

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

DEVONTA EDWARD WILLIAMS,

APPELLANT

APPELLATE CASE NO 2019-000222

INITIAL BRIEF OF APPELLANT

RECEIVED
OCT 28 2019
SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred where it denied appellant's motion to direct a verdict of acquittal on the charge that appellant attempted to murder Latrevious Knox, where there was no evidence appellant intended to kill Knox, since a specific intent to kill is an element of attempted murder?

STATEMENT OF THE CASE

On April 20, 2017, the Horry County Grand Jury indicted appellant for one count of murder and two counts of attempted murder. R. *(indictments). Appellant was tried from February 4 – 7, 2019 before the Honorable Steven H. John and a jury. Tr. 1. Eric Fox represented appellant. Tr. 1. Seth Oskin and George DeBusk represented the state. Tr. 1.

Appellant was found guilty as indicted, and he was sentenced to concurrent terms of thirty-five years, thirty years, and thirty years, respectively. Tr. 389, l. 17 – 390, l. 3; Tr. 400, ll. 5-18.

This appeal follows.

STANDARD OF REVIEW

“A case should be submitted to the jury when the evidence is circumstantial ‘if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced.’” *State v. Bostick*, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011) (quoting *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)). “Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt.” *Id.* “Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error.” *Id.* at 139, 708 S.E.2d at 776-777. “On appeal of the denial of a directed verdict of acquittal, this Court must look at the evidence in the light most favorable to the state.” *Id.* at 139, 708 S.E.2d at 777; *see also State v. Hepburn*, 406 S.C. 416, 429 753 S.E.2d 402, 409 (2013). If the state failed to present any direct evidence or any substantial circumstantial evidence reasonably tending to prove guilt of the accused, the appellate court must reverse the lower court’s denial of the directed verdict motion. *Hepburn*, 406 S.C. at 416, 429 S.E.2d at 409.

ARGUMENT

The trial court erred where it denied appellant's motion to direct a verdict of acquittal on the charge that appellant attempted to murder Latrevious Knox, where there was no evidence appellant intended to kill Knox, since a specific intent to kill is an element of attempted murder.

The court should have directed a verdict in favor of appellant on the attempted murder of Latrevious Knox, because the theory of transferred intent did not provide the requisite mens rea since a specific intent to kill is an element of attempted murder.

Relevant facts

On November 12, 2016, approximately eight people were standing on the side of Fremont Street in Longs. Tr. 148, ll. 9-13; Tr. 178, l. 18 – 179, l. 3; Tr. 158, ll. 2-6; Tr. 104, l. 24 – 105, l. 2. Appellant walked up to join the group and shooting broke out. Tr. 163, ll. 6-10; Tr. 166, ll. 8-13; Tr. 179, ll. 7 – 180, l. 6. Two people—Brandon Wells and Latrevious Knox—were hit by gunfire but survived. Tr. 158, ll. 7-15; Tr. Tr. 166, ll. 10-15. However, Levi Moody was shot and killed. Tr. 148, l. 18 – 149, l. 25. Appellant was tried for murder and two counts of attempted murder.

The state alleged that appellant intentionally shot Brandon Wells due to a dispute over money, and it argued the theory of transferred intent provided the mens rea for the attempted murder of Latrevious Knox (specific intent)¹ and the murder of Levi Moody (malice). Tr. 88, l. 23 – 89, l. 7; Tr. 321, l. 14 – 322, l. 4.

Appellant admitted being at the scene but denied shooting anyone. Appellant said that when he approached the group of people, he noticed among them Brandon Wells, who had stolen

¹ Although the solicitor repeatedly argued that malice was the level of intent required for attempted murder, specific intent to kill is also an element of attempted murder. Tr. 321, ll. 22-24; Tr. 267, ll. 10-19; Tr. 268, ll. 15-25. *See State v. King*, 422 S.C. 47, 63-64, 810 S.E.2d 18, 26-27 (2017).

appellant's moped. Tr. 283, l. 10 – 286, l. 16. Brandon Wells had been shot on two prior occasions, and the solicitor agreed that he was “no angel.” Tr. 332, l. 21; Tr. 241, ll. 11-17. Appellant explained that Wells, who was known to carry a gun, reached into his coat. Tr. 285, l. 15 – 286, l. 18. Appellant believed Wells was going to shoot him, so he drew his own gun,² but explained he ran when he heard shots. Tr. 288, ll. 1-19. Appellant denied that he fired any shots and he denied that he demanded money from anyone. Tr. 300, l. 23 – 301, l. 6; Tr. Tr. 285, ll. 4-5.

The state put up the testimony of witnesses who claimed appellant walked up and said, “Where’s my money?” before shots were fired. Tr. 179, l. 7 – 180, l. 8; Tr. 165, l. 14 – 166, l. 11. One of the group members, Timothy Yates, alleged to police officers that after Brandon Wells had been shot, appellant walked closer and shot Wells again but stopped shooting after he retrieved some money Wells threw on the ground. R. *(State’s Exhibit #27).

In contrast, Latrevious Knox, who was shot in the back of the leg, testified that he did not know who shot him or why. Tr. 158, ll. 9-10; Tr. 159, l. 11 – 159, l. 19. None of the state’s witnesses saw Knox get shot.³ There was no testimony that any gunfire was intentionally directed at Knox, and the state did not present any evidence of animosity between appellant and Knox.

At the close of the state’s case, defense counsel asked the court to direct a verdict of acquittal on the murder of Levi Moody, on the basis that a side wound to the torso did not rise to

² In its reply case, the state introduced appellant’s recorded statement to police officers that he did not have a gun during the incident. Tr. 319, ll. 10-11; State’s Exhibit #2. State’s Exhibit #2 is appellant’s recorded statement and it is on file with this Court.

³ The solicitor implied during his examination of Timothy Yates that Yates told police officers he saw Knox get shot, but Yates denied that he saw Knox get shot, and he denied that he told police officers he saw Knox get shot. Tr. 223, l. 14 – 224, l. 14. Yates’ written statement to police was entered into evidence and nowhere in the statement does it mention Knox being shot. R. *(State’s Exhibit #27).

the level of showing malice. Tr. 261, ll. 13-25. The court denied the motion and provided an extensive ruling on the matter in which it recited relevant law, including the law of transferred intent. Tr. 262, l. 23 – 266, l. 10. In support of its ruling, the court also cited to testimony by eyewitnesses who claimed that appellant was seen with a gun and walked up demanding money; and it cited to Brandon Wells’ statement to police in which he claimed that appellant shot him but stopped shooting after Wells threw some money down. Tr. 264, l. 11 266, l. 10. The charge that appellant murdered Levi Moody thus went to the jury.

Defense counsel next moved for a directed verdict on the attempted murder of Brandon Wells, and argued there had been “no showing of intent to kill, an actual intent to kill.” Tr. 266, ll. 18-19. Despite the court’s prior ruling on defense counsel’s motion for a directed verdict on the murder of Levi Moody, counsel maintained that since there was, in his view, no showing that appellant intended to kill Brandon Wells, there could be no transfer of intent to supply the requisite malice for the murder of Levi Moody. Tr. 266, l. 18 – 267, l. 5. However, the solicitor argued Brandon Wells’ claim that appellant shot him after demanding money was direct evidence on the matter. Tr. 267, ll. 7-19. The court found sufficient evidence was presented on the attempted murder of Brandon Wells to send the case to the jury. Tr. 262, l. 23 – 266, l. 10; Tr. 267, l. 20 – 268, l. 6.

Finally, defense counsel moved that the court direct a verdict in appellant’s favor on the attempted murder of Latrevious Knox. Defense counsel said that **“in regard to the attempted murder indictment on Latrevious Knox, there has been, I think, [a] complete lack of testimony that he was in any way the intended target of [appellant].”** Tr. 268, ll. 7-10 (emphasis added). “He [Knox] denied himself knowing who shot him or why the circumstances

and we will repeat the same arguments we made for the other indictments, Your Honor, and request a directed verdict.” Tr. 268, ll. 10-13.

The solicitor responded that there was “[e]vidence of malice” because appellant fired shots immediately after demanding money, so the charge was proper “under the transferred intent doctrine.” Tr. 268, ll. 16-25.

The court denied defense counsel’s motion as to the attempted murder of Knox and ruled that “referring back to that case law of transferred intent and again, relying on all the evidence that has been previously testified to . . . [and] the law regarding directed verdict . . . Combining those together again, with the law of transferred intent, your request for a directed verdict is respectfully denied.” Tr. 269, ll. 4-7; Tr. 269, ll. 8-10.

At the close of the case, the trial judge charged the jury that attempted murder requires a specific intent to kill, and it charged the jury that transferred intent can supply an intent to kill. Tr. 382, ll. 2-4; Tr. 375, ll. 4-10. Appellant was convicted as indicted after the jury deliberated for three hours. Tr. 383, l. 18; Tr. 388, ll. 7-10; Tr. 389, l. 17 – 390, l. 4.

Discussion

A conviction for attempted murder requires a specific intent to kill. *State v. King*, 422 S.C. 47, 56, 810 S.E.2d 18, 22 (2017). The court erred where it failed to direct a verdict of acquittal on the attempted murder of Latrevious Knox, since there was no showing of a specific intent to kill Knox. It was error to apply transferred intent to this attempted murder charge, because that doctrine negated the requirement of a specific intent to kill.

S.C. Code Ann. §16-3-29 provides in relevant part that: “A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder.” The South Carolina Supreme Court held in *State v.*

King, 422 S.C. at 56, 810 S.E.2d at 22, that “a specific intent to kill is an element of attempted murder as codified in section 16-3-29.” In explaining its reasoning, the Court noted that “it is logically impossible to attempt an unintended result . . .” *Id.* at 56, 810 S.E.2d at 23 (quoting 22 C.J.S. *Criminal Law: Substantive Principles* § 156, at 221-22 (2016)).

In *King*, the South Carolina Supreme Court noted that in *Keys v. State*, 766 P.2d 270 (Nev. 1988), the Nevada Supreme Court held specific intent to kill was an essential element of attempted murder. *Id.* at 57, 810 S.E.2d at 23. The South Carolina Supreme Court quoted *Keys*: “An attempt, by nature, is a failure to accomplish what one *intended* to do.” *Id.* (emphasis in original). “One cannot be guilty of attempted murder by implied malice because implied malice does not encompass the essential specific intent to kill.” *Id.*

The South Carolina Supreme Court further explained, “[I]f there is no evidence that one charged with attempted murder had express malice and a specific intent to kill, we believe the 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.” *Id.* at 64, 810 S.E.2d at 27, n. 5 (emphasis added). Similarly, the concurrence in *King* concluded that “the concept of implied malice has no place in a prosecution for a specific intent crime.” *Id.* at 74, 810 S.E.2d at 32, n. 13.

Here, because transferred intent is a way to imply intent, and *King* acknowledges that implying intent for a specific intent crime is improper, this Court should reverse appellant’s conviction for the attempted murder of Latrevious Knox: *Contra State v. Smith*, 425 S.C. 20, 819 S.E.2d 187 (Ct. App. 2018) (*cert. granted* July 1, 2019).

In *Smith*, the defendant was charged with the attempted murder of an innocent bystander who was shot when the defendant shot at another man (in what he claimed was self-defense).

Smith argued he was entitled to a directed verdict “because the State was required to show his specific intent to kill Victim and the State could not rely on the transferred intent doctrine to do so.” *Id.* at 28, 819 S.E.2d at 191. This Court reasoned, in part, that Smith’s claim “that he was acting in self-defense is undoubtedly an admission that he intended to use deadly force . . .” and so “any evidence showing that [Smith’s] intentional use of deadly force was unjustified, combined with the doctrine of transferred intent, requires this court to affirm the denial of [his] directed verdict motion.” *Id.* at 30, 819 S.E.2d at 192. Here, this case should be distinguished from *Smith*, since appellant did not claim he was acting in self-defense. According to appellant, he did not fire any shots during the incident and instead he ran off to escape the gunfire. Tr. 288, ll. 18-19.

This Court in *Smith* also concluded that the prosecution “showed specific intent *as to Victim* through the doctrine of transferred intent.” *Id.* at 32, 819 S.E.2d at 32 (emphasis in original). This Court cited to the holding in *State v. Fennell*, 340 S.C. 266, 531 S.E.2d 512 (2000), that a person may be guilty of assault and battery with intent to kill (ABIK) based on the theory of transferred intent because, “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.” *Smith*, 425 S.C. at 33, 819 S.E.2d at 194 (quoting *Fennell*, 340 S.C. at 276, 531 S.E. 2d at 517) (emphasis in original).

However, appellant respectfully submits that the holding of *Fennell*, and by extension, *Smith*, should not control his case, since *Fennell* involved ABIK—a general intent crime, unlike attempted murder—a specific intent crime. *See Fennell*, 340 at 275, 531 S.E.2d at 517 (since the

required mental state for ABIK is malice aforethought, the state “must show a general intent that defendant acted with malice to obtain ABIK conviction.”)

Moreover, the premise for which this Court cited *Fennell*—that an accused should have to answer for his deeds where he hit an unintended target while attempting to harm an intended target—is already covered by existing South Carolina law, because the accused may be charged with the applicable degree of assault and battery. *See* S.C. Code Ann. § 16-3-600.

Other states have confronted the question of whether transferred intent applied to attempted murder and found that it did not. In *Cockrell v. State*, 890 So.2d 174, 181 (Ala. 2004), the Alabama Supreme Court declined to read transferred intent into its statutory crime of attempted murder, after it applied the rule of lenity. Similarly, the Connecticut Supreme Court held that “the rule of lenity leads us to conclude that the transferred intent doctrine should not be applied to the crime of attempted murder.” *State v. Hinton*, 630 A.3d 593, 602 (Conn. 1993). *See also King v. State*, 264 So. 3d 987, 988 (Fla. Dist. Ct. App. 2019) (transferred intent does not apply to attempted murder of an unintended victim).

South Carolina courts apply the rule of lenity. *See State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) (“when a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant”). Here, the rule of lenity weighs in favor of not applying the transferred intent doctrine to attempted murder.

In addition to this Court’s recent holding in *Smith*, discussed *supra*, the appellate courts of this state have addressed whether transferred intent may supply the mens rea for attempted murder in another case in recent years—the direct appeal of Gerald Williams. In *State v. Williams*, 422 S.C. 525, 542, 812 S.E.2d 917, 925 (Ct. App. 2018) *aff’d in part as modified, vacated in part*, 427 S.C. 148, 829 S.E.2d 702 (2019), this Court addressed whether charging the

jury on the doctrine of transferred intent is proper where the defendant was charged with three counts of attempted murder for shooting into the front door of a home where three people were present, even though there was no evidence the defendant knew that two of the people were there. This Court held that “as long as the State has shown the specific intent to kill or commit murder, the identity of the victim is irrelevant.” *Id.* at 541, 812 S.E.2d at 925.

This Court found that the accused in *Williams* “misconstrues the attempted murder statute to the extent he argues the statute requires the specific intent to murder specific victims.” *Id.* “Section 16-3-29 does not require a specific victim; instead, it states a ‘person who, with the intent to kill, attempts to kill *another* person’ is guilty of attempted murder.” *Id.* (emphasis in original).

In *State v. Williams*, 427 S.C. 148, 829 S.E.2d 702 (2019), the South Carolina Supreme Court affirmed in part as modified and reversed in part the above decision. The Supreme Court held that because Williams did not object to the jury instruction that attempted murder was not a specific intent crime, but only required a showing of general intent, that instruction had become the law of the case. *Id.* at 157, 829 S.E.2d at 706-707. “Because it is well-established in our state that transferred intent applies to general-intent crimes, we find no error in the trial court’s decision to charge the jury on the doctrine of transferred intent.” *Id.* at 158, 829 S.E.2d at 707.

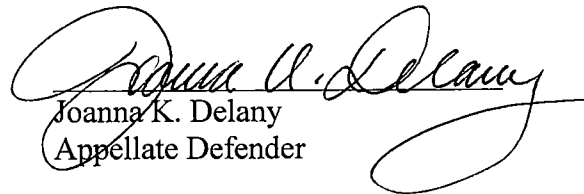
However, the Supreme Court concluded that, “Because the court of appeals treated the case as if it had been tried as a specific-intent crime, we vacate the portion of its opinion dealing with the issue of transferred intent and leave for another day the determination of whether the doctrine applies to attempted murder.” *Id.* at 157-58, 829 S.E.2d at 707.

Here, unlike in *Williams*, the case was tried as a specific intent crime and the trial judge charged the jury that “attempted murder does, does require a specific intent to kill.” Tr. 382, ll. 2-

4. Application of transferred intent to attempted murder, a specific intent crime, rendered the requirement of specific intent meaningless. It was error to apply transferred intent to the attempted murder of Latrevious Knox and allow that charge to go to the jury. Because attempted murder requires a specific intent to kill, and no evidence of a specific intent to kill Latrevious Knox was offered, the court erred when it failed to direct a verdict in appellant's favor on that charge.

CONCLUSION

Based on the foregoing argument, appellant respectfully requests this Court reverse his conviction and sentence for the attempted murder of Latrevious Knox and remand for entry of a directed verdict of acquittal.



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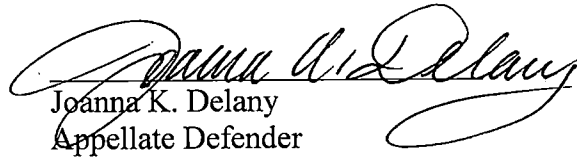
ATTORNEY FOR APPELLANT

This 28th day of October, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Initial Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

October 28, 2019.


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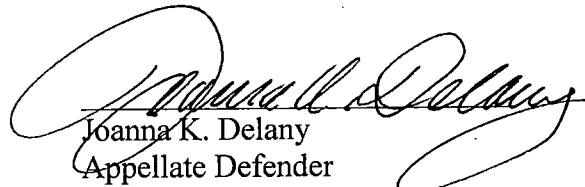
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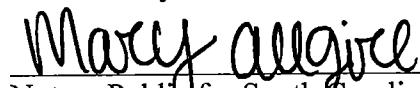
CERTIFICATE OF SERVICE

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The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Devonta Edward Williams, #379115, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 28th day of October, 2019.


Joanna K. Delany
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 28th day of October, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.