Supreme Court of Ohio Clerk of Court - Filed November 06, 2015 - Case No. 2011-2005

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
Appellee,	:	
-vs-	:	Case No. 2011-2005
JASON DEAN,	:	***Death Penalty Case***
Appellant	:	

ON APPEAL FROM THE CLARK COUNTY
COURT OF COMMON PLEAS
CLARK COUNTY, OHIO, CASE NO. 05 CR 0348

JASON DEAN'S MOTION FOR RECONSIDERATION

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Appellant Jason Dean requests that this Court reconsider the merits ruling of October 27, 2015, affirming both his convictions and death sentence. *State v. Dean*, Slip Opinion No. 2015-Ohio-4347. This request is made under Rule 18.02 of the Supreme Court Rules of Practice. The reasons for this motion are more fully set forth in the attached memorandum in support.

Respectfully Submitted,

/s Kathleen McGarry

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MEMORANDUM IN SUPPORT

For the reasons that follow, Appellant Jason Dean requests that this Court reconsider its decisions at to the First, Second and Third Propositions of Law.

Proposition Of Law No. I

THE DEATH SENTENCE IS INAPPROPRIATE AND DISPROPORTIONATE.

Dean argued that his death sentence was inappropriate and disproportionate. The Court found it to be both appropriate and proportionate. Dean, at ¶¶ 315-325.

The Court's emphasis on Dean's age in the analysis of whether the death sentence is appropriate is disturbing. Dean did not shoot at the porch on Dibert Avenue nor was his bullet the one that killed Titus Arnold. Yet he is the one facing execution. It was the gun in the hand of Josh Wade that inflicted the damage. Dean does not dispute that Wade was a teen at the time of the offenses and could not get the death penalty, but his juvenile status should not absolve him of the responsibility in the case. Nor should it cause Dean to bear more responsibility and pay for his life, because Wade could not be executed.

Revised Code 2929.05 requires the Court to do the following:

> Whenever sentence of death is imposed pursuant to sections 2929.03 and 2929.04 of the Revised Code, . . . the supreme court shall review upon appeal the sentence of death at the same time that they review the other issues in the case. The . . . supreme court shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases, except that *they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the*

> *offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate.* In determining whether the sentence of death is appropriate, . . . the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. They also shall review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury or the panel of three judges found the offender guilty of committing, and shall determine whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating factors. The . . . supreme court shall affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case. (emphasis added).

While the Court is to look at other cases to determine if the sentence is excessive and disproportionate, the actual weighing of aggravating circumstances and mitigating factors is an independent review, with an emphasis on what aggravating factors and mitigating circumstances are present in **THIS** case. That is because each death penalty case presents its own aggravating circumstance and mitigating factors.

Because each case should be independently reviewed, the Court's analysis is concerning as to the weighing of the mitigating factors in this case. As set forth in the Merit and Reply Briefs, (pp. 7-16, pp. 5-9 respectively) and acknowledged by the Court in the analysis, Dean grew up in a dysfunctional family. (*Dean*, at ¶320-321) There was mitigating evidence that weighed in favor of a life sentence. However, the Court strayed from the mandate to make an individual determination of aggravating

circumstances and mitigating factors to some sort of a sliding scale of mitigation. Because the Court has "upheld the death penalty for defendant's with backgrounds similar or worse than Dean's," Jason Dean cannot prevail on independent review. The Court also embraces the State's analysis:

> Moreover, as the state points out, there is no evidence that Dean suffered from sexual abuse, intellectual deficits or psychological impairment, which are often factors in many death penalty cases.
> *Dean*, at ¶321.

The Court seems to be saying that unless a defendant suffers from "sexual abuse, intellectual deficits or psychological impairment" that he is not entitled to a life sentence. While Appellant agrees that these are weighty factors in mitigation, the absence of one of those factors should not condemn a person to death.

The Court should grant reconsideration and weigh the aggravating circumstances and mitigating factors in this case, to determine if the death sentence is appropriate, and impose a life sentence.

Proposition of Law No. II

WHEN THE STATE FAILS TO INTRODUCE SUFFICIENT EVIDENCE OF PARTICULAR CHARGES, A RESULTING CONVICTION DEPRIVES A CAPITAL DEFENDANT OF SUBSTANTIVE AND PROCEDURAL DUE PROCESS IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 5, 9, AND 16 OF THE OHIO CONSTITUTION.

This Court rejected Dean's challenges to the sufficiency and manifest weight of the evidence for his convictions of (1) discharging a firearm into an occupied structure, (2) the attempted murder of four persons during the drive-by shootings,

and the aggravated murder of Arnold with prior calculation and design under R.C. 2929.04(A)(7). This Court also rejected Dean's challenges to the sufficiency of the evidence for his convictions of (1) the attempted robbery of Lyles, (2) the attempted murder of Lyles, and (3) the aggravated murder of Arnold as part of a course of conduct under R.C. 2929.04(A)(5). *State v. Dean*, ___Ohio St.3d ___, 2015-Ohio-4347, slip op. at 40-50 (2015).

In reaching this decision this Court goes against the principles set forth in *In re Winship*, 397 U.S. 358 (1970, which prohibit the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt. *See also State v. Adams*, 62 Ohio St. 2d 151, 404 N.E.2d 144 (1980); *State v. Miclau*, 167 Ohio St. 38, 146 N.E.2d 293 (1957); R.C. § 2901.05(A). In examining claims based upon insufficient evidence a reviewing court must ask whether, after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all of the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 316 (1979). *See also State v. Adams*, 62 Ohio St.2d 151, 153, 404 N.E.2d 144, 146; *Miclau*, 167 Ohio St. at 41. Here no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt, and as such Dean's convictions violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Jackson*, 443 U.S. at 316.

This Court's decision likewise erroneously assessed the manifest weight of the evidence in Dean's case. This inquiry is separate from the examination for sufficiency

of the evidence. This review must be directed toward a determination of whether there is substantial evidence upon which a jury could reasonably conclude that all of the elements have been proved beyond a reasonable doubt. *State v. Eley*, 56 Ohio St.2d 169, 172, 383 N.E.2d 132, 134 (1978); *Glasser v. United States*, 315 U.S. 60, 80 (1942). The evidence in Dean's case failed to afford a substantial basis of fact from which the facts at issue could reasonably be inferred, and therefore were also against the manifest weight of the evidence. *See United States v. Orrico*, 599 F.2d 113, 117 (6th Cir. 1979).

INSUFFICIENT EVIDENCE OF DRIVE-BY SHOOTING OFFENSES.

Dean was charged with two counts of knowingly "discharg[ing] a firearm at or into an occupied structure that is a permanent or temporary habitation of any individual" under R.C. § 2923.161(A)(1). Dean was also charged with four counts of attempted murder regarding the four individuals at 609 Dibert Avenue when the shooting occurred. These incidents allegedly occurred on April 12, 2005 on Dibert Avenue in Springfield, Ohio.

The State presented no reliable evidence that Dean was at the scene of this crime. The only witness to put Dean at the scene of that shooting was Crystal Kaboos, Dean's estranged girlfriend. Kaboos claimed that she was in the car with Dean and Wade. (Vol. 8, Tr. p. 1818). According to her account, Wade was driving, Dean was in the passenger seat, and she was sitting in the back of the car. (*Id*. at 1818-1819). Kaboos testified that as they drove down Dibert, Wade turned off the car lights, Dean

rolled down his window, and Wade and Dean began shooting out the passenger window. (*Id*. at 1820).

Kaboos has no credibility. Kaboos acknowledged that she had lied to the police multiple times, including times she told them that Dean had shot Titus Arnold and times she denied being in the car on Dibert. (Vol. 8, Tr. pp. 1837-1842). Also incredible was Kaboos' statement that although she remembered the car turning around and driving back down Dibert, she did not recall hearing any more gunshots because she was "just trying to block the noise out as much as possible 'cause the sound of it in the car was so overwhelming." (*Id*. at 1820). This was the *only* evidence presented to the jury that Dean was involved in the shooting on Dibert Avenue.

In rejecting Dean's sufficiency challenge, this Court relied on "other evidence" that showed Dean's involvement in the offenses. Slip Opinion, at ¶156. This included jail snitch Jason Manns' testimony that Dean said he "shot at people coming out of the house." *Id*. However Manns indicated that in return for his testimony the State had agreed to transfer him to another institution. (Vol. 5, Tr. pp. 2174-2175). He further indicated that while incarcerated with Dean, he had access to and had in fact reviewed Dean's discovery package which is "basically all the evidence they have against you for you to prepare for your defense." (*Id*. at 2177). The only other evidence cited by the Court was the fact that a witness thought the car used was a Riviera (like the car owned by Dean) and that evidence of two different types of shells (.25 and .40 caliber) was found at the scene.

This speculation ignores the testimony of the witnesses who were at the scene. Shanta Chilton testified that after hearing gunshots, she and the others in the house at that time went outside and saw the car come back down the street a second time. (Vol. 7, Tr. pp. 1624-1628). She testified that she saw a "white guy" in the driver's seat and he was the shooter. (*Id*. at 1628). She did not see anyone else in the car. (*Id*. at 1630, 1636). Devon Williams testified that when he saw the car come back the second time, he saw only one person in the car and that individual was not Dean. (Vol. 7, Tr. pp. 1684-1686). Williams further testified that he had previously identified Joshua Wade as the person he saw in the car at the time of the shooting. (*Id*. at 1696). As such there was no reliable evidence that Dean was ever at the location where the offenses occurred.

INSUFFICIENT EVIDENCE OF PRIOR CALCULATION AND DESIGN.

As the State conceded, Dean was not the principal offender, "actual killer" of Titus Arnold. Therefore, the only way Dean could be charged with the R.C. § 2929.04(A)(7) capital specification was if Dean possessed prior calculation and design to kill Titus Arnold. See, *State v. Taylor* (1993), 66 Ohio St.3d 295, syllabus. [1]

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[1] The fact that, pursuant to R.C. 2923.03(F), a defendant who aids and abets another in committing an offense "shall be prosecuted and punished as if he were a principal offender" and so may be convicted of aggravated murder under R.C. 2903.01(B) does not make the defendant "the principal offender" for purposes of imposing the death penalty under R.C. 2929.04(A)(7). Such a defendant will only be eligible for the death penalty if they acted with prior calculation and design. Id., at 307-08.

There is no bright-line test for determining prior calculation and design. *State v. Fears*, 86 Ohio St. 3d 329, 341, 715 N.E.2d 136, 149 (1999). Determinations must be made on the individual facts of each case. *Id*. The question this Court must consider is "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Taylor*, 66 Ohio St. 3d 295, 305, 612 N.E.2d 316 (1993) (citing *Jackson*, 443 U.S. at 319).

In support of its theory that Dean acted with prior calculation and design, the prosecution (again) relied on the testimony of Dean's estranged girlfriend, Crystal Kaboos. Kaboos testified that Dean told her:

> [T]hat the night when they went out to lure somebody out of the bar to rob them, that they was driving down the street; and they seen the individual, Titus Arnold, walking by his self. And they stopped the car and pulled their guns out and told him to lay on the ground, and Jason Dean said that Titus Arnold didn't lay on the ground, that he started to run. And Jason Dean tried to fire his weapon, but he had it on safety; so Josh Wade jumped out of the driver's seat and said to Titus Arnold that he had a bigger gun and shot Titus Arnold.

(Vol. 8, Tr. pp. 1831-1832). This was not, however, the story that Kaboos originally told police investigators. Kaboos acknowledged on direct examination that she originally told investigators that Dean had fired the shots that killed Titus Arnold. (Vol. 8, Tr. p. 1838). This was only one of many lies Kaboos told. As she also acknowledged, she lied to the police when she told them that she was not in the vehicle on Dibert Avenue at the time of the shooting. (Vol. 8, Tr. pp. 1837-1842).

Kaboos' version of the facts (based on Dean's alleged admissions to her) was also contradicted by other witnesses. Kari Epperson, Wade's cousin, witnessed the shooting. She testified that she saw a man get out of the driver's side of the car, run down the street and shoot a man twice. (Vol. 5, Tr. pp. 1192-1196). She further testified that she recognized the shooter as her cousin, Josh Wade. (*Id*. at 1197).

Terri Epperson, Kari's sister, also witnessed the events. She testified that she saw her cousin Josh Wade jump out of the driver's seat, run out to the middle of the street, fire two shots, and get back in the car. (Vol. 5, Tr. pp. 1220-1225). She further testified that she saw only one person get out of and then back into the car. (*Id*. at 1225).

In support of their theory that Dean had acted with prior calculation and design, the prosecution introduced the testimony of Jason Manns who testified that he had been incarcerated with Dean. (Vol. 5, Tr. p. 2175). According to Manns, Dean told him that he had "jumped out [of] the car and went to rob [Arnold]. Titus Arnold turned to run. His gun jammed, and Josh Wade jumped out [of] the car and shot two shots." (*Id*. at 2176). Manns indicated that in return for his testimony, the State had agreed to transfer him to another institution. (*Id*. at 2174-2175). Manns also indicated that while incarcerated with Dean, he had access to and had in fact reviewed Dean's discovery package which is "basically all the evidence they have against you for you to prepare for your defense." (*Id*. at 2177).

The prosecution also introduced the testimony of Kevin Bowshier, who acknowledged that he was snorting cocaine at his sister's house the night Titus Arnold

was shot. (Vol. 9, Tr. pp. 2249, 2256-2257). According to Bowshier, Dean and Joshua Wade came into the house and stated that they had "smoked and robbed" someone that evening. (*Id*. at 2250). On cross examination Bowshier acknowledged that he did not immediately report Dean's admission to the police, nor did he dispute the fact that it could have been a year or longer before he talked to the police about the incident. (Id. at 2258-2259).

In summary, the only evidence the prosecution submitted in support of its theory that Dean acted with prior calculation and design were his supposed admissions to three discredited witnesses. None of these witnesses were at the scene of the shooting. The witnesses who were at the scene, and who were outside on the street when the shooting occurred, did not see Dean.

In rejecting Dean's argument, this Court notes that Dean overlooks the testimony of Haile who was at the scene and testified she saw a tall man and a shorter man chasing the victim. Slip Opinion, at ¶169. However of the many individuals who were at the scene and testified about their observations, Haile is the only person who recalls seeing more than one individual involved in the altercation.

The Court also notes that Dean fails to mention Ronda Sions who testified she heard Dean and Wade talking about the murder. Slip Opinion, at ¶169. However the emphasis of the testimony of all the witnesses was that Dean and Wade were going to rob someone, not they were going out that night to kill someone. The evidence does not support a finding that Dean acted with prior calculation and design.

Dean's conviction for the R.C. § 2929.04(A)(7) specification was also against the manifest weight of the evidence. There was not substantial evidence presented at Dean's trial upon which the jury could have reasonably concluded that all of the elements have been proved beyond a reasonable doubt. *See Eley*, 56 Ohio St.2d at syl. There is simply no credible evidence upon which the jury could have determined that Dean killed Titus Arnold with prior calculation and design.

INSUFFICIENT EVIDENCE TO PROVE MINI MART ROBBERY.

Dean was charged with one count of "attempting or committing a theft offense" while having a deadly weapon on or about his person or under his control in violation of R.C. §2911.01(A). It was alleged that the attempted theft occurred at a Mini Mart in Springfield, Ohio.

No one claims that a theft ever occurred. The only evidence of an attempted theft came from Yolanda Lyles.

Lyles testified that she and Andre Piersol were sitting in her car when Dean approached the vehicle, spoke to Piersol, and offered to sell him some pills. (Vol. 6, Tr. pp. 1448-1450). Piersol declined and Dean walked away. (*Id*. at 1551). According to Lyles, Dean came around the corner sometime later, shouted "give me your money," and then immediately started shooting at them through the windshield of her car. (Vol. 6, Tr. p. 1455-1456).

In rejecting Dean's argument that there was insufficient evidence to prove a robbery, the Court found that Dean's demand for money and his firing shots at the car meets the "substantial step" requirement in the attempted robbery of Lyles. Slip

Opinion, at ¶176. However Lyles' assertion that Dean demanded money before firing his gun was specifically refuted by Andre Piersol who was seated next to Yolanda at the time the demand was allegedly made. When specifically asked by the prosecutor whether Dean had said anything to Yolanda or him before he started firing the gun, Piersol responded, "No, sir." (*Id*. at 1413-1414).

Lyles' belief that Dean was trying to rob her defies logic. If he was in fact trying to get money from her, he would need to give her time to hand the money to him. There would be no reason to ask for money and then immediately start shooting at the occupants of the vehicle. Furthermore, Lyles acknowledged that she was scared throughout the incident and at one point "just kind of like froze for a second." (Vol. 6, Tr. pp. 1457, 1474-1475).

Piersol, who was seated next to her, described her as "stuck, panicked, like her eyes was shut. I thought she was dead for real." (*Id*. at 1415). He further testified that he had to "smack" Yolanda to get her attention so that she would drive him to the hospital for treatment. (*Id*. at 1415). As such, there is simply no credible evidence upon which the jury could have determined that Dean attempted to rob Lyles or Piersol at the Mini Mart that evening.

INSUFFICIENT EVIDENCE OF ATTEMPTED MURDER OF LYLES.

Dean was charged with one count of attempted murder of Yolanda Lyles in violation of R.C. §§2903.02(A) and 2923.02(A). As set forth in the preceding section, Lyles testified that following his earlier attempt to sell pills to Piersoll, Dean returned, walked up to the front of her car, and started shooting through the windshield. (Vol.

6, Tr. pp. 1455-1466). Piersol testified that Dean fired four shots at him, and that he was struck by a bullet in his left arm, and was possibly hit in the face as well. (*Id*. at 1413-1415). Lyles testified that she was not struck by any of the bullets. (*Id*. at 1460).

Lyles further testified that although she was seated in the driver's seat and Dean was standing in front of her, he fired his shots at an angle towards the Piersol who was seated in the front passenger's seat. (Vol. 6, Tr. pp. 1478-1479). Piersol likewise testified that although Dean was standing on the driver's side of the vehicle, he fired at an angle towards him. (*Id*. at 1415). The evidence thus supports a finding that the shooter was attempting to strike Piersol, not Lyles.

This scenario (that the shooter was targeting Piersol) is further supported by Piersol and Lyles' testimony that a third individual, Neil Scott, was either in or standing near the vehicle at the time of the shooting. (Vol. 6, Tr. pp. 1411-1413, 1454-1455). And, according to Piersol, the shooter retreated when Scott "fake threw" something at him. (*Id*. at 1413). Significantly there is no evidence that the shooter shot at, or attempted in any way to harm Scott, despite the fact that he was the only one who offered any resistance.

In rejecting Dean's argument that there was insufficient evidence of attempted murder, the Court held that "[t]he jury could reasonably conclude that Dean's demand for money when he started shooting at the car showed that he was targeting Lyles." Slip Opinion, at ¶179. However Lyles' assertion that Dean demanded money before firing his gun was specifically refuted by Andre Piersol who was seated next to Yolanda at the time the demand was allegedly made. When specifically asked by the

prosecutor whether Dean had said anything to Yolanda or him before he started firing the gun, Piersol responded, "No, sir." (*Id*. at 1413-1414).

As such, there is simply no credible evidence upon which the jury could have determined that Dean attempted to murder Lyles.

INSUFFICIENT EVIDENCE COURSE OF CONDUCT SPECIFICATION.

Dean was charged with two counts of aggravated murder in regard to the death of Titus Arnold . Both counts contained a specification that the offense was part of "a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender" under R.C. §2929.04(A)(5).

Throughout the trial, the prosecution contended that Dean and Wade were involved in a two man crime wave lasting four days. In rejecting Dean's argument that the three events were not interrelated, this Court finds similarity in the fact that "[t]he offenses all occurred in or around Springfield and involved the same (sic) caliber of handguns." Slip Opinion, at ¶184. This Court likewise found that testimony and a sound recording indicate that the same car may have been used in more than one offense. *Id*. Furthermore this Court found robbery to be a motivating factor in two of the three offenses. *Id*.

Despite the Court's finding, there is little indication that any of the three events were interrelated. In fact the trial judge emphasizes this point in his trial opinion: "They were not committed in the heat of the moment, as a part of one continuous event." (Trial Court Opinion, A-10).

In regard to the Titus Arnold shooting, the evidence is undisputed that Joshua Wade, not Dean, fired the shots which caused his death. And as set forth in a preceding section, there is no credible evidence that the shooting was premeditated. Furthermore, as set forth above, there is no credible evidence that Dean was even in the vehicle on Dibert Ave. at the time of the shooting. As such, there is simply no credible evidence upon which the jury could have determined that Arnold's death was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons.

Proposition of Law No. III

THE DOCTRINE OF TRANSFERRED INTENT CANNOT BE USED TO CONVICT THE DEFENDANT OF ADDITIONAL COUNTS OF ATTEMPTED MURDER WHEN THE CRIME WAS NOT COMPLETED.

Appellant Dean argued that transferred intent should not be applied to the attempted murder convictions relating to the Mini-Mart and Dibert Avenue shooting. "The doctrine of transferred intent provides that where an individual is attempting to harm one person and as a result accidentally harms another, the intent to harm the first person is transferred to the second person, and the individual attempting harm is held criminally liable as if he both intended to harm and did harm the second person." *State v. Reese*, 1st Dist. Hamilton Nos. C-060576, C-060577, 2007-Ohio-4319, ¶ 21.

In analyzing this issue, the Court fails to set forth who the intended object of the attempted murders was, particularly as it related to the Dibert Avenue shooting.

The Court states "the persons to who the defendant's intent could be transferred on the attempted murder counts are known." *Dean*, at ¶145. But the point of Dean's argument was *from whom* was the intent transferred. No one, including this Court, ever sets that out. Because the trial court gave the instruction, which was prompted by a jury question asking if the doctrine was applicable to attempted murder, we do not know if the jury ever found an actual intent to harm, or were they relieved of that responsibility by the trial courts instruction.

The two Ohio court of appeals decisions cited by the court are distinguishable from this case. In the *Reese* case, Reese was convicted of felonious assault for knowingly attempting to cause physical harm to a person named Fiorini. Reese did not intend to harm Fiorini or to damage his vehicle. Thus the issue was whether Reese should have been held criminally liable for an attempt to cause physical harm to Fiorini based on his intent to assault another individual named Ralston. It was clear that Ralston was the intended victim.

In Dean's case, no one has been identified as the "intended victim." In addition, the offense of felonious assault, the offense in the *Reese* case is different in type from the attempted murder offenses at issue here. Dean did not argue that transferred intent could not be used in any crime, he argued it was improper in an attempted murder, where there was no intended victim and no one was harmed. (See, Merit Brief, pp. 38-39)

Likewise, in *State v. Wheeler*, 8th Dist. Cuyahoga No. 66923, 1995

WL 322247 (May 25, 1995), the intended victim was clearly known. Wheeler was shooting at a person named Gordon, who eventually died. In the shootout, another person in the case, a man named Brabson, was not injured in any way, but a bullet passed through his shirtsleeve. Gordon was the intended target.

In the *Wheeler* decision, the court of appeals relied on *State v. Mullins* (1992), 76 Ohio App.3d 633. The court stated: "[u]nder the doctrine of transferred intent, an individual whose *intentional attempt to harm one person results in unintended harm to another* is held criminally liable for such harm as if he had harmed his intended victim. See Id. at 636." *Wheeler* at *4. (emphasis added) In Dean's case, there was no intentional attempt to harm one specific person, allowing the transfer to the unintended victims.

In another Eighth District decision, the court of appeals, in reliance on *Wheeler* found appellant fired specifically at Milton Franklin III, who was positioned at the time of the shooting inside the bar and in front of the bar's picture window. The state's evidence was that appellant fired six shots through the bar's front picture window intending to kill Milton Franklin III, and due to his poor aim, Jerome Thomas, Rayshawn Whitsett and Marcus Barnes *were shot instead*. Again, there was an intended victim in the case. In Dean's case, no intended victim was identified.

So the question asked in the Merit Brief remains: Where no one was harmed, what intent was transferred? But when the crime is attempted murder, either Dean or Wade attempted to kill the people on the porch, or they did not. Transferred intent does not apply.

To be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else. The applicability to the Mini-Mart shooting would be the same. Andre Piersol suffered an injury from the shooting through the windshield. If he was the intended target, then what intent is transferred to Yolanda Lyles? Either the intent was there to murder her, or it was not.

The trial court erred in giving the transferred intent instruction, particularly when it was clear the jury was interested in its application to attempted murder. It is particularly troubling since the question would indicate that there was insufficient evidence on the crime of attempted murder, and the only way the jury reached the guilty verdict was through transferred intent.

The verdicts for attempted murder must be vacated. The convictions violate Dean's rights as guaranteed by the Fifth, Fourteenth Amendments to the United States Constitution and Art. I, Sec. 10 and 16 of the Ohio Constitution.

CONCLUSION

Based on the foregoing, Appellant moves this Court to reconsider the merits ruling of October 27, 2015, which affirmed Dean's conviction and death sentence.

Respectfully Submitted,

/s Kathleen McGarry

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Motion for Reconsideration was forwarded by regular U.S. Mail to D. Andrew Wilson, Prosecuting Attorney, P.O. Box 1608, Springfield, Ohio 45501, this 6th. day of November, 2015.

/s Kathleen McGarry
Counsel for Appellant, Jason Dean