Circuit Court for Wicomico County
Case No. C-22-CR-17-000313

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 339

September Term, 2018

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ALEX J. BARTELL

v.

STATE OF MARYLAND

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Fader, C.J.,
Reed,
Sharer, J., Frederick
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Sharer, J.

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Filed: December 30, 2019

Alex J. Bartell was convicted by a jury in the Circuit Court for Wicomico County of five counts of first-degree assault, five counts of second-degree assault, and related and lesser-included offenses, the genesis of which was a "barricade" situation that occurred at a residence in Willards, Wicomico County.[1]

In his appeal, Bartell presents two questions for our consideration, which we have slightly recast for clarity:

1. Was the evidence sufficient to sustain the assault convictions as to Corporal Howard Phillips?

2. Did the court commit plain error by instructing the jury that the attempted battery modality of assault is a general intent crime and not subject to a defense of voluntary intoxication?

For the reasons we shall discuss, the judgments of the circuit court are affirmed.

## FACTUAL BACKGROUND[2]

On the evening of March 6, 2017, two Wicomico County Sheriff's Department deputies, Corporal Howard Phillips and Deputy Steve Ray, responded to an emergency call for service to a residence on Poplar Neck Road in Willards, Wicomico County. There, they met a woman holding a young child and were told that Bartell, the woman's boyfriend, was in a bedroom with a shotgun.

[1] After merger, the circuit court imposed concurrent sentences of 25 years on each of the first-degree assault convictions and a concurrent term of 20 years on the firearm conviction, the first five years without the possibility of parole.

[2] Our factual recitation is taken from appellant's opening brief, which the State accepts "as supplemented and modified" in its argument. Because Bartell's argument as to the sufficiency of the evidence relates only to one victim—Corporal Phillips—we need not present an expansive recounting of the events.

Deputy Ray attempted to make contact with Bartell and to engage him in conversation, details of which we shall recount as needed in our discussion.

As Bartell did not respond directly to the deputy's questions and suggestions, the attempt at conversation was essentially unsuccessful and he was unable to entice Bartell from the bedroom. Ultimately, the deputies heard a gunshot in the bedroom, alerted dispatch of the same, and soon thereafter Phillips escorted the woman and child out of the house to safety. After Phillips returned to the kitchen, two additional shots came through the bedroom door and into the kitchen where he and Ray were located. Both deputies then withdrew from the house, waited for backup, and secured the perimeter of the property and neighboring homes. Before the situation was resolved, Bartell fired several additional shots. It is undisputed that Bartell was under the influence of both prescribed medications for his bipolar disorder and alcohol on that day. Indeed, his defense was predicated on voluntary intoxication.

## DISCUSSION

Bartell challenges the sufficiency of the evidence to support the conviction of the attempted-battery modality of the crime of assault on Corporal Phillips. With respect to that charge, the State relied on evidence that Phillips was, at least some of the time, present in the kitchen of the house when Bartell fired shots from a shotgun through the bedroom door. Bartell restates the argument of his trial counsel, made in support of his motion for judgment at the end of the State's case-in-chief, that "[t]here is no evidence that [he] knows [sic] how many individuals are [sic] out there in that room[.]"

In its denial of the motion, the court noted:

> In this case, there is evidence of the knowledge (by Bartell) of the presence of more than one officer in the home when the shots were discharged through the door and prior to that. Deputy Ray testified, ["]Alex, why are the police here? Come out and talk to **us**.["] He said, ["]**we** are Sheriff's **Deputies** from Wicomico County Sheriff's Office.["] And so, there was conveyed to Mr. Bartell the presence of more than one police officer in the home during the dialogue that preceded the shots being fired, while the police were in the home.

(Emphasis added).

In short, Bartell argues that the attempted-battery modality of assault is a specific intent crime and because the evidence was insufficient to find that Bartell knew of Phillips' presence in the room, he could not have formed the specific intent to injure Phillips. The State responds that the law does not require that an assailant know the number or identity of potential victims. Bartell argues that both the intent to frighten modality and the attempted battery modality are specific intent crimes. The State agrees that the former is a specific intent crime but argues that the latter is a general intent crime.

An assault may be committed by a battery, an attempted battery, or by placing the victim in fear of an imminent battery. *Lamb v. State*, 93 Md. App. 422, 428 (1992).[3] *See also* Md. Code (2002, 2012 Repl. Vol.), Criminal Law Article (CR), § 3-201(b). To convict of second-degree assault of the attempted battery modality, the State must prove the intent to cause injury or offensive touching to the victim and that a substantial step has been taken by the defendant toward that end. *See Lamb*, 93 Md. App. at 434-35; *Hickman v. State*, 193 Md. App. 238, 251 (2010). Second-degree assault, of either variety, is elevated to first

[3] In *Lamb*, Judge Charles Moylan, Jr., writing for this Court, included a comprehensive explanation of the law of assault and attempt, as well as the relationship between the tort concept of assault and criminal assault.

degree assault by, *inter alia*, proof that the assault was accomplished by the use of a firearm, as was the case here. CR § 3-202(a)(2). Bartell does not dispute his use of a firearm.

The State relies principally on *Jones v. State*, 440 Md. 450 (2014). Jones was convicted of several offenses, most notably second-degree assault of the intent to frighten modality, against multiple victims, for having fired three gunshots through a closed door and into an apartment. 440 Md. at 452-54. On appeal, Jones argued that the evidence was insufficient to support a reasonable inference that he was aware of the number of persons in the apartment, other than the woman who answered the door. *Id*. at 454. Affirming Jones' convictions, the Court observed:

> Where a defendant intentionally commits an act that creates a zone of danger, and where the defendant knows that multiple people are in the zone of danger, the defendant intends to place **everyone** in the zone of danger in fear of immediate physical harm—even if the defendant does not know of a particular victim's presence in the zone of danger.

*Jones*, 440 Md. at 456 (emphasis in original).

In its reliance on *Jones*, the State argues that:

> The *Jones* Court's rationale applied in the context of an intent-to-frighten assault, but that logic extends [sic] an assault of the attempted battery variety. Intent-to-frighten assault is a specific intent crime, and if the "zone of danger" rationale [applies] in that context, there is every reason to apply it in the attempted battery context.

The State also refers us to *Snyder v. State*, 210 Md. App. 370 (2013). Snyder was convicted of, *inter alia*, the attempted battery variety of assault for having fired gunshots into the home of two of the victims, even though there was no one in the house at the time. 210 Md. App. at 375-77. This Court noted that "[t]he attempted battery variety of assault

requires that the accused had a specific intent to cause physical injury to the victim, and to take a substantial step towards that injury." *Id.* at 382 (citing *Harrod v. State*, 65 Md. App. 128, 135 (1985)). Moreover, we said that "there is no need for the victim to be aware of the impending battery." *Id*. (citations omitted). Affirming Snyder's conviction, we concluded:

> In sum, the elements for an attempted battery variety of assault in the second-degree are that the defendant actually tried to cause physical harm to the victim, the defendant intended to bring about physical harm to the victim, and the victim did not consent to the conduct. In order to prove the first element, that the defendant actually tried to cause physical harm to the victim, the State must prove that the defendant believed he had the apparent presentability [sic] to consummate a battery.

210 Md. App. at 385 (footnote omitted).

In support of his position that the attempted-battery modality of assault is a specific intent crime, Bartell, in his reply brief, refers us to *Cruz v. State*, 407 Md. 202 (2009). Bartell states that in *Cruz* "the Court of Appeals held that '[a]n attempted battery is an attempt by force to injure the person of another,' and that '[a] defendant must have the specific intent to bring about the offensive physical contact or physical harm to the victim.'"[4] (Quoting *Cruz*, 407 Md. at 209 n.3) (underlining emphasis in the brief). In fact, that language, taken from the Court of Appeals's discussion of criminal attempt in general in *Young v. State*, 303 Md. 298, 306 (1985), is found in footnote 3 in *Cruz*. *See* 407 Md. at 209 n.3. Bartell's recitation from a footnote put forward as an assertion that the *Cruz*

[4] The issue before the Court in *Cruz* was whether the trial court erred in giving a supplemental jury instruction, after deliberations had begun, on an alternative variety of assault. Any reference to a classification of the two modalities of assault is *dicta* of the highest order.

Court "held" that an attempted battery version of assault is a specific intent crime is a vast overstatement. Indeed, it is an egregious misstatement of the law offered in support of his position.

In his assertions that the attempted battery variety of assault is a specific intent crime, Bartell overlooks *Wieland v. State*, 101 Md. App. 1 (1994). Wieland was convicted of, *inter alia*, four assaultive offenses following a shooting that occurred in Talbot County. 101 Md. App. at 4, 6. Of principal interest to us in this appeal is the issue raised by Wieland that the trial judge erred in failing to instruct the jury on the possible effect of voluntary intoxication with respect to two assault offenses—the intent to frighten one victim and the attempted battery of another victim—both of which, he argued, required specific intent. *Id*. at 32.

Because we find Judge Moylan's discussion and analysis in writing for this Court in *Wieland* to be compelling to our conclusion, we quote liberally:

> The legal sufficiency of the evidence to support a conviction for intentional battery represents *ipso facto* legally sufficient evidence to support the lesser included and antecedent assault of the attempted battery variety. Since an intended battery is a general intent crime, the antecedent attempt to commit such a battery—one of the forms of assault—is also a general intent crime….
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> * * *
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> In determining whether a particular crime possesses a necessary specific intent, we cannot approach the subject categorically but must examine each crime on an *ad hoc* basis. We must inquire whether, in addition to the general intent to do the immediate act, it embraces some additional purpose or design to be accomplished beyond that immediate act.

*Wieland*, 101 Md. App. at 27, 37-38.

With respect to the attempted battery modality of assault, Judge Moylan continued:

> By way of contrast [with assault of the intent to frighten variety], we assert that an assault of the attempted battery variety does not require any specific intent. The appellant reminds us of our statement, in *Lamb v. State*, 93 Md. App. 422, 443 (1992), *cert. denied*, 329 Md. 110 (1993), that "[b]oth varieties of assault are specific intent crimes." We hereby repudiate that brief *dictum* as having been overly broad and overly simplistic.
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> Because an assault of the attempted battery variety is, by definition, an attempt, it shares all of the characteristics of attempts generally. One such characteristic is that of the required *mens rea*. In this regard, a nettlesome little problem rears its head. In discussions of attempt law generally, it is sometimes, albeit carelessly, said that an attempt is a specific intent crime. There is, to be sure, an intent requirement—one must intend to commit a very particular and precise crime—but such statements fail to distinguish between general intent and specific intent. A particular intent or a precise intent in this sense is not what the law contemplates by the phrase "specific intent." Perhaps a better distinction than that between general intent and specific intent would be a distinction between a direct intent and an indirect intent or a distinction between an immediate consequence and some further purpose to be brought about thereby.
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> Accurately employed, the term "specific intent" designates some specific mental element or intended purpose above and beyond the mental state required for the mere *actus reus* of the crime itself. Were it not so, every intentional crime would be deemed a specific intent crime and there would no longer even be such a category as that of general intent crimes. Once every intentional crime is denominated a specific intent crime, the problem would be that "specific intent" law would bring with it all of its attendant baggage about the possibly erosive effect of even voluntary intoxication on such intent.
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> Such baggage is not appropriate with the common law misdemeanor of assault of the attempted battery variety. It is a general intent crime. When, for instance, an assailant shoots a gun or strikes out with his fist, he may 1) intend to hit the victim and 2) also intend thereby to bring about the murder, the rape, or the robbery of the victim. Clearly, those latter, incremental, and more remote intended purposes are specific intents. The more immediate intent of hitting the victim, however, remains a general intent merely to do the *actus reus* of the crime—to wit, to commit a battery.

> It is a mistake to speak of attempts generally as having a single monolithic intent element. Some attempts, to be sure, require a specific intent. Other attempts, however, require only a general intent. An attempt to commit a specific intent crime requires the same ultimate specific intent as would the consummated crime. An attempt to commit a general intent crime, on the other hand, requires nothing more than that general intent.
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> A consummated intentional battery requires a general intent on the part of the perpetrator to hit the victim. An attempted battery (assault) requires the same general intent to hit the victim and, therefore, to perpetrate the battery. It is an immediate result that is generally intended and not some more remote end or purpose that might flow from that immediate act.
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> * * *
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> The intent element of an attempted battery involves nothing more than the intent to do the *actus reus* itself. That, by definition, is a general intent.
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> * * *
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> In *Lamb v. State*, to be sure, we did say, 93 Md. App. at 445, "In terms of specific intent, the attempted battery variety of assault requires that the assailant intend to punch." Without realizing it, we had contradicted ourselves in a single sentence. After referring to the category of specific intent, we then gave as an example what is quintessentially a general intent—the intent on the part of an assailant to punch his victim. It is to create a paradox to speak of a specific intent to do a generally intended act. Assault of the attempted battery variety is nothing more than a general intent crime.

101 Md. App. at 38-41 (footnote omitted).

Although the classification of the two modalities of assault as either general intent or specific intent crimes has been often discussed by this Court and the Court of Appeals, we find nothing in those discussions to convince us that *Wieland* should not control our decision. We find that particularly so on the facts in the record before us. There is nothing to suggest that Bartell intended injury to either Ray or Phillips, only that he had a general

intent to act out—that is, to do the *actus reus*, but lacking the *mens reus* to bring about a more remote consequence.

**Jury instructions – Asserted plain error**

Bartell asserts error in the trial court's instructions to the jury on the essence of his defense of voluntary intoxication. It is axiomatic that a prerequisite to our consideration of a plain error review is to determine whether there was error. *See Mines v. State*, 208 Md. App. 280, 302, 306 (2012) (declining to grant plain error review "because there was no error, much less plain error[.]"). *Accord Jones v. State*, 173 Md. App. 430, 454 (2007) (in its discussion of preservation and plain error review, noted that, "'[i]ndeed, if the [matter] in question were not in error, it would make very little difference whether the point had been preserved or not.'" (quoting *Morris v. State*, 153 Md. App. 480, 512 (2003))). Having determined that the court did not err in its instructions to the jury that voluntary intoxication was not available as a defense to the charge relating to Corporal Phillips, there was no error.

The court gave a voluntary intoxication instruction but advised the jury that such defense was only applicable to the specific intent charges of murder, first-degree and second-degree assault, that required the State to prove that Bartell "acted with a specific intent to kill or frighten." The instruction did not mention the general intent assault charges of the attempted battery variety. The court did, however, instruct the jury, in part, that "[v]oluntary intoxication is not a defense to all general intent crimes." Based on his contention that the attempted battery variety of assault is a specific intent crime, Bartell concludes that the court's instruction erroneously undermined his defense. Recognizing

that his trial counsel did not except to the instruction, nor to the State's pursuit of the subject in its closing argument, Bartell asserts that we should undertake a plain error review.

As we have discussed, on the record before us, Bartell's conduct, and the resulting crime, falls within the definition of assault of the attempted battery variety as a general intent crime. Hence, we find no error in the court's instructions. Having found no error, there is none to review.

**JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED; COSTS ASSESSED TO APPELLANT.**