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SUPREME COURT OF THE REPUBLIC OF PALAU

IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

ZYLDEN YANO, Appellant, v. REPUBLIC OF PALAU, Appellee.	CRIM. APPEAL NO. 14-001 Criminal Action No. 13-077 **OPINION**

Decided: September 4, 2014

Counsel for Appellant: William L. Ridpath
Counsel for Appellee: Delanie D. Prescott-Tate

BEFORE: KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice; and R. ASHBY PATE, Associate Justice.

Appeal from the Trial Division, the Honorable ARTHUR NGIRAKLSONG, Chief Justice, presiding.

PER CURIAM:

Zylden Yano appeals the Trial Division's denial of his Rule 34 Motion for Arrest of Judgment with respect to his conviction for Attempted First Degree Murder. For the following reasons, we reverse and remand with directions to vacate Yano's conviction for Attempted First Degree Murder.[1]

[1] Appellant has not requested oral argument, and we determine that oral argument is unnecessary to resolve this matter. *See* ROP R. App. P. 34(a).

BACKGROUND

On July 20, 2013, Nehemiah Pamitalan was brutally attacked during a robbery of the Bem Ermii burger stand near the KB Bridge in Airai. Three days later, the Republic charged Yano with Attempted Murder in the First Degree, Robbery, Aggravated Assault, Assault and Battery with a Dangerous Weapon, and Grand Larceny. He pleaded not guilty.

During the course of the jury trial, Yano never challenged the sufficiency of the Information, requested a bill of particulars, or objected to the jury instructions. After a multi-day trial, the jury found Yano guilty on all five counts. Yano then filed a Rule 34 Motion for Arrest of Judgment, arguing that his conviction for Attempted First Degree Murder must be set aside because Count 1 of the Information failed to charge an offense. More specifically, Yano argued that Count 1 charged him with Attempted First Degree Murder on a felony-murder theory only, and that the crime of Attempted Felony Murder does not exist. The Trial Division denied the motion. Yano timely appeals.

STANDARD OF REVIEW

We review the sufficiency of an information de novo. *United States v. Enslin*, 327 F.3d 788, 793 (9th Cir. 2003); *see also Uehara v. Republic of Palau*, 17 ROP 167, 178 (2010). Where no challenge to the information is raised until after the verdict has been rendered, the information must be "construed liberally in favor of its sufficiency." *United States v. Gibson*, 409 F.3d 325, 331 (6th Cir. 2005).

In reviewing the denial of a Rule 34 motion, our review is limited to the information, plea, verdict, and sentence. *See, e.g.*, *United States v. Bradford*, 194 F.2d

197, 201 (2d Cir. 1952); *United States v. Stolon*, 555 F. Supp. 238, 239 (E.D.N.Y. 1983); *United States v. Guthrie*, 814 F. Supp. 942, 944 (E.D. Wash. 1993); *see also* 3 Fed. Prac. & Proc. Crim. § 601 (4th ed.) ("The purpose of a Rule 34 motion to arrest judgment is to give the trial judge another chance to invalidate a judgment due to a fundamental error appearing on the face of the record. The 'record' includes only the indictment, the plea, the verdict, and the sentence.").

ANALYSIS

The Republic charged Yano with Attempted Murder in the First Degree in Count 1 of the Information. Count 1 of the Second Amended Information reads:

> **ATTEMPTED MURDER IN THE FIRST DEGREE**, in that Defendant **ZYLDEN YANO,** did unlawfully and intentionally attempt to take the life of NEHEMIAH PAMITALAN while in perpetration of a robbery, in violation of 17 PNC §§ 104 and 1701. This crime is classified as a felony, and upon conviction thereof the offender shall be imprisoned for 30 years.

As noted above, Yano did not make any substantive challenges to Count 1 during pretrial proceedings or at trial. However, after the verdict, Yano filed a Motion for Arrest of Judgment under Rule 34 requesting that his conviction on Count 1 be vacated.

Rule 34 provides that "the court on motion of a defendant shall arrest judgment if the complaint or information does not charge an offense or if the court was without jurisdiction of the offense charged." ROP R. Crim. P. 34. Here, Yano argues that Count 1 of the Information fails to charge an offense. He does not argue that he had no notice that he was charged with Attempted First Degree Murder, but instead challenges the alleged theory underlying the crime. He asserts that the Republic charged him with Attempted First Degree Murder under a felony murder theory only—in other words, that it did not

charge him with having the requisite intent for Attempted First Degree Murder, but instead charged him with almost killing the victim (accidentally or otherwise) in the course of committing robbery. Yano argues that felony murder is not a legally cognizable premise for attempted murder and that Count 1 of the Information therefore fails to charge an offense.

The Republic's response is two-fold. First, it argues that Attempted First Degree Murder may be prosecuted under a felony murder theory in the Republic, so the Information charging Yano under that theory and his subsequent conviction are valid. Second, the Republic argues that the Information actually charged Yano with Attempted First Degree Murder under two alternate theories: (1) that Yano attempted to kill the victim with the requisite intent (intent-based theory) and (2) that Yano attempted to kill the victim in the course of committing robbery (felony murder theory). Accordingly, the Republic argues that, even if the felony murder theory is legally insufficient, Yano's conviction should stand because the Information still charges an offense—namely, Attempted First Degree Murder under an intent-based theory.

I. Attempted Felony Murder Does Not Exist

Section 1701 of the Palau Criminal Code defines the offense of Murder in the First Degree:

> Every person who shall unlawfully take the life of another with malice aforethought by poison, lying in wait, torture, or any other kind of wilful, deliberate, malicious, and premeditated killing, or while in the perpetration of, or in the attempt to perpetrate, any arson, rape, burglary, or robbery, shall be guilty of murder in the first degree[.]

17 PNC § 1701. Section 1701 thus sets out two alternate means of committing Murder in the First Degree: (1) by killing another person with the requisite intent (malice aforethought plus some kind of premeditation), or (2) by killing a person in the course of committing or attempting to commit one of the enumerated felonies. *See State v. Bowerman*, 802 P.2d 116, 120 (Wash. 1990) ("Premeditated murder and felony murder are not separate crimes. They are alternate ways of committing the single crime of first degree murder."). In felony murder, no intent to kill is necessary. *See People v. Viser*, 343 N.E.2d 903, 910 (Ill. 1975) "[T]he distinctive characteristic of felony murder is that it does not involve an intention to kill."). Instead, an intent to kill is implied by legal fiction from the intent to commit the predicate felony. *See State v. Gray*, 654 So. 2d 552, 553 (Fla. 1995) ("[F]elony murder is based on a legal fiction that implies malice aforethought from the actor's intent to commit the underlying felony.") (overruled on other grounds by statute).

Section 104 is Palau's attempt statute. It provides that "[e]very person who shall unlawfully attempt to commit murder, which attempt shall fall short of actual commission of the crime itself, shall be guilty of attempted murder[.]" 17 PNC § 104(b). It further specifies that Attempted Murder in the First Degree carries a sentence of 30 years' imprisonment, while Attempted Murder in the Second Degree is punishable by a sentence of not less than 30 months and not greater than 30 years. 17 PNC § 104(b)(1)-(2).

The Republic's argument in favor of the existence of attempted felony murder is deceptively simple. It argues that Section 104 criminalizes any attempt to commit murder

that falls short of the actual commission of murder, and Section 1701 provides that murder may be committed either with the requisite intent or in the commission of a felony, so falling short of killing someone while in the commission of a felony qualifies as attempted murder.

What the Republic fails to apprehend, however, is that the crime of attempt requires a specific intent to commit the crime attempted. *See Trust Territory v. Rodriquez*, 8 TTR 491, 496 (1985) ("It is basic criminal law that an attempt to commit a crime requires specific intent, the performance of an act toward the commission, and the failure to consummate the act."); *United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1193 (9th Cir. 2000) (use of the word "attempt" in a criminal statute implies that specific intent is required). Felony murder, in contrast, exists for the purpose of punishing individuals who, while in the course of committing serious felonies, unintentionally kill others. *See Rodriquez*, 8 TTR at 495("The felony murder rule originated in England and at common law the author of an unintended homicide is guilty of murder if the killing takes place in the perpetration of a felony. Thus malice is implied by the law and what is intended is the felony and an unintended homicide.") (citation omitted). Attempted felony murder is, therefore, a legal impossibility, because one cannot intend to do the unintentional.

This conclusion is supported by the fact that almost every U.S. state to have considered the issue has rejected the existence of attempted felony murder. *See, e.g., In re Richey*, 175 P.3d 585, 586-88 (Wash. 2008) ("In electing to charge first degree felony murder, the State relieves itself of the burden to prove an intent to kill or, indeed, any

mental element as to the killing itself. It follows that a charge of attempted felony murder is illogical in that it burdens the State with the necessity of proving that the defendant intended to commit a crime that does not have an element of intent."); *State v. Kimbrough*, 924 S.W.2d 888, 890-92 (Tenn. 1996) (discussing logical and legal impossibility of attempted felony murder and collecting cases); *Bruce v. State*, 566 A.2d 103, 105 (Md. 1989) ("Because a conviction for felony murder requires no specific intent to kill, it follows that because a criminal attempt is a specific intent crime, attempted felony murder is not a crime in Maryland."); *People v. Viser*, N.E.2d 903, 910 (Ill. 1975) ("[T]he offense of attempt requires an 'intent to commit a specific offense', while the distinctive characteristic of felony murder is that it does not involve an intention to kill. There is no such criminal offense as an attempt to achieve an unintended result.") (citation omitted); State v. Darby, 491 A.2d 733, 736 (N.J. App. Div. 1984) ("'Attempted felony murder' is a self-contradiction, for one does not 'attempt' an unintended result.").

Palauan case law largely supports this result. In *Rodriquez*, we observed that "[w]ithout a homicide the felony murder rule simply does not come into play" because an actual killing "is the most basic requirement for the application of the felony murder rule." *Rodriquez*, 8 TTR at 495. Moreover, we acknowledged the fundamental incompatibility of attempt, which requires specific intent, and felony murder, which is designed to punish unintentional killings. *See id.* at 497. ("The common law fiction of *transferred* intent is used to support the felony murder rule. There is such a basic and logical inconsistency between the *specific* intent required for an attempted crime that an attempted felony murder is a legal impossibility."). Our reasoning in *Rodriquez* aligns

perfectly with the majority position in the United States and remains as sound today as it was in 1985.

To be fair, in *ROP v. Ngiraboi*, 2 ROP Intrm. 257 (1991), we retreated from this well-reasoned conclusion without explanation and without any mention of *Rodriquez*. However, the issue of whether a felony murder theory could support a conviction for attempted murder was not squarely presented in *Ngiraboi*; so, that Court's observations in dicta have little precedential value. Moreover, the *Ngiraboi* Court appears to have overlooked the fact that attempt requires specific intent, because it noted that mere recklessness would be sufficient to support an intent-based conviction for attempted second degree murder. *Ngiraboi*, 2 ROP Intrm. at 262. This is plainly wrong. *See, e.g.*, *United States v. Kwong*, 14 F.3d 189, 195 (2d Cir. 1994) (holding that attempted murder requires proof of specific intent, and "mere recklessness will not suffice"). In any event, to the extent that *Ngiraboi* held that attempted felony murder exists in Palau, it is hereby overruled.

II. Alternate Means

The Republic argues that, even if attempted murder cannot be predicated on a felony murder theory, Yano's conviction should be affirmed because the Information charged intent-based attempted murder as well as felony murder. Count 1 includes the following language: "**ATTEMPTED MURDER IN THE FIRST DEGREE**, in that Defendant **ZYLDEN YANO,** did unlawfully and intentionally attempt to take the life of NEHEMIAH PAMITALAN while in perpetration of a robbery, in violation of 17 PNC §§ 104 and 1701." The Republic asserts that the use of the word "intentionally" indicates

an intent-based theory of the crime, rather than simply a felony murder theory (in which, ostensibly, the intent to kill would be implied by legal fiction from the intent to commit the underlying felony). Accordingly, the Republic argues, the Information charged at least one acceptable theory of Attempted Murder in the First Degree.

Given that we must construe the Information with maximum liberality, the Republic's argument is plausible. It is true that, to distinguish intent-based Attempted First Degree Murder from intent-based Attempted Second Degree Murder, the Republic should have specified that the attempted murder was committed "by poison, lying in wait, torture, or any other kind of wilful, deliberate, malicious, and premeditated killing[.]" 17 PNC § 1701. However, it is clear from the caption and the statutes listed that the Republic was charging Attempted Murder in the First Degree, not Attempted Murder in the Second Degree. Thus, it is possible that the Information charged Attempted First Degree Murder under both an intent-based theory and a felony murder theory.

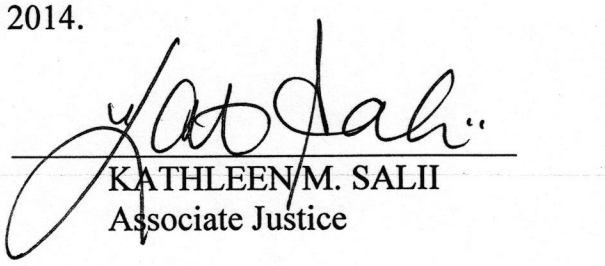
Even assuming the Information charged alternate means, however, Yano's conviction cannot stand. A guilty verdict must be set aside "where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." *Yates v. United States,* 354 U.S. 298, 312 (1957). This rule applies "whenever one of the possible grounds of conviction was legally inadequate for any reason." *United States v. Holly*, 488 F.3d 1298, 1304-07 (10th Cir. 2007); *see also United States v. Howard*, 517 F.3d 731, 736-38 (5th Cir. 2008) ("[A] conviction must be vacated if a legally invalid theory was submitted to the jury and it is impossible to tell whether the jury's verdict of guilt relied on the invalid theory."). Here, Yano was charged with

Attempted First Degree Murder under both a valid theory of the crime (intent-based attempted murder) and a legally inadequate theory (felony murder). The jury's verdict simply states that it found Yano guilty of Attempted First Degree Murder. There is no way to discern from the verdict upon which theory the jury rested its decision.[2] Accordingly, Yano's conviction for Attempted First Degree Murder must be set aside.

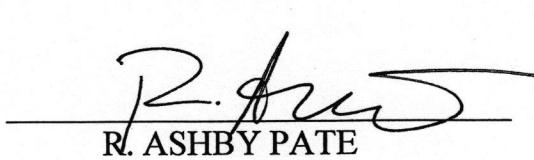
CONCLUSION

For the foregoing reasons, the decision of the Trial Division is **REVERSED and REMANDED** with instructions to vacate Yano's conviction on Count 1.

SO ORDERED, this 4th day of September, 2014.



KATHLEEN M. SALII
Associate Justice



LOURDES F. MATERNE
Associate Justice

R. ASHBY PATE
Associate Justice

[2] Although we do not rely on this fact, we note that the jury instructions make it abundantly clear that the jury actually based its verdict on the improper felony murder theory, because that was the only theory of the crime upon which it was instructed. Indeed, the jury was specifically instructed that, if it found Yano guilty of Attempted Murder in the First Degree, it was required to find him guilty of Robbery "because Robbery is an element of Attempted Murder in the First Degree." Jury Instruction No. 10.