STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable DeAndrea G. Benjamin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT XAVIER GETER,

APPELLANT

APPELLATE CASE NO 2018-001647

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

STATEMENT OF ISSUES ON APPEAL

1.

Whether the Court erred by instructing the jury on transferred intent since that was an improper, inapplicable jury charge in an attempted murder case, where specific intent to kill was an element of that crime?

2.

Whether the Court erred by allowing Richland County Sheriff's investigator Joseph Clarke to testify that defense counsel's opening statement to the jury was the first time he had heard the defense "scenario of the facts," while at the same time he vouched for Victim Stone's testimony being absolutely consistent, since it was an improper for the solicitor to use the sheriff's investigator to opine that the defense case was inconsistent with the evidence he uncovered during his investigation while the victim's testimony was consistent?

STATEMENT OF THE CASE

Appellant was indicted by the Richland County Grand Jury for the offenses of murder and attempted murder. R. 661. His case came on for trial on April 9, 2018 before the Honorable DeAndrea G. Benjamin, and a jury. Aimee Zmroczek and Ryan Schwartz represented appellant. Richard Cathcart and Jeremiah Shellenberg were the assistant solicitors. R. 1.

On April 12, 2018, the jury found appellant guilty of both charges. R. 613, l. 21 – 614, l. 6. Judge Benjamin sentenced appellant to forty years imprisonment for murder, and she imposed a twenty-year concurrent sentence for attempted murder. R. 623, l. 19 – 624, l. 1.

This appeal follows.

ARGUMENT

1.

The Court erred by instructing the jury on transferred intent since that was an improper, inapplicable jury charge in an attempted murder case, where specific intent to kill is an element of that crime

Standard of Review

"In criminal cases an appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "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." Id.

Relevant Facts

Clarence Stone was the victim in the attempted murder charge in this case. In addition to being a customer at Culler's Pool Room on Monticello Road, "I watched over the place, I cleaned up, sometimes I worked in the kitchen [there]." R. 135, l. 1 – 136, l. 1.

Stone remembered on the night of the incident in this case, March 7, 2015, that he was "basically watching over the place . . . making sure there wasn't no fighting going on, no arguing, or none of that." R. 136, ll. 2 – 8. Stone recalled seeing James Lewis, the decedent, there that night, as well as appellant. Stone had met appellant and the decedent through different friends. R. 136, ll. 16 – 25.

Stone was "shooting a game of pool by myself" when he noticed people in the crowded poolroom moving around as if something was wrong. Stone investigated, and he saw that the

decedent was on top of appellant. They were fighting "in between the ATM machine and the bathroom wall." "Before I even touched him [the decedent], I let him know it was me. And I picked him up off the top of Mr. Geter. I took him out the back on the deck." R. 138, ll. 4 – 11.

Stone testified that when he went on the back deck with the decedent that the decedent wanted to get back into the main poolroom to get "his chain." Stone told him, "I'd get it for him." R. 138, l. 23 – 139, l. 6.

Stone related that after a couple minutes appellant came outside, and "he [appellant] asked Mr. Lewis [the decedent], are we good, we good? He started walking towards him. He gets closer. He swings." Stone said he thought everything was calm up until this point. Then, the men started fighting for the second time. "That's when I came in and tried to break it up once again. That's when I got caught." Stone said the only two people involved in that fight were the decedent and appellant. "That's it." R. 140, ll. 2 – 25.

Stone testified, as he was attempting to break up the fight, "I thought I got hit in the nose. Then, unfortunately, I was stabbed in the eye, and I got caught right here across the pinky." R. 141, ll. 1 – 6. Stone permanently lost vision in that eye after being stabbed. R. 141, ll. 1 – 24.

Deborah Culler owned the businesses. She was retired from the military. Culler owned the poolroom and "Deli Say No More, Monticello Package, Monticello Pool Room, and Columbia Community Outreach." R. 18, ll. 8 – 10. She described her business at issue here as "a poolroom, restaurant."

Culler remembered on the night of March 7, 2015, she was cooking in the kitchen. Appellant and the decedent were both at the poolroom that night. She said the decedent was "a customer and there to protect me, you know, make sure that I don't leave by myself. He's

always been a very protective person . . . He is my godson . . . He kept me." R. 18, l. 8 – 19, l. 10.

Culler described appellant as "just a troubled young man trying to get his life back together." Culler testified that she had invited appellant to her church, appellant accepted the invitation, and he came to her church. R. 20, ll. 2 – 13. Appellant's nickname was "Boo." Culler recalled a "commotion going on," and that there was a confrontation between the decedent and appellant. R. 29, ll. 2 – 22. "They was exchanging words. And when I came back in, they started fighting." "All I heard James say [was], Go on ahead, Man, go ahead on. And Boo kept coming after him. He just kept coming after him. And then the next thing you know, he jumped on him and they started fighting." R. 30, ll. 7 – 13.

Culler testified that "James was on top of him [appellant]. And the guys came from around the corner and broke the fight up." R. 30, ll. 14 – 23. Culler maintained: "It was a one-on-one fight" between the decedent and appellant. R. 31, ll. 14 – 15.

Culler said that she then asked appellant to leave. Her memory was that the decedent had already left the poolhall at that point. R. 32, ll. 3 – 25.

Culler did not see the second fight in which the decedent and Stone were stabbed. "I saw Mr. Lewis coming in the back door. He had two people on his side bringing him in, and he was all bloodied up. He was all bloodied up. And they brought him from the back door to the front door and they set him in the front door. And we tried to get him comfortable. We laid him flat. We tried to get him comfortable until the ambulance came to get him. And he was bleeding terribly." R. 33, ll. 1 – 9.

On cross-examination, Culler said that the decedent had left the poolroom apparently to go outside to the back deck, when she asked appellant to leave. This occurred in a very crowded

poolhall where there were approximately forty people present inside or on the back deck. R. 50, l. 21 – 51, l. 8. Culler admitted during a previous proceeding (the mistrial) that she had testified that the decedent went outside *after* appellant had already gone there. In other words, the decedent followed appellant outside, and not the other way around. Culler now said she must have been mistaken at the prior proceeding, apparently citing health problems at the time of that trial. She now maintained: "James left first."[1] R. 67, l. 19 – 68, l. 19.

Reeshemah Culler was the daughter of Rebecca Culler. She was also present on the night of March 7, 2015 when the fight occurred with some friends. R. 86, l. 19 – 87, l. 24. Culler remembered that "Robert Geter and James Lewis was fighting." R. 91, ll. 10 – 20. Culler also recalled, "Mr. Lewis got the best of him . . . and there was several guys that was trying to break it up. And every time they would break the fight up, I would see Mr. Geter coming back at Mr. Lewis." R. 92, l. 12 – 93, l. 18.

Culler maintained that the decedent went out the back door, and "my mom was telling Mr. Geter to leave." R. 94, ll. 15 – 21. "[A]nd Mr. Geter was standing there and my mom was asking him to leave, and he was telling her that he didn't do anything, he didn't do anything. So finally, he did leave, but I was watching him because my mom was talking to him, so I was watching him. And I saw him put his hand in his coat, but I can't say if he pulled anything out of it or not, I just saw him put his hand like in his coat. And he went around the same corner

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[1] A prior trial was held May 15-17, 2017 before the Honorable Alexander S. Macaulay. Judge Macaulay denied appellant immunity under the Protection of Persons and Property Act statute, and that jury trial ended in a mistrial based on certain jurors not coming forward with information they knew about the case during *voir dire*. Judge Macaulay denied appellant immunity after the prior pre-trial immunity hearing before the mistrial, in large part, because he found Deborah Culler had asked appellant to leave between the non-fatal fight and the second, fatal fight. Judge Macaulay, however, erred by finding that conflicting evidence mandated the jury decide the "self-defense" issue at trial. R. 2, l. 12 – 4, l. 16. See State v. Cervantes-Pavon, 426 S.C. 442, 827 S.E.2d 564 (2019)(Just because conflicting evidence as to immunity exists does not automatically require the court to deny immunity).

towards the back door where Mr. James Lewis went." R. 95, l. 18 – 96, l.3. Culler claimed she then heard a commotion, "A lot of people started running, Oh, he got a gun, he got a gun." R. 96, l. 23 – 97, l. 9.

Culler said during the next fight that ensued appellant stabbed the decedent and "[H]e picked him up again, just like that, stood over him and he took the knife and he hit him right there in the chest. And he pulled it up and he snatched it out and said, I do this shit, Nigga, and throwed him down, and he went down the back doorsteps of the deck. And I haven't seen him since." Culler said a couple of women helped the decedent get to the front of the club until the EMS paramedics arrived. R. 99, l. 7 – 101, l. 22.

On cross-examination, Culler admitted, "I can't tell you exactly how it [the fight] started, but I can tell you that I saw the fight." R. 132, ll. 9 – 20.

Michael Harkness was Rebecca Culler's brother. He was also at the poolhall on the night of the incident. R. 70, l. 6 – 71, l. 23. Harkness remembered that appellant and the decedent were fighting, and "by the time I got around there, they had done broke it up. Then the second time it started again, I seen the second fight." R. 72, ll. 16 – 22.

Harkness testified that appellant started the fight by "stepping on his [the decedent's] foot. He asked him not to step on his foot no more." Harkness offered that the decedent had just had surgery on his foot. R. 72, l. 23 – 73, l. 14.

The essence of Harkness's testimony, that the state wanted before the jury, was his belated claim at trial that before appellant went out on the back porch where the decedent was, he allegedly said: "I'm going to kill me somebody tonight." R. 171, ll. 2 – 24. On cross-examination, Harkness admitted he did not talk to the police after the incident and that it was

only at the time of trial that he first alleged appellant made the threat to kill someone that night. R. 84, l. 20 – 85, l. 11.

The surgeon, Dr. Alejandro Luis, operated on the decedent on the night of the stabbing. He testified that the decedent died of a stab wound to his left chest. R. 86, l. 9 – 88, l. 21. Dr. Luis explained that the decedent was given "massive amounts of blood" in transfusions, and that the decedent "died on us, and then we began intracardiac CPR. So that's basically when we squeeze the heart to get it to beat again. Heart has [a] very good memory. So if you can help it along, it will beat." Dr. Luis said he continued this intracardiac CPR for approximately twenty minutes, and when the decedent still had no regular heartbeat or rhythm, "We had at that point decided to let the patient expire and cease our efforts." R. 187, ll. 1 – 24.

Directed Verdict Motion

When moving for a directed verdict on the attempted murder charge, defense counsel referenced Clarence Stone's testimony that "I got caught in the eye trying to break up the fight. And I even clarified that again, I said, you got caught in the eye?" Counsel argued there was no specific intent to kill Stone. Stone was inadvertently stabbed while trying to break up a fight between appellant and the decedent. R. 324, l. 5 – 325, l. 5.

The solicitor argued that "He got stabbed in the eye as Mr. Geter was attempting to kill Mr. Lewis." The solicitor urged under the doctrine of transferred intent that the specific intent to kill Lewis was transferred to Stone. Defense counsel argued that, while it was an unsettled question in South Carolina whether transferred intent could apply to attempted murder, she concluded, "there is no transferred intent to attempted murder." Counsel added, "I understand *that in murder cases or felony murder cases, the intent follows the bullet.* And if we're going to argue—we weren't moving for a directed verdict motion on the murder because I believe that is

a question of fact whether it was self-defense or not. However, I think that we can run into a problem because if it is—if they do find self-defense on the murder and then—then there is no—then the intent was to kill in self-defense. And so there is no transferred intent to the attempted murder." R. 324, l. 5 – 327, l. 3. (emphasis added).

The solicitor again claimed, "when someone is stabbed in the face *because he was trying to kill somebody else, that is the intent to kill and malice transfers to the person who is attacked, both of them.*" R. 327, ll. 5 – 16. (emphasis added). The judge then stated she thought the defense presented an interesting argument on transferred intent and she said, "I'm not sure they are going to be able to find not guilty of murder and guilty of the attempted murder if the argument is transferred intent." The judge concluded specific intent to kill was an issue of fact the jury had to decide and denied the directed verdict motion. R. 327, l. 17 – 329, l. 11.

When the solicitor essentially asserted that appellant committed a crime when he stabbed a man (Stone) in the face, the judge interjected that the attorneys later may need to discuss lesser-included offenses [of attempted murder]." R. 329, ll. 4 – 16.

Appellant Testifies

Appellant took the stand in his own defense. He testified he had finished the eleventh grade at Eau Claire High School, and he had worked various jobs. He was apparently working for an electric company at the time of the incident. He was helping "wiring for the dorms at Fort Jackson." He had also worked at Columbia Farms. R. 348, ll. 3 – 25.

On the day of the poolroom incident, appellant testified, "I had the day off" and "I was selling t-shirts, pocket books, pants, things like that . . . on Monticello Road, right across the street from Culler's Pool Hall." R. 349, ll. 5 – 20.

That evening, appellant left his girlfriend's house after she got home from working at the Babcock Center. Appellant walked to a friend's house where "we played video games and chilled for a minute." They then went to Culler's Pool Hall around eight or nine p.m. that evening. Appellant remembered there was a good crowd -- between thirty and forty people – at the pool hall. R. 350, l. 8 – 351, l. 23.

Appellant knew the decedent. He remembered that night he had purchased a beer and was putting money in the juke box when the decedent told him that he had stepped on his foot. "And I was like, Oh, my bad, my bad, my bad, you know what I'm saying. I'm having a good time. I'm like, my bad." R. 356, l. 20 – 357, l. 16.

Appellant testified that Clarence Stone then tried to intervene as if there were a problem. Appellant told Clarence, "Man, you ain't got nothing to do with this. You ain't got nothing to do with this." R. 357, ll. 11 – 23. Appellant said after he apologized to the decedent for stepping on his foot that "Clarence hit me from behind. He hit me in the back of my head. So I turned around and I grabbed Clarence's hand to stop him from hitting me, and that's when James jumped in." R. 358, ll. 10 – 23.

Appellant admitted that the decedent was beating him badly. As appellant tried to defend himself, "Clarence come and kicked me in the face." Appellant continued to fight, and the decedent ended up getting stabbed during the fight. R. 362, l. 5 – 364, l. 25. Appellant remembered, "My eyes were shut, both my eyes were shut, and it was blurry. All I seen was blur, like two people at the same time. And I still got the knife. So everybody came up to me, like, Man, what happened, what happened, Boo? I was like, Man, they just jumped me, they just jumped me." Appellant remembered the decedent "come out the back door" saying, "Mother fucker, you just stabbed me." R. 365, ll. 1 – 14.

Appellant testified on cross-examination that there were a number of men "stomping me, but my only focus was on Clarence and James because they was the closest. They was getting the most licks in. They was the closest." Appellant confirmed he thought there were about five men beating him that evening. R. 401, ll. 1 – 12.

The judge ultimately charged transferred intent over objection:

> Ladies and gentlemen, we'll next talk about the doctrine of transferred intent. If the Defendant with malice aforethought attempts to kill another person, but by mistake injures or kills a different person, the law considers that the Defendant still had the intent to kill. Intent to kill is a mental state. It exists in the mind. *So if the State proves that a Defendant 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 Defendant attempted to kill to the actual person injured.* Pursuant to the transfer intent doctrine, if one person intends to harm a second person, but instead unintentionally harms a third, the first person's criminal intent towards the second applies to the third as well.

R. 593, l. 11 – 594, l. 3. (emphasis added).

After the judge charged the jury, defense counsel renewed her objections to the jury charge, noting "specifically to the renewed objection to transferred intent." R. 605, ll. 11 – 17.

After the verdict, defense counsel moved for a new trial based on her objection to charging the jury on transferred intent as to attempted murder. R. 615, l. 6 – 616, l. 1. The judge denied the motion for a new trial for charging transferred intent over objection. R. 616, l. 25 – 617, l. 2.

Discussion

The state successfully had the trial judge instruct the jury on transferred intent because its theory of the case was that appellant killed the decedent during a fight by stabbing him in the chest, and that Clarence Stone was collateral damage or accidentally stab in the eye while attempting to break-up the fight. The state wanted the jury to transfer appellant's alleged intent

to kill the decedent to Stone's injuries thereby finding appellant guilty of the attempted murder of Stone. Given the judge's instruction on transferred intent above there was respectfully no way the jury could not have convicted appellant of attempted murder for Stone getting stabbed.

In Cockrell v. State, 890 S0.2d 174 (2004), which is discussed more fully infra, the Alabama Supreme Court held that the doctrine of transferred intent did not apply to the charge of the attempted murder as to an unintended victim. The Cockrell court cited Rollin M. Perkins, Perkins on Criminal Law 826 (2d ed.1969) (footnote omitted) with the following example:

> "If, without justification, excuse or mitigation D with intent to kill A fires a shot which misses A but unexpectedly inflicts a non-fatal injury upon B, D is guilty of an attempt to commit murder—*but the attempt was to murder* A whom D was trying to kill and not B who was hit quite accidentally. *And so far as the criminal law is concerned there is no transfer of this intent from one to the other so as to make D guilty of an attempt to murder B.* Hence, an indictment or information charging an attempt to murder B, or (under statute) an assault with intent to murder B, will not support a conviction if the evidence shows that the injury to B was accidental and the only intent was to murder A."

Cockrell v. State, 890 So.2d 174, 177 (2004). (emphasis added).

Attempted murder requires proof that the defendant had a specific intent to kill the victim. State v. King, 422 S.C. 47, 810, S.E.2d 18 (2017). In State v. Williams, 427 S.C. 148, 829 S.E.2d 702 (2019), the Supreme Court left open "for another day" the determination of whether the doctrine of transferred intent applies to attempted murder. However, the issue may be decided in State v. Michael Juan Smith, Appellate Case No. 2018-002050, which is pending

in the state Supreme Court on certiorari from this Court at the time of the writing of this initial brief[2].

The evidence in this case showed that Clarence Stone testified he was breaking up a fight between the decedent and appellant, and that he had no intention to attack or harm appellant. Appellant thought Stone was taking the decedent's "side" in the fight, and hitting him. However, appellant also testified his ability to know exactly what was happening as he was getting beaten was severely compromised. His eyes were so swollen and his vision so blurred from being beaten that he did not know he had even stabbed the decedent or how badly he had injured the decedent. Appellant's testimony showed he had no intention to harm, much less kill Stone. The state's theory of the case, which it sold to the jury, was that this was a "one-on-one" fight between appellant and the decedent which the decedent was easily "winning" until appellant pulled a knife. There was evidence the stabbing of Clarence Stone during the fight was unintentional and that the decedent was the target of the knife. Appellant asserted the stabbing of the decedent was in self-defense. Appellant was convicted of murdering Lewis.

As seen, the issue of transferred intent first arose during the discussion of appellant's motion for directed verdict on the attempted murder charge. Defense counsel took exception to the jury instruction on transferred intent, and she raised it again in her motion for a new trial.

Attempted murder requires a specific intent to kill, pursuant to State v. King, and therefore the doctrine of transferred intent does not apply to the crime of attempted murder. King states that *without expressed malice or specific intent*, a "crime would involve the lower level of intent and, thus, *would fall within the lesser degrees of assault and battery offenses* codified in §16-3-600." King at 26-27, n. 5, 810 S.E.2d at 63-64, n. 5. (emphasis added).

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[2] Prior to the filing of the final brief of appellant, State v. Michael Juan Smith, Op. No. 27958, Shearouse's Adv. Sh. 11, at pp. 21-28 (filed March 18, 2020) was decided.

Everything in King indicates that transferred intent does not apply to the specific intent crime of attempted murder. Transferred intent is just another way to infer or imply malice, and King indicates that doing so for a specific intent crime is improper.

As argued infra, assault and battery of a high and aggravated nature (ABHAN) was the proper charge for the injuries to Stone in this case since it was a general, not specific intent crime. However, the solicitor declined a charge on the lesser-included offense of ABHAN when asked by the trial judge if he wanted it instructed, even though there was evidence supporting that lesser-included offense. R. 518, l. 21 – 519, l. 10.

In Cockrell v. State, 890 So.2d 174 (2004), the Alabama Supreme Court affirmed the Court of Appeals holding that the doctrine of transferred intent did not apply to the charge of attempted murder of an unintended victim. In Cockrell, the Court noted that Cockrell fired several shots into Carlos Ivey's car, and one of the shots struck a twelve-year-old, who was standing on his grandmother's front porch. Cockrell was charged with the attempted murder of the unintended victim. The Court in Cockrell noted that a Florida District Court of Appeals in Bell v. State, 768 So.2d 22, 28 (Fla.Dist.Ct.App.2000), provided a helpful collection of authorities rejecting the applicability of the doctrine of transferred intent to the offense of attempted murder of an unintended victim: Jones v. State, 159 Ark. 215, 251 S.W. 690 (1923); People v. Chinchilla, 52 Cal.App.4th 683, 60 Cal.Rptr.2d 761, 765 (1997); People v. Calderon, 232 Cal.App.3d 930, 283 Cal.Rptr. 833 (1991); State v. Hinton, 227 Conn. 301, 630 A.2d 593, 602 (1993); Ford v. State, 330 Md. 682, 625 A.2d 984 (1993); State v. Williamson, 203 Mo. 591, 102 S.W. 519 (1907); State v. Mulhall, 199 Mo. 202, 97 S.W. 583 (1906); People v. Fernandez, 88 N.Y.2d 777, 650 N.Y.S.2d 625, 673 N.E.2d 910, 914 (1996); State v. Shanley, 20 S.D. 18, 104 N.W. 522 (1905).

Again, the proper charge or jury verdict for the injury to Clarence Stone, where appellant had no intent to kill Stone, was ABHAN. Indeed, in State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000), our Supreme Court found that the doctrine of transferred intent could be used to convict a defendant of ABIK (a general intent crime) which was the highest of the assault and battery offenses prior to the enactment of the specific intent crime of attempted murder. See State v. Hill, 361 S.C. 297, 303-04, 604 S.E.2d 696, 699 (2004) (the offense of attempted murder is unnecessary). See S.C. Code Section 16-3-29 (eff. June 2, 2010) ("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").

In State v. Fennell, the defendant became angry after the victim made a disparaging remark towards him and he retrieved his 38-caliber revolver from his car. The defendant declared he was "going to kill that son of a bitch," and he emptied his gun at the victim, striking him with five shots. The victim thereafter died. However, a stray bullet struck another man who was standing nearby in the right arm and chest. There was evidence that this man was an unintended victim.

The Court in State v. Fennell noted it had held in several cases that a defendant may be found guilty of murder or manslaughter in a case of bad or mistaken aim under the doctrine of transferred intent. The Court noted it had not decided a case where the intended victim was killed, but the unintended victim was injured, but not killed. The Court noted, "a person who, acting with malice, unleashes a deadly force in an attempt to kill or injure an intended victim should anticipate the law will require him to answer fully for his deeds when that force strikes or injures an unintended victim. Accordingly, we hold that the doctrine of transferred intent *may be used to convict a defendant of ABIK*, when the defendant kills the intended victim and also

injures an unintended victim." State v. Fennell, 340 S.C. 266, 276, 531 S.E.2d 512, 518 (2000). (emphasis added). Again, the crime in State v. Fennell, was ABIK, the predecessor crime to the now specific intent crime of attempted murder which was enacted in 2010, ten years after the Fennell decision.

The fiction of transferred intent is not needed for the offense of attempted murder. The defendant is guilty of the completed crime of attempted murder at the time he shoots at the intended victim, regardless of whether any injury resulted to an unintended victim or not. Bell v. State, 768 So.2d 22, 28 (Fla.Dist.Ct.App.2000). In short, the defendant shot intending to kill the victim and it matters not whether he actually shot him.

The Court of Appeals of Alaska in Ramsey v. State, 56 P.3d 675 (2002), held that Ramsey could only be found guilty of the attempted murder of a bystander at the time he shot and killed a fellow high school student if he had the specific intent to kill the bystander. In Ramsey, the sixteen-year-old defendant went to Bethel High School with a twelve-gauge shot gun hidden under his jacket. The defendant was angry at a fellow student, Joshua, and he shot him in the stomach. Joshua later died from his wounds. Two other students sitting near Joshua were also hit by pellets from the shotgun blast and wounded. The Court in Ramsey noted that the defendant could be found guilty of attempted murder, whether or not he actually injures *his intended victim* but to be guilty of attempted murder he must have had the specific intent to kill the victim, not someone else.

In this case, if appellant swung his knife at the decedent and missed him, he could be guilty of attempted murder if he had the specific intent to kill the decedent. The same was true of Stone. However, the offense of attempted murder was inapplicable as to Clarence Stone since he was not the intended victim. Stone was only attempting to break up the fight, given his

testimony and the state's theory of the case. Again, the proper crime to be charged for the injury to Stone was ABHAN, a general intent crime. The remedy for this error, most respectfully is not to torture the logic of the specific intent crime of attempted murder.

As the Supreme Court of Connecticut held in State v. Hinton, 630 A.2d 593, 600-602 (Conn. 1993), "a defendant can still be prosecuted for his intent to kill and conduct aimed at killing the intended victim, whether a third party is killed or no one is even injured." "The doctrine of transferred intent, generally considered a necessary fiction, is therefore not necessary to prosecute for attempted murder a defendant whose aim was poor." Id. Moreover, the rule of lenity also urges a rejection of the doctrine of transferred intent for attempted murder. South Carolina, like Connecticut, applies the rule of lenity. See State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) (When a statute is penal in nature, it must be construed strictly against the state and in favor of the defendant.) See also, Hair v. State, 305 S.C. 77, 406 S.E.2d 332 (1991); State v. Cutler, 274 S.C. 376, 263 S.E.2d 420 (1980).

Since there was no evidence in this case that appellant stabbed Clarence Stone with the intent to kill him, appellant could not he guilty of attempted murder. Appellant could have been found guilty of ABHAN if a jury found appellant stabbed Stone during his fight with the decedent. Appellant's conviction for attempted murder should therefore be reversed.

2.

The Court erred by allowing Richland County Sheriff's investigator Joseph Clarke to testify that defense counsel's opening statement to the jury was the first time he had heard the defense "scenario of the facts," while at the same time he vouched for Victim Stone's testimony being absolutely consistent, since it was an improper for the solicitor to use the sheriff's investigator to opine that the defense case was inconsistent with the evidence he uncovered during his investigation while the victim's testimony was consistent

Standard of Review

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) ("quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

Relevant Facts – Opening Statement

In his opening statement to the jury, defense counsel Schwartz told the jurors that: "The defense here is that Robert fought back. And he was the prey for no other good reason other than accidentally stepping on somebody's shoes . . . James Lewis was absolutely beating the crap [out] of Robert Geter for no reason other than he stepped on his shoe. The fight breaks out. At some point Robert is hit in the back of the head with a beer bottle. And James Lewis and his friends continue to pummel him. R. 10, l. 20 – 11, l. 20. Defense counsel also told the jury that appellant tried to get away from the decedent, and instead, "[J]ames Lewis and Clarence Stone come after him swinging." R. 11, l. 21 – 12, l. 19.

Defense counsel told the jurors: "Robert may have defended himself, but he did not murder James or attempt to murder Clarence. Murder requires malice. . . The only intentional act that night was Robert was defending himself." R. 14, ll. 14-20. Defense counsel concluded, "he is not guilty of murder. He is not guilty of attempted murder. James Lewis is dead because of what James Lewis did that night. Mr. Stone lost an eye because of what James Lewis did not night." R. 16, ll. 5-23.

The Investigator's Testimony

The state called Richland County Sheriff's Department investigator, Joseph Clarke, as a witness. R. 200, ll. 3 –24. Clarke was the "primary homicide investigator on call" on the night of March 7, 2015. R. 201, ll. 5 – 22. Clarke offered that, after speaking to witnesses, "At that point they were saying, Boo [appellant] did it, Boo was the one responsible for it, et cetera. And I said, Fine." R. 212, ll. 12 – 24.

Clarke also testified that after he received word that the decedent had died, he secured a warrant for murder against appellant, and a second warrant for the attempted murder of Stone. R. 224, ll. 2 – 18. Appellant agreed to meet Clarke at the police station the next day, and Clarke told appellant this was "still his side to the story that we need to know about. And that was truly what I was interested in. This had happened in a bar. It happened early in the morning. And there had been a lot of people there. So we want to hear his side of this thing." R. 227, l. 2 – 228, l. 1.

Appellant gave Clarke the "bloody knife" at the police station, and he told Clarke "there was like five dudes there." R. 228, ll. 2 – 6. Clarke said he then advised appellant of his

"Miranda[3] rights," took the knife from him, gave appellant the two arrest warrants, and "we transported him to Alvin S. Glenn Detention Center without further incident." R. 228, ll. 2 – 22.

On cross-examination, defense counsel showed Clarke some photographs showing appellant's injuries. Clarke acknowledged, "There appears to be some swelling to his face, no question." R. 238, l. 11 – 241, l. 17. Defense counsel asked Clarke about his experience in law enforcement and what he had done before taking out the arrest warrants. Clarke insisted, "I had probable cause for the arrest." R. 232, l. 23 – 237, l. 3. Clarke offered that "evidence is like money, you always want more of it," and he said that more investigation could lead to more corroboration of one side of the story or the other. R. 237, l. 1 – 244, l. 6. When questioned about what investigation he did into appellant's self-defense case, Clarke responded that was "not relevant." The following occurred on cross-examination of Clarke:

> Q: [N]ot relevant to you because you had already taken out the warrants, right?
>
> A: Because I had probable cause for the arrest, counselor.
>
> MS. ZMROCZEK: No further questions, Your Honor.

R. 244, ll. 3 – 8.

On redirect examination, Clarke said, other than appellant telling him he was attacked by five men, there was no one else saying anything other than this was a "one-on-one" fight between appellant and the decedent. R. 244, ll. 13 – 17. Clarke also said he was getting other statements that corroborated what the Cullers told him had occurred. R. 246, ll. 5 – 15. The following then occurred in redirect examination of Clarke by the solicitor:

> Q: *And you were here in opening statements, correct?*
>
> *A:* *Yes.*

---

[3] Miranda v. Arizona, 384 U.S. 436 (1966).

Q: Is that the first time you heard that story?

A: No. Oh, that story?

Q: Yes, the story that he gave about -- in opening statements?

MS. ZMROCZEK: Your Honor, I object. Openings are not evidence, so.

THE COURT: Overruled.

BY MR. CATHCART:

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

A: Yes.

Q: And you also, by the time Mr. Geter came, turned himself in, knowing that the police were looking for him, this hand that has no other injuries but is covered in blood wasn't covered in blood by the time you got to it, correct?

A: It did not appear to be covered in blood when he came to me.

Q: The clothes on him that had what appeared to be blood on them, you collected, right?

A: Correct.

Q: Including this gray undershirt, correct?

A: Correct.

Q: *You confirmed that Clarence Stone was also a victim?*

A: I did.

Q: And you spoke with him [Stone] as well?

A: I did. I took a statement at his home.

Q: And he gave a statement of what occurred?

A: He did.

Q: *You saw him testify again today?*

A: I did.

Q: And was that exactly what he told you?

MS. ZMROCZEK: Objection, Your Honor. Improper vouching.

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

MR. CATHCART: Yes. We watched him just a few minutes ago.

THE COURT: Overruled.

BY MR. CATHCART:

Q: The same thing he told this jury happened to him is what he told you?

A: Seems absolutely consistent, correct.

Q: Thank you. No further questions.

MS. ZMROCZEK: I know. I will be very brief, Your Honor.

THE COURT: Go ahead.

RECROSS-EXAMINATION

BY MS. ZMROCZEK:

Q: Actually, it was not the first time you heard that story because Mr. Geter told you, right, when he turned himself in, that he was jumped by five people?

A: He said, It was like five dudes.

Q: Okay. Five dudes. So that is actually not the first time that you have heard that story in here in opening.

A: *What counselor asked me was what was discussed in trial today or in trial up to this point. And, no, that is not the first -- that would be the first time I heard that story.*

Q: Okay. Let me make it more clear. The first time you heard about Robert Geter being attacked was when he turned himself in six hours after Mr. Lewis had expired, correct?

A: No, I never heard he had been attacked.

R. 247, l. 4 – 249, l. 23. (emphasis added).

Clarke repeated on re-cross examination that "what y'all are putting together as defense, was that the first time I heard it that way. Yes, that was the first time I heard it since I been in court. The only thing Mr. Geter told me was it was like five dudes." R. 250, ll. 9 – 16.

Discussion

It was improper for the solicitor to ask Investigator Clarke if the defense's opening statement was the first time he heard the defense scenario or narrative of what occurred. Clarke was a fact witness and should not have been allowed to draw legal conclusions about the evidence or vouch for the consistency or veracity of one of one side or the other. This error was highly unusual since it seems a solicitor would know better, and it was extremely prejudicial.[4]

In State v. Westmoreland, 421 S.C. 410, 807 S.E.2d 701 (Ct.App.2017), this Court (Thomas, J., Lockemy, C.J., and Huff, J.) held that the trial court erred by allowing the coroner to testify he determined the manner of death was a homicide because it was improper opinion testimony by a lay witness in violation of Rule 701(a), SCRE. Westmoreland's defense was that he accidentally hit the victim with his car. Therefore, the coroner's opinion that the manner of death was a homicide excluded Westmoreland's accident defense as being viable, and it was

[4] Further, once these fundamental testimonial errors were elicited the state defense counsel cannot be blamed for her attempt to attack or clarify the investigator's testimony. In this case, as seen, Investigator Clarke just doubled down on his testimony that this was the trial was the first time he had heard this self-defense story, and that Stone, the living victim, conversely had been consistent.

therefore highly prejudicial. This Court found that the error was not harmless as to Westmoreland's murder conviction.

Similarly, in State v. Andrews, 424 S.C. 304, 818 S.E.2d 227 (Ct.App. 2018), an EMT paramedic testified that the victim was shot on the porch of Andrew's house. This went against the heart of Andrew's defense that he shot the victim while the victim was inside Andrew's house when the victim refused to leave. This Court found this was also an improper opinion testimony by a lay witness, and it reversed. See also State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001) (conclusion by police officer that the victim was riding his bike when he was shot exceeded the scope of a crime scene processor's expertise, and it was highly prejudicial to the defense of self-defense.)

Again, Investigator Clarke's conclusion that the first time he heard the defense's "story" of what happened that night was during defense counsel's opening argument was highly improper. Given the *context* of the solicitor's examination it was an opinion that the self-defense case was inconsistent with the corroborated evidence, and that self-defense was an invention. It was a fabrication of the defense attorney.

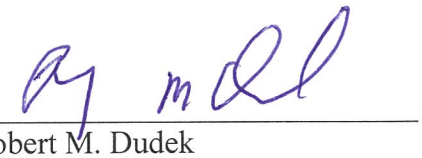
Further, Investigator Clarke should not have been allowed to vouch for Stone's testimony in the manner the solicitor asked him to do in this case. Again, Clarke was a fact witness, and him signaling his belief that Stone was credible and consistent was error. That opinion from a homicide investigator that the self-defense case was essentially a fabrication was highly prejudicial, and it was not harmless. Neither a solicitor nor a prosecution witness can vouch for the credibility of one party as it invades the province of the jury and places the government's prestige behind a witness.

The testimony of any witness is improper bolstering if: (1) the witness directly states an opinion about the victim's credibility, (2) the sole purpose of the testimony is to convey the witness's opinion about the victim's credibility, or (3) there is no way to interpret the testimony other than to mean the witness believes the victim is telling the truth. Chappell v. State, Op. No. 5704, Shearouse's Adv. Sh. #1, at p. 79 (January 2, 2020) *citing* Briggs v. State, 421 S.C. 316, 325, 806 S.E.2d 713 (2017); State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011); State v. McKerley, 397 S.C. 461, 465, 725 S.E.2d 139, 142 (2012). See, also, State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013); Gilchrist v. State, 350 S.C. 221, 565 S.E.2d 281 (2002).

To put it mildly, it was highly unusual for a solicitor to use his chief homicide investigator in a case to testify he had heard the opening statement of the defense, and that was the first time he had ever heard that version of what occurred from the defense. Nothing could be more damaging to the credibility of a defendant. Further, to have the chief investigator vouch for Stone's credibility in a self-defense case, where the Supreme Court and this Court have an admirable history of allowing a defendant's self-defense case to be determined by a jury of his or her peers -- without undue interference or unseemly tactics -- should be, respectfully, condemned. Appellant should be granted a new trial since the solicitor purposefully used the chief homicide investigator to convey to the jury that the defense was a belated fabrication of counsel, and that the living victim was conversely totally consistent, and therefore credible.

CONCLUSION

By reason of the foregoing arguments, appellant's convictions should be reversed, and this case remanded to Richland County Court of General Sessions for new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 7th day of May, 2020.

CERTIFICATE OF COUNSEL

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

May 7, 2020.

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