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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SUMTER COUNTY
Court of General Sessions
Howard P. King, Circuit Court Judge

Appellate Case No. 2017-001601

THE STATE, ...RESPONDENT,

v.

JAMES CALEB WILLIAMS,.....APPELLANT.

RESPONDENT'S PETITION FOR REHEARING

On July 14, 2021, this Court issued a published opinion in which it reversed Appellant's convictions for attempted murder and possession of a weapon during the commission of a violent crime. State v. Williams, Op. No. 5385 (S.C. Ct. App. Filed July 14, 2021). In reversing Appellant's conviction, this Court found the trial judge erred in refusing to direct a verdict in Appellant's favor on his charge after determining transferred intent is inapplicable to the crime of attempted murder. Notably, the majority's opinion based its conclusion on two critical findings: (1) the specific intent for Appellant's intended victim could not transfer to the unintended victim because Appellant was acquitted by the jury of the intended crime; and (2) the issue of transferred intent was preserved for appellate review. Pursuant to Rule 221(a), SCACR, Respondent, the State, respectfully petitions for rehearing because this Court appears to have misapprehended two critical points: (1) the issue of transferred intent was not preserved for

appellate review because Appellant did not object to its applicability at trial; and (2) the acquittal on Appellant's attempted murder charge pertaining to his intended victim was an inappropriate not only because Appellant failed to raise this "inconsistent verdict" to this Court, but because the jury's verdicts were not inconsistent and, even if they were, had no impact on the trial judge's evaluation of Appellant's charges at the directed verdict stage of trial.

Issue Preservation

The question of issue preservation looms large in this Court's opinion. As noted by the dissent, the only issue preserved on appeal is whether the trial court erred in denying Appellant's motion for directed verdict as related to his charge of attempted murder of Ashley R. When making his directed verdict motion, trial counsel argued "[he] certainly d[id]n't think the [S]tate had met its burden beyond a reasonable doubt" because both Myers and Ashley R. could not say "conclusively" who shot them. (R.p.159, line 20–R.p.160, line 11). The State responded by explaining there was "strong evidence" the bullet which hit Ashley R. was fired from Appellant's gun and added the State was proceeding under the theory of transferred intent in regard to the attempted murder charge for Ashley R. (R.p.160, line 12–R.p.161, line 6). The trial judge acknowledged this was the State's theory of the case and Appellant failed to contest the applicability of transferred intent to that charge. (R.p.161, line 7–R.p.163, line 2). Later, when the trial judge charged transferred intent to the jury, Appellant again failed to challenge the applicability of the doctrine. (Tr.p.212, line 11–R.p219, line 20). At no point did Appellant object to the use of transferred intent doctrine on the basis that transferred intent could not be applied to a specific intent crime. Thus, as noted by the dissent, Appellant's current challenge to the applicability of transferred intent is not preserved for appellate review. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). ("A party need not use the exact name of a legal

doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground.")

Although the majority opinion acknowledges Appellant failed to argue the impropriety of transferred intent at trial, it brushes the issue aside by noting the State did not raise the issue of preservation in its brief and this omission by the State somehow implies the "obscurity" of the issue. (*citing* Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 332–33, 730 S.E.2d 282, 287 (2012)("When the opposing party does not raise a preservation issue on appeal, courts are not precluded from finding the issue unpreserved if the error is clear. However, the silence of an adversary should serve as an indicator to the court of the obscurity of the purported procedural flaw.")(Toal, C.J., concurring in result in part and dissenting in part)). In Lewis, then-Chief Justice Toal observed this finding was based on two aspects of the case: (1) her belief the majority "scour[ed] the records before [it]" for the purpose of finding a preservation issue; and (2) "the question of preservation [was] subject to multiple interpretations," and in such a situation "doubt should be resolved in favor of preservation." However, this issue is not one of obscurity: as noted above, Appellant never challenged the doctrine of transferred intent at trial. Because the trial judge was never given any facts, law, or even arguments challenging the propriety of transferred intent to his case, the issue was waived. See State v. Porter, 389 S.C. 27, 37–38, 698 S.E.2d 237, 242. (Ct. App. 2010). As noted by the **majority** in Lewis, "While it may be good practice for us to reach the merits of an issue when error preservation is doubtful, we should follow our **longstanding precedent** and resolve the issue on preservation grounds when it clearly is unpreserved." Lewis, 398 S.C. at 330, 730 S.E.2d at 285 (emphasis added).

Further, the State's failure to raise preservation in his brief is a product of the length of time between the filing of briefs in this case and this Court's opinion. The State filed its Final Brief of Respondent on August 21, 2018, almost three years before this Court issued its opinion. At that time, this Court had issued its opinions in State v. Gerald Williams, 422 S.C. 525, 812 S.E.2d 917 (Ct. App. 2018) ("Gerald Williams I"), and State v. Smith, 425 S.C. 20, 819 S.E.2d 187 (Ct. App. 2018) ("Smith I"), finding, unequivocally, the doctrine of transferred intent applied to the crime of attempted murder. Id. at 542, 812 S.E.2d at 925–26.

Subsequent to those opinions (and the filing of the State's brief in this case), the supreme court granted certiorari and vacated the portion of this Court's opinion in Gerald Williams I concerning the application of transferred intent, noting that because Williams failed to challenge the trial court's jury instruction that specific intent to kill was not an element of attempted murder, only a general intent to commit serious bodily injury, **that unappealed ruling was the law of the case** and this court had erroneously reached the question of whether transferred intent applied to a specific intent crime. State v. Gerald Williams, 427 S.C. 148, 157–58, 829 S.E.2d 702, 706–07 (2019) ("Gerald Williams II"). Thus, the court decided to "leave for another day" the question of whether transferred intent applied to attempted murder. Id. at 157–58, 829 S.E.2d at 707. Later, the supreme court issue its opinion in State v. Smith, 430 S.C. 226, 230, 845 S.E.2d 495, 496 (2020) ("Smith II"), reversing Smith's conviction for attempted murder due to improper jury instructions. Like in Gerald Williams II, the supreme court declined to determine whether the doctrine of transferred intent applied to the specific intent crime of attempted murder, finding resolution of other issues dispositive. Id. at 234 n.9, 845 S.E.2d at 499 n.9.

As indicated above, at that time briefing occurred in this case, there was no question transferred intent applied to the specific intent crime of attempted murder and Appellant was unable to cite to any South Carolina cases contradicting the State's authority. Issue preservation was discussed by the State during oral argument because of Gerald Williams II and its finding that, regardless of the applicability of transferred intent to specific intent crimes, the failure to properly object to the issue at trial renders it improper for appellate review. (Oral Argument at 10:02–14:43). Appellant failed to object to the theory of transferred intent during his directed verdict motion and again when the trial judge declared he was charging it to the jury.

Accordingly, it was error for this Court to ignore issue preservation and issue an opinion addressing the merits of Appellant's transferred intent argument which, notably, was never raised or ruled upon at any point prior to the appellate proceedings.

Verdict Inconsistencies

The foundation of the majority's opinion focuses on the fact that the jury acquitted Appellant for the attempted murder of Myers, explaining it could not "reconcile the jury's acquittal of Williams on the attempted murder charge for the shooting of Myers with its guilty verdict for an attempted murder of Ashley R." However, the perceived inconsistency between these verdicts was, for several reasons, an inappropriate ground upon which to reverse Appellant's convictions.

First, and most significant, is the fact that the issue of the inconsistent verdicts was not briefed by Appellant nor articulated in his issues on appeal. Thus, it is entirely improper to **reverse** Appellant's conviction on this ground. See Repko v. Cty. of Georgetown, 424 S.C. 494, 503–04, 818 S.E.2d 743, 748–49 (2018) ("In I'On, L.L.C. v. Town of Mt. Pleasant, we ... clarified that while an appellate court may affirm a lower court judgment for any reason

appearing in the record, '[a]n appellate court may not, of course, reverse for any reason appearing in the record.' .... The [C]ourt of [A]ppeals sua sponte raised and ruled upon an issue Repko never presented to the trial court. Therefore, we reverse the court of appeals' holding that a jury issue exists as to whether subsection 15-78-60(12) applies to the facts of this case"); also State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005) ("The rule is *well established* that if asserted errors are not presented to the lower Court, the question cannot be raised for the first time on appeal." (emphasis added)). Moreover, reversing Appellant's convictions for an issue not raised in the briefs is inconsistent with the majority's opinion in this very case and its refusal to affirm Appellant's convictions based on the issue preservation issues acknowledged by both the majority and dissent. Thus, both precedent and internal inconsistency demand rejection of the inconsistent verdict issue. See id.

However, even if that preservation problem could be ignored, the State asseverates that any alleged inconsistency with the verdicts does not justify reversal of Appellant's conviction. First and foremost, the jury's ultimate verdict has no bearing on a trial judge's grant or denial of a directed verdict. When ruling on a motion for a directed verdict, the trial court is concerned with the existence or non-existence of evidence, not its weight. State v. Curtis, 356 S.C. 622, 633, 591 S.E.2d 600, 605 (2004). "[I]f there is **any direct** or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011) (emphasis added). A jury's later evaluation of the facts has **no** bearing on whether a trial judge abused her discretion in denying a defendant's motion for a directed verdict: a trial judge properly submits a case to a jury when there is any direct or substantial circumstantial evidence justifying submission. As explained by the United States Supreme Court:

> [A] criminal defendant already is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts. This review should not be confused with the problems caused by inconsistent verdicts. Sufficiency-of-the evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilty beyond a reasonable doubt. This review should be independent of the jury's determination that evidence on another count was insufficient. The Government must convince the jury with its proof, and must also satisfy the courts that given this proof the jury could rationally have reached a verdict of guilty beyond a reasonable doubt. We do not believe that further safeguards against jury irrationality are necessary.

United States v. Powell, 469 U.S. 57, 67 (1984) (citations omitted). Importantly, South Carolina courts have explicitly adopted the rationale of Powell and rejected the prohibition against inconsistent verdicts. See State v. Alexander, 303 S.C. 377, 382–83, 401 S.E.2d 146,149–50.[1]

Juries may at times acquit defendants of at least some portion of their charged crimes, and their reasons for doing so—assuming they are even legitimate considerations—are not revealed in any way by a general verdict of guilty or not guilty; for example, a jury may reach a unanimous agreement that a defendant is guilty of a charged offense but may issue a verdict of not guilty for the purpose of jury nullification. See State v. Banko, 861 A.2d 110, 117 (N.J. 2004) ("An inconsistent verdict may be the product of jury nullification. We permit inconsistent verdicts to be returned by a jury because it is beyond our power to prevent them. We do not speculate why a jury acquits." (citations and internal quotations omitted)). Importantly, because a jury may issue a verdict for a myriad of reasons, a jury's acquittal does not invariably mean the trial judge abused his discretion in denying a directed verdict on that charge. The majority's inability to cite to any precedent finding error in the denial of a directed verdict based upon a jury's later acquittal only strengthens this point.

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[1] In fact, the State believes the likely reason Appellant failed to raise the inconsistent verdict issue in his brief was due to the supreme court's rejection of the prohibition against inconsistent verdicts in Alexander.

Further, the majority's opinion misconstrues what, in fact, an acquittal means. Acquittal on criminal charges does not prove that a defendant is innocent, only that the factfinder found the defendant not guilty of the charged crime in a legal—not necessarily factual—sense. United States v. Watts, 519 U.S. 148, 155 (1997). Thus, an acquittal on the attempted murder charge related to Myers cannot be interpreted as it finding Appellant on the charge. In fact, as noted by the dissent, the jury's acquittal of the attempted murder of Myers but conviction for the attempted murder of Ashley R. can readily be reconciled. As explained by the dissent:

> . . . [I]t is understandable that the jury did not appreciate this nuance, especially given the fact that (1) Myers discouraged the jury from holding Appellant responsible for shooting him; (2) the defense introduced evidence there was a third shooter present; (3) the State presented evidence the bullet that struck Ashely R. could have been fired from the gun used by Appellant that night but presented no evidence concerning the bullet that struck Myers; (4) the defense argued to the jury that five of the six bullets shot by Appellant hit Appellant's car and it would have had to have been a "magic bullet" to have hit both Ashley R. and Myers, implying to the jury that Appellant could not be guilty of shooting both of them; and (5) the jury was implicitly instructed a permissible verdict included one in which Appellant could be found guilty on either count of attempted murder without being found guilty on the other.

The State cannot emphasize these points enough: based on the evidence, arguments, and instructions provided to the jury, it believed it could find Appellant guilty of Ashley R.'s attempted murder independent of the charge pertaining to Myers. At no point did Appellant challenge the trial judge's instructions or argue the verdicts were inconsistent. Thus, it is inappropriate to reverse Appellant's conviction based on the inconsistency perceived by the majority. See Powell, 469 U.S. at 67; Alexander, 303 S.C. at 382–83, 401 S.E.2d at 149–50; Duncan v. Record Pub. Co., 145 S.C. 196, 143 S.E. 31, 74 (1927) ("We are only judges of the law. **We are not advocates of either of the parties to the cause.**" (emphasis added)); also Econ. Folding Box Corp. v. Anchor Frozen Foods Corp., 515 F.3d 718, 721 (7th Cir. 2008) ("It is not the court's responsibility to research the law and construct the parties' arguments for

them."); State v. Hill, 632 S.E.2d 777, 789 (N.C. Ct. App. 2006) (explaining it is "not the duty of the appellate courts to supplement an appellant's brief with legal authority or arguments not contained therein").

Transferred Intent and Attempted Murder

Finally, the State believes the majority erred in finding that supreme court's opinions in State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017), Gerald Williams II, and Smith II indicate the doctrine of transferred intent is inapplicable to the attempted murder charge for Ashley R. In Gerald Williams I and Smith I, this Court found the doctrine of transferred intent applies to attempted murder. Gerald Williams I, specifically, reached this conclusion by viewing the long-established precedent of transferred intent explained in State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000), which itself explains South Carolina law views a defendant's mental state as never leaving his brain: instead, it "is like a spotlight emanating from its source—the defendant's mind—to its target—the intended victim." Fennell, 340 S.C. at 271, 531 S.E.2d at 515. Nothing in Gerald Williams II or Smith II repudiates this analysis or states transferred intent is inapplicable to the crime attempted murder. Because the supreme court has declined to address the issue in its opinions, this Court should defer to the logic of Gerald Williams I and Smith I along with the precedent of Fennell and affirm Appellant's conviction.

Conclusion

For the reasons stated above, Respondent petitions for rehearing pursuant to Rule 221(a), SCACR, and requests this Court reinstate Petitioner's conviction for voluntary manslaughter.

Respectfully submitted,

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PROOF OF SERVICE

I, Caroline Collins, certify that I have served the within Petition for Rehearing on Appellant via electronic email to the address listed by the attorney in AIS for:

Robert M. Dudek, Esquire
S.C. Commission on Indigent Defense
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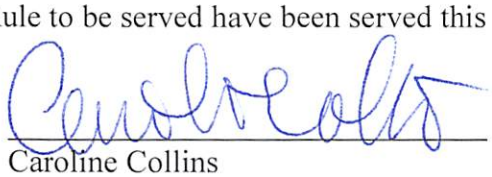
I further certify that all parties required by Rule to be served have been served this 29th day of July, 2021.



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From: Caroline Collins
Sent: Thursday, July 29, 2021 2:09 PM
To: rdudek@sccid.sc.gov
Cc: Kellner, Haley; Bill Schumacher; William Blitch
Subject: The State v. James Caleb Williams (2017-001601)
Attachments: WILLIAMS James - Respondent's Petition for Rehearing - 2017-001601 (02658728xD2C78).PDF

Good Afternoon Mr. Dudek,

Attached please find a copy of the Respondent's Petition for Rehearing in The State v. James Caleb Williams (2017-001601). This petition will be submitted to the South Carolina Court of Appeals today via the AIS One Drive System.

If you will, please reply to this email to confirm receipt.

Thank you!

CAROLINE COLLINS, Administrative Coordinator
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