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Assault With Intent To Murder - Necessity For Actual Intent To Cause Death - Wimbush v. State

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Assault With Intent To Murder — Necessity For Actual Intent To Cause Death

Wimbush v. State[1]

Defendant was convicted of assault with intent to murder. The evidence indicated that prosecutrix left the defendant, her paramour, and began consorting with another man. Some time thereafter the defendant approached a car in which the prosecutrix was sitting and tried to persuade her to return to him. When she refused, he drew a concealed revolver and fired at least three shots, wounding her in the arm, face and hand. The defendant later signed a statement admitting the assault but denying an intention to kill. At the trial, he testified that he was an expert marksman, and could have killed the prosecutrix had he intended to do so. The Court of Appeals in a *per curiam* decision sustained the defendant's conviction. In so holding, the Court stated that there was sufficient evidence to justify a conviction because the assault was admitted by the defendant and the *intent to kill* was inferable from the use of a deadly weapon directed at a vital part of the body.[2] The Court went on to state that in order to convict, it was not necessary that a *specific intent* to take life be shown.[3]

If the Court means by specific intent an actual intent to take life, and is promulgating the rule that in severe assaults a conviction will lie for assault with intent to murder even though there is no actual intent to kill, then Maryland has adopted a minority position with respect to the state of mind necessary for the offense.

According to the usual view, assault with intent to murder consists of two elements: an assault and an intent to murder. The requisite intent element can be broken down into two sub-elements: malice and an actual intent to kill.[4] Such malice is the same malice which is the essential mental element that distinguishes murder from manslaughter.[5] In an intentional killing, malice is the intentional doing of a wrongful act, dangerous to life, without

[1] 224 Md. 488, 168 A. 2d 500 (1961).

[2] It should be noted that an inference of intent from the use of a deadly weapon differs from the deadly weapon rule where intent is presumed or not required to be proven.

[3] *Supra*, n. 1, 489.

[4] Williams v. State, 27 Ala. App. 504, 175 So. 335, 336 (1937); Craig v. State, 205 Ark. 1100, 172 S.W. 2d 256, 258 (1943).

[5] Faulcon v. State, 211 Md. 249, 257, 126 A. 2d 858 (1956).

just cause, excuse or justification.[6] The intention required in malice refers only to the intent to do the act, e.g., knifing or shooting, not the intent to achieve a specific result, i.e., death.[7] In discussing the distinction between malice and specific intent in assault with intent to murder, the Georgia Supreme Court said in *Adams v. State*:[8]

> "While, therefore, a presumption of malice will arise from the use of a deadly weapon, a specific intent to kill will not be presumed where death does not ensue, and the existence of such intent is a question of fact to be passed on by the jury."[9]

In addition to malice an actual intent to take life is necessary to establish the offense of assault with intent to murder.[10] It is this intent which the law seeks to punish and prevent, and which distinguishes the offense from a simple assault. An intent to shoot, knife, etc., is not the same as an intent to murder. Shooting at another is not always done with an actual intent to take life; there may only be an intent to wound or incapacitate.

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[6] BLACK'S LAW DICTIONARY (4th ed. 1951) 1109 defines "malice" as the intentional doing of a wrongful act without just cause or excuse, whereas (at p. 1110) "premeditated malice" is defined as an intent to kill unlawfully, deliberately formed in the mind as the result of a determination meditated upon and fixed before the act; see also State v. Crutcher, 231 Iowa 418, 1 N.W. 2d 195, 199 (1941); State v. Jones, 133 S.C. 167, 130 S.E. 747, 750 (1925).

[7] Malice in non-intentional killings takes other forms. PERKINS, CRIMINAL LAW (1957) 38. Malice may exist where one merely intends great bodily harm; State v. Jensen, 120 Utah 531, 236 P. 2d 445 (1951); has a wanton disregard of human life; State v. Wooten, 228 N.C. 628, 46 S.E. 2d 868 (1948); or where one intends to commit a serious crime other than murder as in the felony murder rule, 1 WARREN, HOMOCIDE (Perm. Ed., 1938) § 74, p. 318.

[8] 125 Ga. 11, 53 S.E. 804, 805 (1906). There may be disagreement on this point in the Georgia intermediate Courts of Appeal. *Cf.*, Colbert v. State *infra*, n. 14 and Chambliss v. State, 37 Ga. App. 124, 139 S.E. 80 (1927); however, see Wright v. State, 40 Ga. App. 118, 149 S.E. 153 (1927) conforming to 168 Ga. 690, 148 S.E. 731 (1927) for a possible explanation. Also see Gresham v. State, 46 Ga. App. 54, 166 S.E. 443 (1932) which seems in accord with Colbert v. State, *supra*.

[9] *Id.*, 805.

[10] Most of the cases and texts support this view. People v. Mason, 6 Cal. Rptr. 649, 653-654 (Dist. Ct. of App. 1960); Lewis v. State, 14 Ga. App. 503, 81 S.E. 378 (1914); Vallas v. State, 137 Neb. 250, 288 N.W. 818, 820 (1939); Watts v. State, 151 Tex. Cr. 349, 207 S.W. 2d 94, 97 (1947); State v. Taylor, 70 Vt. 1, 39 A. 447, 450 (1896); see also Beall v. State, 203 Md. 380, 385, 101 A. 2d 233 (1953), "[i]ntent is the essence"; 40 C.J.S. 942, Homicide, § 79; 26 Am. Jur. 579, Homicide, § 600; CLARK & MARSHALL, CRIMES (6th ed. 1958) § 10.17, 651; also 12 M.L.E. 8, Homicide, § 5; MODEL PENAL CODE (Tent. Draft No. 10, 1960) 29; PERKINS, CRIMINAL LAW (1957) 673; 1 WARREN, *op. cit. supra* n. 7, § 129, p. 568, "an intent merely to inflict great bodily injury, or to do serious bodily injury or to punish or torture is not sufficient."

Since the intent is subjective, it must be inferred from the circumstances accompanying the assault.[11] The use of a deadly weapon upon a vital part of the body is only evidence from which an actual intent to murder may be inferred.[12] It does not establish intent as a matter of law.[13] In *Colbert v. State*[14] the Georgia Court of Appeals said:

> "To constitute the offense of assault with intent to murder, there must be a specific intent to kill. This intent is not necessarily or conclusively shown by the use of a weapon likely to produce death, in a manner likely to produce death."[15]

Nor does the actual intent to murder include necessarily the elements of premeditation and deliberation.[16] The intent may be formed in an instant. Premeditation and deliberation are requirements in most cases of intentional first degree murder,[17] but, since murder has two degrees, there may be an assault with intent to commit murder in the second degree,[18] involving an actual but unpremeditated intent to take life.[19]

To summarize the majority position on *mens rea* for assault with intent to murder: malice and actual intent to kill are combined so as to require an actual, but not necessarily premeditated, intent to kill, without justification, excuse or mitigation. This state of mind may be proved circumstantially but is not a matter of legal presumption from any given factual setting.

The minority rule considers the character and degree of harm inflicted by the assault as the aggravation necessary to raise simple assault to assault with intent to murder. This view holds the more general mental state of malice sufficient and provides that actual intent to murder need

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[11] Craig v. State, *supra*, n. 4, 257.

[12] Webb v. State, 201 Md. 158, 161, 93 A. 2d 80 (1952); Lewis v. State, 209 Ark. 51, 189 S.W. 2d 641, 642 (1945); Davis v. State, 165 Tex. Cr. 294, 306 S.W. 2d 353, 355 (1957).

[13] *Supra*, n. 10. See also Patterson v. State, 85 Ga. 131, 11 S.E. 620, 621 (1890).

[14] 84 Ga. App. 632, 66 S.E. 2d 836, 837 (1951), reversing a conviction of assault with intent to murder for failure to give an instruction that absent intent defendant could only be convicted of statutory assault for shooting at another.

[15] *Id.*

[16] Cheeks v. State, 169 Ark. 1192, 278 S.W. 10 (1925).

[17] 3 MD. CODE (1957) Art. 27, § 407; see also Faulcon v. State, 211 Md. 249, 126 A. 2d 858 (1956), and Welsh, *The Developing Law of International Murder in Maryland*, 13 Md. L. Rev. 327, 329-331 (1953).

[18] State v. Litman, 106 Conn. 345, 138 A. 132 (1927).

[19] Cheeks v. State, *supra*, n. 16; State v. Litman, *id.*

not be shown; rather, it may be presumed from the seriousness of the assault. One statement of the minority position is: if, death occurring, the defendant would have been guilty of murder in the first or second degree; then, death not resulting, he is guilty of assault with intent to murder.[20] In Illinois it is presumed that destruction of life was intended where there is an actual and wanton disregard of human life evidenced by an act the natural tendency of which is to kill.[21] Such formulations make specific intent to kill unnecessary, since intent to cause great bodily harm or extreme recklessness is then allowed to satisfy the intent requirement.

The requirement of actual intent has had a rather complex history in Maryland. The significance of the use of a deadly weapon may be considered first. In the recent case of *Johnson v. State*,[22] in which the defendant had stabbed the victim in the back with a dirk, the Court indicated by way of dictum that the use of a deadly weapon directed at a vital part of the body establishes the elements of assault with intent to murder as a matter of law.[23] However, in the earlier case of *Webb v. State*[24] where the defendant had shot the victim through the neck, the bullet barely missing the jugular vein, the Court said:

> "To support a charge of assault with intent to murder it is generally recognized that there must be proof of both an assault and an intention to murder. The intent cannot be inferred from the mere fact of the assault, although the character of the assault and the use of a deadly weapon are factors to be considered. * * * *Neither can*

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[20] 1 WHARTON, CRIMINAL LAW (12th ed. 1932) § 841, pp. 1131, 1132; for cases involving the offense of malicious shooting with intent to kill see Epps v. Comm., 190 Va. 93, 56 S.E. 2d 237, 241 (1941); Johnson v. Comm., 135 Va. 524, 115 S.E. 673, 675 (1923). *Cf.*, Merritt v. Comm., 164 Va. 653, 180 S.E. 395, 399 (1935), where in reversing a conviction for attempted murder for failure to allege a specific intent in the indictment, the Court said, "[t]he act charged here is an assault. In order to raise this assault to a more substantive crime, it must be done with a specific intent to take life, the intent can not be inferred from the act alleged."

[21] People v. Shields, 61 Ill. 2d 200, 127 N.E. 2d 440, 443 (1955) affirmed a conviction of assault with intent to murder where defendant beat the victim with his fists and kicked him, injuring him severely. See also People v. Carter, 410 Ill. 462, 102 N.E. 2d 312, 314 (1951); Harvell v. State, 155 Fla. 556, 20 So. 2d 801 (1945).

[22] 223 Md. 253, 164 A. 2d 267 (1960). See also Mason v. State, ... Md. ...., 169 A. 2d 445 (1961) which cites Johnson as authority for the statement that stabbing a man with an eight inch knife at a point within two inches of heart is sufficient to sustain a charge of assault with intent to murder.

[23] *Id.*, 255.

[24] 201 Md. 158, 93 A. 2d 80 (1952).

> *the intent be established as a matter of law* from the mere use of a deadly weapon."[25]

In *Johnson,* a knife was plunged into the victim's back; in *Webb,* a bullet entered the neck and barely missed the jugular vein. The respective weapons seem deadly, and the respective wounded parts of the body appear vital. Under the statement in *Webb,* which represents the majority view, the character of the assault and the weapon used give rise to only an inference of intent. Under the *Johnson* dictum, which follows the minority view, intent is established as a matter of law.

This shift in emphasis to the minority view seems to have been the result of another statement in *Webb,* which dealt specifically with the nature of the intent which must be proved. In a verbatim quote from WHARTON,[26] the Court said:

> "It is not necessary . . . to sustain such an indictment that a *specific intent to take life be shown.* If the intent were to commit grievous bodily harm, and death occurred in consequence of the attack, then the case would have been murder in the second degree; and, in case of death not ensuing, then the case would be an assault with intent to murder in the second degree."[27]

WHARTON is the sole authority cited in support of this point in *Webb.* In the later case of *Hall v. State*[28] the Court affirmed a conviction of assault with intent to murder where defendant, after breaking into the victim's home, hid in an upstairs bedroom, waited until the victim was alone, then hit him several times with either his fist or a crowbar, knocking him unconscious, and removed $450 from his wallet. Citing *Webb*[29] for the statement quoted from WHARTON the Court said:

> "If the assault were committed under circumstances such that, if death ensued, the crime would have been murder in either the first or second degree, it is not

[25] *Id.,* 161. Emphasis added. This principle has been reiterated in Beall v. State, 203 Md. 380, 385, 101 A. 2d 233 (1953); and Davis v. State, 204 Md. 44, 51-52, 102 A. 2d 816 (1954). See also Couser v. State, 221 Md. 474, 476, 157 A. 2d 426 (1960), where the Court said, "The use of a deadly weapon directed at a vital part of the body is a circumstance which indicates a design to kill."

[26] WHARTON, *loc. cit. supra,* n. 20.

[27] *Supra,* n. 24, 161-162. Emphasis added.

[28] 213 Md. 369, 131 A. 2d 710 (1957).

[29] The Court also cited Davis v. State, 204 Md. 44, 102 A. 2d 816 (1954) which will be discussed in this note, *circa,* n. 34.

necessary to sustain such a charge that a specific intent to take life should be shown."[30]

WHARTON'S proposition would seem to completely eliminate any requirement of actual intent to murder in certain situations. This would seem particularly true if the deadly weapon rule is the basis for the statement in the instant case and in *Johnson*. According to such view, if one directs a deadly weapon at a vital part of the body, where, if death occurred it would have been murder, then death not occurring, it is assault with intent to murder.

If Maryland wishes to follow WHARTON'S far reaching proposition, it would seem that a careful examination of its rationale is mandatory. If the proposition rests, for its validity, on being an affirmative form of the generally accepted negative principle that, if the offense would not have been murder had death ensued, the defendant must be acquitted of assault with intent to murder,[31] the fallacy is apparent. To show that a state of mind inadequate for murder is also inadequate for assault with intent to commit murder, is not to show that a state of mind sufficient for murder is also sufficient for assault with intent to murder. The generally accepted principle merely eliminates convictions where, because of the absence of malice, any homicide would have been manslaughter or no crime at all, e.g., because of self-defense. It does not establish the elements of the offense of assault with intent to murder; it merely says that, absent malice, the offense has not been committed.

Even assuming some other basis for WHARTON'S proposition, the proposition still contains an inherent defect; it is based on a double presumption. Not only must we assume a murder which, concededly, did not occur, but we must also assume an intent to commit murder based on the

[30] *Supra*, n. 28, 375. This statement seems to be the reiteration of the Webb statement quoted from WHARTON. The Johnson case, *supra*, n. 22, also cited the Webb and Hall cases for support of the proposition that use of a deadly weapon directed at a vital part of the body establishes the offense as a matter of law. Careful research of the cases seems to indicate that statements of presumed intent and that specific intent is no longer necessary stem from the Webb case and its quote from WHARTON.

It is also possible that the robbery in the Hall case caused the court to think in terms of the felony-murder rule and to extend the assault rule by a novel analogy: the rule that a killing in the course of a dangerous felony is murder would thus be extended to provide also that, at least in cases of serious injury, an assault and battery in the course of a dangerous felony is assault with intent to murder.

[31] WHARTON, *op. cit. supra*, n. 20, § 841, pp. 1126-1128 and cases cited therein.

notion that a man is presumed to have intended the probable consequences of his acts. However, since death did not occur, how can we presume an intent based on a result which did not occur? A presumption to be valid and have force must have a sound basis and a high degree of probability.[32]

Perhaps the minority view's rationale rests on an unstated assumption of policy that assaults which are in fact very dangerous deserve to be treated in the same manner as assaults accompanied by an actual intent to kill, or that the triers of fact are likely to acquit too often of the aggravated assault offense if told they must find an actual intent. It would seem that such policy decisions would be more appropriate for legislatures than for courts.

The authority for WHARTON'S statement is as uncertain as the rationale. WHARTON cites but one case in direct support of his view, and it does not appear to be in point. The case is *State v. Saylor*.[33] There, the trial judge quashed an indictment of assault with intent to commit murder in the first degree which alleged a specific intent to murder, but failed to allege premeditation and deliberation. The appellate court reversed, holding that the indictment could be sustained as alleging an assault with intent to commit murder in the second degree since second degree murder does not require premeditation and deliberation. The Court did not indicate that specific intent was unnecessary. The case does not seem to support WHARTON'S statement that "specific intent need not be shown", but seems rather to indicate that premeditation and deliberation are not elements of specific intent.

It may well be that the Court in the instant case was defining specific intent to include premeditation and deliberation and meant to indicate that specific intent as so defined, i.e., intent to commit murder in the first degree, need not be shown. Under this definition the Court would not be eliminating the necessity of showing an actual intent to take life. That Maryland might adhere to this special meaning of specific intent seems to be indicated in *Davis v. State*.[34] There, the trial judge refused to give the following advisory instruction, correct under the majority definition of specific intent, for the defendant:

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[32] Welsh, *The Developing Law of Intentional Murder in Maryland*, 13 Md. L. Rev. 327, 335 (1953).

[33] 6 Lea (Tenn.) 586 (1880).

[34] 204 Md. 44, 102 A. 2d 816 (1954).

> "The circumstances must be such that if death had resulted, the homicide would have been murder, and in addition to this, there must be a specific intent to murder."[35]

In sustaining the trial judge's refusal, the Court said:

> "The appellant said at the argument that the first prayer was intended to, and did mean, that the law is that there can only be assault with intent to murder if there existed a specific, wilful, deliberate and premeditated intent to kill. The prayer meant to instruct the jury that it could convict only if it found that, had death resulted, the homicide would have been murder in the first degree. This is not the law."[36]

It would seem from this statement that the appellant-defendant was seeking to define specific intent to include premeditation and deliberation, i.e., intent to commit murder in the first degree, and that the Court may have accepted this proffered definition. If the Court in the instant case is so defining specific intent, then the statement that specific intent need not be shown is in accord with the majority view since even the majority does not require a premeditated intent but only an actual intent to take life. However, if the Court defines specific intent as an actual intent to murder and means to imply that the intent to murder need no longer be shown, then Maryland has accepted the minority view. If the latter view is the one to be accepted, it would appear that the crime is improperly labeled, "assault *with intent to murder.*"

From the foregoing, it would seem necessary that the Court should at the first instance define its conception of specific intent. It is suggested that the specific intent mentioned in the instant case should not be interpreted as abolishing the necessity for an actual intent in Maryland, and, that the use of a deadly weapon directed at a vital part of the body should be construed as merely creating an inference of intent,[37] and that the jury should be so instructed. It is further suggested that the Legis-

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[35] *Id.*, 49.

[36] *Supra*, n. 34, 49.

[37] Watts v. State, 151 Tex. Cr. 349, 207 S.W. 2d 94 (1947) reversed a conviction of assault with intent to murder where defendant had fired a shotgun at victim which wounded him in the chest, holding that the use of a deadly weapon on a vital part of the body does not give rise to a presumption of law as to intent, but a mere presumption of fact, which is rebutted by the defendant's testimony of lack of intent.

lature should consider providing for those assaults, which, although serious in nature due to their aggravating circumstances and the harm inflicted, cannot be punished as an assault with intent to murder due to the absence of intent, but deserve a more severe treatment than the simple assault.[38] This might be done by creating an intermediate offense such as "assault with intent to commit great bodily harm."[39]

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[38] 3 MD. CODE (1957) Art. 27, § 12, provides for imprisonment from two to fifteen years for assault with intent to murder. Note that simple assault is a common law offense and may be punished by fine or imprisonment as circumstances require, Heath v. State, 198 Md. 455, 466-467, 85 A. 2d 43 (1951). In the recent case of Shields v. State, 223 Md. 485, 168 A. 2d 382 (1961) a sentence of 8 years for assault and battery was held not to be cruel and unusual punishment. It is conceivable that one could be sentenced for more than 15 years (which is the maximum penalty for assault with intent to murder) for simple assault. The Court could also take into account what it believed to be intent to inflict serious harm in sentencing defendants convicted of simple assault. However, it would seem that defendant's interest in having the trier of fact make a specific determination supported by evidence might be better preserved, and that administration might be simplified by the creation of an intermediate offense, particularly since simple assault is a misdemeanor and assault with intent to kill is a felony. Art. 27, § 12.

[39] See MODEL PENAL CODE, § 201.10, p. 80 (Tent. Draft No. 9, 1960) for the offense of Bodily Injury.