STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Georgetown County

Honorable Steven H. John, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

TY'SHUN MARIO BESSELLIEU,

APPELLANT.

APPELLATE CASE NO. 2018-000622

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# BRIEF OF APPELLANT

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## STATEMENT OF ISSUES ON APPEAL

1.

Did the trial court err in charging the doctrine of transferred intent as to the attempted murder charges?

2.

Did the trial court err in denying Bessellieu's motion for a directed verdict?

## 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). When reviewing the denial of a directed verdict motion, the Court examines only the existence or nonexistence of evidence, not its weight, and views the evidence and all reasonable inferences in the light most favorable to the State. State v. Bennett, 415 S.C. 232, 235-36, 781 S.E.2d 352, 353-54 (2016).

## ARGUMENT

1.

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 then-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) aff'd as modified and vacated in part by State v. Williams, 427 S.C. 148, 829 S.E.2d 702 (2019). The State requested a charge on transferred intent, citing the portion of

the Court of Appeals opinion in Williams that was ultimately vacated by the Supreme Court.[1] 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. In the recent case of State v. Smith, ___ S.C. ___, ___ S.E.2d ___, Op. No. 27598 (Mar. 18, 2020), the South Carolina Supreme Court did not directly address the transferred intent issue because other issues were dispositive, but the Court's language in the opinion indicates that transferred intent does not apply. In footnote eight of Smith, the Court states, seemingly with approval, that on remand the defendant would be charged with three counts of attempted murder and one count of ABHAN, to which transferred intent would apply because it is a crime of general intent.

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[1] The Supreme Court's Opinion in Williams vacated the Court of Appeals' opinion adopting transferred intent for attempted murder, ultimately holding that it did not need to reach the issue because the law of the case was that the defendant was tried under a general intent theory. Williams at 157-58, 829 S.E.2d at 706-07.

Smith, n.8. The Court's statement strongly implies that transferred intent would not apply to attempted murder, a specific intent crime.

Apart from the Court's discussion of transferred intent, the reasoning of Smith on the applicability of the felony murder rule to attempted murder makes it highly unlikely that transferred intent is a viable theory any longer in South Carolina. In Smith, the solicitors were able to convince the trial judge to charge that the felony murder rule applied to attempted murder, with felony possession of a gun as the underlying felony. Smith at ___. The Court examined the felony murder rule as a theory of inferred malice. Id. The Court first stated that it joined the majority of jurisdictions refusing to recognize felony attempted murder. Id. The Court then pointed out the logical fallacy of allowing the jury to infer malice based on the felony murder rule in a case where self-defense was charged. Id.

The Court's criticism of inferred malice further supports the conclusion that, after Smith, transferred intent is not a viable legal theory for attempted murder. Transferred intent is another form of inferred and implied malice. It allows the jury to infer malice as to multiple victims despite the possibility of malice existing only toward a single victim. Transferred intent is a necessary legal fiction for the general intent crime of murder, but it is unnecessary for attempted murder because injury to the victim is not an element of the crime. With specific intent, and the lack of an injury element, no need exists to use transferred intent for attempted murder. A defendant cannot "get away with" attempted murder merely because he has bad aim. He can still be successfully prosecuted for attempted murder even if his intended victim is uninjured.

With Smith and Williams, the Supreme Court had the opportunity to affirm the Court of Appeals' adoption of transferred intent and in both cases, the Supreme Court chose the opposite course. South Carolina's jurisprudence before Smith and Williams, and that from other states,

also leads to the conclusion that the Supreme Court will ultimately explicitly reject the doctrine for attempted murder. 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 primary case the Court of Appeals relied on in Williams, 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."). Therefore, the vacated reasoning in Williams should not be re-adopted in this case.

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.

Erroneously charging transferred intent in appellant's case relieved the State of its burden to prove specific intent on three of the attempted murder charges and cannot be harmless. 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 because of the erroneous jury charge.

2.

The trial court erred in denying appellant's motion for a directed verdict.

At the close of the State's case, appellant moved for a directed verdict on the attempted murder charges stating, "The basis for this argument is [the] Defense believes the state has failed to prove specific intent as required by State v. King." R. 306, l. 14 – 307, l. 16. Defense counsel noted that intending to kill four women based on "being called gay at a bar" was a "tenuous" connection made by the State. R. 306, l. 14 – 307, l. 16. Defense counsel further argued that the facts surrounding the shooting did not prove specific intent because the shooter was a "significant amount" of distance from the women, armed only with a pistol and two of the bullets were found in the second floor of the building. R. 306, l. 14 – 307, l. 16. The State argued that evidence of premeditation existed and that specific intent could be "expressed or implied," then pointed out that one of the women was struck in the face by a bullet. R. 307, l. 19 – 308, l. 22. After reviewing the evidence, King, and the now-vacated Court of Appeals opinion in Williams, the trial judge denied the motion for a directed verdict.

The trial court erred. As defense counsel argued, the facts of this case do not rise to the level of specific intent. Furthermore, even if some evidence of specific intent could be argued to exist as to Moultrie, the State could not prove specific intent for the other three charges without the doctrine of transferred intent. As shown above in Issue 1, the doctrine of transferred intent does not apply to attempted murder. Therefore, at the least, appellant was entitled to directed verdict on the charges related to Anderson, Kennedy, and McGirt. This Court should reverse appellant's convictions.

## CONCLUSION

For the foregoing reasons, appellant's convictions should be reversed.

This 27th day of March, 2020.

s/David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS



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Appeal from Georgetown County

Honorable Steven H. John, Circuit Court Judge

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THE STATE,

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APPELLANT.

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CERTIFICATE OF SERVICE

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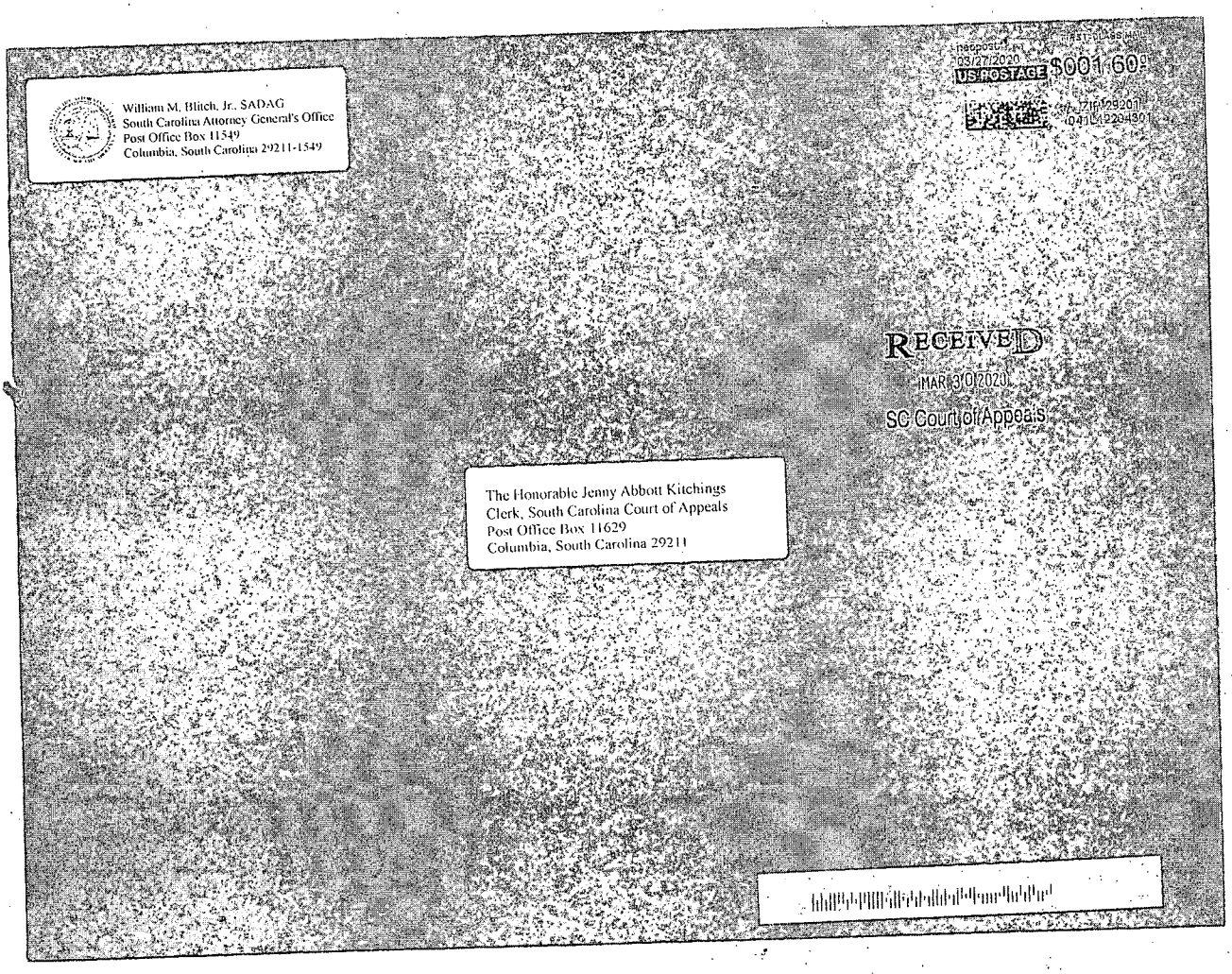
The undersigned hereby certifies that a true copy of the Brief of Appellant in the above referenced case has been served upon William Blitch, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Appellant has been served on Tyshun Mario Bessellieu, #375758, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 25th day of March, 2020.

s/David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 25th day of March, 2020.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 22, 2024.



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