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In the

Supreme Court of Virginia

At Richmond

Record No. 190016

GEORGE TREVON WATSON-SCOTT,

Appellant,

– v. –

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

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NATURE OF THE CASE AND MATERIAL PROCEEDING BELOW

On June 15, 2017, Mr. Watson was tried, without a jury, on an allegation of second-degree murder, in violation of Va. Code § 18.2-32. J.A. 233. This is an appeal from the Court of Appeals ruling affirming the City of Richmond Circuit Court ruling on June 15, 2017 finding the appellant guilty of second-degree murder, and his sentence of 40 years with 16 years suspended, as imposed on September 11, 2017 by the Hon. Bradley Cavedo. J.A. 233, 293.

The appellant filed a Motion to Set Aside the Verdict which was denied on September 11, 2017. J.A. 237-242, 293. The appellant filed a timely notice of his appeal to the Court of Appeals on September 21, 2017. J.A. 297. On December 4, 2018, the Court of Appeals issued an unpublished opinion upholding the trial court's verdict. J.A. 350. The appellant filed his notice and petition for appeal to the Virginia Supreme Court on January 3, 2019.

ASSIGNMENTS OF ERROR

I. The Court of Appeals erred in affirming the trial court's murder conviction of appellant where the element of malice was absent because there was no person or persons against whom a malicious intent was held. [Issue preserved at J.A. 152, 170-172, 237].

II. The Court of Appeals erred in affirming the trial court's murder conviction of appellant because the perpetrator did not hold a malicious intent towards the decedent and the doctrine of transferred intent was not implicated. [Issue preserved at J.A. 170-172, 237].

STATEMENT OF FACTS

On October 9, 2016, Carmella Winston was sitting in a parked car when she was fatally struck by a bullet fired from nearly four hundred feet away. J.A. 38, 121. No argument preceded the incident and only one weapon was fired. J.A. 62, 85.

Four eyewitnesses testified at trial: Shameek Massey, Kenneth Moore, Jean Redwood, and Jewel Henry. J.A. 36, 45, 56, 82. Shameek Massey and Kenneth Moore were located approximately twenty to twenty-five feet behind the shooter. J.A. 70-71, 78, 82. Jean Redwood and Jewel Henry were located near the decedent, which was approximately four hundred feet in front of the shooter. J.A. 37, 45-46, 121. Ms. Redwood was sitting in the car with the decedent at the time of the shooting. J.A. 37. Ms. Henry had recently exited the vehicle and was walking away from the location of the shooting. J.A. 45-46.

Prior to the incident, Ms. Redwood, Ms. Henry, and the decedent sat in a parked vehicle talking for approximately five minutes. J.A. 36. Neither Ms. Redwood nor Ms. Henry saw anyone in the area during that time. J.A. 41, 49.

Immediately after the shooting, Ms. Redwood exited her vehicle and stood in the middle of the road. J.A. 38. She did not see anyone in the area. J.A. 38, 40-42.

Neither Ms. Massey nor Mr. Moore, who were positioned behind the shooter, observed anyone in the direction of the gunfire.[1] J.A. 62, 85-86.

There was no evidence presented at trial suggesting that the shooter knew the decedent, that the decedent was visible from the shooter's location, or that the decedent was an intended target of the shooting.

STANDARD OF REVIEW

I. Whether the Court of Appeals erred in affirming the appellant's conviction where malice was lacking because there was no person or persons against whom a malicious intent was held presents a mixed question of law and fact. Whether malice requires an intention, held against another, is a question of law and is reviewed *de novo*. *Timbers v. Commonwealth*, 28 Va. App. 187, 193 (1998) ("We review *de novo* questions of law and the trial court's application of defined legal standards to the particular facts of a case"). Whether the evidence in the present case sufficiently established the existence of malice is a question of fact, and "the evidence and all

[1] Ms. Massey and Mr. Moore observed two men in a parked vehicle directly in front of Mr. Massey's car. J.A. 70, 85. However, that car and its occupants were located behind the shooter and in the opposite direction of the line of fire. J.A. 70-71.

reasonable inferences fairly drawn therefrom must be viewed in the light most favorable to the Commonwealth." *Tuggle v. Commonwealth*, 228 Va. 493 (1984).

II. Whether the Court of Appeals erred in affirming the appellant's conviction where the perpetrator did not hold a malicious intent towards the decedent and the doctrine of transferred intent was inapplicable presents a mixed question of law and fact. Whether an intended target is a prerequisite to the doctrine of transferred intent is a question of law. "[W]e review the trial court's statutory interpretations and legal conclusions *de novo*." *Sink v. Commonwealth*, 28 Va. App. 655, 658 (1998). Whether the particular facts of the present case implicate the doctrine of transferred intent is a question of fact. "[A]n appellate court must review the circuit court's findings of historical fact only for clear error, and the appellate court must give due weight to inferences drawn from those factual findings." *Commonwealth v. Redmond*, 264 Va. 321, 324 (2002).

ARGUMENT

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S MURDER CONVICTION OF APPELLANT WHERE THE ELEMENT OF MALICE WAS ABSENT BECAUSE THERE WAS NO PERSON OR PERSONS AGAINST WHOM A MALICIOUS INTENT WAS HELD.

The Court of Appeals erred in upholding the trial court's conviction of Mr. Watson because the element of malice was not demonstrated by the Commonwealth.

"Without malice there cannot be murder." *Coleman v. Commonwealth*, 184 Va. 197, 201 (1945). Malice encompasses a requisite intention, held against another, which is lacking in the present case. Accordingly, Mr. Watson could not be convicted of any homicide offense greater than manslaughter.

A particularly well-known example of second degree murder is demonstrated wherein "a workman throws a stone, or a piece of timber from a house, in a populous city, into the street, *where he knows people are passing*, and gives them no warning, and kills a man." *Whiteford v. Commonwealth*, 27 Va. 721, 724-25 (1828) (emphasis added). Significantly, this example requires that the accused know that there are people in the street below. This critical fact would not have been included in the Virginia Supreme Court's fictitiously constructed demonstration of law if it were surplus language.

"Implied malice is evidenced by any deliberate, cruel act committed *by one person against another* […]." *Davidson v. Commonwealth*, 167 Va. 451, 455 (1936) (emphasis added). "Malice is that state of mind which results in the intentional doing of a wrongful act *to another* without legal excuse or justification […]. Malice may be inferred from any deliberate willful and cruel act *against another*, however sudden." *Rhodes v. Commonwealth*, 41 Va. App. 195, 199 (2003) (emphasis added). *See also, Williams v. Commonwealth*, 13 Va. App. 393, 398 (1991); *Canipe v. Commonwealth*, 25 Va. App. 629, 642 (1997). It is intuitive that for an intentional

act to be deemed cruel, it must be directed at a lifeform. It would be implausible to consider an inanimate object the victim of cruelty.

The Commonwealth failed to introduce evidence from which it could be inferred that the culprit knew anyone was present in the direction of the shooting. Unlike the hypothetical example in *Whiteford*, there was no evidence that the incident occurred in a densely populated area or that the shooter had knowledge that anyone was present.

Ms. Redwood testified that she sat in her parked car for approximately five minutes prior to the shooting and did not see anyone around. J.A. 36, 41. After the shooting, Ms. Redwood got out of her vehicle and stood in the middle of the street and, again, did not see anyone. J.A. 38, 40. Ms. Henry, who also sat in the parked car for approximately five minutes, did not see anyone in the area. J.A. 49. No one was observed fleeing from harm's way by any witness.

The only people Mr. Moore observed during the shooting were two men sitting in a parked vehicle, Shameek Massey and the shooter. J.A. 62. Mr. Moore, Ms. Massey and the two men were all located behind the perpetrator, who shot in the opposite direction of their location. J.A. 71. No one was observed by Mr. Moore in the direction that the perpetrator was shooting. J.A. 71. Corroborating Mr. Moore's account, Shameek Massey also testified that she did not see anyone in the direction of the shooting. J.A. 86.

The Court of Appeals held that "a rational trier of fact could have found that when appellant fired a deadly weapon multiple times up St. James Street he was attempting to shoot a specific person—*i.e.*, the man with a bike who had been walking and talking with him just a minute before." J.A. 353. This proposition does not reasonably flow from the evidence. The first fallacy of this contrived interpretation is the logistical obstacle of how the shooter and his companion, who were walking side-by-side, became separated by such a great distance that Mr. Moore could not see the companion when he got out of his car. J.A. 61. Additionally, had the second man traveled such a distance up Saint James Street, he would have been visible to Ms. Redwood when she exited her vehicle immediately after the shooting. J.A. 38, 40-42. There was no argument preceding the shooting to suggest a sudden shift from companionship to violence. J.A. 62, 85. The testimony and physical evidence at trial established that the shooter was standing on the sidewalk in a pathway that ran perpendicular to Saint James Street. J.A. 71-72, 78, 84. After the shooting, the perpetrator turned left and departed using this pathway. *Id*. In all likelihood, moments before the shooting, the shooter's companion departed using the same pathway. This interpretation accounts for the companion being visible to Mr. Moore a minute before the shooting, but never becoming visible to Ms. Redwood or Ms. Henry. J.A. 38, 40-42, 49, 62, 85-86. Given that the two came from the same direction together and walked in the same

direction together, it is logical for them to also depart in the same direction as each other. The quandary of the second man "just disappear[ing], poof, mid air" only arises if trying to force a contrived interpretation of the evidence in which he is on Saint James Street at the moment of the shooting. J.A. 174, 353. Indeed, this would be nonsensical. There is no plausible explanation for the how the unidentified second man could be located between Mr. Moore and Ms. Redwood during the shooting, but not be seen by anyone either during or after the shooting. The more logical interpretation is that the second man departed using the perpendicular pathway prior to the shooting.

There was no evidence from which the factfinder could infer that the culprit committed an intentionally cruel act towards another. While the shooter's conduct was certainly gross and culpable, without a person against whom the conduct was directed, there is no malice. Accordingly, Mr. Watson's conviction should be reduced to an offense no greater than manslaughter.

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S MURDER CONVICTION OF APPELLANT BECAUSE THE PERPETRATOR DID NOT HOLD A MALICIOUS INTENT TOWARDS THE DECEDENT AND THE DOCTRINE OF TRANSFERRED INTENT WAS NOT IMPLICATED.

The Court of Appeals erred in upholding the trial court's conviction of Mr. Watson because there was no factual basis implicating the doctrine of transferred

intent. There was no evidence suggesting that the decedent was an intended victim and no such claim was argued by the Commonwealth. Since the shooter lacked malice towards the decedent, the doctrine of transferred intent must be relied upon to sustain a conviction for second degree murder. It is fundamental that a culprit must hold the requisite intention towards an intended party before that *mens rea* can be transferred to the harmed party. The Commonwealth failed to prove that the perpetrator held the requisite mental state towards another and, therefore, there was no intention to transpose to the decedent.

"Under the common law doctrine of transferred intent, if an accused attempts to injure one person and an unintended victim is injured because of the act, the accused's intent to injure the intended victim is transferred to the injury of the unintended victim, even though this wounding was accidental or unintentional." *Crawley v. Commonwealth*, 25 Va. App. 768, 773-74 (1997) (citations omitted). "The doctrine of transferred intent permits a fact finder to transpose a defendant's criminal intent to harm an intended victim to another unintended, but harmed, victim." *Blow v. Commonwealth*, 52 Va. App. 533, 541 (2008).

The discussion from the previous assignment of error regarding the absence of a person in the perpetrator's line of fire is equally relevant to the present analysis and is hereby incorporated by reference.

There were no further circumstances from which it could be inferred that the perpetrator's actions were directed at anyone. Mr. Moore testified that he did not hear arguing prior to the shooting. J.A. 62. Nor did he hear shots fired by anyone other than the perpetrator. J.A. 62. No one was observed fleeing from harm's way. Had an intended target had been present, one would expect that person to either return fire or run for shelter, neither of which occurred. The shooter did not say anything prior to or during the incident. J.A. 60. After the gunfire ended, "an [*sic*] F-word came out of his mouth" but, absent pure speculation, this testimony does not portray a scene wherein the vulgarity is directed at anyone. J.A. 60. To the contrary, when viewed in conjunction with the testimony that no one was in the area, the 'F-word' seems most consistent with the shooter muttering to himself after the incident, possibly even as a direct response to hearing Ms. Redwood's windshield shatter.

Mr. Moore's account was corroborated by Ms. Massey, who testified that the only gunshots she heard were fired by the perpetrator and that she did not hear any arguing. J.A. 85.

It is the Commonwealth's burden to prove, beyond a reasonable doubt, that there was an intended target of the perpetrator's purported malice prior to such an intention being transferred to the deceased. There was no evidence suggesting the existence of an intended target, rendering the doctrine of transferred intent inapplicable. Nor was there any evidence that the perpetrator possessed a direct

malicious intent towards the decedent. Accordingly, there was insufficient evidence upon which any reasonable trier of fact could find malice and Mr. Watson's conviction should be reduced to an offense no greater than manslaughter.

CONCLUSION

For the foregoing reasons, Mr. Watson urges this Honorable Court to reduce his conviction to an offense no greater than manslaughter and remand the case to the trial court for re-sentencing.

Respectfully submitted,
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CERTIFICATE

I hereby certify that:

1. On August 7, 2019, Appellant's Opening Brief and Appendix were filed electronically via the court's VACES system and hand delivered to the court. This same date, a copy was sent via email to:

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2. Counsel for the appellant requests oral argument.

3. Counsel for the appellant is court-appointed.

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