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## Criminal Law - The Use of Transferred Intent in Attempted Murder, a Specific Intent Crime: *State v. Gillette*

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# CRIMINAL LAW—The Use of Transferred Intent in Attempted Murder, a Specific Intent Crime: *State v. Gillette*

## I. INTRODUCTION

In *State v. Gillette*,<sup>1</sup> a case of first impression in New Mexico, the New Mexico Court of Appeals upheld a conviction for attempted murder where the specific intent to kill was directed at someone other than the actual victim.<sup>2</sup> The *Gillette* court applied the common law doctrine of transferred intent,<sup>3</sup> rather than requiring specific intent, and upheld the sufficiency of transferred intent to convict Gillette of attempted murder.<sup>4</sup> This Note discusses the court's rationale in light of the nature of attempt liability and the underlying principles of transferred intent.

## II. STATEMENT OF THE CASE

On February 29, 1983, an anonymous person left a package at Kathleen's<sup>5</sup>

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1. *State v. Gillette*, 102 N.M. 695, 699 P.2d 626 (N.M. Ct. App. 1985).

2. *Id.* at 705, 699 P.2d at 636; Justice Donnelly delivered the opinion of the Court, to which Justice Hendley dissented. *Id.* at 697, 706, 699 P.2d at 628, 637.

3. See *infra* Section III for discussion of transferred intent.

4. *Gillette*, 102 N.M. at 705, 699 P.2d at 636.

5. *Id.* at 698, 699 P.2d at 629, n. 1. On the court's own motion Kathleen and her family were referred to by first name only. The charges against Gillette arose out of a bizarre and tangled scenario. *Id.* Gillette met Kathleen and her family in California in August of 1980. *Id.* He became a boarder in their home. *Id.* Kathleen was living with her three children, including D.M., age 12. *Id.* D.M. testified that Gillette shared a room with him and made sexual advances to him. *Id.* D.M. also testified that he initially resisted these advances, but later submitted to Gillette. *Id.* In August 1981, Kathleen moved her family to Albuquerque. *Id.* Gillette moved with the family and continued to live in their home. *Id.* D.M. testified that he and Gillette continued their sexual activity after the move to New Mexico until April 1982. *Id.*

Kathleen discovered that Gillette had sexually propositioned her older son, and asked Gillette to move out of her home. *Id.* Gillette left, but was allowed to visit D.M. until Kathleen decided that Gillette and D.M. were spending too much time together. *Id.* Kathleen forbade Gillette from seeing D.M. *Id.* Gillette, however, would secretly come to visit D.M. approximately once per week and spend the night with D.M. *Id.* Sexual activity would occur between Gillette and D.M. during these visits. *Id.*

In the latter part of November 1982, a fire occurred in the attic of Kathleen's house. *Id.* The evening of the fire, Gillette and D.M. discussed the family's possible move to Australia, due to Kathleen's recent engagement and plans to move the family there. *Id.* Later that night D.M. was awakened and his mother told him that someone had started a fire in the house. *Id.* Gillette had left sometime earlier. *Id.* Arson investigators found evidence of arson in the garage. *Id.* at 699, 699 P.2d at 630. A witness identified Gillette as having purchased a container of the same brand of fuel as was found in Kathleen's home. *Id.* Gillette was charged with burglary arising from his unlawful entry of Kathleen's home and arson resulting from the fire in the attic. *Id.*

workplace containing a can of poisoned Dr. Pepper.<sup>6</sup> Kathleen, suspicious of its flavor,<sup>7</sup> asked two co-workers, Erdmann and Westbrook, to taste the Dr. Pepper.<sup>8</sup>

Gillette was later arrested and tried in Bernalillo County District Court for the attempted murder of Kathleen, Erdmann, and Westbrook.<sup>9</sup> The district court applied the doctrine of transferred intent and convicted Gillette of attempted first degree murder on all counts.<sup>10</sup> The court determined that because Gillette left a poisoned drink for Kathleen intending to kill her, his intent to kill was transferred to others who ingested the poison.<sup>11</sup> The court concluded that Gillette's intent followed the container of poison and, therefore, he was guilty of attempted murder of each individual who drank from the container.<sup>12</sup>

Gillette appealed the convictions for the attempted murder of Erdmann and Westbrook.<sup>13</sup> He argued that attempted murder is a specific intent crime<sup>14</sup> and that there was no evidence to show that he had the specific intent necessary to support a conviction of attempted murder of Erdmann or Westbrook.<sup>15</sup> The state argued that Gillette's convictions should be upheld based on the doctrine of transferred intent.<sup>16</sup> Under the state's theory, Gillette's intent to murder Kathleen by deliberation and premeditation transferred to Erdmann and Westbrook when they drank from the poisoned Dr. Pepper.<sup>17</sup> The New Mexico Court of Appeals agreed with the state's theory, upholding the convictions on the ground that Gillette's intention to murder Kathleen transferred to the foreseeable victims of his act.<sup>18</sup>

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6. *Id.* Kathleen testified that several months after the fire, when she arrived at work at Presbyterian Hospital, a package containing a Dr. Pepper had been left for her by an anonymous person. *Id.*

7. When Kathleen tasted the Dr. Pepper, she thought it tasted terrible. *Id.*

8. *Id.* Erdmann and Westbrook also drank from the container and thought something had been added to the Dr. Pepper. *Id.* They noticed that the bottom of the container had been tampered with and resealed. *Id.* The police were notified. *Id.*

Chemical tests established that pentobarbital had been mixed with the beverage. *Id.* Pentobarbital can cause death if taken in sufficient quantities. *Id.* It is commonly used for death by injection. *Id.* At the time the pentobarbital was discovered in the Dr. Pepper, Gillette was employed at an animal clinic, where he had access to sodium pentobarbital. *Id.* Sodium pentobarbital turns into pentobarbital if mixed with Dr. Pepper. *Id.* Evidence showed that Gillette had worked as a paramedic and was experienced in administering injections. *Id.*

9. *Id.* at 695, 699 P.2d at 626.

10. *Id.* at 699, 699 P.2d at 630; there is no "attempted first degree murder" statute. The combination of the attempt to commit a felony statute and the murder statute form the basis of the charge of attempted first degree murder. See N.M. STAT. ANN. §§ 30-28-1 and 30-2-1 (1978).

11. *Gillette*, 102 N.M. at 695, 699 P.2d at 626.

12. *Id.*

13. *Id.*

14. See *infra* note 23, for an example of a specific intent crime.

15. *Id.* at 703, 699 P.2d at 634.

16. *Id.*

17. *Id.* at 705, 699 P.2d at 636.

18. *Id.*

## III. DISCUSSION AND ANALYSIS

To effectively analyze the *Gillette* court's reasoning, it is necessary to first address the nature of attempt liability, and the underlying principles of transferred intent. This Note will then discuss the New Mexico Court of Appeals' application of these principles to *Gillette*.

## A. Attempt Liability

A charge of criminal attempt has two elements: a specific intent to commit a particular crime, and an act done in furtherance thereof but which fails to effect its commission.<sup>19</sup> There can be no conviction for criminal attempt without proof of a specific intent to effect the particular criminal consequence which constitutes the completed crime.<sup>20</sup> Thus, commission of an act that creates a probability of death or great bodily harm does not necessarily allow the inference that the actor had the intent to kill. If the crime of attempt could be accomplished by an act alone without a specific intent, then the law would convict an individual for intending to do an unintended act, a logical impossibility.<sup>21</sup>

Central to an understanding of attempt liability is an understanding of intent. It is, therefore, important at this juncture to address the two types of intent, specific and general. Specific and general intent are difficult terms to apply due primarily to the inherent ambiguity of the definition of specific intent and general intent. Often the characterization of a particular crime as one of specific intent is made by the presence of words in the statutory language describing psychological factors, such as intent or malice.<sup>22</sup> When a statute refers to the defendant's intent to do some

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19. *People v. Neal*, 97 Cal. App. 2d 668, 671, 218 P.2d 556, 559 (1950); *See also* 40 C.J.S. *Attempts* § 68 (1944). N.M. STAT. ANN. § 30-28-1 (1978), provides in part that an "[a]ttempt to commit a felony consists of an overt act in furtherance of and with intent to commit a felony and tending but failing to effect its commission." N.M. STAT. ANN. § 30-28-1 (1978).

20. Note, *Criminal Attempts*, 41 HARV. L. REV. 821, 841-42 (1928); Specific intent required to constitute the crime will not be imputed or inferred. *State v. Thomas*, 127 La. 576, 53 So. 868 (1910); *Jones v. State*, 159 Ark. 215, 251 S.W. 690 (1923); *State v. Martin*, 119 S.W.2d 298 (Miss. 1938).

21. *Commonwealth v. Griffin*, 310 Pa. Super. 39, 456 A.2d 171 (1983). In those instances where the notion of transferred intent is an accepted doctrine of liability, the argument has been made that the use of transferred intent in the criminal law be limited to those cases where the unintended victim was severely harmed or injured. Prosser, *Transferred Intent*, 45 TEX. LAW. REV. 650, 656. *See also* *People v. Williams*, 102 Cal. App. 3d 1018, 162 Cal. Rptr. 748 (1980) (transferred intent has no applicability to cases where the victim is not injured).

Analytically, reliance upon harm to determine culpability makes little sense. It does, however, suggest a general dissatisfaction with the use of transferred intent. The courts find it necessary to seize upon the element of harm in order to justify the use of transferred intent. This suggests that if transferred intent is to be used in attempt cases, it should be used only in those instances where the unintended victim suffered harm. *Gillette* is not such a case.

22. N.M. Unif. Jury Instruction—Criminal 1.50, Add. 1, *Lazy Lawyer's Guide to Criminal Intent in New Mexico* (1978).

act beyond the prohibited *actus reus*, the crime is deemed to be one of specific intent.<sup>23</sup> When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a particular consequence beyond the prohibited *actus reus*, the intent involved is deemed to be a general criminal intent.<sup>24</sup>

### B. Underlying Principles of Transferred Intent

Transferred intent has the effect of blurring the distinction between specific intent and general intent. It is the common law doctrine which states that one's criminal intent follows the corresponding criminal act to its unintended consequences.<sup>25</sup> If the defendant intends a particular consequence, he is guilty of a crime of intention as to that consequence even though his act takes effect upon someone other than the desired victim.<sup>26</sup> A legal fiction transfers intent from the person planned to be injured to another.<sup>27</sup> The defendant is then treated as though he had intended to harm the actual victim when, in fact, he did not have any such purpose as to that person, but was only reckless.<sup>28</sup> Attempt is a crime that can only be committed intentionally.<sup>29</sup> Therefore, it requires intention as to a given consequence, not merely recklessness.<sup>30</sup>

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23. *Id.* Attempt, for example, is considered to be a specific intent crime, for within the language defining the crime is contained the phrase "with intent." See *supra* note 19, N.M. STAT. ANN. § 30-28-1.

24. N.M. Uniform Jury Instruction—Criminal 1.50, Add. 1, *Lazy Lawyer's Guide to Criminal Intent in New Mexico*, (1978). For example, aggravated assault, is a general intent crime; the actor need only intend to cause bodily injury to another with a deadly weapon. See N.M. STAT. ANN. § 30-3-2 (1978).

25. *People v. Mathews*, 91 Cal. App. 3d 1018, 154 Cal. Rptr. 628 (1979). See generally W. LAFAYE & A. SCOTT, BASIC PREMISES OF CRIMINAL LAW, §§ 34-35, at 243 (1972).

26. G. WILLIAMS, CRIMINAL LAW, § 46, at 126 (1961).

27. *Id.*

28. *Id.* For example, if D fires a gun at a duck and hits P, his act in regard to P is considered reckless. However, if he is shooting at another human being, O, his act in regard to P is regarded as intentional. *Id.* at § 48, at 134. Actually D is reckless in each case. However, the application of the transferred intent doctrine requires that in the second case, there is attempted murder of O. *Id.* D has the *mens rea* of murder (of O), and commits the *actus reus* of murder (of P); the difference in victim is immaterial. *Id.* This reasoning results in a collapse of the distinction between intentional behavior and reckless behavior. With intentional behavior, the consequence is desired. *Id.* § 24, at 53. With reckless behavior, the consequence is foreseen as possible or probable, but not desired. *Id.* *Gillette* is such a case. *Gillette's* single act toward Kathleen was intentional. The consequence of that act as to Erdmann and Westbrook was not intentional, but reckless.

29. G. WILLIAMS, CRIMINAL LAW, § 22, at 51 (1961).

30. *Id.* A single act may be intentional as to one consequence and reckless as to a second. *Id.* § 24, at 57. For example, a person who drives at an excessive speed through a school zone just when school is letting out, realizing that there is great danger of hitting a child, intentionally commits the offense of speeding. "If, however, he kills someone, the death will be caused recklessly, not intentionally, for the death, unlike the mode of driving, is not intentional." *Id.* § 24, at 58. In *Gillette*, *Gillette's* single act toward Kathleen was intentional. The consequence as to Erdmann and Westbrook was reckless.

### C. The Court's Rationale

In *Gillette*, the defendant intended to kill and in fact, attempted a killing.<sup>31</sup> Although the result as to Kathleen was intended, the result as to Erdmann and Westbrook was not.<sup>32</sup> *Gillette* was not convicted for attempting to kill in the abstract; he was convicted for the attempted murder of Erdmann and Westbrook.<sup>33</sup> It should, therefore, be necessary to establish specific intent in relation to the attempted murder of Erdmann and Westbrook. *Gillette* may have been guilty of attempted murder, but not of an attempt to murder Erdmann and Westbrook.<sup>34</sup>

In support of its use of transferred intent in sustaining the attempted murder convictions, the *Gillette* court looked to cases where courts applied transferred intent to uphold convictions for the murder of unintended victims.<sup>35</sup> In those cases, murder convictions were upheld even though the specific intent to kill was directed at someone other than the actual victim.<sup>36</sup> The *Gillette* court analogized that an attempted murder conviction may be upheld on the same grounds,<sup>37</sup> and reasoned that where one intends to assault or kill a certain person, and by mistake or inadvertence assaults or kills another in his stead, the intent is transferred from the party who was intended to the actual victim.<sup>38</sup> The court stressed the significance of the fact that danger to Erdmann and Westbrook was real

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31. *Gillette*, 102 N.M. at 703, 699 P.2d at 634.

32. *Id.* The opinion states that no specific intent to murder Erdmann and Westbrook was shown.

33. *Id.*

34. *Id.* at 706, 699 P.2d at 637.

35. *Id.* at 703, 699 P.2d at 634. See *State v. Hamilton*, 89 N.M. 746, 557 P.2d 1095 (1976) (upheld two murder convictions for death of intended as well as unintended victim); *State v. Carpio*, 27 N.M. 265, 199 P. 1012 (1921) (shooting); *Coston v. State*, 144 Fla. 676, 198 So. 467 (1940) (poisoning).

36. *State v. Hamilton*, 89 N.M. 746, 557 P.2d 1095 (1976); *State v. Carpio*, 27 N.M. 265, 199 P. 1012 (1921); *Coston v. State*, 144 Fla. 676, 198 So. 467 (1940).

37. *Gillette*, 102 N.M. at 704, 699 P.2d at 635. The court offered no policy reasons for concurring with the cases cited in note 35 *supra*.

38. *Id.* The *Gillette* court cited *People v. Wells*, 145 Cal. 138, 140, 78 P. 470, 471 (1904) in support of the use of transferred intent. In *Wells*, the court determined that transferred intent may be applied where one intends to assault or kill a certain person and by mistake kills or assaults another in his stead. *Id.* Literally speaking, however, the "mistaken identity" situation is not a case of transferred intent, because the target which the defendant actually aimed at is the victim. See *People v. Williams*, 102 Cal. App. 3d 1018, 162 Cal. Rptr. 748 (1980); W. LAFAVE & A. SCOTT, BASIC PREMISES OF CRIMINAL LAW, § 87, at 252-55 (1972). For example, if A shoots at B and harms or kills B, believing him to be C, A has the specific intent to shoot at B. His mistake as to B's identity does not negate the specific intent to shoot at B. There is no need to transfer any intent; the intent was clearly there. The *Wells* court, therefore, unnecessarily applied the doctrine of transferred intent. If one accepts this analysis, then the *Gillette* court's reliance on *Wells* was misplaced.

A true transferred intent situation would be presented where A shoots at B with the intent to harm B. A misses B and hits C, an innocent bystander. Here it is clear that A did not have the intent to harm C, but was merely reckless toward C. The latter example appears to be the situation in *Gillette*, supporting a charge of recklessness rather than one of attempted murder.

and was proof of Gillette's present ability to kill.<sup>39</sup> The court determined that it was of no consequence that none of the victims were harmed, since the gravamen of the offense of attempted murder is the felonious intent manifested in an attempt to poison.<sup>40</sup> The court concluded that since Gillette left a poisoned drink for Kathleen intending to kill her, his felonious intent to kill transferred to others who foreseeably ingested the poison.<sup>41</sup>

#### IV. IMPLICATIONS

The implications of applying transferred intent to attempted murder, a specific intent crime, are substantial.<sup>42</sup> Gillette's conviction allows an attempt conviction of an individual without proof of specific intent, which is contrary to the very requirement of proof of specific intent in attempt crimes. If Gillette had the specific intent to murder Erdmann and Westbrook, the court would not have found it necessary to apply the doctrine of transferred intent. The court's use of transferred intent was an admission of the absence of Gillette's specific intent to kill Erdmann and Westbrook.

Whereas a finding of specific intent is necessary for a conviction of

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39. No law requires, however, that proof of the ability to kill is necessary to proving a specific intent to kill. There is no language in either § 30-28-1 or § 30-2-1 that speaks of ability to kill. N.M. STAT. ANN. §§ 30-28-1 and 30-2-1 (1978). Gillette's ability to kill could just as easily be proof of his recklessness toward Erdmann and Westbrook. However reckless Gillette's conduct may have been, without proof of a specific intent to commit the crime for which he was convicted, there should be no liability for criminal attempt. See *Gillette*, 102 N.M. at 706, 699 P.2d at 637 (Hendley, J., dissenting).

40. *Gillette*, 102 N.M. at 705, 699 P.2d at 636. See also *State v. Ready*, 110 S.C. 177, 96 S.E. 287 (1918) (the court held that the gravamen of the offense of attempted murder is the felonious intent manifested in an attempt to poison).

41. *Gillette*, 102 N.M. at 705, 699 P.2d at 636. Justice Hendley, in dissent, disagreed with the majority's application of transferred intent. He stated that a charge of attempt to murder will not support a conviction where the evidence shows that the injury to the unintended victim was accidental. *Id.* at 706, 699 P.2d at 637 (Hendley, J., dissenting). There was no evidence that Gillette was even aware of the existence of Westbrook and Erdmann. Therefore, the convictions should be reversed. *Id.* Hendley viewed the majority's decision as extending the doctrine of transferred intent beyond reasonable grounds. *Id.* Justice Hendley focused on the requirement of specific intent in an attempt crime rather than following the majority's analogy to murder. *Id.* He stated that if, without justification, one fires a shot at another with the intent to kill, and unexpectedly inflicts a non-fatal injury upon an unintended victim, he is guilty of an attempt to commit murder—but the attempt was to murder the person he was in fact trying to kill and not the person who was hit accidentally. *Id.* According to Justice Hendley, so far as the criminal law is concerned, there is no transfer of this intent from one to the other in order to support a conviction of an attempt to murder the unintended victim. *Id.*

42. The *Gillette* decision creates ambiguity in similar cases by disregarding the intent of the actor where exactness in requiring specific intent to be proven is mandated. This decision undermines a basic premise of American jurisprudence, consistency in applying the law. *Gillette* also permits the court to rewrite the law, an area reserved for the legislature, by ignoring the fundamental requirement of specific intent. The use of transferred intent in attempt crimes where no specific intent is proven as to the actual victim does not provide sufficient latitude for charges of lesser offenses.

attempted murder,<sup>43</sup> however reckless Gillette's conduct was, without a specific intent to murder Erdmann and Westbrook, he should not have been convicted for attempted murder. Conviction should not rest upon a presumption that if the actor intended to kill one person, he also intended to kill all others who were within the circle of danger. This expands liability for attempt where there is no foreseeability of the victims and where the defendant has no specific intent to kill. There is no evidence that Gillette was even aware of the existence of Erdmann and Westbrook.<sup>44</sup> He could not, therefore, have had the specific intent to kill them.

The *Gillette* decision reduces the state's burden of proof in attempt crimes. After *Gillette*, the state need only show a general criminal intent, rather than the previously required showing of specific intent, in order to get an attempt conviction. This shifts the burden of proof from the state to the defendant, who now bears a greater burden in proving his innocence.

## V. CONCLUSION

The New Mexico Court of Appeals in *State v. Gillette* applied the common law doctrine of transferred intent to uphold a conviction of attempted first degree murder, even though the specific intent to kill was directed at someone other than the actual victims.<sup>45</sup> The result of this decision in New Mexico criminal law is to negate proof of the actor's specific intent in criminal attempt, a specific intent crime. The *Gillette* decision expands liability for attempt where there is no foreseeability of the victims and where the defendant has no specific intent to kill. A defendant in New Mexico charged with an attempt crime now has a greater burden to bear, while the state has a lesser burden of proving only a general criminal intent, rather than specific intent.

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43. See *supra* note 18 and accompanying text. See also *supra* notes 28 and 29.

44. *Gillette*, 102 N.M. at 706, 699 P.2d at 637 (Hendley, J., dissenting).

45. *Id.* at 705, 699 P.2d at 636.