STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Laurens County

Honorable Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

PATRICK O'NEIL MCGOWAN,

APPELLANT

APPELLATE CASE NO 2016-001220

RECEIVED

MAY 29 2018

SC Court of Appeals

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I.

Whether the trial court erred in failing to direct a verdict on the indictment involving the four year old juvenile (a) where the state presented no evidence that Appellant knew she was inside of the trailer such that he could not form the requisite specific intent to injure her to prove guilt of an attempt crime, and (b) where there was evidence that only three shots were fired such that, at most, Appellant could be convicted of three attempt offenses?

II.

Whether the trial court erred in denying the defense's request that the jury charge on assault and battery first degree include an instruction that specific intent had to be proven as to each victim?

STATEMENT OF THE CASE

On August 3, 2012, the Laurens County Grand Jury returned four separate indictments against Appellant Patrick McGowan for attempted murder. Each indictment alleged the attempted murder of a separate individual: John Glenn, Sarah Irby, Tiffany Garrett, and Saliyh R. (a four-year old juvenile). R. 403; R. 5, ll. 9-12.

On May 31 – June 2, 2016, McGowan appeared for trial before the Honorable Donald B. Hocker and a jury. McGowan was represented by Thomas Adducci, and the state was represented by assistant solicitors C. Dale Scott and Margaret Boykin. R. 1.

The jury found McGowan not guilty of attempted murder as to each alleged victim, but convicted him of four counts of assault and battery, first-degree. R. 391 – 393. Judge Hocker sentenced McGowan to seven and one half years incarceration on each count, running the sentences for the indictments involving Irby and Glenn consecutively and the others concurrently. R. 400 – 402.

This appeal follows.

STATEMENT OF FACTS

The charges against McGowan arose from a shooting incident that occurred at the home of John Glenn and Sarah Irby on March 31, 2012. The couple was hosting a children's birthday party earlier in the day, which turned into a gathering for adults later in the evening. Irby took her granddaughter, Saliyh R., inside of the house at approximately 5:00 or 5:30 p.m. McGowan had relatives and friends who lived on the same street, with whom he was spending time outside that evening. The groups intermingled and there was evidence that at approximately 7:00 or 8:00 p.m., McGowan came into Glenn's yard. Garrett said that she had seen McGowan "around" before when he was visiting his relatives. Later on in the night, McGowan and Glenn began to argue. R. 137, l. 8 – 145, l. 20; R. 151, l. 5 – 152, l. 5; R. 165, l. 9 – 167, l. 5; R. 174, l. 14 – 177, l. 11; R. 202, l. 16 – 211, l. 8; R. 215, l. 23 – 216, l. 7; R. 222, l. 8 – 223, l. 24. Glenn said that he had never seen the person with whom he was arguing before, but in-court he identified McGowan as the man with whom he argued and told to leave his yard. R. 141, ll. 3-5; R. 144, ll. 8-14; R. 149, ll. 6-20.

Glenn's wife, Sarah Irby, testified that she was informed that Glenn was in an argument, so she went outside to get him. She and Glenn both went inside, where Saliyh R. was asleep in one of the bedrooms. Glenn and Irby both said that less than a minute after they went inside, they heard gunfire and realized that the bullets had come inside of their house. R. 145, l. 21 – 147, l. 3; R. 149, l. 24 – 150, l. 18; R. 156, ll. 15-25; R. 166, l. 22 – 169, l. 14. Glenn and Irby both ran outside after the shots were fired. Glenn said that he did not see anything other than people running. R. 147, ll. 4-10; R. 153, ll. 16-24. Irby claimed that when she ran outside after the gunfire, she saw McGowan running down the road with a gun in his hand. She admitted that she had seen McGowan earlier in the evening but never had any dispute with him. R. 169, l. 15

– 170, l. 17; R. 173, ll. 12 – 174, l. 3; R. 177, l. 12 – 178, l. 19; R. 183, l. 19 – 186, l. 21.

Irby's daughter, Tiffany Garrett, was outside during the shooting. According to Garrett she saw McGowan walk away from the argument with Glenn, toward the road. Garrett heard gunshots, looked up, and claimed to see McGowan standing in the middle of the street firing a gun. Garrett thought he was shooting up into the air, but later realized that the shots were fired into the home. R. 211, l. 10 – 213, l. 16. Though Garrett was unfamiliar with McGowan's full name on the night of the incident, she said that she found his picture on Facebook afterward using his last name to search. Garrett said that was how she was able to give the investigator the name "Patrick McGowan" when he came to meet with the family several days after the incident. R. 216, ll. 8-18.; R. 226, l. 20 – 230, l. 3. Glenn and Irby claimed that a mutual friend, Willie James, brought McGowan by their house sometime after the shooting and McGowan offered to pay them for their damaged property. R. 147, l. 11 – 149, l. 23; R. 172, l. 2 – 173, l. 11.

Officer Barton Holmes was dispatched to Glenn's home at approximately 11:15 p.m. for a report of "shots fired into a residence." R. 108, ll. 2-10; R. 134, ll. 17-23. Holmes said that he observed three "fresh" bullet holes in the front, exterior vinyl siding of the house. R. 110, l. 23 – 113, l. 11; R. 128, l. 21 – 130, l. 2. He said that the witnesses "express[ed] that they were familiar with the shooter," but he could not recall whether any of them reported seeing the shooting as it occurred. R. 131, ll. 7-20. No one provided him with the name of the shooter, "just that he was a black male." R. 130, ll. 4-8. Holmes generated a report and the case was transferred to an investigator. R. 132, ll. 4-16. Holmes uploaded the video and audio from his body camera to the department's server, but the footage for this case, along with others, was destroyed in a 2013 crash of the police department's server following a storm. R. 135, ll. 2-19; R. 195, l. 16 – 197, l. 9; see also R. 54, l. 11 – 56, l. 19. Investigator Chris Martin took over the

case but never reviewed the video footage prior to its destruction. On April 3, 2011, he spoke with Glenn, Irby, and Garrett at their home. Martin said that Garrett gave him the name "Patrick McGowan" and later identified McGowan as the shooter from a photograph array on April 20, 2011. R. 188, l. 1 – 192, l. 16; R. 194, l. 4 – 195, l. 20; see R. 216, l. 19 – 220, l. 4.

The defenses at trial were twofold – misidentification and failure to prove "attempt," which requires both specific intent and an act. The defense presented three witnesses, two of whom – James McGowan and Derrick Handberry – said that they were next to McGowan when the shots went off and never saw him with a gun that night. R. 289, l. 20 – 293, l. 11; R. 316, l. 17 – 319, l. 23. Rather, the only person who James McGowan saw with a gun that night was a man named Terry Cunningham. R. 302, l. 2 – 303, l. 8; R. 306, l. 3 – 308, l. 8. The other defense witness, Bill Cunningham, was Glenn's neighbor and first cousin and McGowan's friend. R. 271, ll. 7-13. Cunningham said that McGowan and some other men had gathered in an area next to his house earlier in the evening. R. 265, l. 6 – 267, l. 10; R. 271, l. 21 – 276, l. 24. He went to bed early but woke when he heard Glenn and McGowan arguing. He intervened and called McGowan over to his front porch. Cunningham was speaking with McGowan on the porch just moments before he went inside to use the bathroom and heard the gunshots. When Cunningham came outside once the gunfire stopped, McGowan walked off of the porch toward his car. He did not see McGowan with a gun at all that night. R. 267, l. 11 – 269, l. 19; R. 269, l. 25 – 271, l. 20; R. 276, l. 3 – 279, l. 22; R. 280, l. 25 – 285, l. 19.

ARGUMENT

I.

The trial court erred in failing to direct a verdict on the indictment involving the four year old juvenile (a) where the state presented no evidence that Appellant knew she was inside of the trailer such that he could not form the requisite specific intent to injure her to prove guilt of an attempt crime, and (b) where there was evidence that only three shots were fired such that, at most, Appellant could be convicted of three attempt offenses.

Introduction

McGowan was charged with four counts of attempted murder, with each indictment involving a separate individual. The trial judge instructed the jury on both attempted murder and the lesser included offense of assault and battery first degree under S.C. CODE ANN. § 16-3-600(C)(1)(b)(i), which prohibits the unlawful offer or attempt to injure another person with the present ability to do so where the act is accomplished by means likely to produce death or great bodily injury. Both charges were "attempt" offenses, such that the State was required to prove "that the defendant had the *specific intent* to commit the underlying offense, along with some *overt act,* beyond mere preparation, in furtherance of the intent." State v. Reid, 393 S.C. 325, 329, 713 S.E.2d 274, 276 (2011) (emphasis in original); see also State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), *cert granted* Mar. 28, 2016. McGowan was ultimately convicted of four counts of assault and battery first degree.

The trial judge erred in allowing the jury to render judgment on all four counts because the state failed to present any evidence that an offense was committed against Saliyh R. There was no evidence that McGowan had any knowledge that the child was inside of the house and only three bullets were fired. Thus, the trial judge should have granted directed verdict as to the child and submitted only three counts – those involving John Glenn, Sarah Irby, and Tiffany Garrett – to the jury. Further, the trial judge erred in failing to charge the jury that it was

required to find that McGowan had specific intent to injure as to each of the alleged victims. The evidence in this case was such that if the jury believed McGowan to be the shooter, it could have found that he possessed no specific intent to injure anyone. Alternatively, the jury could have found that McGowan intended to injure only Glenn, with whom he argued that evening, but lacked specific intent to injure Irby or Garrett. The trial judge had a duty to tailor the jury charge to the facts and circumstances of the case. See State v. Fuller, 297 S.C. 440, 444, 377 S.E.2d 328, 331 (1989). Had the jury been properly charged that the state was required to prove intent as to each victim beyond a reasonable doubt, there is a reasonable likelihood that the jury would have found McGowan not guilty of one or more of the charges.

Relevant Facts

At the close of the state's case, defense counsel made a motion for directed verdict, relying upon State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), *cert granted* Mar. 28, 2016, and State v. Sutton, 340 S.C. 393, 532 S.E.2d 283 (2000), for the proposition that both attempted murder and assault and battery first degree, under the attempt theory, require specific intent. R. 236, ll. 2-7; R. 239, l. 2 – 240, l. 2; R. 243, ll. 3-4; R. 245, l. 5 – 247, l. 2. Counsel argued that the state failed to present evidence of specific intent regarding Saliyh R., citing the state's own evidence that the child had been inside of the house since the end of the children's party around 5:00 or 6:00 o'clock and that McGowan arrived after 7:00 o'clock. R. 236, ll. 2-21. Counsel further argued: "There is also testimony that there were only three shots. And there are, apparently, four victims. I don't know how the State can show specific intent to murder four people with three shots at the home." R. 237, ll. 3-7.

The prosecutor initially argued that both attempted murder and assault and battery first degree under the "offer or attempt" subsection were general intent crimes. R. 237, l. 10-15; R.

241, l. 21 – 242, l. 25; R. 243, l. 5 – 244, l. 5. However, he conceded, after a review of King, that attempted murder is a specific intent crime and that attempt crimes are "generally" specific intent crimes. He suggested that with respect to Saliyh R. and Sarah Irby, the trial judge should charge the lesser included offense of assault and battery first degree. The prosecutor admitted that "it would be difficult" for the state to show that McGowan had any knowledge that Saliyh R. was in the house. He recalled that the testimony was that "McGowan arrived around 7:00 o'clock and the children's party ended around 5:00." R. 240, l. 14 – 241, l. 21; R. 244, l. 12 – 245, l. 25; R. 247, ll. 4 – 248, l. 12. .

Even so, the prosecutor argued that the state was not required to prove that the shooter knew that there were occupants in the home to prove attempted murder or assault and battery first degree. Instead, he persisted in his argument that if the shooter had hit and killed Saliyh R., not knowing that she was inside, he would have committed a "voluntary homicide." Thus, he argued that the crime when the shooter fails to hit her is attempted murder. R. 238, ll. 2-19; R. 241, l. 21 – 242, l. 25; R. 244, ll. 1-5; R. 248, ll. 13-16. Defense counsel argued that murder could not be properly analogized to attempted murder and assault and battery first under subsection (C)(1)(b)(i) because they require different levels of intent, with murder being only a general intent crime and the others requiring specific intent.[1] R. 245, ll. 18-25.

The prosecutor further argued that under the defense's theory there would be no crime committed if you fire into a home, not knowing anyone was inside, if the person inside is not hit with a bullet. R. 248, l. 13 – 249, l. 8. Defense counsel responded that the proper charge in such

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[1] "Murder" is the killing of any person with malice aforethought, either express or implied. S.C. CODE ANN. § 16-3-10. "In the context of murder, malice does not require ill-will toward the individual injured, but rather it signifies a 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 re Tracy B., 391 S.C. 51, 704 S.E.2d 71 (Ct. App. 2010).

a case would be discharge of a firearm into an occupied dwelling. R. 249, l. 10 – 250, l. 8; see S.C. Code Ann. § 16-23-440.

The trial judge said that his initial inclination was to grant the motion for directed verdict as to the child, but that he would take the matter under advisement over lunch. R. 250, l. 23 – 251, l. 14. Over the break, the prosecutor e-mailed the trial judge and defense counsel, suggesting that the doctrine of transferred intent would allow all of the charges to go to the jury. Defense counsel argued in response that transferred intent was not applicable to an attempt crime because it requires proof of specific intent, especially where there is no injury to the alleged victim. The prosecutor asserted that our Supreme Court's opinion in State v. Childers, 373 S.C. 367, 645 S.E.2d 233 (2007), supported his position that "[a]s much as the doctrine of transferred intent applies to murder, the Court should find that it applies to attempted murder." However, the prosecutor was unable to cite to any language in Childers that referenced any applicability of the transferred intent doctrine to attempted murder. R. 256, l. 11 – 258, l. 9. Defense counsel responded that the thrust of the state's argument seemed to be that specific intent was only to commit to the act, whereas he was arguing that the specific intent was required to commit the act against each individual person. He reiterated that to find otherwise would negate the specific intent requirement. R. 258, l. 19 – 259, l. 2.

The trial judge noted that he was concerned with the existence of evidence rather than weight at the directed verdict stage. He said that he was not sure if they "should get so wrapped up on trying to determine whether or not it's specific or general [intent]." He found that there was some evidence that McGowan knew that Glenn and Irby where in the house and that Garrett was standing in plain sight outside of the house, such that those counts of attempted murder should be submitted to the jury. The trial judge said that he would also charge assault and

battery first degree as to all four alleged victims. Regarding transferred intent, the judge said that he did not think it would need to "come into play" and he would not charge the jury on it. R. 258, ll. 10-16; R. 259, l. 5 – 260, l. 25.

When defense counsel asked for clarification of whether the denial of the motion for directed verdict included the count with the child, the judge responded:

> That was for all four. And I'll be candid with you folks, too, I may -- at the conclusion of the case, I may, at a minimum, once you renew your motion for directed verdict, grant it with respect to the child, but at this stage I'm not going to.

R. 261, ll. 1-8. Defense counsel renewed his motion for directed verdict at the close of the defense's case. R. 335, ll. 15-17. The judge took the renewed motion under advisement, but four counts of attempted murder and assault and battery first degree were ultimately submitted to the jury. R. 335, ll. 18-23; R. 387, l. 16 – 388, l. 17.

Discussion

The motion for directed verdict as to the indictment involving the child, Saliyh R., should have been granted for two reasons. First, the state failed to prove that, if McGowan was the shooter, he had any specific intent to kill Saliyh R. where there was no evidence that he was aware that she was inside of the house. By the state's own admission, the only evidence before the jury was that Saliyh R. was inside of the home and asleep at the time that McGowan arrived in the area. The concept of transferred intent, which allows specific intent toward an intended victim to be expanded toward an unintended victim, was not applicable because there was no injury to Saliyh R. Second, the state could not support four charges where the evidence reflected that only three bullets were fired because attempt requires specific intent *coupled with an overt act* in furtherance of the intent. While there was a dispute as to whether McGowan even possessed the specific intent to kill anyone, with evidence of only three "acts," the maximum

number of offenses for which he could be found guilty were three.[2] Thus, the state failed to present evidence to support the charges of attempted murder or assault and battery first degree under S.C. CODE ANN. § 16-3-600(C)(1)(b)(i) with respect to Saliyh R. and it was the judge's duty to grant the motion for directed verdict.

A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. Curtis, 356 S.C. 622, 591 S.E.2d 600 (2004). In reviewing a denial of a directed verdict, the appellate court must view the evidence in the light most favorable to the State. State v. Jarrell, 350 S.C. 90, 97, 564 S.E.2d 362, 366 (Ct. App. 2002). If there was any direct evidence of guilt, or if there is substantial circumstantial evidence, that reasonably tends to prove the defendant's guilt, the appellate court must find that the trial court properly submitted the case to the jury. State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011); State v. Rogers, 405 S.C. 554, 563, 748 S.E.2d 265, 270 (Ct. App. 2013). "A defendant may not be convicted of a criminal offense unless the State proves beyond a reasonable doubt that he acted with the criminal intent, or mental state, required for a particular offense." State v. Fennell, 340 S.C. 266, 271, 531 S.E.2d 512, 515 (2000).

A. First-Degree Assault Under S.C. CODE ANN. § 16-3-600(C)(1)(b)(i) Is a Specific Intent Crime

The trial judge properly determined that both attempted murder and assault and battery first degree under S.C. CODE ANN. § 16-3-600(C)(1)(b)(i) were specific intent crimes because they were "attempt" offenses. Though McGowan was acquitted on the attempted murder

[2] While Appellant is aware of the remote possibility that a bullet can pass through one person and into another, as the "magic bullet" allegedly did in the assassination of President John F. Kennedy, Appellant avers that such would certainly be an exceptional circumstance and not the natural and probable consequence of firing an individual bullet.

charges, the jury convicted him of four counts of assault and battery first degree. S.C. CODE ANN. § 16-3-600(C)(1)(b)(i) provides:

> A person commits the offense of assault and battery in the first degree if the person unlawfully . . . offers or attempts to injure another person with the present ability to do so, and the act . . . is accomplished by means likely to produce death or great bodily injury . . . .

In State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), *cert granted* Mar. 28, 2016, this Court held that the attempted murder statute, which requires "intent to kill" was a specific intent crime. The same reasoning applied in King supports the trial judge's determination that assault and battery first degree under the "offer or attempt" subsection required specific intent.

The King Court found that the words of the attempted murder statute were ambiguous such that the Court was required to "look beyond the words of the statute and use our rules of statutory construction to determine what the Legislature intended." 412 S.C. at 408, 772 S.E.2d at 191-92. The Court recognized that the attempted murder statute was enacted by the in 2010 as part of the Omnibus Crime Reduction and Sentencing Reform Act, but that prior opinions of our courts held that attempt crimes required the state to prove the defendant had specific intent to complete the attempted crime. Id. at 408-09, 772 S.E.2d at 192 (citing State v. Sutton, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000); State v. Thompson, 374 S.C. 257, 262, 647 S.E.2d 702, 705 (Ct. App. 2007); State v. Nesbitt, 346 S.C. 226, 231, 550 S.E.2d 864, 866 (Ct. App. 2001)). In Sutton, decided prior to the enactment of section 16-3-29, our Supreme Court found that there was no offense of "attempted murder" in South Carolina. 340 S.C. 393, 397, 532 S.E.2d 283, 285. However, the Court specifically noted that such an offense "would require the specific intent to kill," and "specific intent means that the defendant consciously intended the completion of acts comprising the [attempted] offense." Id. Based on this history, of which the Legislature was presumed to be aware, the King Court held that "the Legislature intended to require the State

to prove specific intent to commit murder as an element of attempted murder." 412 S.C. at 409-10, 772 S.E.2d at 192-93. Likewise, the "attempt" language in the assault and battery first degree statute triggers the applicability of the established "attempt" case law. "In the context of an attempt crime, specific intent means the defendant intended to complete the acts comprising the underlying offense." State v. Reid, 393 S.C. 325, 329, 713 S.E.2d 274, 276 (2011).

While the prosecutor in the present case was unwilling to concede that specific intent was required in this case, he argued that, to the extent it was, it required only specific intent to injure and not specific intent to injure each alleged victim. As will be discussed more fully *infra*, transferred intent is not applicable to attempt crimes where the unintended "victim" was not injured or killed. To hold otherwise would be contradictory to the specific intent requirement and lessen the state's burden of proof.

B. Transferred Intent is Not Applicable to Attempt Offenses Where the Alleged Victim was Not Actually Injured

There was no evidence that McGowan knew that the four-year-old child was inside of the trailer. Thus, the only way that McGowan could have been liable for an attempt toward her is if the concept of transferred intent applied to attempt crimes even where no one was injured. This is a novel issue in South Carolina, as our Courts have not ruled on whether the concept of transferred intent is applicable under such circumstances. In State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000), our Supreme Court found that transferred intent was properly applied to an assault and battery with intent to kill where there *was an injury* to the unintended victim. 340 S.C. at 270-71, 531 S.E.2d at 514. Fennell argued that the trial court should have granted the motion for directed verdict because his intent was "fully satisfied" with the death of Thraikill and because the harm inflicted (injury) was not the same as the harm intended (death). Id.

The appellant in Fennell was a paranoid schizophrenic involved in the Chester Civitan Club, who had a dispute with one its other members, William Thraikill. 340 S.C. at 269, 531 S.E.2d at 514. Fennel left the restaurant where the club was meeting, retrieved his revolver, and came back into the restaurant. Id. As he emptied his gun toward Thraikill, Fennel said that he was "going to kill that son of a bitch." Id. Five of the bullets hit Thraikill, who eventually died from complications caused by his injuries. Id. at 269-70, 531 S.E.2d at 514. A stray bullet hit bystander Elihue Armstrong and she suffered injuries. Id. The trial judge denied the defense's motion for directed verdict, which was premised upon the fact that the state failed to prove that Fennel intended to kill Armstrong and that the transferred intent doctrine was inapplicable. Id.

The Fennel Court recognized that "criminal liability normally is based upon the concurrence of two factors: the defendant's criminal intent and the actual, physical act constituting the offense." 240 S.C. at 271, 531 S.E.2d at 515. "A defendant may not be convicted of a criminal offense unless the State proves beyond a reasonable doubt that he acted with the criminal intent, or mental state, required for a particular offense." Id. The court clarified that "transferred intent" is somewhat of a misnomer, as is the concept that "malice follows the bullet." Id. Rather, the Court said that a more apt description is that "the mental state is like a spotlight emanating from its source—the defendant's mind—to its target—the intended victim." Id. Thus, the Court was not persuaded by the defense's first argument, finding that a defendant's mental state is not "in limited supply" and "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.*" Id. (emphasis added).

The Court found the second argument, regarding the applicability of the "legal fiction" of transferred intent "to transfer appellant's alleged mental state with regard to Thrailkill, the

intended victim who was killed, to Armstrong, the unintended victim who was injured but not killed," more interesting. Fennel, 340 S.C. at 272, 531 S.E.2d at 515. The Court wrote:

> **To pursue our analogy, the jury ordinarily may not unilaterally shift the defendant's mental state "spotlight" from one person to another. The jury simply must determine whether that spotlight existed, i.e., was it "on" or "off."** The question in this case is whether it is appropriate to allow the jury to place its collective hand upon the "spotlight" of appellant's mental state and adjust the imaginary beam so that it encompasses not only Thrailkill, but also Armstrong in order to convict appellant of ABIK.

Id. (emphasis added). Though the Fennel Court found support for the assertion that transferred intent was applicable where the unintended victim was *killed* by the defendant, it had never decided the applicability of transferred intent where the intended victim was killed and the unintended victim *was only injured*, but not killed. Id.

The Fennel Court noted that several out-of-state courts had "decline[d] to resort to the doctrine of transferred intent when they are convinced this legal fiction is not needed to hold the defendant criminally liable for his acts." Id. at 273, 531 S.E.2d at 516. However, the Court distinguished those cases based upon the fact that South Carolina, at the time, only recognized three levels of assault – simple assault and battery, assault and battery of a high and aggravated nature (ABHAN), and assault and battery with intent to kill ("ABIK"). Id. at 274, 531 S.E.2d at 516. The Court noted that the required mental state for ABWIK, like murder, was malice aforethought. Id. at 275, 531 S.E.2d at 517. The Court agreed that the evidence showed that Fennel acted only with malice toward Thraikill and not toward Armstrong such that the maximum offense for which he could be found liable was ABHAN absent the application of the transferred intent doctrine. Id. at 275-76, 531 S.E.2d at 517. However, the Court reasoned that to limit liability to ABHAN would be improper under the circumstances. Id. The Court wrote: "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 deeds ***when that force kills or injures*** **an unintended victim**." Id. (emphasis added). Thus, the Court held that the doctrine of transferred intent may be used to convict a defendant of ABIK when an unintended victim is injured but not killed. Id.

It is notable that since the Court's decision in Fennel, our legislature passed the Omnibus Crime Reduction and Sentencing Reform Act of 2010, which abolished the common law offenses of assault and battery with intent to kill, assault with intent to kill, assault and battery of a high and aggravated nature, simple assault and battery, assault of a high and aggravated nature, aggravated assault, and simple assault. 2010 South Carolina Laws Act 273 (S.B. 1154). The Act further codified the offense of attempted murder and created various levels of assault, including assault and battery of a high and aggravated nature ("ABHAN"), assault and battery in the first degree, assault and battery in the second degree, and assault and battery in the third degree. Id.; see S.C. CODE ANN. § 16-3-29; S.C. CODE ANN. § 16-3-600. Furthermore, this case is distinguishable from Fennel because none of the alleged victims were injured. As discussed more fully *infra*, several courts in other jurisdictions have considered that set of circumstances and agreed that **transferred intent should not apply to inchoate crimes where the unintended "victims" are not hit or injured in any way.**

In Harvey v. State, 681 A.2d 628, 639 (Md. Ct. Spec. App. 1996), the Maryland Court of Special Appeals ruled that, despite division over the applicability of transferred intent in other circumstances, "everyone agrees" that "[w]hen what is being considered is a charge of inchoate homicide – attempted murder, attempted voluntary manslaughter, or assault with intent to murder – and the unintended victim has *not* been hit or injured in any way, there will be *no* "transfer" of intent from the intended victim to the unintended victim." (emphasis in original). The Court

cited its prior decision in Harrod v. State, 499 A.2d 959 (Md. Ct. Spec. App. 1985), in which the state urged the application of transferred intent where the defendant, throwing a hammer, missed his intended victim and *almost hit* an infant lying in a nearby port-a-crib. Harvey, 681 A.2d at 639. The Harrod Court held that "when there is no harm to the unintended victim, the doctrine of transferred intent is inapplicable," reasoning:

> **To extend the doctrine of transferred intent to cases where the [un]intended victim is not harmed would be untenable. The absurd result would be to make one criminally culpable for each unintended victim who, although in harm's way, was in fact not harmed by a missed attempt towards a specific person. We refuse, therefore, to extend the doctrine of transferred intent to cases where a third person is not in fact harmed.**

Id. (quoting Harrod, 499 A.2d at 963) (emphasis added).

In People v. Bland, 48 P.3d 1107, 1116-18 (Cal. 2002), the California Supreme Court noted that "[t]he crime of attempt sanctions what the person intended to do but did not accomplish, not unintended and unaccomplished potential consequences." The Court noted that differing mens rea required for murder and attempted murder, such that "[t]o constitute murder, the guilty person need not intend to take life; but to constitute an attempt to murder, he must so intend." 48 P.3d at 1117. Contrary to the prosecutor's argument in the present case, the Bland Court wrote: "The wrong-doer must specifically contemplate taking life; and though his act is such as, were it successful, would be murder, if in truth he does not mean to kill, he does not become guilty of an attempt to commit murder." Id.; see R. 238, ll. 2-19; R. 368, ll. 3-19. Regarding the applicability of transferred intent, the Court held:

> To be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else. The defendant's mental state must be examined as to each alleged attempted murder victim. Someone who intends to kill only one person and attempts unsuccessfully to do so, is guilty of the attempted murder of the intended victim, but not of others.

Id. The Court further noted the difficulty in determining the breadth of transferred intent were it applied where no bystander was physically injured, stating that "it is virtually impossible to decide to whom the defendant's intent should be transferred." Id. The Court wrote: "Is the intent to murder transferred to everyone in proximity to the path of the bullet? Is the intent transferred to everyone frightened and thereby assaulted by the shot? There is no rational method for deciding how the defendant's intent to murder should be transferred." Id.

In Cascen v. Virgin Islands, 60 V.I. 392 (V.I. 2014), the Supreme Court of the Virgin Islands found that the evidence was insufficient to support a third degree assault conviction under the transferred intent theory. Cascen fired fifteen shots into a gathering of people, including his intended victim, Cyril Peters. A minor child who was attending the gathering, W.J., was grazed by a bullet but survived. The Court agreed with Cascen that there was no evidence at trial that he intended to assault W.J., and therefore his sufficiency challenge hinged solely on whether Cascen's intent to murder Peters could be transferred to W.J. to support the third-degree assault conviction. 60 V.I. at 407. The Court noted that unlike first-degree murder, where the government need only prove intent to commit murder, the assault charge required proof of the specific intent to injure the alleged victim. Id. (citing Boston v. People, 56 V.I. 634, 641 (V.I. 2012)). The Court ruled: "This prevents Cascen's intent to murder Peters from being used to support an assault conviction because even though the People showed that Cascen used 'unlawful violence upon the person of' W.J., the People introduced no evidence establishing that Cascen had the 'intent to injure' W.J." Id. at 408. Thus, the Court held that the inapplicability of the transferred intent doctrine required the Court to find that that the evidence was insufficient for the jury to find Cascen guilty of third-degree assault and reversed his conviction. Id.

Similar to the above cases, in the present case, there was no evidence that McGowan knew that Saliyh R. was inside of the home such that the only means by which the state could prove specific intent was via the transferred intent doctrine. In light of the changes in the 2010 changes to our laws, is questionable whether the Fennel Court's reasoning remains valid. Regardless, where there is no physical harm or injury to the unintended victim, the state should not be allowed to rely upon transferred intent to prove the specific intent requirement. Thus, the trial judge should have granted directed verdict as to the indictment involving Saliyh R.

C. "Attempt" Requires that the Offender's Intent be Coupled with an Overt Act as to Each Alleged Victim

In addition to its failure to prove the required mens rea as to Saliyh R., the prosecution failed to produce sufficient evidence to support four convictions because there were only three shots fired. Attempt requires proof of both specific intent and an overt act. State v. Reid, 393 S.C. 325, 329, 713 S.E.2d 274, 276 (2011) ("To prove attempt, the State must prove that the defendant had the *specific intent* to commit the underlying offense, along with some *overt act,* beyond mere preparation, in furtherance of the intent.") (emphasis in original); State v. Evans, 216 S.C. 328, 333, 57 S.E.2d 756, 758 (1950) ("[I]ntent alone, not coupled with some overt act toward putting the intent into effect, is not cognizable by the Courts. The law does not concern itself with mere guilty intention, unconnected with any overt act."). Here, there were only three overt acts taken such that, at most, McGowan could be convicted of only three offenses.

In Foreman v. State, 51 So. 3d 957, 959-60 (Miss. 2011), the Mississippi Supreme Court concluded that Foreman was erroneously charged and convicted of four counts of aggravated assault when the evidence supported only one attempt charge. There was evidence at Foreman's trial to show that he pulled out a gun, pointed it at a car in which five people were riding, and tried to shoot it. 51 So. 3d at 959. When the gun did not fire, he cocked it again and shot it. Id.

The bullet struck Edward Minor in the head and killed him. Id. Foreman was convicted of four counts of aggravated assault, one count of murder, and one count of shooting into a vehicle. Id. The Court ruled that "[u]nder the facts of this case, to be guilty of four counts of aggravated assault, Foreman must have attempted to cause injury to all four individuals." Id. at 960. The Court found that Foreman's attempt to discharge the gun one time did not support the inference that he intended to injure four individuals such that the evidence was not sufficient to support four convictions for aggravated assault. Id. Thus, the Court found that the trial court erred in failing to dismiss three of the aggravated-assault charges and vacated Foreman's convictions and sentences for three counts of aggravated assault. Id.; see also State v. Buck, 445 N.E.2d 720, 721-22 (Ohio Ct. App. 1982) (ruling that evidence that the defendant fired a single shot from a pistol through a window outside of which stood four police officers was insufficient to sustain defendant's conviction of three counts of felonious assault upon police officers, since the defendant was shown to have possessed but a single animus in firing once in the direction of the four officers).

Though Foreman dealt with the "one-shot scenario," the reasoning is equally applicable any time the number of alleged victims exceeds the number of shots fired. Our laws are not designed to punish "for evil or criminal thoughts alone." State v. Reid, 383 S.C. 285, 293, 679 S.E.2d 194, 198 (Ct. App. 2009),), aff'd, 393 S.C. 325, 713 S.E.2d 274 (2011). Thus, even if a defendant intended to kill one hundred people, if he fired only three shots, he can only be convicted of attempted assault against three individuals. Here, the defense argued that there was no specific intent to kill or injure at all, or at most that the intent was directed solely at Glenn. However, assuming *arguendo* that the jury believed that the state proved specific intent as to all four of the alleged victims, there were only three acts taken in conjunction with that intent. As

such, the evidence was not sufficient to support convictions of four counts of assault and battery first degree. Thus, the trial judge should have granted the motion for directed verdict as to the indictment involving Saliyh R.

II.

The trial court erred in denying the defense's request that the jury charge on assault and battery first degree include an instruction that specific intent had to be proven as to each victim.

Relevant Facts

The charge conference was held in chambers, but the matters raised by the defense were later put on the record. R. 338, ll. 1-8. Defense counsel made the following request relevant to this Issue:

> [I]n two jury instructions, which is the attempted murder and assault and battery first degree, there's a line that says specific intent to, and then list the charge. We would ask the Court to add the individual listed in the indictment as an element of the crime. We believe that clears up any specific – that's a more clear expression of what specific intent is regarding these charges.

R. 338, ll. 11-19. The trial judge denied the request. R. 338, l. 23. The judge summarized the defense and state's conflicting views as follows:

> And just for the record, concerning the specific intent, basically, the Defense believes that the specific act would include not only the shooting, but also the person involved. Whereas, the State takes the position that it's just the shooting. And that's stated kind of in general simple terms, but I think that's the respective positions of both sides, correct?

R. 338, l. – 339, l. 6. The prosecutor agreed that such was an accurate summary. R. 339, l. 7.

In his closing, defense counsel argued that proof of specific intent required proof of specific intent to kill or injure each alleged victim. R. 349, l. 16 – 350, l. 5. He then went through each of the alleged victims and explained how the prosecutor failed to meet his burden of proving intent to harm each person. R. 352, l. 11 – 353, l. 14. The prosecutor responded:

> The law – I'll take some objection to the Defense's version of what the law is, but it's – I guess it's kind of out of my hands really because, ultimately, he can describe the law, I can describe the law, but it's, ultimately, what the Judge says the law is. That's how you must apply it to the case.

R. 366, l. 25 – 367, l. 6. He then argued that McGowan should responsible for "each one of these people he whizzed bullets by" and that "he should [not] get credit for missing." R. 367, l. 7 – 368, l. 8. The prosecutor then told the jury what he believe to be the law on attempted murder and assault and battery first degree. R. 368, l. 20 – 370, l. 7; R. 371, l. 11 – 372, l. 9. Markedly absent from the prosecution's closing was any mention of the term "specific intent." See R. 355, l. 13 – 372, l. 25.

At the beginning of the jury charge, the trial judge instructed them that "[e]ach indictment charges a separate and distinct offense because each indictment involves a separate alleged victim" and that they must decide each indictment separately. R. 375, ll. 3-9. The jury was then charged on the separate roles of the judge and jury, the presumption of innocence, the state's burden beyond a reasonable doubt, direct and circumstantial evidence, credibility, the defendant's right to remain silent, factors in determining the accuracy of an identification, criminal intent, attempted murder, malice, and assault and battery first degree. R. 375, l. 14 – 386, l. 25. The assault and battery first-degree charge included the following:

> Now, ladies and gentlemen, if you find that the State has failed to prove beyond a reasonable doubt that the Defendant committed attempted murder on any of the four indictments, then you may consider whether the State has proven beyond a reasonable doubt the lesser included charge of assault and battery in the first degree. A person commits the offense of assault and battery in the first degree if the person unlawfully offers or attempts to injure another person with the present ability to do so and the act is accomplished by means likely to produce death or great bodily injury.
>
> Great bodily injury means bodily injury which causes a substantial risk of death or which causes serious permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ. A specific intent is an element of assault and battery first degree which must be proven by the State beyond a reasonable doubt.

R. 386, ll. 7-25. The judge told the jury that they would receive a written copy of the jury charges and explained to them the verdict form. R. 387, l. 1 – 388, l. 17. After the jury left the

courtroom, but prior to its beginning deliberations, defense counsel renewed his prior requests regarding the charge. R. 389, ll. 16-23.

Discussion

Essentially, defense counsel requested an instruction that the transferred intent doctrine was not applicable, but rather that the state was required to prove specific intent as to each alleged victim. The trial judge erred in failing to tailor his jury charge to the facts and circumstances of this case. See State v. Fuller, 297 S.C. 440, 444, 377 S.E.2d 328, 331 (1989). As discussed more fully *supra* in Issue I, the trial judge properly found that assault and battery first degree under the "offer or attempt" subsection was a specific intent crime. As such, it required the state to prove both specific intent and an overt act. During the directed verdict motion, defense counsel argued that the specific intent requirement was not just a specific intent to injure, but a specific intent to injure each alleged victim. The prosecutor averred that it was only required to prove specific intent to commit the act. In the present case, there was conflicting evidence upon which the jury could have determined that McGowan was not the shooter, did not have specific intent to injure anyone, had only specific intent to injure Glenn, or had specific intent to injure Glenn, Irby, and Garrett. Despite this distinctive set of facts, the trial judge gave only the basis specific intent charge and the statutory definition of assault and battery first degree. R. 383, l. 1 – 386, l. 25. Instead, he should have granted the defense's request that the jury be instructed that it was required to find that the state proved specific intent to injure each alleged victim beyond a reasonable doubt.

The law to be charged to the jury is to be determined by the evidence presented at trial. State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 835 (1989). The trial court commits reversible error when it fails to give a requested charge on an issue raised by the indictment and

the evidence presented. Id. It is not the function of the trial judge to weigh the evidence in deciding whether a charge is proper. State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999) ("It is well-settled the law to be charged is determined from the evidence presented at trial, and if any evidence exists to support a charge, it should be given. The trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence."). Thus, the State's theory of the case cannot dictate the propriety of the charge. See Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727 (2006) ("[B]y evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt.").

As discussed more fully *supra* in Issue I, the California Supreme Court has ruled that, with respect to attempted murder that the defendant "must intend to kill the alleged victim, not someone else." People v. Bland, 48 P.3d 1107, 1117 (Cal. 2002). The Bland Court wrote: "The defendant's mental state must be examined as to each alleged attempted murder victim. Someone who intends to kill only one person and attempts unsuccessfully to do so, is guilty of the attempted murder of the intended victim, but not of others." Id.

In Gov't of Virgin Islands v. Davis, 561 F.3d 159, 168-70 (3d Cir. 2009), the Third Circuit Court of Appeals held that a jury instruction on transferred intent in a first-degree assault prosecution impermissibly relieved the People of its burden of proving every element of the crime beyond a reasonable doubt, warranting reversal. Though the Court reversed the conviction on other grounds, it addressed the merits of that issue because of its likelihood of recurrence at a new trial. Id. at 168. Over Davis' objection, the trial court instructed the jury that "[t]he law transfers the intent from the original victim to any unintended victims." Id. The Third Circuit

Court of Appeals agreed with Davis that the doctrine of transferred intent did not apply to first-degree assault as defined under Virgin Islands statutory law. Id.

The relevant statute in Davis provided: "Whoever . . . with intent to commit murder, assaults another . . . shall be imprisoned not more than 15 years." 561 F.3d at 168 (citing V.I. CODE ANN. tit. 14, § 295(1)). The Davis Court recalled its' prior decision in Gov't of Virgin Islands v. Brown, 685 F.2d 834 (3d Cir.1982), wherein the Court ruled that the four convictions for first-degree assault could only be sustained if the evidence showed beyond a reasonable doubt that the defendants not only assaulted their victims but intended to commit the underlying offense – in that case, robbery – "on each of them specifically." 561 F.3d at 169. As such, the Brown Court ruled that "[t]he jury should have been instructed that in addition to the other essential elements, the government had to prove beyond a reasonable doubt that the defendants intended to rob the particular victim on whom the assault was perpetrated." Brown, 685 F.2d at 841.

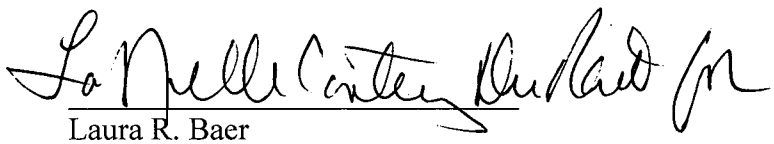
The Davis Court similarly found that the People were required to prove that Davis had the specific intent to commit murder and that such intent was directed against the individual assaulted. 561 F.3d at 169. Thus, the Court ruled that it was error for the trial judge to give the transferred intent instruction, as it improperly "relieved the Government of its burden of proving beyond a reasonable doubt that Davis had the specific intent to commit murder against each individual on whom the assault was committed." Id.; see also United States v. Duhart, 496 F.2d 941, 944-45 (9th Cir.) (reversing convictions where the jury was instructed that the defendant could be convicted of assault with intent to commit rape "whether the assault be upon the person of the female intended to be raped, or upon the person of some other individual," ruling that "to constitute the offense, the assault must be upon the person intended to be raped").

In the present case, defense counsel and the prosecutor each argued their respective interpretations of the law on specific intent in their closing arguments. However, the trial judge's jury charge never made clear which of those differing interpretations was correct. Though the jury was not charged on transferred intent, the trial judge's failure to clarify the full extent of the specific intent requirement, as requested by defense counsel, was just as egregious. The relevant portion of the assault and battery first-degree statute required that the attempt be made with the specific intent "to injure another person." See S.C. Code Ann. § 16-3-600 (C)(1)(b); State v. Reid, 393 S.C. 325, 329, 713 S.E.2d 274, 276 (2011) (emphasis in original); see also State v. King, 412 S.C. 403, 772 S.E.2d 189 (Ct. App. 2015), *cert granted* Mar. 28, 2016. Thus, the prosecutor was required to prove beyond a reasonable doubt that McGowan intended to injure each victim.

The evidence reflected that the only person with whom McGowan had a dispute that night was Glenn. Even so, defense counsel argued that if there was an intent to kill or injure, it would not have made sense to wait for your intended to victim to inside and walk into the street before shooting. Further, while there was sufficient evidence to overcome directed verdict as to Irby and Garrett, counsel argued that there was no evidence that McGowan had any ill will toward them, or even knew where they were standing. R. 352, l. 11 – 354, l. 16. Thus, it was the role of the jury, as fact finders, to determine whether McGowan had specific intent to injure each of the alleged victims. Despite defense counsel's request, the jury was not charged regarding that facet of their required findings. The result was a jury charge that improperly reduced the state's burden of proof. McGowan is accordingly entitled to a new trial.

CONCLUSION

Based on the foregoing, Appellant Patrick O'Neil McGowan respectfully requests that this Court reverse his convictions and sentences, enter judgment of acquittal on the count involving the four-year-old juvenile, and remand his case for a new trial on the three remaining counts.



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of May, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

May 29, 2018

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