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March 10, 2022

The Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
Post Office Box 11629
Columbia, S.C. 29211

Re: State v. Devonta Edward Williams, Appellate Case No. 2019-000222
Oral argument on Tuesday, March 15, 2021 at 12:00 PM

Dear Ms. Kitchings:

The Court is scheduled to hold oral argument in the above case on Tuesday, March 15, 2022 at 12:00 PM. Please find enclosed the South Carolina Supreme Court decision of *State v. Smith*, 430 S.C. 226, 845 S.E.2d 495 (2020), and the South Carolina Court of Appeals decisions of *State v. Geter*, 434 S.C. 557, 864 S.E.2d 569 (Ct. App. 2021); *State v. Taylor*, 434 S.C. 365, 862 S.E.2d 924 (Ct. App. 2021); and *State v. Williams*, 435 S.C. 288, 867 S.E.2d 430 (Ct. App. 2021). These decisions came to undersigned counsel's attention after the initial briefs had been served and filed. Pursuant to Rule 208(b)(7), SCACR, I am respectfully advising this Court that the *Smith*, *Geter*, *Taylor*, and *Williams* cases represent pertinent and significant authority for the issue presented in the brief filed by undersigned counsel. By copy of this letter, I am notifying opposing counsel of the submission of this supplemental authority.

If you have any questions concerning this matter, please do not hesitate to contact me.

Sincerely,

s/ *Joanna K. Delany*
Joanna K. Delany
Appellate Defender

JKD/kpw

cc: Tommy Evans, Jr., Esquire (with enclosure)

Enclosures: as stated

430 S.C. 226
Supreme Court of South Carolina.

The STATE, Respondent,
v.
Michael Juan SMITH, Petitioner.

Appellate Case No. 2018-002050
|
Opinion No. 27958
|
Heard December 12, 2019
|
Filed March 18, 2020
|
Re-Filed June 17, 2020

Synopsis

Background: Defendant was convicted in the Circuit Court, Richland County, Robert E. Hood, J., of attempted murder. Defendant appealed. The Court of Appeals, Geathers, J., 819 S.E.2d 187, affirmed, and defendant filed petition for writ of certiorari.

Holdings: On rehearing, the Supreme Court held that:

felony attempted-murder is not a recognized crime;

trial court's instruction to jury regarding the requirements and consequences of felony attempted-murder was erroneous;

implied malice charge was unnecessary to jury's decision; and

trial court's error in giving felony attempted-murder charge was not harmless.

Reversed and remanded.

Procedural Posture(s): Appellate Review.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County, Robert E. Hood, Circuit Court Judge

Attorneys and Law Firms

Appellate Defender David Alexander, of Columbia, for Petitioner.

Attorney General Alan Wilson, Senior Assistant Deputy Attorney General William M. Blitch Jr., and Solicitor Byron E. Gipson, all of Columbia, for Respondent.

****496 *228** ORDER

After careful consideration of the State's petition for rehearing, the Court grants the petition for rehearing, dispenses with further briefing, and substitutes the attached opinion for the opinion previously filed in this matter.

s/ Donald W. Beatty, C.J.

s/ John W. Kittredge, J.

s/ Kaye G. Hearn, J.

s/ John Cannon Few, J.

s/ George C. James, Jr., J.

Opinion

PER CURIAM:

In October 2013, a young woman (the victim) was shot by Petitioner Michael Smith in the Five Points area of Columbia. It was undisputed Smith did not intend to harm her. Rather, Smith claimed he was acting in self-defense by shooting at a group of men who had threatened him. Smith missed his intended target and hit the victim by accident. Smith was subsequently charged with the attempted murder of the victim and a host of other gun-related charges, including possession of a firearm by a person convicted of a felony.

***229** At the outset of trial, in opening statements, counsel for Smith conceded guilt to the felon-in-possession offense, but denied the attempted murder charge and asserted a claim of self-defense. In doing so, Smith implicitly acknowledged he had an express intent to kill the men at whom he was shooting, but asserted his actions were justified given his belief that he faced an imminent threat to his own life. The State ultimately conceded Smith presented evidence he acted in self-defense, and that therefore a jury charge to that effect must be given. Nonetheless, the State inexplicably requested

the trial court charge the jury on implied malice.[1] The law at the time of trial precluded an implied malice jury charge (based on the use of a deadly weapon) when a viable self-defense claim existed.[2] Perhaps recognizing this, the State sought to create a new category of implied malice for "felony attempted-murder," with the predicate felony being the felon-in-possession charge. As noted, Smith had already conceded guilt to this charge. Thus, in requesting the new felony attempted-murder charge, which the trial court accepted over Smith's objection, the State essentially circumvented then-existing law expressly precluding an implied malice charge. Consequently, the trial court erred in accommodating the State's request for an implied malice charge. The error was compounded, for the State relied on a crime—the so-called crime of felony attempted-murder—which South Carolina has not adopted.

*230 Adhering to the majority approach, we find felony attempted-murder is not a recognized crime in South Carolina, and, therefore, any jury charge to that effect was error. Likewise, we hold trial courts may no longer give an implied malice charge when there has been evidence presented that the defendant acted in self-defense.[3] We therefore **497 reverse Smith's convictions for attempted murder and the possession of a weapon during the commission of a violent crime and remand for a new trial.[4]

FACTS/PROCEDURAL HISTORY

On the night in question, Smith and four companions were in the Five Points area of Columbia. While waiting on a street corner for the traffic signal, Smith's group was approached by two men (the rival group) who called Smith a "slob"—a derogatory name for a member of the Bloods street gang.[5] The two groups parted without exchanging any additional words or insults.

Several minutes later, Smith's group began walking back toward their car. On the way, they were again confronted by the rival group, who had been joined by a third man. The two groups began posturing and exchanging insults.

*231 At this point, the testimony at trial diverged significantly between the State's witnesses and the defense witnesses. According to the State's witnesses, following the verbal altercation, the rival group turned their backs and attempted to leave, and Smith pulled out a gun and fired several shots at the rival group while they were walking away. According to the defense witnesses, following the verbal altercation, an unidentified individual yelled that a member of the rival group had a gun, the rival group began shooting at Smith's group, and Smith pulled out his own gun and fired one shot in return.

Regardless of who shot first, Smith's shot missed the rival group and hit the victim, who was waiting for a taxicab nearby. The bullet severed her spinal cord, causing instant, irreversible paralysis. Law enforcement caught Smith fleeing the scene within seconds of the shooting.

Smith was indicted for the attempted murder of the victim and four gun charges: (1) possession of a weapon by a person convicted of a prior violent felony;[6] (2) unlawful possession of a weapon by a person convicted of a prior crime of violence;[7] (3) unlawful carrying of a handgun; and (4) possession of a weapon during the commission of a violent crime.[8] During opening statements, Smith twice conceded guilt to the first two gun charges, telling the jury he had already pled guilty to those same offenses in federal court.

The State conceded during the trial there was sufficient evidence of self-defense to charge the jury. However, the State additionally requested the trial court charge the jury on felony attempted-murder, claiming it was "another way to *232 infer malice." The State argued that "a person who is not allowed by law to carry a gun would be" committing an inherently dangerous felony, and thus—as in the ordinary application of the felony-murder rule—the jury could infer malice because the attempted murder occurred during the commission of a felony. Notwithstanding then-existing **498 law which expressly disallowed an implied malice charge when evidence of self-defense existed, the trial court relented to the State's request for a charge on felony attempted-murder, instructing the jury:

> Now, the law also allows you to infer malice if you conclude that the attempted murder was a proximate direct result of the commission of a felony. And for that regard, two of the gun charges, possession of a firearm by a person convicted of a crime of violence and possession of a weapon by a person convicted of a violent felony[,] would be felonies under our law.
>
> You can imply that malice existed if a person in the commission of a felony at the time of the attempted

> fatal blow [--] if one attempts to kill another during the commission of a felony, the inference of malice may arise.

The jury found Smith guilty of attempted murder and the gun charges. Smith appealed, and the court of appeals affirmed. *State v. Smith*, 425 S.C. 20, 819 S.E.2d 187 (Ct. App. 2018). This Court granted Smith's petition for a writ of certiorari to review the decision of the court of appeals.

LAW/ANALYSIS

There were multiple errors in the trial below that require reversal of the attempted murder conviction. First, as a majority of states have found, felony attempted-murder is not a recognized crime. *Cf. State v. Sanders*, 241 W.Va. 590, 827 S.E.2d 214, 219–22 & n.9 (2019) (collecting an extensive list of cases, all of which note the "logical absurdity" of recognizing the crime of felony attempted-murder). As a result, the trial court's instruction to the jury regarding the requirements and consequences of felony attempted-murder was erroneous.

Additionally, the State argued the felony attempted-murder charge was permissible because it was merely "another ***233** way to infer malice." In claiming self-defense, *Smith admitted he had an express intent to kill*, but argued his intent to kill was legally justified due to an imminent threat to his life from the rival group. Thus, there was no need for the jury to infer his malice from the circumstances surrounding the shooting. Rather, the jury was faced with the choice of either believing Smith's story and finding he acted in self-defense, or believing Smith had a self-admitted intent to kill that was *not* legally justified—the very definition of express malice. *See, e.g., State v. King*, 422 S.C. 47, 57, 810 S.E.2d 18, 23 (2017) (defining express malice as the deliberate intention to unlawfully kill another (quoting *Keys v. State*, 104 Nev. 736, 766 P.2d 270, 273 (1988))). In either case, an implied malice charge was wholly unnecessary to the jury's decision. *Cf. id.* at 64 n.5, 810 S.E.2d at 27 n.5 (asking the General Assembly to re-evaluate the language in section 16-3-29 of the South Carolina Code (2015) that the malice aforethought necessary for attempted murder could be "expressed or implied," "as the inclusion of the word 'implied' in section 16-3-29 is arguably inconsistent with a specific-intent crime. *See Keys*[, 766 P.2d at 273] (stating, '[o]ne cannot *attempt* to kill another with implied malice because there is no such criminal offense as an attempt to achieve an unintended result' ...)."); *see also Wilds*, 355 S.C. at 276–77, 584 S.E.2d at 142 (explaining malice need be implied only if there is no positive evidence of express malice). The State's unrelenting quest to obtain an implied malice charge is troubling.

Of course, erroneous jury instructions are subject to a harmless error analysis. *See Burdette*, 427 S.C. at 496, 832 S.E.2d at 578 (citation omitted). Here, however, the felony attempted-murder charge cannot be considered harmless. During his opening statement, Smith twice conceded guilt to the two felon-in-possession charges. By requesting the felony attempted-murder charge after Smith had already conceded guilt to the predicate felonies, the State essentially eliminated its own burden to prove all of the elements of attempted murder beyond a reasonable doubt, specifically that Smith acted with malice aforethought. For a constitutional error of this magnitude, "We need go no further than saying we cannot conclude the error was harmless beyond a reasonable doubt." *Belcher*, 385 S.C. at 611, 685 S.E.2d at 809 ("[W]e are firmly ***234** convinced that instructing a jury that 'malice may be inferred by the use of a deadly weapon' is confusing and prejudicial where evidence is presented ****499** that would reduce, mitigate, excuse or justify the homicide. A jury charge is no place for purposeful ambiguity.").

CONCLUSION

In accordance with the majority approach, we hold that felony attempted-murder is not a recognized crime in South Carolina. Likewise, we hold an implied malice charge should not be given if there has been evidence presented that the defendant acted in self-defense. Accordingly, we reverse Smith's convictions for attempted murder and the possession of a firearm during the commission of a violent crime and remand for a new trial. [9]

REVERSED AND REMANDED.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

All Citations

430 S.C. 226, 845 S.E.2d 495

Footnotes

1 *See, e.g., State v. Wilds*, 355 S.C. 269, 276–77, 584 S.E.2d 138, 142 (Ct. App. 2003) (explaining malice must be implied when there is *no positive evidence* of a deliberate intention to unlawfully take the life of another (i.e., when there is no evidence of express malice), but instead circumstances demonstrate that a reasonably prudent man would have known there was a strong likelihood death would follow his actions (citing 40 C.J.S. *Homicide* § 34–35 (1991))).

2 *See, e.g., State v. Belcher*, 385 S.C. 597, 600, 685 S.E.2d 802, 803–04 (2009) (holding that "a jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide"), *overruled on other grounds by State v. Burdette*, 427 S.C. 490, 501–03, 832 S.E.2d 575, 582–83 (2019) (extending the holding in *Belcher* to prohibit trial courts from ever instructing juries that malice may be inferred from the use of a deadly weapon, "[r]egardless of the evidence presented at trial").

3 This is a slightly different holding than the one we reached in *Burdette*, where we found an implied malice charge *based on the use of a deadly weapon* could never be given. Here, we find *any* implied malice charge cannot be given if there is also evidence presented that the defendant acted in self-defense.

4 As we explain further below, Smith was convicted of four other gun charges stemming from this incident. He does not challenge any of those convictions on appeal, and our decision today therefore should not be read to require a re-trial on three of the four gun charges. In particular, we affirm Smith's convictions for (1) possession of a weapon by a person convicted of a prior violent felony; (2) unlawful possession of a weapon by a person convicted of a prior crime of violence; and (3) unlawful carrying of a handgun. However, given that we reverse Smith's conviction for attempted murder, we must also reverse and remand his conviction for the possession of a weapon during the commission of a violent crime. Smith must be re-convicted of committing a violent crime before he can properly be found to have illegally possessed a weapon during that crime.

5 Smith is a self-professed member of the Bloods.

6 *See* S.C. Code Ann. § 16-23-500 (Supp. 2019). Unrelated to this incident, Smith had been previously convicted of burglary in the second degree.

7 *See* S.C. Code Ann. § 16-23-30(B) (2015). Smith's same conviction for burglary in the second degree served as the "crime of violence" element for this crime as well.

8 Smith was also indicted on a fifth gun charge, possession of a stolen handgun. However, the trial court later granted Smith's motion for a directed verdict on this charge because the State did not present any evidence Smith knew he was in possession of a stolen firearm. *See* S.C. Code Ann. § 16-23-30(C) ("A person shall not *knowingly* ... possess any stolen handgun ...." (emphasis added)).

9 Smith also contends the court of appeals erred in finding the doctrine of transferred intent applied to attempted murder because it is a specific-intent crime. In particular, Smith argues the requisite specific intent necessary to support an attempted murder conviction must be the specific intent to kill *a specific person*. Smith points out the "State elected to prosecute [him] for the attempted murder of [the victim] instead of the attempted murder of [the men in the rival group]," and he "was not tried (nor has ever been tried) for any crime related to [the rival group]." We need not address this issue because the prior issues are dispositive. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999). Nonetheless, we note the State indicated that—were the Court to reverse Smith's convictions—it intended to charge Smith with three counts of attempted murder for shooting at the rival group, and one count of assault and battery of a high and aggravated nature (ABHAN) for shooting the victim. ABHAN is a general-intent crime, and, thus, there would be no question on remand as to the applicability of the doctrine of transferred intent. *See State v. Williams*, 427 S.C. 148, 157, 829 S.E.2d 702, 707 (2019) ("It is well-settled in South Carolina that the doctrine of transferred intent applies to general-intent crimes.").

Finally, while not necessary to the disposition of this appeal, we note our concern with the scope of the medical testimony elicited by the State and admitted by the trial court at Smith's trial. To be sure, the facts of this case are tragic and heartbreaking. That reality would be evident even if the State had not sought to

improperly appeal to the emotions of the jury. Here, for example, the State called a witness to testify about the possibility that the victim may suffer future injuries due to the shooting. That witness testified in detail about things such as the victim's future bathroom habits; the difficulty she will have doing everyday tasks (such as climbing in and out of bed); the possibility she will suffer from recurrent urinary tract infections, sepsis, and osteoporosis; and other similar issues that may affect her future health. Upon Smith's objection to the relevance of this testimony, the State justified it to the trial court by claiming: (1) "the fact that [the victim] could have recurrent infections, that this injury could still cost her her life [was important]"; and (2) "when we -- the State of South Carolina, when we accuse someone of attempted murder, *we have to prove the injuries.*" (Emphasis added.) We note the attempted murder statute does not require an injury to the victim at all, much less for future *possible* injuries to be described in such graphic detail. *See* S.C. Code Ann. § 16-3-29 ("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."); *Williams*, 427 S.C. at 154, 158, 829 S.E.2d at 705, 707 (affirming three attempted murder convictions in a case in which the defendant shot at three people repeatedly, injuring none of them). The gross prosecutorial overreach manifested here further supports our decision not to rely on harmless error to rescue this conviction.

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434 S.C. 557
Court of Appeals of South Carolina.

The STATE, Respondent,
v.
Robert Xavier GETER, Appellant.

Appellate Case No. 2018-001647
|
Opinion No. 5851
|
Heard June 7, 2021
|
Filed August 18, 2021
|
Rehearing Denied November 5, 2021

Synopsis

Background: Defendant was convicted in the Circuit Court, Richland County, DeAndrea G. Benjamin, J., of murder and attempted murder arising from bar fight. Defendant appealed.

Holdings: The Court of Appeals, Konduros, J., held that:

doctrine of transferred intent was inapplicable as to attempted murder charge;

investigator's testimony impermissibly vouched for or bolstered bouncer's credibility; and

trial court's error in allowing investigator's opinion as to the consistency of bouncer's testimony with his prior statement was harmless.

Affirmed in part, reversed in part, and remanded

Geathers, J., filed an opinion concurring in part and dissenting in part.

Procedural Posture(s): Appellate Review; Trial or Guilt Phase Motion or Objection.

**570 Appeal From Richland County, DeAndrea G. Benjamin, Circuit Court Judge

Attorneys and Law Firms

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, Assistant Attorney General Tommy Evans, Jr., and Solicitor Byron E. Gipson, all of Columbia, for Respondent.

Opinion

KONDUROS, J.:

*560 In this criminal case, Robert Xavier Geter appeals his convictions for the murder of James Lewis (Decedent) and the attempted murder of Clarence Stone. The events in the case stem from a bar fight between Geter and Decedent. Geter maintains the circuit court erred in charging the jury on transferred intent in relation to the attempted murder charge and in allowing certain testimony from Investigator Joseph Clarke. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL BACKGROUND

On the night of March 7, 2015, Stone was at a pool room/ restaurant, Culler's Pool Hall, located on Monticello Road in Richland County. Stone acted as something of a bouncer for the business, watching out for arguments or other types of trouble or disturbances. According to Stone, he was playing a game of pool when he heard a commotion and went to investigate. He found Decedent and Geter on the floor fighting. Stone broke up the fight and took Decedent outside on a **571 deck behind the building. Decedent wanted to go back inside to get his chain, and Stone indicated he would retrieve it for him. As Stone was preparing to go back inside, Geter came out onto the deck, approaching Decedent and asking "we good?" Then, Geter swung at Decedent and Stone was caught in between the two while attempting to break up the altercation. Geter had a knife and stabbed and killed Decedent. Geter *561 also struck Stone, stabbing him in the eye, causing permanent blindness in that eye.

Geter was indicted on one count of murder and one count of attempted murder. At trial, in opening statements, Geter's attorney indicated Geter had acted in self-defense after several men, including Decedent and Stone, had attacked and beaten him.

Investigator Joseph Clarke, of the Richland County Sheriff's Office, testified after Stone in the State's case and indicated he was the on-call homicide investigator on the night of the stabbing. He testified as follows regarding his investigation of the incident.

[STATE]: And you were here in opening statements, correct?

[CLARKE]: Yes.

[STATE]: Is that the first time you heard that story?

[CLARKE]: No. Oh, that story?

[STATE]: Yes, the story that he gave about – in opening statements?

[GETER]: Your Honor. I object. Openings are not evidence, so.

THE COURT: Overruled.

[STATE]: His scenario of the facts that Mr. Geter's attorney is now saying happened, is that the first time you have ever heard that?

[CLARKE]: Yes.

...

[STATE]: You confirmed that Clarence Stone was also a victim?

[CLARKE]: I did.

[STATE]: And you spoke with him as well?

[CLARKE]: I did. I took a statement at his home.

[STATE]: And he gave a statement of what occurred?

[CLARKE]: He did.

[STATE]: You saw him testify again today?

[CLARKE]: I did.

[STATE]: And was that exactly what he told you?

*562 [GETER]: Objection. Your Honor. Improper vouching.

THE COURT: Overruled. You are asking about the testimony that he gave?

[STATE]: Yes. We watched him just a few minutes ago.

THE COURT: Overruled.

[STATE]: The same thing he told this jury happened to him is what he told you?

[CLARKE]: Seems absolutely consistent. Correct.

At the close of the State's case, Geter moved for a directed verdict arguing the State had offered no evidence Geter specifically intended to kill Stone as required by the attempted murder statute. The State contended the necessary intent to establish the attempted murder charge could be transferred based on Geter's intent to kill Decedent. The circuit court agreed and denied the directed verdict motion.

Geter testified in his own defense and indicated he had accidentally stepped on Decedent's foot and when confronted by Decedent, he apologized. While doing so, Stone came over and interfered in their conversation by hitting Geter in the back of the head. Then, according to Geter, Stone and Decedent were beating him pretty severely and he believed several other men were also attacking him. To defend himself, he pulled out his knife and while brandishing it, Decedent and Stone were injured.

At the close of all testimony, Geter renewed his motion for directed verdict which the circuit court denied. Geter objected to the circuit court charging on the doctrine of transferred intent. The circuit court denied the objection and charged the jury as follows:

Ladies and gentlemen, we'll next talk about the doctrine of transferred intent. If the [d]efendant with malice aforethought attempts to kill another person, but by mistake injures or kills a different person, the law considers that the [d]efendant still **572 had the intent to kill. Intent to kill is a mental state. It exists in the mind. So, if the State proves that a [d]efendant acting with malice had the intent to kill one person, but mistakenly injured another, the intent to kill is merely transferred from the original person the [d]efendant attempted to kill to the actual person injured.

*563 Pursuant to the transfer[red] intent doctrine, if one person intends to harm a second person but instead unintentionally harms a third, the first person's criminal intent toward the second applies to the third as well.

The circuit court also charged the jury on self-defense. Geter was convicted of murder and attempted murder and sentenced to forty years' imprisonment and twenty years' imprisonment, respectively, to run concurrently. This appeal followed.

STANDARD OF REVIEW

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011) (*quoting Clark v. Cantrell,* 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). Likewise, the admission or exclusion of evidence is subject to the discretion of the circuit court. *State v. Kromah*, 401 S.C. 340, 349, 737 S.E.2d 490, 494-95 (2013). Additionally, any abuse of discretion related thereto is subject to a harmless error analysis. *Id.* at 362, 737 S.E.2d at 501.

LAW/ANALYSIS

I. Transferred Intent and Attempted Murder

Geter argues the circuit court erred in charging the jury on the doctrine of transferred intent to support the attempted murder charge. We agree.

The South Carolina Court of Appeals has twice-answered the first question presented in this appeal—whether the doctrine of transferred intent applies to attempted murder which requires specific intent. [1] In *State v. Williams*, 422 S.C. 525, 539, 812 S.E.2d 917, 924 (Ct. App. 2018), *aff'd in part as modified, vacated in part*, 427 S.C. 148, 829 S.E.2d 702 (2019), the court concluded "the doctrine of transferred intent is proper to convict a defendant of attempted murder regardless ***564** of whether a victim, intended or unintended, suffers an injury." In that case, Williams had fired shots into a trailer in which his intended target and two other people were located. *Id.* This court found:

> Williams misconstrues the attempted murder statute to the extent he argues the statute requires the specific intent to murder specific victims. Williams specifically argues the transferred intent charge erroneously allowed the jury to find Williams guilty of attempted murder of Ycedra and Wrighton without requiring the State to prove (1) Williams knew they were in the [r]esidence and (2) Williams specifically intended to kill Ycedra and Wrighton [unintended targets], in addition to Young. We disagree.

Id.

However, the Supreme Court of South Carolina, based on preservation grounds, vacated the portion of *Williams* that decided the transferred intent question. *State v. Williams*, 427 S.C. 148, 150, 829 S.E.2d 702, 703 (2019). Because the defendant had not appealed the erroneous jury charge indicating attempted murder was a *general* intent crime, the court declined to weigh in. *Id.* "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. In spite of declining to address the merits of the issue, the court offered more insight in a footnote to the opinion.

> ****573** [W]e find the doctrine of transferred intent unnecessary to sustain the convictions for the attempted murders of Young and Wrighton. Petitioner was alleged to have specifically intended to kill Young the night of the shooting, and to have shot at the door where Wrighton stood, intending to kill the figure in the doorway. It matters not that Petitioner may have been unaware it was Wrighton in the door, rather than Young. Simply put, Petitioner *intended* to shoot the person (Wrighton) who appeared in the doorway. As a result, we alternatively sustain Petitioner's convictions for the attempted murders of Young and Wrighton without resort to the doctrine of transferred intent. Because Petitioner was sentenced to three

> concurrent twenty-year sentences, reversing ***565** his conviction for the attempted murder of [Ycedra[2]] would have no effect on the length of Petitioner's term of imprisonment, and we decline to do so, particularly given that the case was tried as if attempted murder was a general-intent crime.

Id. at 158 n.9, 829 S.E.2d at 707 n.9.

In *State v. Smith*, 425 S.C. 20, 32, 819 S.E.2d 187, 193 (Ct. App. 2018), *rev'd and remanded*, 430 S.C. 226, 845 S.E.2d 495 (2020), the court of appeals was again presented with the opportunity to consider the doctrine of transferred intent and attempted murder. The court concluded the doctrine of transferred intent could provide the specific intent to support the charge. *Id.* at 32, 819 S.E.2d at 193. It stated "[t]he foregoing evidence shows Appellant's unjustified, specific intent to kill at least one of the three men he encountered. Further, the State showed specific intent *as to Victim* [not one of the three men] through the doctrine of transferred intent." *Id.* As it had done in *Williams*, the supreme court declined to adopt the court of appeals' position on the issue. The supreme court stated:

> Smith also contends the court of appeals erred in finding the doctrine of transferred intent applied to attempted murder because it is a specific-intent crime. In particular, Smith argues the requisite specific intent necessary to support an attempted murder conviction must be the specific intent to kill *a specific person.* Smith points out the "State elected to prosecute [him] for the attempted murder of [the victim] instead of the attempted murder of [the men in the rival group]," and he "was not tried (nor has ever been tried) for any crime related to [the rival group]." We need not address this issue because the prior issues are dispositive. *Nonetheless, we note the State indicated that—were the [c]ourt to reverse Smith'sconvictions—it intended to charge Smith with three counts of attempted murder for shooting at the rival group, and one count of assault and battery of a high and aggravated nature (ABHAN) for shooting the victim. ABHAN is a general-intent crime, and, thus, there would be no question on remand as to the applicability of the doctrine of transferred intent.*

***566** *Id.* at 234, 845 S.E.2d at 499 (emphasis added)(citation omitted).

Jurisdictions are split over whether transferred intent can be applied in attempted murder cases. In jurisdictions finding transferred intent applies in attempted murder cases, the rationale is largely based in public policy and reflects the logical extension of the of transferred intent doctrine in murder cases. In other words, if transferred intent applies to convict a killer of an unintended murder, why should a bad actor have lesser consequences simply because the unintended victim did not die? *See e.g. People v. Ephraim*, 323 Ill.App.3d 1097, 257 Ill.Dec. 291, 753 N.E.2d 486, 496 (2001) ("It is well established that in Illinois, the doctrine of transferred intent is applicable to attempted murder cases where an unintended victim is injured."); *State v. Gilman*, 69 Me. 163, 171 (1879) (applying transferred intent to ensure defendants are punished for their actions not the results); *Ochoa v. State*, 115 Nev. 194, 981 P.2d 1201, 1205 (1999) (finding no reason not to apply transferred intent in case where intended victim died and unintended victim ****574** was wounded because although charges differed the intent was the same); *State v. Ross*, 115 So. 3d 616, 621 (La. App. 2013) ("Applying the doctrine of transferred intent to the facts of this case, Mr. Ross's specific intent to shoot Ms. Cloud was transferred when he accidentally also shot Ms. Peters and Mr. Newman" and the extent of their injuries was inconsequential); *State v. Fennell*, 340 S.C. 266, 276, 531 S.E.2d 512, 517 (2000) ("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.").[3]

***567** On the other hand, some jurisdictions require a specific, intended victim to support an attempted murder charge. Those jurisdictions generally maintain that a person cannot be guilty of "attempting" to do an act he did not intend to do [injuring B while attempting to kill A] and public policy did not require extending the doctrine to punish or deter bad actors. *See Cockrell v. State*, 890 So. 2d 174, 181 (Ala. 2004) ("Applying the foregoing rules of construction, we conclude that the statute defining 'attempt' does not clearly evince a legislative intent to apply the doctrine of transferred intent—applicable only to the completed crime of murder —to punish as attempted murder the consequences of an unintended, nonfatal result."); *Ramsey v. State*, 56 P.3d 675, 681 (Alaska Ct. App. 2002) (finding the jury would have to conclude the defendant intended to kill the injured victim to convict her of attempted murder and could not rely upon transferred intent); *People v. Falaniko*, 1 Cal.App.5th 1234,

205 Cal. Rptr. 3d 623, 631 (2016) ("[B]ecause '[t]he crime of attempt sanctions what the person intended to do but did not accomplish, not unintended and unaccomplished potential consequences,' the shooter who fails to kill the unintended victim cannot be convicted of attempted murder under a theory of transferred intent.") (quoting *People v. Bland*, 28 Cal.4th 313, 121 Cal.Rptr.2d 546, 48 P.3d 1107 (2002)); *State v. Hinton*, 227 Conn. 301, 630 A.2d 593, 602 (1993) ("[T]he rule of lenity leads us to conclude that the transferred intent doctrine should not be applied to the crime of attempted murder."); *State v. Brady*, 393 Md. 502, 903 A.2d 870, 882-83 (2006) (finding "if a defendant intends to kill a specific victim and instead wounds an unintended victim without killing either, the defendant can be convicted only of the attempted murder of the intended victim and transferred intent does not apply");.

After considering South Carolina jurisprudence, as well as that from other jurisdictions, we conclude the circuit court erred in charging transferred intent as to the attempted ***568** murder charge.[4] To support that charge, the State must demonstrate Geter attempted to kill Stone, and that was not the ****575** State's theory of the case. So long as attempted murder is a specific intent crime, transferring the intent to kill does not satisfy the necessary mens rea to convict a defendant of the attempted murder of an unintended victim. Furthermore, from a public policy standpoint, the supreme court has strongly suggested in both *Williams* and *Smith* that the lesser offense of ABHAN in cases such as this would serve as an appropriate punishment for the accused.

Based on all of the foregoing, we conclude the circuit court erred in charging transferred intent in this case, and we reverse Geter's conviction for attempted murder.

II. Testimony of Investigator Clarke

Geter contends the circuit court erred in allowing Investigator Clarke to testify that Geter's opening statement to the jury was the first time he had heard the defense's "scenario of the facts" and that Stone's pretrial statement and testimony were "consistent." We agree in part.

The objection to Investigator Clarke's statement that he first heard Geter's scenario of the facts during opening statements is not preserved for our review. Geter did not object to the question on the ground of bolstering but only noted opening statements are not evidence. Consequently, the point is not preserved. *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. A party ***569** may not argue one ground at trial and an alternate ground on appeal.").

The second statement—that Stone's prior statement to Investigator Clarke was consistent with his trial testimony—is troubling. In *Chappell v. State*, 429 S.C. 68, 837 S.E.2d 496 (Ct. App. 2019), our supreme court outlined the elements to be examined when determining whether a witness is improperly bolstering another witness's testimony. This court decided the testimony of a witness is improper bolstering if:

> (1) the witness directly states an opinion about the [other witness]'s credibility; (2) the sole purpose of the testimony is to convey the witness's opinion about the [other witness]'s credibility; or (3) there is no way to interpret the testimony other than to mean the witness believes the [other witness] is telling the truth.

Id. at 77, 837 S.E.2d at 501.

"Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness's veracity[ ] or where a prosecutor implicitly vouches for a witness's veracity by indicating information not presented to the jury supports the testimony." *State v. Shuler*, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001).

Investigator Clarke did not *directly* comment on the veracity of Stone's testimony. By definition, consistent does not necessarily mean truthful, but it does mean "free from variation or contradiction,"[5] thus creating the impression of accuracy and truthfulness. The question serves no other purpose than to bolster Stone's trial testimony and puts an improper imprimatur on Stone's testimony as truthful. Notably, Stone's prior statement would not have been admissible to prove it was consistent with this trial testimony unless Geter had suggested Stone's trial testimony was a recent fabrication.[6] Therefore, it was inappropriate for

Investigator **576 Clarke *570 to opine as to the consistency of Stone's testimony with his prior statement.

Nevertheless, any error in allowing Investigator Clarke's testimony is subject to a harmless error analysis. *See State v. Reyes*, 432 S.C. 394, 405-06, 853 S.E.2d 334, 340 (2020) (conducting a harmless error analysis in an appeal premised on improper vouching); *see also State v. Kelly*, 343 S.C. 350, 369-70, 540 S.E.2d 851, 860-61 (2001) (conducting a harmless error analysis after finding a witness had improperly vouched for another witness and suggested an imprimatur from the State) *rev'd and remanded on other grounds*, 534 U.S. 246, 122 S.Ct. 726, 151 L.Ed.2d 670 (2002). "Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial. [O]ur jurisprudence requires us not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict." *Reyes*, 432 S.C. at 406, 853 S.E.2d at 340 (citations omitted).

In this case, all of the eyewitnesses' testimony was consistent and the forensic evidence in the case matched a version of events in which Geter was the final aggressor outside on the deck that evening, acting out of revenge rather than self-defense. Additionally, the circuit court instructed the jury that it was charged with determining the credibility of the witnesses in the case. It charged "[n]ecessarily, you must determine the credibility of witnesses who have testified in *571 this case. Credibility simply means believability. It becomes your duty as jurors to analyze and to evaluate the evidence and determine which evidence convinces you of its truth." This instruction did not nullify Investigator Clarke's improper statement but mitigated its impact. *See id.* at 408-09, 853 S.E.2d at 342 (explaining any bolstering of a minor witness's credibility was cured by, among other things, the court's instruction that the jury was the sole arbiter of credibility). Accordingly, we find even though the circuit court erred in allowing Investigator Clarke's statement, the error was harmless.

CONCLUSION

Based on the foregoing, we find the circuit court erred in charging the jury on transferred intent. This finding mandates the reversal of Geter's conviction for attempted murder. Additionally, we conclude the circuit court erred in admitting Investigator Clarke's statement regarding the consistency of Stone's testimony with his prior statement. However, this error was harmless under the facts of this case. Nevertheless, we caution the State against eliciting such improper testimony. Because the reversible error in this case pertains only to Geter's conviction for attempted murder, his conviction for Decedent's murder is sustained.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

MCDONALD, J., concurs.

GEATHERS, J., concurring in part and dissenting in part:
I agree with the majority that the challenged testimony of Investigator Clarke did not contribute to the verdict and, therefore, its admission was harmless beyond a reasonable doubt. However, I respectfully depart from section I of the majority's analysis concerning the status of our state's jurisprudence as to transferred intent. This court previously addressed this status in *State v. Smith*, 425 S.C. 20, 32–34, 819 S.E.2d 187, 193–94 (Ct. App. 2018), *rev'd on other grounds*, 430 S.C. 226, 845 S.E.2d 495 (2020). While our supreme court reversed our decision to affirm Smith's attempted murder conviction on other grounds, there is nothing to indicate that *572 the court rejected our interpretation of its jurisprudence as to transferred intent. Therefore, I stand by that interpretation. Accordingly, I would affirm not only Geter's murder conviction but also his attempted murder conviction.

All Citations

434 S.C. 557, 864 S.E.2d 569

Footnotes

1 "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." S.C. Code Ann. § 16-3-29 (2015).

2 We refer to the third person in the trailer, Ycedra Williams, as Ycedra to avoid confusion with the defendant.

3 In *Fennell*, 340 S.C. 266 at 277, 531 S.E.2d at 518, the court found transferred intent applied to a charge of assault and battery with intent to kill (ABWIK). ("We hold that the doctrine of transferred intent may be used to convict a defendant of AB[W]IK when the defendant kills the intended victim and also injures an unintended victim."). However, ABWIK was a general intent crime. *See State v. Foust*, 325 S.C. 12, 14-15, 479 S.E.2d 50, 51 (1996) ("As this [c]ourt has recognized that a specific intent is not required to commit murder, the logical inference is that, likewise, a specific intent is not required to commit AB[W]IK."). Therefore, the analysis in *Fennell* cannot be considered determinative of this issue as the court has specified attempted murder is not the codification of ABWIK and does require specific intent. *State v. King*, 422 S.C. 47, 63-64, 810 S.E.2d 18, 26-27 (2017) ("Considering the legislative history as a whole, we conclude that section 16-3-29 is not a codification of the offense of ABWIK. We find the General Assembly expressly repealed the offense of ABWIK and purposefully created the new offense of attempted murder, which includes a 'specific intent to kill' as an element.").

4 We recognize this court has essentially drawn the same conclusion in the recent case of *State v. James Caleb Williams*, Op. No. 5835, —— S.C. ——. —— S.E.2d ——, 2021 WL 2944778 (S.C. Ct. App. filed July 14, 2021) (Shearouse Adv. Sh. No. 24 at 21). However, certain facts in the two cases are distinguishable. Because Williams was acquitted of attempting to murder his "target," the majority in *Williams* concluded no intent existed that could be transferred to the unintended recipient of Williams's bullet. In the case sub judice, Geter was convicted of Decedent's murder. Therefore, because disposition of this case is *wholly* dependent on finding the transferred intent charge *never* applies to sustain an attempted murder charge, we conduct a full analysis rather than exclusively relying on *Williams*, even though much of the analysis follows the same rationale.

5 *See* Merriam-Webster.com/dictionary/consistent (defining consistent as "marked by harmony, regularity, or steady continuity; free from variation or contradiction").

6 To admit a prior consistent statement at trial:

(1) the declarant must testify and be subject to cross-examination,

(2) the opposing party must have explicitly or implicitly accused the declarant of recently fabricating the statement or of acting under an improper influence or motive,

(3) the statement must be consistent with the declarant's testimony, and

(4) the statement must have been made prior to the alleged fabrication, or prior to the existence of the alleged improper influence or motive.

State v. Saltz, 346 S.C. 114, 121-22, 551 S.E.2d 240, 244 (2001); *see id.* (explaining Rule 801(d)(1)(B), SCRE, changed South Carolina's common law to make a prior consistent statement admissible as substantive evidence).

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434 S.C. 365
Court of Appeals of South Carolina.

The STATE, Respondent,
v.
Shelby Harper TAYLOR, Appellant.

Appellate Case No. 2018-000341
|
Opinion No. 5853
|
Submitted March 1, 2021
|
Filed September 1, 2021
|
Rehearing Denied September 28, 2021

Synopsis

Background: Defendant was convicted in the Circuit Court, Horry County, Robert E. Hood, J., of attempted murder and sentenced to 25 years' imprisonment after she placed her newborn daughter in a trash bag and left her in a dumpster. Defendant appealed.

The Court of Appeals, Hewitt, J., held that reference to implied or inferred malice in jury instruction did not improperly allow the jury to imply malice by operation of law, but rather, instructed that malice could be proven by direct evidence or by the jury's inferences from other facts.

Affirmed.

Procedural Posture(s): Appellate Review.

**925 Appeal From Horry County, Robert E. Hood, Circuit Court Judge

Attorneys and Law Firms

John H. Blume, III, of Elizabeth Franklin-Best, P.C., and Emily C. Paavola, of Death Penalty Resource & Defense Center, both of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Mark Reynolds Farthing, both of Columbia; and Solicitor Jimmy A. Richardson, II, of Conway, all for Respondent.

Opinion

HEWITT, J.:

*367 The question in this case is whether "inferred malice"—the concept that a jury may deduce malice from a defendant's actions—is inconsistent with the specific intent to kill required for attempted murder. We hold it is not. After all, actions can speak louder than words.

Sometimes the jury is left with nothing to consider except the defendant's actions. That was the case here. Shelby Harper Taylor placed her newborn baby in a trash bag and left the bag in a dumpster. The jury was charged that it could not convict her unless it found she intended to kill the baby and that the difference between "express" and "implied" malice related to whether malice was proved by words, preparation, or by inferring malice from other facts. This was proper under the law. Thus, we affirm.

926 **FACTS

This case's background is heartbreaking. Taylor gave birth to a baby girl in the bathroom of her apartment during the early hours one morning in April 2015. She was in her early twenties and had successfully hidden the pregnancy from her family. This was Taylor's second child.

At the time, she lived in the apartment with her husband and their sixteen-month-old daughter. After giving birth, Taylor placed the newborn inside a trash bag, tied the bag, took the bag downstairs, and placed it in the apartment's shared trash dumpster. Taylor also cleaned the bathroom.

Taylor's husband and toddler slept through all of this. Taylor proceeded with her day as though nothing had happened: she took a nap, took her toddler for a well checkup, and visited her mother.

*368 Early that afternoon, two boys from another unit in the apartment complex were taking out the trash and heard what they believed was an animal in the dumpster. When they investigated, the boys saw the newborn's face pressed against the side of the trash bag and rescued the baby.

A receipt inside the bag led police to a local restaurant. The police got the restaurant's internal surveillance video, isolated the picture of a person of interest, and sent the image to local media.

Taylor went to the police station after she learned her picture was on the news. Taylor denied knowing anything about the baby or how the baby came to be in a bag that indisputably contained her trash. Police did not believe her denial, nor did Taylor's husband, whom police initially questioned separately.

Taylor confessed after her husband sat with police while they interviewed her a second time. She was then taken to the hospital where a doctor confirmed she had recently given birth. Taylor also spoke with a psychologist and a social worker. She told them she was not the victim of any domestic abuse and that she had hidden the pregnancy from her family.

The basic facts we have recited were not disputed at trial. The sole issue in court was Taylor's mental state and her intent. Taylor claimed she did not intend to kill the newborn when she discarded the child. She said the event occurred during a state of Transient Peripartum Psychosis. In other words, she claimed this happened while she was temporarily delusional.

Taylor supported this argument with testimony from an expert who opined Taylor experienced impermanent psychosis in the months leading up to and immediately after the child's birth. The expert explained Taylor told him she was the victim of emotional and physical domestic abuse, she was stressed because her family already did not support her decision to have the couple's first child, and the couple was in a difficult financial situation. The expert explained these things (and others) were consistent with a finding of Transient Peripartum Psychosis.

***369** The State argued the only logical inference from the evidence was that Taylor intended to kill the child. The State believed this was the most obvious explanation for placing the newborn in a trash bag and dumpster rather than dropping the baby at a hospital or fire station, and this was also the best way to understand Taylor's hiding the pregnancy from her family and not seeking prenatal care. The State believed Taylor's theory of psychosis was refuted by Taylor's months-long decision to conceal her pregnancy, by Taylor's cover-up of the birth, and by the fact that Taylor resumed normal daily activities immediately following the birth.

The case was tried in February 2018. This was shortly after our supreme court's October 2017 decision in *State v. King*, holding attempted murder is a specific intent crime. 422 S.C. 47, 63–64, 810 S.E.2d 18, 26–27 (2017). *King* was a central feature of the discussions concerning the jury charges.

The jury convicted Taylor of attempted murder, and the trial court sentenced her to twenty-five years' imprisonment. This appeal followed.

ISSUE

Whether the trial court erred in instructing the jury on inferred malice.

****927** STANDARD OF REVIEW

In criminal cases, the appellate court sits solely to review errors of law. *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "In reviewing jury charges for error, this Court must consider the circuit court's jury charge as a whole in light of the evidence and issues presented at trial." *State v. Simmons*, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009).

LAW/ANALYSIS

Attempted murder was codified as part of the Omnibus Crime Reduction and Sentencing Reform Act of 2010, which abolished several common law assault and battery offenses including assault and battery with intent to kill, also known as ABWIK. *See* Act No. 273, 2010 S.C. Acts 1947–49. It replaced these with new, codified offenses including the crime of attempted murder. *Id.* at 1948. In pertinent part, the attempted murder statute provides that "[a] person who, with intent to ***370** kill, attempts to kill another person with malice aforethought, either express or implied, commits the offense of attempted murder." S.C. Code Ann. § 16-3-29 (2015).

King held the attempted murder statute "[wa]s not [simply] a codification of the offense of ABWIK[, instead] the General Assembly expressly repealed the offense of ABWIK and purposefully created the new offense of attempted murder, which includes a 'specific intent to kill' as an element" that was not required for ABWIK. 422 S.C. at 63–64, 810 S.E.2d at 26–27.

Taylor's argument about implied or inferred malice is drawn from a footnote in *King*. In footnote five, *King* suggested the General Assembly re-evaluate the statute's language because "the inclusion of the word 'implied' in section 16-3-29 is arguably inconsistent with a specific-intent crime." *Id.* at 64

n.5, 810 S.E.2d at 27 n.5. Taylor argues this language makes implied malice out-of-bounds. We disagree.

When our supreme court spoke of implied malice in *King*, it was speaking of malice implied by operation of law, not of the jury's ability to infer malice based on its view of certain facts. *King* cited *Keys v. State*, 104 Nev. 736, 766 P.2d 270 (1988), for its holding that specific intent to kill is an essential element of attempted murder. *King*, 422 S.C. at 56–57, 810 S.E.2d at 23. *Keys* distinguished attempted murder from murder by defining "express malice" as a specific intent to kill and said "express malice" was "malice in fact." 766 P.2d at 272. "Implied malice," on the other hand, consisted of a "general malignant recklessness" rather than the specific intent to kill. *Id.* at 273. As *Keys* and *King* explain, malignant recklessness is a sufficient criminal intent for murder but not for attempted murder because the attempted murder statute explicitly requires "intent to kill." Recklessness is not enough.

If "implied malice" is used to describe mere "malignant recklessness," *King* plainly holds implied malice is inconsistent with and falls short of the bar for attempted murder. Even so (and critically), nothing in *Keys*, *King*, or any other case prevents a jury from being charged that it can look at a defendant's actions and imply or infer from those actions that the defendant "in fact" had the specific intent to kill.

***371** Here, the jury charges repeatedly emphasized that the jury could not convict Taylor without finding she specifically intended to kill the child. The judge gave the jury a general charge on "criminal intent." Then, the judge charged the language of the attempted murder statute. Next, the judge charged the jury on malice, but excluded any language about negligence or recklessness. Finally, the judge charged that attempted murder was a specific intent crime.

The judge charged the jury that malice could be expressed or inferred—but that those terms referred to the whether malice was proven by direct evidence or by the jury's inferences from other facts. The judge charged the jury that malice means hatred or ill will and that it could be inferred from conduct that shows a total disregard for human life. He also charged that specific intent to kill can be shown by acts and conduct from which someone would naturally and reasonably infer intent and that specific intent could be inferred from voluntary and ****928** willful actions that naturally tend to destroy another's life.

Abundant authorities support using inferences to find specific intent. *See, e.g., State v. Raglin*, 83 Ohio St.3d 253, 699 N.E.2d 482, 488 (1998); *Williams v. Maggio*, 695 F.2d 119, 122 (5th Cir. 1983); 4 *Wharton's Criminal Law* § 695 (15th ed.); 41 C.J.S. *Homicide* § 283. Here, the judge charged malice in a way that complied with *King*, using language from both *King* and *Keys*.

To be fair, the first section of the general malice charge included language common in malice charges that malice includes intentionally doing a wrongful act without just cause or excuse, with an intent to inflict an injury, or "under circumstances that the law will infer an evil intent." Even so, there were no charges regarding the circumstances under which *the law* may imply malice. This was the only reference to malice implied by operation of law. The judge gave the jury multiple instructions that it could not find Taylor guilty unless it found she intended to kill the child. Thus, when taken in its entirety, we believe the charge was correct. *See Simmons*, 384 S.C. at 178, 682 S.E.2d at 36 ("In reviewing jury charges for error, this Court must consider the circuit court's jury charge as a whole in light of the evidence and issues presented at ***372** trial."); *see also State v. Burkhart*, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002) ("A jury charge is correct if it contains the correct definition of the law when read as a whole.").

Taylor contends *State v. Shands* supports her argument that implied malice instructions do not belong in an attempted murder case. 424 S.C. 106, 817 S.E.2d 524 (Ct. App. 2018). There, the relevant issue was whether the trial court erred in instructing the jury that malice could be inferred from the use of a deadly weapon. *Id.* at 128, 817 S.E.2d at 535–36. This court wrote "malice can never be implied in an attempted murder case," and that attempted murder requires the State to prove the defendant "acted with express malice *and* the specific intent to kill." *Id.* at 130–31, 817 S.E.2d at 536–37.

As already noted, we understand "implied malice" as prohibited in *King* to mean malice implied by the law, not malice found by the jury based on the circumstances. Again, neither *King* nor any other case holds an intent to kill cannot be shown through circumstantial evidence, as Taylor seems to insist. *Shands* turned on this court's analysis of *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009), which has since been overruled by *State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019) (holding the charge that malice may be inferred from use of a deadly weapon is improper in all

instances). Critically, no deadly weapon instruction was given here.

Finally, Taylor argues the court should not have allowed the solicitor to suggest during closing argument that the jury could find malice based upon Taylor's attempts to cover up the crime. The solicitor told the jury it could infer malice from Taylor's effort to cover up a crime and her intentional denials to police in the face of the evidence against her. Nothing suggests this argument was improper. Indeed, our supreme court has emphasized that parties are free to argue the existence or nonexistence of malice based on the evidence. *Burdette*, 427 S.C. at 503, 832 S.E.2d at 582–83.

AFFIRMED. [1]

LOCKEMY, C.J., and HUFF, J., concur.

All Citations

434 S.C. 365, 862 S.E.2d 924

Footnotes

1 We decide this case without oral argument pursuant to Rule 215, SCACR.

435 S.C. 288
Court of Appeals of South Carolina.

The STATE, Respondent,
v.
James Caleb WILLIAMS, Appellant.

Appellate Case No. 2017-001601
|
Opinion No. 5835
|
Heard May 27, 2021
|
Filed July 14, 2021
|
Rehearing Denied November 18, 2021

Synopsis

Background: Defendant was convicted in the Circuit Court, Sumter County, Howard P. King, J., of attempted murder and possession of a weapon during the commission of a violent crime. Defendant appealed.

Holdings: The Court of Appeals, McDonald, J., held that:

the specific intent for an attempted murder for which defendant was acquitted could not be transferred for purposes of establishing a specific intent to kill bystander who was struck with a bullet in her thigh, and

defendant would have to be reconvicted of committing a violent crime before he could properly be found to have illegally possessed a weapon during that crime.

Reversed and remanded.

Huff, J., filed dissenting opinion.

Procedural Posture(s): Appellate Review; Trial or Guilt Phase Motion or Objection.

Appeal From Sumter County, Howard P. King, Circuit Court Judge

Attorneys and Law Firms

Chief Appellate Defender Robert Michael Dudek, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General William Frederick Schumacher, IV, both of Columbia, and Third Circuit Solicitor Ernest Adolphus Finney, III, of Sumter, all for Respondent.

Opinion

MCDONALD, J.:

***431** James Caleb Williams appeals his convictions for attempted murder and possession of a weapon during the commission of a violent crime, arguing the circuit court erred in denying his motion for a directed verdict because no direct or substantial circumstantial evidence supports a finding that Williams had a specific intent to kill the victim. We find the doctrine of transferred intent inapplicable to this charge of attempted murder; thus, we reverse Williams's convictions. [1]

Facts and Procedural History

In the early morning hours of May 2, 2015, Corporal Randy Jones of the Sumter Police Department (SPD) was dispatched to a shooting outside Club Cream in Sumter. In the club parking lot, Corporal Jones found Ashley R., a fifteen-year-old female who had been shot in the leg. Law enforcement subsequently recovered six shell casings and a black Springfield model XD .40 Smith and Wesson from the parking lot area.

On March 17, 2016, the Sumter County Grand Jury indicted Williams for two counts of attempted murder and one count of possession of a weapon during the commission of a violent crime. Williams pled not guilty, and his jury trial began on July 17, 2017.

Chelsea Rogers reluctantly testified that on May 2, 2015, she went to Club Cream for a teen party. She explained a "teen party" is "where a lot of teens get together, you know, have fun, but something bad always ends up happening." Rogers and her friends arrived around 11:30 p.m. or 12:00 a.m. and were "dancing and having fun" when she saw "something going on" on the other side of the club; however, when nothing materialized, the group went back to dancing.

Sometime between 1:00 and 2:00 a.m., Rogers left the club to go home. Her then-boyfriend, Malik Myers, exited a few minutes later. Rogers recalled, "After that, we [were] walking to the car and I told [Myers] to come on, let's go. When we got over there to the car, I heard a gunshot." At that point, Myers "ran over there—to where his friends were, I guess, and that's when I—I heard another gunshot, and then I heard another one come back from right where everybody was at." She further stated, "I didn't know if [Myers] had [a gun] or not, but I did not see him with one."

Ashley R. arrived at the party between 10:00 and 11:00 p.m., and was leaving Club Cream as it closed at 2:00 a.m. When Ashley R. reached the parking lot, she heard "fight, gun, shooting. That's when—by the time I could duck down, [it felt] like a bee sting. I touched my leg, and started to panic."[2] She heard gunshots and saw Myers, whom she had met earlier that day. Ashley R. testified, "I [saw] him shoot after—I [saw] the other like two—two shots before he [shot], that's when I ducked down." After initially answering that she did not see Myers shoot first, Ashley R. explained, "I [saw Myers] with a gun, that's when I heard the—before he [shot], I heard like two more, two or three gunshots before he [shot]." On the night of the incident, Ashley R. told law enforcement she was shot by an "unknown black man" and recalled at trial that she did not really know Myers until he "came to me and apologized to me afterwards. That's how I [got] to know him."

On cross-examination, Ashley R. admitted that in her written statement to police, she identified Myers as the man who started the shooting and her statement did not include that she heard shots before Myers fired his weapon. Defense counsel asked her on cross-examination:

> Q: You can't testify today who was shooting the shots, who was actually shooting, can you?
>
> A: Not the first two shots.
>
> ....
>
> Q: And the shot that hit you, you pretty sure who shot you?
>
> A: Like when it first happened?
>
> ***432** Q: Uh-huh.
>
> A: Since I [saw Myers], I thought he shot me, but that's when—because after that, because he came to me, he apologized—
>
> ...
>
> Q: Why would he apologize if he did not shoot you? What is he apologizing for?
>
> A: I'm not sure.
>
> Q: He apologized for shooting you?
>
> A: I'm not sure. After he said that, I said, "You good. I'm not mad at you." He said, "Okay."
>
> Q: Okay. But you don't know what he was apologizing for?
>
> A: No sir.

Myers pled guilty to one count of assault and battery of a high and aggravated nature (ABHAN) for his involvement in the Club Cream incident. Despite his prior written statement to the police indicating he and Williams "had beef" in the past, Myers testified at trial: "Man, I just came from a hospital, man. I wasn't thinking right when I was writing my statement.... [I]t wasn't no altercation. It was just some words." Myers also contradicted his written statement—in which Myers claimed Williams shot him in the leg—by denying Williams made any hand gestures toward him while inside the club. Myers admitted he had his .38 revolver that night "because anything could have happened after the club," and repeatedly denied any knowledge of whether Williams was the person who shot him. Myers testified, "I didn't know whether James Williams was shooting or not. I'm just saying —I—you telling me—I just know I got shot. You're saying he's the shooter. I'm telling you[,] I didn't know he was shooting. That's what this statement said."

At the conclusion of the State's case, Williams moved for a directed verdict, arguing neither Ashley R. nor Myers could identify their shooter and the State's expert could not conclusively connect the bullet removed from Ashley R.'s leg with Williams's weapon.[3] The circuit court denied the motion, finding "there is evidence in the record, both direct and circumstantial that would support the charges." The circuit court explained its "recollection of the testimony [was] that the defendant, Mr. Williams, fired first and was firing at both Mr. Malik Myers and that by transferred intent, at the other victim in this case."

Williams testified in his own defense. He arrived at the club alone around 11:00 p.m. and, at some point during the party, Myers bumped into him. Williams explained, "We didn't

say nothing to each other or anything, but I already knew like something was going to happen, like once I left. That's why I was already in my car getting ready to go ahead and leave." Williams knew something was going to happen with Myers "[b]ecause we had problems since we [were] in middle school, like we always had words. But I [knew] it was probably going to end up coming to something one day."

Williams stated he was walking to his car when he saw Myers approaching. As Myers had a gun and began shooting at him, Williams "started shooting, and that's when I ran off when I [saw] the security guard coming, and I threw my gun under —up under the tree." Williams testified, "But when I was shooting, I was shooting into the back of my car so he would think I was shooting back at my car." Williams claimed he shot into the back of his own car so that Myers "would have thought I was shooting at him, and he would have been—he would have tried to run off." However, Myers did not run. Instead, Myers "came close to shooting [Williams]" and shot Qawiyy McFadden in ***433** the ear. Williams then left the parking lot to drive McFadden to the hospital. [4]

On cross-examination, Williams admitted he had a black .40 caliber Springfield with him in the parking lot and that he fired shots into his own car in an effort to scare Myers. He found five bullet casings on top of his car, and regarding the sixth, testified, "I probably shot it into the ground." Williams reiterated that Myers shot at him first and claimed there were more than two shooters in the parking lot. [5] He testified he did not shoot Ashley R., and he did not intend to shoot anyone. McFadden was sitting in Williams's car when he saw "everybody coming out the club." Williams's car was backed into the parking space, with the front of the car facing the club. McFadden testified, "I got out the car to see what was the next move for the night. And then mix-up—the shots starting going off when I was out of the club. I [saw Williams] go like towards the back of his car and by maybe the first five shots, I was already hit." On cross-examination, McFadden admitted he did not know if Williams did any of the shooting, nor did he know who fired the first shot.

At the end of his case, Williams renewed his motion for a directed verdict. The circuit court denied the motion, finding, "there is evidence in the record by which the jury could conclude that the offenses occurred ... and the believability of those witnesses will be a matter for the jury to determine."

The jury found Williams guilty of the attempted murder of Ashley R., but not guilty of the attempted murder of Myers. The jury also found Williams guilty of possession of a weapon during the commission of a violent crime. The circuit court sentenced Williams on the attempted murder conviction to fifteen years' imprisonment, suspended upon the service of ten years, and five years' probation. As to his conviction for possession of a weapon during the commission of a violent crime, the court sentenced Williams to a concurrent five years' imprisonment.

Standard of Review

"In ruling on a motion for directed verdict in a criminal case, a trial court must view the evidence in the light most favorable to the State." *State v. James*, 362 S.C. 557, 561, 608 S.E.2d 455, 457 (Ct. App. 2004). "The trial court is concerned with the existence or nonexistence of evidence, not its weight." *Id.* "The accused is entitled to a directed verdict when the State fails to present evidence on a material element of the offense charged." *State v. Brannon*, 388 S.C. 498, 503, 697 S.E.2d 593, 596 (2010).

Law and Analysis

Williams argues the circuit court erred in failing to direct a verdict on the attempted murder charge because the State failed to present any direct or substantial circumstantial evidence that he had the specific intent to kill anyone—either Myers or Ashley R. He asserts the circuit court erroneously applied the doctrine of transferred intent because the offense of attempted murder requires a specific intent to commit murder. We agree. [6]

***434** In *State v. King*, our supreme court affirmed this court's opinion that "the Legislature intended to require the State to prove specific intent to commit murder as an element of attempted murder." 422 S.C. 47, 55, 810 S.E.2d 18, 22 (2017) (quoting *State v. King*, 412 S.C. 403, 411, 772 S.E.2d 189, 193 (Ct. App. 2015)); S.C. Code Ann. § 16-3-29 (2015) ("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 supreme court explained, "Because the phrase 'with intent to kill' in section 16-3-29 does not identify what level of intent is required, the Court of Appeals properly looked to the legislative history of section 16-3-29 and appellate decisions holding that 'attempt crimes require the State to prove the defendant had specific intent to complete the attempted crime.' " *Id.* (quoting *King*, 412 S.C. at 409, 772 S.E.2d at 192). Although the supreme court agreed with the State that certain language referenced from *State v. Sutton*, 340

S.C. 393, 532 S.E.2d 283 (2000), was dicta, it found *Sutton's* definition of "specific intent" to be an accurate statement of the law. *King*, 422 S.C. at 55–56, 810 S.E.2d at 22 (" 'Attempted murder would require the specific intent to kill,' and 'specific intent means that the defendant consciously intended the completion of acts comprising the [attempted] offense.' " (quoting *Sutton*, 340 S.C. at 397, 532 S.E.2d at 285)).

In *State v. Gerald Williams*, our supreme court considered a case in which one of the issues raised involved "whether and to what extent the common law doctrine of transferred intent applies to the newly-codified crime of attempted murder." 427 S.C. 148, 149, 829 S.E.2d 702, 702 (2019). There, the petitioner was convicted of three counts of attempted murder related to his alleged shooting into an occupied mobile home where he knew his intended victim was present, but did not realize two other individuals were in the trailer as well. *Id.* at 150, 829 S.E.2d at 702. The court explained:

> Under the common law, transferred intent makes a whole crime out of two halves by joining the intent to harm one victim with the actual harm caused to another. Normally, transferred intent applies to general-intent crimes. However, attempted murder is a specific-intent crime in South Carolina, and we have not yet addressed whether transferred intent may supply the requisite mens rea for such a crime.
>
> Because this case was tried without objection as a general-intent crime, we find the doctrine of transferred intent applies in this instance. We therefore decline to address the applicability of transferred intent to a specific-intent crime such as attempted murder and vacate the portion of the court of appeals' opinion dealing with this issue.

Id. at 150, 829 S.E.2d at 702–03. [7]

Although not directly on point, our supreme court's more recent opinion in ***435** *State v. Smith*, 430 S.C. 226, 845 S.E.2d 495 (2020), is helpful to our analysis here. *Smith* involved an attempted murder conviction resulting from the accidental shooting of an innocent victim in the vicinity of a dispute among rival gang members. *Id.* at 228, 845 S.E.2d at 496. There, the court explained, "[i]t was undisputed Smith did not intend to harm [the victim]. Rather, Smith claimed he was acting in self-defense by shooting at a group of men who had threatened him. *Id.* Smith missed his intended target and hit the victim by accident." *Id.* In conceding guilt to a felon-in-possession possession charge, but denying the attempted murder charge and asserting a claim of self-defense, "Smith implicitly acknowledged he had an express intent to kill the men at whom he was shooting, but asserted his actions were justified given his belief that he faced an imminent threat to his own life." *Id.* at 229, 845 S.E.2d at 496. Perhaps recognizing "[t]he law at the time of trial precluded an implied malice jury charge (based on the use of a deadly weapon) when a viable self-defense claim existed .... the State sought to create a new category of implied malice for 'felony attempted-murder,' with the predicate felony being the felon-in-possession charge." *Id.* The supreme court reversed Smith's conviction, addressing both the question of whether South Carolina recognizes the charge of felony attempted murder (finding that, like the majority of states, we do not) as well as the State's request for the erroneous implied malice charge. *Id.* at 230, 845 S.E.2d at 496–97.

As these issues were dispositive, the court declined to address Smith's additional argument that "the court of appeals erred in finding the doctrine of transferred intent applied to attempted murder because it is a specific-intent crime. *Id.* at 234 n. 9, 845 S.E.2d at 499 n. 9. In particular, Smith argue[d] the requisite specific intent necessary to support an attempted murder conviction must be the specific intent to kill *a specific person.*" *Id.* The court's footnote then referenced the State's plan—if the court were to reverse Smith's convictions—to "charge Smith with three counts of attempted murder for shooting at the rival group, and one count of assault and battery of a high and aggravated nature (ABHAN) for shooting the victim" and noted that because ABHAN is a general-intent crime, "there would be no question on remand as to the applicability of the doctrine of transferred intent." *Id.*; *see also Gerald Williams*, 427 S.C. at 157, 829 S.E.2d at 707 ("It is well-settled in South Carolina that the doctrine of transferred intent applies to general-intent crimes.").

Considering this footnote along with our supreme court's recent pronouncements in *King* and *Gerald Williams*, along with Williams's acquittal here of the attempted murder of Malik Myers, we find the doctrine of transferred intent inapplicable in the context of the current indictment charging Williams with the attempt "to kill another person, Ashley R., with malice aforethought, either express or implied, by firing a gun numerous times at Malik Raekwon Myers, and striking Ashely R. with a bullet in her thigh." While it is undisputed that Williams was armed and fired his weapon in the parking lot, we cannot 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. The language of the indictment and the State's contention that it was "proceeding under transferred intent and we do believe that [Williams] was firing his gun with malice and the bullet struck Ashely R." are incongruous with such a result.

***436** At oral argument, the State reiterated it was proceeding under the doctrine of transferred intent and admitted Williams did not possess a specific attempt to kill Ashley R. with malice aforethought. This was a reasonable position in light of our case law at the time of trial; however, we do not understand how the specific intent for an attempted murder for which Williams was acquitted (shooting at Myers) could be transferred for purposes of establishing a specific intent to kill Ashley R.—even if the doctrine of transferred intent were applicable to South Carolina's codification of attempted murder, a specific-intent crime.

Conclusion

We find the doctrine of transferred intent inapplicable to this charge of attempted murder. The circuit court erred in denying Williams's directed verdict motion because § 16-3-29 requires proof of a specific intent to kill. The jury acquitted Williams of the attempted murder of Myers, and no evidence in the record suggests Williams possessed *any* intent to kill Ashley R. *See Gerald Williams*, 427 S.C. at 150, 829 S.E.2d at 702–03 (holding attempted murder is a specific-intent crime in South Carolina); *Brannon*, 388 S.C. at 503, 697 S.E.2d at 596 (explaining a defendant "is entitled to a directed verdict when the State fails to present evidence on a material element of the offense charged."). Thus, we reverse Williams's conviction for attempted murder. Given that we reverse Williams's conviction for attempted murder, "we must also reverse and remand his conviction for possession of a weapon during the commission of a violent crime." *Smith*, 430 S.C. at 230 n.4, 845 S.E.2d at 497 n.4. Williams "must be reconvicted of committing a violent crime before he can properly be found to have illegally possessed a weapon during that crime."[8] *Id.*; *see also* S.C. Code Ann. § 16-23-490(A) (2015) (requiring where a person is in possession of a firearm "during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime as defined in Section 16-1-60, he must be imprisoned five years, in addition to the punishment provided for the principal crime.").

REVERSED and REMANDED.

THOMAS, J., concurs.

HUFF, J., dissenting in a separate opinion.

HUFF, J.:

I respectfully dissent. First, and most importantly, whether the doctrine of transferred intent was properly applied in this attempted murder case was never an issue raised to the trial court, and was certainly not a basis of Appellant's motions for directed verdict before the trial court. Accordingly, this argument is not preserved for our review. The only preserved issue is whether the State presented sufficient evidence that Appellant shot Ashley R. Because, viewing the evidence in a light most favorable to the State, I find the trial court properly submitted this case to the jury and denied Appellant's directed verdict motions, the inquiry should end here. However, further addressing the majority opinion, I also note Appellant never raised an issue to the trial court in regard to any inconsistencies with the verdicts and does not appear to have done so on appeal. Rather, the majority latches on to this, at least in part, as an underlying basis for reversing Appellant's convictions. Nonetheless, even assuming there is no error preservation problem in this regard as well, given the evidence and arguments presented at trial, I do not have the same problem the majority does in "reconcil[ing] the jury's acquittal of [Appellant] on the attempted murder charge for the shooting of Myers with its guilty verdict for an attempted murder of Ashley R." As more fully set out below, based upon the evidence presented at trial—particularly that by Appellant —as well as the argument of defense counsel, the jury could have concluded that Appellant fired the bullet that struck Ashley R. but that a third person fired the bullet that struck Myers. Finally, I disagree with the majority's conclusion that —based upon our supreme court's recent pronouncements in this area of law—the ***437** doctrine of transferred intent is inapplicable in this attempted murder case. Accordingly, I would affirm Appellant's convictions.

I. FACTUAL/PROCEDURAL BACKGROUND

Around 1:30 a.m. on May 2, 2015, gunfire broke out in the parking lot of Club Cream in Sumter, where a teen party had just taken place. Three individuals suffered gunshot wounds during the incident: Ashley R., a then fifteen-year-old female who was shot in her left leg; Malik Myers, a then seventeen-year-old male who was shot in his left leg and admitted he fired a .38 revolver during the incident; and

Qawiyy McFadden, who was outside Appellant's car at the time of the shooting and suffered a gunshot wound to his ear. Upon securing the scene, officers located a Springfield model XD .40 Smith and Wesson pistol in a grassy area, as well as six spent shell casings. All six of the fired cartridge cases were later determined to have been fired from the recovered Springfield Smith and Wesson—a gun Appellant admitted he fired and abandoned at the scene on the night in question. No other weapon was found at the scene and it was noted that if a revolver had been shot, it would not have left any shell casings, as such would have remained in the cylinder of the gun.

Appellant was indicted on two counts of attempted murder: one for the attempted murder of Myers, based upon his firing a gun at Myers, and the second for the attempted murder of Ashley R., based upon his firing a gun at Myers but striking Ashley R. Appellant was also charged with possession of a weapon during the commission of a violent crime. Myers was likewise indicted on two counts of attempted murder: one for the attempted murder of Appellant, based upon his firing a gun at Appellant, and the second for the attempted murder of McFadden, based upon his firing a gun at Appellant and hitting McFadden. He was also charged with possession of a weapon during the commission of a violent crime stemming from this incident. Myers thereafter entered a guilty plea in regard to this matter and was serving his sentence at the time of Appellant's trial.

On May 4, 2015, Myers gave a statement to law enforcement indicating that on the night in question Appellant bumped into him while in the club and also made a hand gesture, pointing his finger at Myers as if he had a gun, pulling a trigger. Myers indicated in his statement that Appellant left the club first and, when Myers went outside and saw Appellant's car, he walked to his own car and retrieved a .38 gun. He was attempting to leave when he heard shooting and looked behind him to see that it was Appellant pointing a black gun at him and shooting. Myers stated he pulled out the .38 and shot back, "shoot[ing] [Appellant's] car about 5 time[s]." Myers indicated he had been shot in his left leg and was taken to the hospital by a friend. He stated Appellant "had beef with [him] in the pas[t]," saying things to him and trying to fight him. Myers also noted in his statement that there was "a girl [he] was playing dice[ ] [with] on Poplar Square[ ] [and] she got shot by [Appellant's] gun." Myers's statement was published to the jury.

While on the stand in Appellant's trial, Myers was less than cooperative, denying that he and Appellant had ever had disagreements, denying anything happened between him and Appellant at the club that night, and denying that there was an altercation between them. When confronted with his written statement, Myers claimed he had "just come from the hospital" when he gave his statement and he "wasn't thinking right." He denied that he and Appellant bumped into each other that night, and when asked if Appellant shot him that night, Myers replied, "Nope. I don't know." He agreed that he told law enforcement that Appellant bumped into him that night, but testified he really did not see his face and only "figured it was [Appellant]." He acknowledged, however, that he had identified Appellant as the person who made the hand gestures at him and told law enforcement that Appellant began shooting at him and he shot back. He testified that once he was outside the club, he armed himself with a .38 revolver, not because of an altercation inside the club with Appellant but "because anything could have happened after the club." When asked on the stand how many shots he fired at Appellant, Myers stated he fired all six shots from the revolver. ***438** Myers testified he did not know if Appellant was shooting or not, and he just knew that he got shot and he did not know who shot him.

Ashley R. testified she exited the club and was in the parking lot when she heard "fight, gun, shooting." By the time she could duck down, she felt something akin to a bee sting, touched her leg, and began to panic. She heard two or three gunshots and saw Myers begin to shoot after those gunshots. She specifically testified she did not see Myers shoot first. [9] About four or five gunshots were fired before she felt herself get hit by a bullet. She told law enforcement she did not know who it was, but there was an unknown black male—and she described his clothing—who was one of the people involved in the shooting that night. She did not know Myers at the time of the shooting, but he later apologized to her about the incident and that was how she got to know him. Ashley R. testified she had been at Poplar Square earlier on the day of the incident playing dice, and she had seen one of the unknown suspects there at that time. This person at Poplar Square was the person she identified as the one who started shooting *after* she heard the two shots, i.e., Myers. Ashley R. did not know who fired the first two shots. Asked why Myers would apologize to her if he had not shot her, Ashley R. stated she was not sure. She clarified that she heard at least two people shooting guns that night, and she did not know who fired the gun that resulted in her injury. Myers's then girlfriend, Chelsea Rogers, testified that she exited the club

with Myers following behind her that night; as she got to the car she heard gunshots; when the gunshots started, Myers who had been behind her, began running toward his friends on the opposite side of the gunfire; and she saw Myers when the first gunshot rang out and he was not firing.

South Carolina Law Enforcement (SLED) Agent Michelle Eichenmiller, qualified as an expert witness in ballistics and firearm examination, testified that she tested the six cartridge cases found at the scene, the bullet recovered from Ashley R., and a bullet test fired from the gun recovered at the scene. The agent opined all the fired cartridge cases found at the scene were fired by the Springfield model XD .40 Smith and Wesson. When she compared the test fired bullet to the bullet recovered from Ashley R., however, there were not enough individual characteristics to form an opinion as to whether the bullet recovered from Ashley R. was fired from that gun. Agent Eichenmiller observed they "rifled the same," they had "six lands and grooves" that were approximately the same width, and both had six twists to the right, but the comparison was deemed inconclusive. Agent Eichenmiller testified it was not uncommon to be unable to make a conclusive match, even when she has observed a bullet shot from a firearm, explaining that a well-produced or well-cared for firearm may not have enough individual marks from which to form an opinion, and a Springfield is typically a little bit better manufactured gun. She testified the recovered bullet could have been fired from a 10-millimeter firearm or a .40 Smith and Wesson. When asked if it could have been fired from a .38, the agent stated it was a little bit larger than a .38 and, depending on the firearm, she had seen some that had worn barrels that it possibly could have been fired from, "but not usually." Agent Eichenmiller also agreed there were other weapons that would fire a .40 round, but observed those firearms have different rifling than what they saw in the Springfield and in the bullet they had. Notably, the State presented no evidence concerning ballistics or the bullet wound in regard to Myers other than he sustained an injury to his left leg.

*439 Detective Nathalie Kelly testified Appellant gave a statement on May 6, 2015, following his arrest. Appellant's statement was admitted without objection and published to the jury, providing as follows:

> I got to Club Cream at like 11:00 in my green Mustang. I went in the club and danced around until the party was over. When I got out, I was sitting in my car about to leave. I seen [Myers] about to walk up to my car, so I got out and went to the back, opened my car, and by the time I got to the back to open my car, [Myers] had his gun and I had a gun. So he started shooting, so I started shooting, but I was shooting in the back of my car so the bullets wouldn't hit nobody. And I didn't want him to think I was shooting in the air. And when I was inside the club, [Myers] bumped into me, so I already knew he was up to something.
>
> I was behind my car shooting into my car so my gun looked like it was pointing at him. He was in the front of my car shooting and threw my gun under the tree because I seen a security.

Detective Kelly testified that, outside of his written statement, Appellant indicated that the gun they recovered was the gun he referred to in his statement as being thrown under a tree that he used that night. Detective Kelly testified that Myers was charged with shooting at Appellant and with shooting McFadden, who had been in Appellant's car, and that Appellant's Mustang sustained bullet holes. She further stated that Appellant claimed he shot into the back of his car. Law enforcement had several pictures depicting holes in the canopy portion of Appellant's car.

Following Detective Kelly's testimony, the State rested, at which point Appellant moved for a directed verdict. The following colloquy occurred:

> [Defense Counsel]: .... Your, Honor, at this time I would move for a directed verdict on behalf of my client. I certainly don't think the State has met its burden beyond a reasonable doubt. From its own witness testimony today, it was very difficult for [Myers]. Said he's not sure who shot him. Of course, we sort of heard from him, it's sort of hard to believe what he says. But even some of the other testimony, even the expert witness they had, she couldn't say conclusively that that bullet that was pulled out of Ashley's leg was shot by this weapon that we have here in court.
>
> [The Court]: She didn't say it was not, either.
>
> [Defense Counsel]: Yeah, but she didn't say it was, either. Anyway, I'm making that motion here on — on those grounds, Your Honor.
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> ...
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> [Solicitor]: Your Honor, there's testimony on the record from multiple witnesses, some through impeachment purposes, but [from] multiple witnesses that [Appellant] shot first. [Appellant] himself admitted that there had been bad blood between them in the club. [ ] Myers through his

statement under impeachment acknowledged they had bad blood in the club. They both armed themselves, and started a shootout. I think this becomes a jury question. I certainly think we've established malice aforethought. As it pertains to Ashley R., Your Honor, I think there is strong evidence that the bullet did come from the gun. The barreling, the rifling is all the same. It was not able to be conclusive, but there's plenty for me to argue, and I think it's a jury question at this point. And also just specifically because he was not shooting directly at Ashley, I would point out that we're proceeding under transferred intent and we do believe that he was firing his gun with malice and the bullet struck Ashley R.

...

And Your Honor, the other thing, these are violent crimes and he's admitted he had a gun.

[The Court]: All right. Rule 19 of the South Carolina rules of criminal procedure provides that upon the motion of the defendant or on its own motion, the Court should direct a verdict for defendant — in the defendant's favor on any offense charged in [an] indictment after the evidence on either side is closed if there's a ***440** failure of competent evidence tending to prove the charges in the indictment.... [T]he rule goes on to say that in ruling on this motion, the trial judge shall consider only the existence or nonexistence of the evidence and not its weight.

My recollection of the testimony was that — whether it's believable or not does not matter, but my recollection of the testimony is that the defendant, [Appellant], fired first and was firing at both [ ] Myers and that by transferred intent, at the other victim in this case. And my job is to determine the existence or nonexistence of the evidence and not its weight. That is a matter solely for the jury to determine, and it would be improper for me to interpose my opinion of the evidence or to weigh the evidence and grant a ... directed verdict if there is any evidence in the record. And there is evidence in the record, both direct and circumstantial that would support the charges in this case. The motion is respectfully denied.

Thereafter, Appellant presented witnesses on his own behalf. First, McFadden testified he left Club Cream around 1:00 a.m. and was sitting in Appellant's Mustang [10] when he saw everyone coming out of the club, at which time he exited the car to see what everyone was planning for the night. Then, "shots started going off" and he saw Appellant go toward the back of his car. By about the first five shots, McFadden had been shot in his left ear. He did not see who was shooting, and he did not see Appellant shooting. After he was shot, Appellant drove him to the hospital.

Appellant also presented Crime Scene Investigator Amanda Snapp as his witness. Investigator Snapp took pictures of Appellant's car several days after the incident. Investigator Snapp stated she was not an expert and could not testify concerning the trajectory of a bullet. However, she did state she found what appeared to be five holes in the roof line of Appellant's vehicle. Additionally, when asked about the direction of the bullets, she stated, "there [were] no bullet holes in the front of the vehicle, so I can only imagine that they came from the back of the vehicle, most likely."

Lastly, Appellant testified in his own defense. Like Myers, he was seventeen years old at the time of the incident. Appellant testified that on the night in question, Myers bumped into him while inside the club, and he knew "something was going to happen" once they left the club because the two of them "had problems since [they were] in middle school." Appellant stated he exited the club around 1:30 and went to his car, which he had backed into a parking space. He saw Myers coming toward his car and observed Myers had a gun. According to Appellant, he then got out of his car and when he got to the back of his car, Myers started shooting. That's when Appellant started shooting and then ran off and threw his gun under a tree when he saw a security guard. Appellant explained that when he was shooting, he shot into the back of his car so Myers would think he was shooting at him and he would run off, but Myers did not run. Rather, Myers came close to shooting Appellant and Appellant ran. When Appellant returned to the car, he found out McFadden had been shot and took him to the hospital. Appellant stated he was not sure why Myers wanted to shoot him but he knew they "had beef" since middle school. He denied shooting first, claiming Myers shot first, Myers shot more than one time, and there were no bullet holes in the front of his car but several in the rear where Appellant was standing. Appellant denied shooting Myers or Ashley R. that night.

On cross-examination, Appellant admitted the shell casings found at the scene came from his black Springfield .40 that he dropped in the bushes. Appellant stated he was not sure if he fired every round directly into his car, but he tried to get all of them in the car, and there were five holes in the top of his car. When asked what happened to the sixth bullet, Appellant stated that he "probably shot it into the

ground." He stated "everything was happening too fast" but that he *441 knew that he "was shooting the back of [his] car so [he] wouldn't hit anybody." When questioned about how many rounds Myers fired at him, Appellant stated it was more than one but he was not sure if it was more than two or three. When the solicitor then asked if he and Myers were the only two shooters out there that night, Appellant replied, "No. It was other shooters out there because I — yeah. It was other shooters out there." When the solicitor challenged Appellant as to why he had not stated that during questioning by defense counsel or told Investigator Kelly, Appellant maintained he had told both defense counsel and the investigator, and continued to maintain in his testimony that there was another shooter that night.

The defense rested and the State called Investigator Kelly in reply, who testified Appellant never indicated to her that there was any other shooter in this matter besides him and Myers. After the State again rested, defense counsel stated, "Your Honor, just move again for a directed verdict in this matter for the reasons I stated earlier." The trial court again noted it was to consider only the existence or nonexistence of evidence, not its weight, found there was evidence in the record from which the jury could conclude that the offenses occurred, and denied Appellant's motion.

During the solicitor's closing argument, he argued Appellant was guilty of the attempted murder of Ashley R. based upon the doctrine of transferred intent. Defense counsel argued in closing that the defense did not contest the fact that Myers and Ashley R. were shot, but argued the State failed to prove that Appellant shot both of them. Counsel also argued the evidence showed that five bullets entered the back of Appellant's car, which left one remaining bullet, and suggested this one "magic bullet" would have had to hit Myers, "make a right turn, go around Ashley, [and] hit Ashley on the other side on her left leg" to fit the State's theory.

During a discussion on jury charges, the solicitor requested an instruction on transferred intent, which the court indicated it intended to charge with no objection from the defense. [11] The trial court thereafter instructed the jury on the doctrine of transferred intent without objection. The jury was instructed that if it were to find Appellant not guilty of both the attempted murder of Myers and Ashley R., it was to go no further in its deliberations, but if it found Appellant "guilty of either of the attempted murder charges," it was to then consider the separate charge of possession of a weapon during the commission of a violent crime. Accordingly, the jury was implicitly instructed that permissible verdicts included guilty verdicts as to only one of either of the attempted murder charges. Following deliberations, the jury found Appellant not guilty of the attempted murder of Myers, guilty of the attempted murder of Ashley R., and guilty of possession of a firearm during the commission of a violent crime.

II. STANDARD OF REVIEW

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." *State v. Prather*, 429 S.C. 583, 608, 840 S.E.2d 551, 564 (2020) (quoting *State v. Hernandez*, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009)). "In an appeal from the denial of a directed verdict motion, the appellate court must view the evidence in the light most favorable to the State." *Id.* (quoting *State v. Cope*, 405 S.C. 317, 348, 748 S.E.2d 194, 210 (2013)). "When the evidence presented merely raises a suspicion of the accused's guilt, the trial court should not refuse to grant the directed verdict motion." *State v. Phillips*, 416 S.C. 184, 192, 785 S.E.2d 448, 452 (2016). "However, the trial court must submit the case to the jury 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 *442 deduced.' " *Id.* at 192-93, 785 S.E.2d 448 (quoting *State v. Mitchell*, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)).

III. LAW/ANALYSIS

On appeal, Appellant argues there is no substantial circumstantial evidence that he shot Ashley R. or that he specifically intended to attempt to murder her. He argues the same was true of Myers, the jury acquitted him of that attempted murder, and if he did not possess the intent to shoot Myers, it is hard to fathom how the trial court thought there was substantial circumstantial evidence he attempted to shoot and kill Ashley R. Appellant points to the testimony of the SLED expert that the comparison of the bullet removed from Ashley R.'s leg to that of one test fired from the Springfield .40 caliber weapon yielded an inconclusive result. He maintains that such an inconclusive result does not rise to the level of substantial circumstantial evidence, and further argues "there is no evidence [he] intended to shoot and kill Ashley." Appellant contends the trial court committed error in reasoning that the State carried its burden at the directed verdict stage because he could be guilty by reason of transferred intent. I disagree.

A. Preservation of Transferred Intent Argument

It is well settled that, in order to be preserved for appellate review, an issue must be raised to and ruled upon by the trial court. *State v. McKnight*, 352 S.C. 635, 646, 576 S.E.2d 168, 174 (2003). "The general rule of issue preservation is if an issue was not raised to and ruled upon by the trial court, it will not be considered for the first time on appeal." *State v. Porter*, 389 S.C. 27, 37, 698 S.E.2d 237, 242 (Ct. App. 2010). "Imposing this preservation requirement is meant to enable the trial court to rule properly after it has considered all the relevant facts, law, and arguments." *Id.* at 38, 698 S.E.2d at 242. An appellate court is limited by appellate rules that allow the court to consider *only the precise question* that was before the trial court and ruled upon by the court. *State v. Whitten*, 375 S.C. 43, 47, 649 S.E.2d 505, 507 (Ct. App. 2007). "[E]rror preservation has been a critical part of appellate practice in this State for a long time, serving to ensure ... that we do not reach issues which were not ruled upon by the trial court." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012). "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." *Id.* (quoting *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)). "[T]hese rules must ... be applied consistently and not selectively." *Id.* "[T]his is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants, but rather is an adherence to settled principles that serve an important function." *Id.* at 329-30, 730 S.E.2d at 285. "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." *Id.* at 330, 730 S.E.2d at 285. "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." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). "[T]he issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the [trial court]." *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011).

As noted, the only basis for Appellant's directed verdict motion was that the State failed to meet its burden to prove he shot Myers or that the bullet that struck Ashley R. was shot by Appellant's weapon. Because Appellant was acquitted of the attempted murder of Myers, the only preserved issue on appeal is whether the trial court erred in denying his motion for directed verdict as related to the charge concerning Ashley R., i.e., whether there was sufficient evidence Appellant's bullet struck Ashley R. The Solicitor specifically addressed the argument actually raised by Appellant, asserting there was "strong evidence" that the bullet which hit Ashley R. did come from Appellant's gun. Although the solicitor included in his response ***443** that the State was proceeding under the theory of transferred intent in regard to Ashley R., the mere fact that he noted this as the State's theory of the case, and the trial court recognized this as the State's theory, did not raise to the trial court that Appellant contested the applicability of that theory. Notably, when the solicitor specifically stated during the directed verdict motion that the State was proceeding on this basis, Appellant raised no objection and made no argument that he was entitled to a directed verdict because transferred intent could not be applied to a specific intent crime. Further, the trial court charged transferred intent to the jury without objection, thereby evidencing Appellant's acquiescence to the theory in his trial. Indeed, as observed by the State in oral argument, the solicitor made clear from the outset of the case the State was proceeding with the attempted murder of Ashley R. charge—through the theory of transferred intent—based upon Appellant's firing a gun at Myers, and at no time during the trial did Appellant object to that theory. Accordingly, at a minimum, the theory of transferred intent was tried by consent, and Appellant should not now be allowed to grasp onto it as a basis for his directed verdict motion simply because it was mentioned by the solicitor as the State's theory of the case when presenting the State's case in response. I do not believe that in any manner the trial court could have possibly understood from Appellant's directed verdict motion that he was challenging the sufficiency of the evidence on the attempted murder charge in relation to Ashley R. on the basis that Appellant was required to have a specific intent to shoot her and could not be guilty by virtue of transferred intent. While the trial court clearly recognized—and restated—that the State was proceeding under the theory of transferred intent in this attempted murder, specific-intent crime, Appellant did not raise to the court that such was improper, and neither did the trial court consider "all the facts, law, and arguments" regarding the same and make a ruling on such. *See Porter*, 389 S.C. at 37-38, 698 S.E.2d at 242 ("Imposing [the preservation requirement that an issue be raised to and ruled upon by the trial court] is meant to enable the trial court to rule properly after it has considered all the relevant facts, law, and arguments."). Because the trial court was not given an opportunity to consider all the relevant facts, law, and

argument and rule on this issue, I would find it is not preserved for appellate review. [12]

As to Appellant's argument that the evidence was insufficient to rise to the level of substantial circumstantial evidence that he shot Ashley R., I also disagree. Though the evidence was inconclusive as to whether the bullet recovered from Ashley R.'s leg was fired from Appellant's weapon, it is undisputed that all six of the cartridges at the scene were fired from Appellant's Springfield model XD .40 Smith and Wesson. Further, the SLED expert testified a comparison of the bullet fired from that weapon and the bullet retrieved from Ashley R.'s leg showed they were rifled the same, they had "six lands and grooves" that were approximately the same width, and they had six twists to the right. Though a .38 caliber weapon could fire a .40 round if the barrel was worn enough, the expert testified that was not usually the case. Further, while there were other weapons that could fire a .40 round, those other weapons did not have the same rifling as seen on a Springfield. Additionally, aside from the ballistic evidence, Ashley R. identified Myers as the person she had seen earlier on the day of the shooting when she was at Poplar Square playing dice, and in his written statement to law enforcement, Myers indicated that a girl he was playing dice with on Poplar Square ***444** "got shot by [Appellant's] gun" that night. Thus, there is additional evidence Appellant shot Ashley R. that night. Accordingly, viewing the evidence in the light most favorable to the State, I would find no error in the trial court's determination of the sufficiency of evidence to send the matter to the jury. *See Prather*, 429 S.C. at 608, 840 S.E.2d at 564 ("When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." (quoting *Hernandez*, 382 S.C. at 624, 677 S.E.2d at 605)); *id.* ("In an appeal from the denial of a directed verdict motion, the appellate court must view the evidence in the light most favorable to the State." (quoting *Cope*, 405 S.C. at 348, 748 S.E.2d at 210)); *Phillips*, 416 S.C. at 192-93, 785 S.E.2d at 452 ("[T]he trial court must submit the case to the jury 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.' " (quoting *Mitchell*, 341 S.C. at 409, 535 S.E.2d at 127)).

B. Verdict Inconsistencies

Appellant argues the jury acquitted him of the attempted murder of Myers, and if he did not intend to shoot Myers, "it is hard to fathom how the [trial court] thought there was substantial circumstantial evidence [he] attempted to shoot and kill Ashley R." The majority notes it "cannot reconcile the jury's acquittal of [Appellant] on the attempted murder charge for the shooting of Myers with its guilty verdict for an attempted murder of Ashley R.," maintaining the indictment language and the State's contention it was proceeding under the doctrine of transferred intent whereby Appellant was firing his gun with malice and struck Ashley R. were "incongruous with such a result." In effect, Appellant and the majority are maintaining Appellant's convictions should be reversed, in part, based upon the inconsistencies in the verdicts. I disagree. First, Appellant has not set forth any inconsistency in the verdict in his issues on appeal. *See* Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."). At any rate, I have no problem reconciling the jury's verdict of acquittal on the charge in regard to Myers and the guilty verdict in regard to Ashley R. I readily concede the jury could have returned guilty verdicts of the attempted murder of Myers and Ashley R. based on its belief that Appellant shot six bullets, five hit his car, and one hit Ashley R., with his intent that a bullet strike Myers but did not. Whether a bullet he aimed at Myers actually struck him is of no consequence, for attempted murder does not require an injury to the person. *See* S.C. Code Ann. § 16-3-29 (2015) ("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."). However, it 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 Ashley 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 Appellants 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. Notably, Appellant raised no exception to the jury instruction in this regard, nor did he raise any argument to the trial court that the verdicts were inconsistent. Further, while Appellant argues it is hard to fathom how the trial court could think there was substantial circumstantial evidence he attempted to shoot and kill Ashley R. if he did not intend to shoot Myers—as evidenced by Appellant's acquittal of the attempted murder

of Myers—what Appellant fails to appreciate is that the trial court was not looking at the evidence through the lens of what the jury would eventually, in fact, determine. Rather, the trial court was looking at the evidence ***445** through the lens of what the jury could, based upon the evidence, determine. *See Phillips*, 416 S.C. at 193, 785 S.E.2d at 452 ("[T]he lens through which a [trial] court considers circumstantial evidence when ruling on a directed verdict motion is distinct from the analysis performed by the jury.") (quoting *State v. Bennett*, 415 S.C. 232, 236, 781 S.E.2d 352, 354 (2016)). In short, I believe any perplexities in the jury's verdict result, not from the trial court's proper denial of Appellant's succinct directed verdict motion, but from the manner in which the case was tried and the successful argument of trial counsel that Appellant could not be responsible for both bullets that hit Ashley R. and Myers.

C. Transferred Intent and Attempted Murder

Finally, I disagree with the majority's determination that, given Appellant's acquittal of attempted murder as relates to Myers, the recent pronouncements by our supreme court in *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017), *State v. Gerald Williams*, 427 S.C. 148, 829 S.E.2d 702 (2019) (*Gerald Williams II*), and *State v. Smith*, 430 S.C. 226, 845 S.E.2d 495 (2020) (*Smith II*) mandate a determination that the doctrine of transferred intent is inapplicable to the attempted murder charge as relates to Ashley R. As noted, the fact that Appellant was acquitted of the attempted murder of Myers is understandable based upon the manner in which the case was tried before the jury. Whether certain arguments and motions should have been raised by defense counsel at trial is a matter perhaps to be addressed in a post-conviction relief action, but matters not addressed to the trial court should not be the basis for reversal on appeal.

Undoubtedly, *King* provides the crime of attempted murder is a specific-intent crime which requires proof of specific intent to commit murder. 422 S.C. at 55, 810 S.E.2d at 22. However, what remains to be resolved by our supreme court is whether the doctrine of transferred intent applies to attempted murder. This court, however, has twice addressed the issue, and on both occasions has answered the question in the affirmative.

In the first case, *Gerald Williams I*, this court found the doctrine of transferred intent applied to that attempted murder case, finding the statute governing the crime did not require the specific intent to murder a specific victim; rather, the requisite specific intent for attempted murder is the specific intent to commit murder. *State v. Gerald Williams*, 422 S.C. 525, 542, 812 S.E.2d 917, 925-26 (Ct. App. 2018), *aff'd in part as modified, vacated in part*, 427 S.C. 148, 829 S.E.2d 702 (2019). However, our supreme court granted certiorari and ultimately vacated the portion of this court's opinion in *Gerald Williams I* concerning the application of transferred intent in an attempted murder scenario. *Gerald Williams II*, 427 S.C. at 158, 829 S.E.2d at 707. There, our supreme court noted this court had found the doctrine of transferred intent applied to the specific-intent crime of attempted murder; however, inasmuch as Williams failed to challenge the trial court's jury instruction that specific intent to kill was not an element of attempted murder, but there must be a general intent to commit serious bodily injury, that unappealed ruling became the law of the case. *Id.* at 157, 829 S.E.2d at 706-07. Accordingly, Williams's attempted murder case was tried, without objection, as a general-intent crime. *Id.* at 158, 829 S.E.2d at 707. Because this court had erroneously "treated the case as if it had been tried as a specific-intent crime," our supreme court vacated that portion of our opinion dealing with the issue of transferred intent and, pointedly, decided to "*leave for another day* the determination of whether the doctrine [of transferred intent] applies to attempted murder." *Id.* at 157-58, 829 S.E.2d at 707 (emphasis added).

In the second instance, *Smith I*, this court addressed numerous issues raised by Smith following his conviction for attempted murder. In particular, Smith argued three separate bases for reversal: (1) he was entitled to a directed verdict based on the State's failure to prove he had the specific intent to kill the victim; (2) he was entitled to a mistrial based upon improper statements made by the prosecution in closing arguments; and (3) the trial court erred in instructing the jury it could infer malice based upon the "felony murder rule." *State v. Smith*, 425 S.C. 20, 24, 819 S.E.2d 187, 189 (Ct. App. 2018), *rev'd and* ***446** *remanded*, 430 S.C. 226, 845 S.E.2d 495 (2020). This court affirmed Smith's conviction finding (1) a mistrial was not warranted based upon the solicitor's improper remarks, 425 S.C. at 39, 819 S.E.2d at 197, and (2) no error under any of the several bases argued by Smith concerning the "felony murder rule." 425 S.C. at 39-47, 819 S.E.2d at 197-201. Further, we disagreed with Smith's argument that "he was entitled to a directed verdict on the attempted murder charge because the State was required to show his specific intent to kill [the victim] and the State could not rely on the transferred intent doctrine to make this showing." 425 S.C. at 28, 819 S.E.2d at 191. After examining, among other things, our law on transferred intent, this court concluded "the State properly relied on the transferred intent doctrine to

show specific intent as to [the victim]" and affirmed the denial of Smith's directed verdict motion. 425 S.C. at 32-34, 819 S.E.2d at 193-94. Our supreme court granted certiorari and issued an opinion reversing and remanding Smith's attempted murder and possession of a weapon during the commission of a violent crime convictions. *Smith II*, 430 S.C. at 230, 845 S.E.2d at 496-97. The basis for the reversal was solely on improper jury instruction because (1) "felony attempted-murder is not a recognized crime in South Carolina, and, therefore, any jury charge to that effect [is] error" and (2) "trial courts may no longer give an implied malice charge when there has been evidence presented that the defendant acted in self-defense." 430 S.C. at 230, 845 S.E.2d at 496. Although Smith also argued that this court erred in finding the doctrine of transferred intent applied to attempted murder because it was a specific-intent crime—which required the specific intent to kill a specific person—our supreme court specifically declined to reach the issue, finding resolution of the other issues dispositive and noting the State indicated its intent, on retrial, to charge Smith with a general intent crime for the shooting of the victim in that matter. 430 S.C. at 234 n.9, 845 S.E.2d at 499 n.9.

In sum, I find nothing in *King*, *Gerald Williams II*, and *Smith II* to indicate our courts have concluded the doctrine of transferred intent is inapplicable to a charge of attempted murder. Further, I can discern no analysis from the majority as to why transferred intent should not apply in such a case. Inasmuch as our supreme court chose not to address the issue, I would decline to depart from the well-reasoned analysis as set forth by Judge Geathers in *Smith I*. However, as I expressed from the outset, I do not believe we should reach this issue. Appellant failed to raise this as a basis for his motion for directed verdict. Further, even assuming the mention of the theory by the State and the trial court during discussion of the motion was sufficient to encompass the theory as a basis of Appellant's directed verdict motion, I do not believe the question of whether the doctrine of transferred intent applied to the specific-intent crime of attempted murder here should be addressed, as Appellant never challenged the trial court's instruction to the jury on transferred intent. *See Gerald Williams II*, 427 S.C. at 157-58, 829 S.E.2d at 707 (vacating the portion of this court's decision dealing with the issue of transferred intent and a specific-intent crime because Williams failed to challenge the trial court's instruction to the jury that specific intent to kill was not an element of the crime of attempted murder, but there must be a general intent to commit serious bodily injury and, accordingly, Williams's attempted murder case was tried, without objection, as a general-intent crime).

All Citations

435 S.C. 288, 867 S.E.2d 430

Footnotes

1 With respect to Williams's conviction for possession of a weapon during the commission of a violent crime, we reverse and remand.

2 Ashley R. estimated four or five shots were fired before she realized she had been shot in the leg and was bleeding.

3 SLED ballistics and firearms agent Michelle Eichenmiller testified that in her opinion, cartridge cases found at the scene "were fired by [the Springfield model XD .40 Smith and Wesson]." As to the bullet removed from Ashley R.'s leg, Eichenmiller "didn't see enough individual characteristics to form an opinion as [to whether] it was fired by that firearm." However, she noted "both the Springfield XD and the bullet [she] received were six right, conventional rifling with approximately the same land and groove width." The bullet removed from the victim's leg "could have been [fired from] a 10-millimeter firearm or a 40 S&W." Eichenmiller explained, "It's a little bit larger than a .38. Depending on the firearm, I have seen some that have worn barrels that it could have been fired from, but not usually." On cross-examination, Eichenmiller admitted a Glock 22 also fires a .40 bullet.

4 Myers, who was initially charged with two counts of attempted murder, pled guilty to one count of ABHAN for shooting McFadden in the left ear. McFadden testified Myers's shot hit him from the front, and there is no evidence in the record to the contrary.

5 SPD crime scene investigator Amanda Snapp testified during the defense's case. Based on her examination, "it appeared that there [were] five bullet holes in the roof line of the vehicle." Snapp further stated "there [were] no bullet holes in the front of [Williams's] vehicle, so I can only imagine that they came from the back of the vehicle, most likely."

6 Our dissenting colleague urges us to decline to consider the applicability of the doctrine of transferred intent to this charge of attempted murder. The dissent would find the matter unpreserved for our review on the basis that the trial court "was not given the opportunity to consider all the relevant facts, law, and argument and rule on this issue." (Huff, J., dissenting). Our review of the record, however, reveals the trial judge had such opportunity when defense counsel moved for a directed verdict on the basis that the State had not met its burden of proof beyond a reasonable doubt. In response, the State argued, "And also just specifically because he [Williams] was not shooting directly at Ashley, I would point out that we're proceeding under transferred intent and we do believe that he was firing his gun with malice and the bullet struck Ashley R." The circuit court ruled immediately-giving defense counsel no chance to reply to the State's argument-citing Rule 19 of the South Carolina Rules of Criminal Procedure and recollecting its understanding of the testimony that "the defendant, Mr. Williams, fired and was firing at both Mr. Malik Myers and that by transferred intent, at the other victim in this case."

While we acknowledge the defense could have better articulated the precise question of transferred intent at trial, like the dissent, we recognize "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." *State v. Carmack*, 388 S.C. 190, 200–01, 694 S.E.2d 224, 229 (Ct. App. 2010) (quoting *State v. Dunbar,* 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003)). Notably, the State did not raise preservation as an issue in its respondent's brief. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 418 n.6, 526 S.E.2d 716, 722 n.6 (2000) ("Under present rules, the appellant receives notice of the respondent's additional sustaining grounds through the respondent's brief. The appellant may address those additional grounds in a reply brief." (citing Rule 208(a)(3), SCACR.")); *Atl. Coast 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)).

7 As in *Gerald Williams*, this case was tried before our supreme court's decision in *King*, but after the General Assembly's 2010 codification of the crime of attempted murder. *See* 427 S.C. at 153 n.4, 829 S.E.2d at 705 n.4. However, unlike the attempted murder charge in *Gerald Williams*, Williams's attempted murder charge was not tried as a general intent crime. In the charge to the jury here, the circuit court instructed that "an attempt includes a specific intent to do a particular criminal act with an act falling short of the act intended." The court's instructions on transferred intent and self-defense followed, without objection. Although a brief charge conference was held on the record prior to closing arguments, and defense counsel initially expressed concern about the transferred intent charge, the remainder of the charge discussion was omitted from the record on appeal. Williams has not appealed any error related to the circuit court's jury instructions and argues only that the circuit court erred in denying his motion for a directed verdict because "there was no substantial circumstantial evidence that appellant intended to kill or murder Ashely R." Given the facts of this case and these distinctions—including the unsettled status of the application of the doctrine of transferred attempt to statutory attempted murder—we disagree with our good colleague that any failure by Williams to challenge the circuit court's "transferred intent" jury instruction forecloses our review of the legal issue raised here.

8 As the State notes in its brief, a proper remedy on remand "would be retrial of Williams on the charge of ABHAN and possession of a weapon during the commission of a violent crime."

9 The majority indicates Ashley R. "admitted in her written statement to police, she identified Myers as the man who started the shooting and her statement did not include that she heard shots before Myers fired his weapon." My reading of the record is not in accord. On cross-examination, Ashley R. was asked if she identified to the police the man who started the shooting as the one who she saw at Poplar Square. She

responded, "Yes, *but ... after I heard the two shots shooting.*" Thus, she clearly indicated she had identified the person she saw at Poplar Square as one of the shooters, but not as the first shooter. Further, when challenged as to whether she mentioned to the police that someone else had shot first, Ashley R. twice insisted that she did write that, and she thereafter continued to maintain that she heard two shots before Myers began shooting. Ashley R.'s written statement is not included in the record.

10 McFadden testified Appellant's car had been backed into the parking space with his car facing toward the club.

11 We note the trial court asked defense counsel if he believed a charge on transferred intent was appropriate, to which counsel replied, "Yes, sir," but he then noted some hesitancy because he mistakenly believed—as verified by review of the indictments—that Myers had been charged with shooting Ashley R. When it was clarified that Myers had not been charged with shooting Ashley R. but had been charged with shooting McFadden and Appellant had been charged with shooting Ashley R., defense counsel raised no objection to a transferred intent charge.

12 I acknowledge the State did not challenge Appellant's preservation of this issue in its appellate brief. It is well settled, though, that an appellate court is "not precluded from finding an issue unpreserved even when the parties themselves do not argue error preservation to us." *Lewis*, 398 S.C. at 329, 730 S.E.2d at 285 (2012). As aptly observed by the majority, an adversary's silence may "serve as an indicator to the court of the obscurity of the purported procedural flaw." *Id.* at 333, 730 S.E.2d at 287 (Toal, C.J., concurring in result in part and dissenting in part). I note, however, at the time of the filing of its brief, the State relied on this court's recent case law—discussed further below—in which this court unwaveringly applied the doctrine of transferred intent to the crime of attempted murder. Further, at oral argument, the State left no doubt that it was, in fact, challenging the preservation of this issue on appeal.

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