of Justice Harwood. Id. at 183-84. Justice Harwood wrote separately to emphasize that the Alabama legislature had "'covered all the bases'" with both attempted murder and the different degrees of assault and battery. Id. He wrote, "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." Id. South Carolina's comprehensive statutory scheme enacted in 2010 along with the attempted murder statute created new degrees of assault and battery. See S.C. Code Ann. § 16-3-600. The logic of Justice Harwood's concurrence carries equal force in South Carolina. The Court of Appeals' reliance on decisions interpreting common law general intent crimes begs review by this Court to interpret the 2010 changes to assault and battery by our Legislature.

This Court should also take this case because of the differing decisions in courts around the nation. If this Court grants certiorari, the State will likely encourage this Court to follow the reasoning of states like Nevada, which allows application of the transferred intent doctrine. See Ochoa v. State, 981 P.2d 1201 (Nev. 1999). Petitioner will urge this Court to adopt the reasoning of states like Alabama, Alaska, California, Connecticut, and Maryland, which ultimately conclude that the legal fiction of transferred intent is unnecessary. See Cockrell, Ramsey v. State, 56 P.3d 675 (Alaska Ct. App. 2002); People v. Smith, 124 P.3d 730, 739-40 (Cal. 2005); State v. Hinton, 630 A.2d 593, 600-02 (Conn. 1993); and State v. Brady, 903 A.2d 870 (Md. 2006). These courts' analyses apply with great force in South Carolina because here, a defendant can be charged with the attempted murder of his intended victim even if the intended victim is not injured. Unlike murder, a defendant cannot "get away with" attempted murder if his aim fails and can be fully punished under the law. This Court should grant certiorari to consider both the applicability of these jurisdictions' decisions and to interpret our Legislature's intent.

The Court of Appeals' Decision Conflicts with State v. King

This Court should also grant certiorari because the Court of Appeals' decision conflicts with King. King's recognition that the Legislature made specific intent an element of statutory attempted murder is addressed in the court's decision, but the court failed to recognize the impact of King and its statutory analysis is flawed. The court concluded that specific intent does not require a specific victim, erroneously relying on the Legislature's use of "another person." Williams, 812 S.E.2d at 925-26. 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 or a specific group of people. 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.").

The Court of Appeals' decision also waters down the element of specific intent to the point where, if its decision stands, its meaning would be hard to distinguish from general intent. The court, in contradiction of both the majority and dissent in King, assumed malice can be inferred or implied even though attempted murder requires specific intent. Williams, 812 S.E.2d at 925-26. King states 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 26-27, n.5, 810 S.E.2d at 63-64, n.5. The dissent in King agreed with the majority that, after its ruling, the notion of implied malice for specific intent crimes would be problematic. Id. at 73-74, n.9, 810 S.E.2d at 32, n.9. Transferred intent is another way to infer or imply malice and King indicates that doing so for a specific intent

crime is improper. Because nothing in King supports the Court of Appeals' application of the transferred intent doctrine, this Court should grant certiorari to address this conflict.

2.

The Court of Appeals erred in finding harmless the trial court's erroneous refusal to charge the lesser included offense of first-degree assault and battery.

The Court of Appeals 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 used Charley's testimony during his cross-examination and discarded his testimony during his direct-examination. Williams, 812 S.E.2d at 922-23. In doing so, the court essentially made its own credibility finding and improperly weighs the evidence. 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.

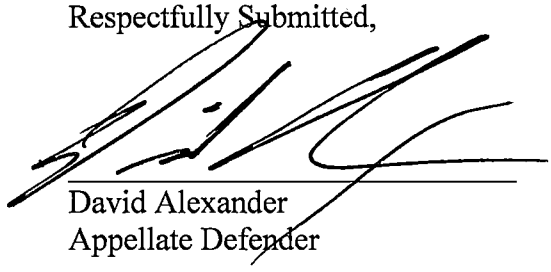
The jury was entitled to decide which parts of Charley's testimony were true. The jury was also free to discard Charley's testimony entirely. Credibility determinations are not made on appeal and when a case hinges on credibility, an error cannot be harmless. See State v. Stukes, 416 S.C. 493, 500, 787 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. Williams, 812 S.E.2d at 922. These facts necessarily include Charley's testimony during direct-examination. The court's opinion is therefore inconsistent in using part of Charley's testimony to find that a lesser included offense charge was warranted but another part of Charley's testimony to find the error harmless. Picking and choosing which parts of Charley's testimony to

believe is a jury function. Furthermore, if this Court holds that transferred intent does not apply, then this error cannot be harmless. This Court should grant certiorari and reverse so that a jury can weigh credibility and decide between the greater and lesser offenses.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari with the ultimate result of reversing petitioner's convictions and granting him a new trial.

Respectfully Submitted,



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of June, 2018.

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THE STATE,

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CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on 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 21st day of June, 2018.

David Alexander
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 21st day of June, 2018.

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