STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Georgetown County

Honorable Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TY'SHUN MARIO BESSELLIEU,

APPELLANT

APPELLATE CASE NO. 2018-000622

ANDERS BRIEF OF APPELLANT

RECEIVED
JAN 02 2019
SC Court of Appeals

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Whether the trial court erred in charging the doctrine of transferred intent with respect to attempted murder?

STATEMENT OF THE CASE

On November 16, 2016, a Georgetown County grand jury indicted appellant Ty'Shun Mario Bessellieu with four counts of attempted murder, discharging a firearm into a dwelling, possession of a weapon during a violent crime, unlawful possession of a pistol by a minor, possession of marijuana with intent to distribute, and possession of a Schedule IV controlled substance (Xanax). R. 411 – 428. On March 19, 2018, appellant was tried before the Honorable Steven H. John and a jury. R. 1. Alicia A. Richardson represented the State and William Foster Edgeworth, III, represented appellant. R. 1. The jury convicted appellant on all charges. R. 397, l. 10 – 399, l. 5. Judge John sentenced appellant to sixteen years' imprisonment for the attempted murder charges and lesser sentences on the other counts with all time run concurrent. R. 407, l. 2 – 408, l. 10. This appeal follows.

STANDARD OF REVIEW

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).

ARGUMENT

The trial court erred in charging the doctrine of transferred intent with respect to attempted murder.

On the night of August 31, 2016, Tysha Moultrie and four of her friends went out for an evening in Georgetown. R. 122, l. 13 – 123, l. 11. They began at a bar named Fishtails and then went to Ming'z Bar and Grill. R. 123, l. 12 – 124, l. 1. Moultrie knew appellant and saw him at Ming'z. R. 123, l. 16 – 124, l. 4.

Appellant made sexual advances on Moultrie, which she rejected. R. 124, l. 5 – 128, l. 3. He persisted in his advances and they began to loudly argue. R. 124, l. 5 – 128, l. 3. Moultrie called appellant "gay" and he became very angry. R. 124, l. 5 – 128, l. 3. One of Moultrie's friends, Danasha Anderson, said Moultrie called appellant a "faggot." R. 53, ll. 10 – 13. A crowd gathered to watch the argument. R. 53, l. 2 – 54, l. 19.

Appellant left and told Moultrie to "meet him on the ave," which Moultrie interpreted as hostile. R. 54, ll. 3 – 24. R. 133, ll. 6 – 16. R. 137, ll. 3 – 12. Anderson described appellant as embarrassed and angry when he left. R. 55, ll. 1 – 5. Another of the friends, Shaniqua McGirt, said appellant seemed "deranged" at Ming'z. R. 106, l. 25 – 107, l. 10. All of the women had been drinking and McGirt admitted smoking marijuana. R. 72, ll. 20 – 73, l. 4. R. 125, ll. 17 – 23. R. 116, ll. 7 – 12.

After the encounter with appellant at Ming'z, the women decided to go to McGirt's apartment. R. 128, ll. 14 – 23. The women sat outside listening to music and talking. R. 91, ll. 18 – 25. They saw appellant drive by the apartment in his car. R. 92, ll. 7 – 24. They went inside the apartment to see where appellant was going and then heard a loud noise. R. 92, l. 16 – 93, l. 10.

The women stayed in the apartment for about 20 minutes and then went back outside. R. 109, ll. 15 – 22. They were outside for another 20-30 minutes when they saw a man walking across a nearby field. R. 138, ll. 23 – 139, l. 19. None of the women could identify the man in the field. R. 63, ll. 9 – 24. R. 112, l. 14 – 113, l. 12. McGirt said it "was a small guy ... not too short, not big at all." R. 113, ll. 9 – 14. Moultrie described him as "skinny, kinda tall." R. 131, ll. 8 – 10.

The women then saw multiple gunshots come from the man in the field. R. 131, ll. 11 – 17. R. 110, l. 6 – 111, l. 15. R. 60, l. 3 – 61, l. 4. Anderson was shot in the jaw, treated at the hospital, and released that morning. R. 71, l. 2 – 72, l. 9. R. 277, l. 3 – 279, l. 19. None of the other women were injured.

The police recovered four .40 caliber shell casings from the field. R. 152, ll. 1 – 22. The police arrested appellant and found a .40 caliber pistol, marijuana, and Xanax on his person. R. 176, l. 14 – 181, l. 6. The State's firearms expert could not match a projectile recovered from the scene to appellant's gun, but claimed the shell casings found in the field were fired by the gun. R. 298, l. 5 – 302, l. 7.

At the conclusion of the evidence, Judge John held an extensive charge conference with the parties regarding specific intent for attempted murder and lesser included offenses. R. 318, l. 16 – 342, l. 19. The court discussed the impact of recent appellate decisions on attempted murder, State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017) and State v. Williams, 422 S.C. 525, 812 S.E.2d 917 (Ct. App. 2018) cert. granted Oct. 18, 2018. The State requested a charge on transferred intent, citing Williams. R. 324, l. 25 – 325, l. 22. Judge John gave a proposed transferred intent charge. R. 325, l. 23 – 327, l. 14. Defense counsel then stated his objection:

> Well, Your Honor, my problem with it the whole time is that I do believe that a lot of the statements coming out of Williams arises out

> of the same confusion that led to the Court's decision on the other—on the attempted murder. I think it blends what would've been the common law attempted murder where there was a general intent requirement which would allow for these unintentional and consequences of the act itself. And here we're requiring a specific intent to kill and we're eluding to the components that normally would have arised out of the unintentional consequences or the—the general intent requirement as opposed to a specific intent requirement.

R. 327, l. 22 – 328, l. 8. The trial judge said he would not "add anything else" and that he would charge transferred intent. R. 328, ll. 9 – 13. The court ultimately charged the jury on transferred intent. R. 375, l. 21 – 376, l. 2.

The trial judge erred because transferred intent does not apply to attempted murder. Williams, the case relied on by the trial judge, is currently pending before the South Carolina Supreme Court. Williams will likely be reversed because South Carolina law does not require specific intent to be transferred and Williams conflicts with King.

In Williams, the Court of Appeals erred in applying the doctrine of transferred intent and finding that South Carolina required use of the doctrine. 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). Williams is the first case 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). It was error to apply these older cases to the new statutory crime. Unlike a completed murder, the doctrine is unnecessary for an attempt crime because the defendant can be fully prosecuted for the attempt even when no injury occurs. See Cockrell v. State, 890 So.2d 174 (Ala. 2004); Ramsey v. State, 56 P.3d 675 (Alaska 2002); State v. Hinton, 630 A.2d 593, 600-02 (Conn. 1993). ("A defendant can still be prosecuted for his intent to kill and conduct aimed at killing the intended victim whether a third party is killed or no one is even injured.").

Rejecting transferred intent would also be consistent with King. King's recognition that the Legislature made specific intent an element of statutory attempted murder is addressed in the Williams 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.").

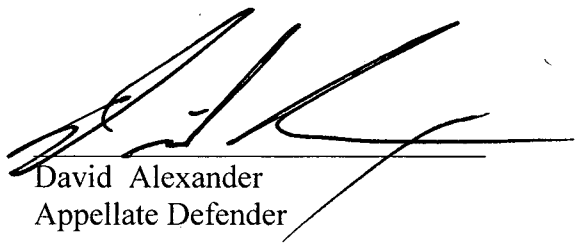
Furthermore, if Williams stands, the meaning of specific intent would be hard to distinguish from general intent. The court, in contradiction of both the majority and dissent in King, assumed malice can be inferred or implied even though attempted murder requires specific intent. Williams, 812 S.E.2d 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 just another way to infer or imply malice and King indicates that doing so for a specific intent crime is improper. The trial judge recognized this conflict when he said he did not believe the Supreme Court would agree with the Court of Appeals' decision in Williams.

Without transferred intent, the State would not have been able to prove specific intent with respect to three of the women. At best, the State could prove specific intent related to Moultrie because of the conflict at Ming'z. However, the State had no evidence to meet the specific intent element on Anderson, McGirt, or Kennedy. Charging transferred intent made the entire charge hopelessly confusing. Indeed, the jury asked to be recharged on the elements of the greater and lesser included offenses. R. 410. R. 388, l. 7 – 395, l. 21. Therefore, all of appellants' convictions should be reversed.

CONCLUSION

For the foregoing reasons, appellant's convictions should be reversed and this case remanded for a new trial.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of January, 2019.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Tyshun Mario Bessellieu states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before the Honorable Steven H. John, which was held on March 19 - 22, 2018, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for Ty'Shun Mario Bessellieu.

Respectfully Submitted,

David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

This 2nd day of January, 2019.

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

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Appellant proposes the following be included in the Record on Appeal:

(1) True-billed indictments
(2) Trial Transcript (March 19-22, 2018)
(3) Court's Exhibit #1 (Jury Note)

I certify that this designation contains no matter which is irrelevant to this appeal.

January 2, 2019

David Alexander
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ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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."

January 2, 2019.

David Alexander
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Ty'Shun Mario Bessellieu, #375758, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 2nd day of January, 2019.

David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 2nd day of January, 2019.

Courtney Powers (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.