

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

No. 2009-0548

State of New Hampshire

v.

Clarence Sanders

**Appeal Pursuant to Rule 7 from Judgment
of the Rockingham County Superior Court**

BRIEF FOR THE DEFENDANT

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(Oral Argument Waived)

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QUESTION PRESENTED

Whether the State introduced sufficient evidence to prove, beyond a reasonable doubt, that Sanders had the purpose to kill Arlene Lancey.

Issue preserved, in bench trial, by defense argument that the State had not proven the element, and the trial court's finding of a purpose to kill. T. 375-97; App. 9-13.*

*Citations to the record are as follows:

"T." refers to the transcript of the three-day trial held on April 20-22, 2009;

"S." refers to the transcript of the sentencing hearing, held on July 2, 2009;

"App." refers to the Appendix filed with this brief.

STATEMENT OF THE CASE

A Rockingham County grand jury charged Clarence Sanders with two counts of attempted murder and two counts of first degree assault. App. 1-4. One first degree assault charge and one attempted murder charge specified Arlene Lancey ("Arlene") as the victim, while the two other similar charges specified Leon Lancey ("Leon") as the victim. Id. The defense elected a bench trial, and the parties agreed to have the court consider the first degree assault charge associated with each victim only if the court first acquitted Sanders of the attempted murder charge associated with that victim. App. 9.

Before submitting the case for a verdict, the defense conceded Sanders's guilt for the first degree assault of both Lanceys. T. 356. That left in dispute only Sanders's guilt for their attempted murders, and the trial therefore ultimately focused on whether Sanders had formed a purpose to kill. Following the trial, the court (McHugh, J.) convicted Sanders of the attempted murder of Arlene and of the first degree assault of Leon, having acquitted him of Leon's attempted murder. App. 5-8. The court sentenced Sanders to a term of twenty years to life for the attempted murder, and to a consecutive term of five to ten years for the first degree assault. S. 32; App. 5, 8.

STATEMENT OF THE FACTS

In early 2006, Clarence Sanders moved in with his brother, Larry Sanders ("Larry"), and Larry's wife, Thelma Sanders ("Thelma"), in Raymond. T. 152-53. Larry worked at a Wal-Mart distribution center, and arranged for Sanders to work there under the auspices of Labor Ready, a temporary employment service. T. 156-57, 165-68, 234. Arlene also worked at the distribution center, and met Sanders there through Larry. T. 157, 192. In April, Sanders and Arlene began an intimate relationship. T. 193.

A few months after Sanders moved in, Larry told Sanders to find another place to live. T. 157. At around the same time, Sanders lost his job at Wal-Mart, evidently because of an inability to pass Wal-Mart's employee drug test. T. 165-66, 234-35. Arlene told Sanders he could move in with her while he looked for a place of his own. T. 158, 193. Soon afterwards, though, their relationship deteriorated to the point that Arlene ordered Sanders to move out. T. 193-96.

On the morning of May 14, 2006, Arlene told Sanders by phone that, while she was at work, he needed to remove his property from her apartment and leave. T. 196-97, 228. With Larry's assistance, Sanders went to Arlene's apartment later that morning, packed his belongings, and returned with them to Larry's house. T. 158-60. Larry testified that, soon after their

return, Sanders said that he was going for a walk. T. 161.

When she left work that day at around 1:00 p.m., Arlene went to the home of her twenty-year-old son, Leon, to ask him to accompany her to her apartment. T. 101, 197. Arlene testified that she asked for Leon's company, for fear of what Sanders might do if she encountered him alone. T. 197, 252. Leon agreed, and at Arlene's apartment, they found Sanders in the bedroom, seemingly packing his belongings. T. 9, 59-60, 74. Arlene refused Sanders's request to talk, picked up a Mother's Day gift for her mother that was in the apartment, and left to deliver the gift. T. 11, 197. Arlene went across the street to her mother's apartment, while Leon waited in the car. T. 12.

Moments later, Sanders knocked on the window of the car to ask Leon to get Arlene, saying that he had locked himself out of the apartment. T. 13-14. Leon testified that Sanders seemed suspiciously to be keeping his hands in his pockets. T. 16. Nevertheless, Leon went to his grandmother's apartment to convey the request to Arlene. Arlene and Leon came out and returned to Arlene's apartment with Sanders. T. 14-15.

Inside the apartment, Sanders and Arlene went to the bedroom and began arguing. T. 17, 70, 198-99. Leon and Arlene testified that Sanders evidently had lied about locking his keys in the apartment, as he produced his keys and threw them onto the bed as soon as they entered the apartment. T. 17, 68, 224. Soon

afterwards, Leon saw Sanders pull a knife from inside his clothing and swing it at Arlene. T. 18-19. Leon then jumped on Sanders, a much larger man, and yelled to his mother to run. T. 19, 47, 77, 79, 251. While the two struggled, Sanders stabbed Leon and threw him off Sanders's back. T. 20, 119-24. Arlene ran out of the apartment, down the stairs, and into the apartment immediately beneath her own, in which lived Arlene's friends, the Rushfords. T. 84, 126-27, 199. Sanders pursued Arlene, and reached the Rushfords' door before Arlene had fully closed it. T. 29-30. Sanders kicked it open and stabbed Arlene several times. T. 30, 85, 200-01, 248-49.

At that point, Leon arrived at the Rushfords' apartment, yelling that he was going to call the police. T. 32, 87. Sanders then ran from the building back to Larry's house, on his way dropping the now-bent knife into the catch basin from which the police later recovered it. T. 26, 32-33, 175. Upon arriving at Larry's house, Sanders said "I did it," at which point Thelma told Larry to get Sanders out of the house. T. 154. Larry drove Sanders to the bus station and gave him money to buy a ticket. T. 162-63. Sanders bought a ticket under the name Kenneth Threat, and was arrested at a bus station in West Virginia en route to California. T. 331-32.

The State sought to introduce a video of a more than three-hour-long interrogation of Sanders by a West Virginia police

officer. T. 354. Ultimately, because Sanders did not testify at trial, and because nothing Sanders said to the police officer proved an intent to kill, the court refused to watch the video. T. 355-58, 372, 403. The court did, though, accept a proffer of its contents, including Sanders's description of the struggle as involving only a fist fight, and his explanation that the fight arose out of a confrontation "about the son sleeping with the mom." T. 362-63. The court also admitted a written statement Sanders had given to the West Virginia police officer. T. 361.

The State further introduced the testimony of two inmates, Robert Brearley and Luke Hansen, who claimed that Sanders had made incriminating statements to them about the stabbing. Brearley testified that Sanders said that he had stabbed the Lanceys in a dispute over drugs they had stolen from him, and that he could have shot them instead of stabbing them, but wanted them to feel some pain. T. 258-59. Because Brearley denied that Sanders said that he intended to kill the Lanceys, to resolve the disputed question of Sanders's intent, the prosecution focused more on Hansen's testimony. T. 259.**

Hansen testified that Sanders told him also that he had stabbed the Lanceys in a dispute over drugs they stole from him.

**Sanders used a wheelchair at trial, and Brearley testified that Sanders attributed the injuries necessitating the wheelchair to an assault he suffered while jailed in West Virginia. Brearley testified that Sanders can still walk to some extent. T. 262-63, 292.

T. 294. Hansen further attributed to Sanders a statement relating to his intentions: "he said that when he found out that Leon was the one who stole his shit ... and I was like, I think I would have killed him, and he said, that was his intentions of when he went after him with a knife." T. 294-95. Hansen denied, though, that Sanders said anything specifically about Arlene. T. 296.

In light of Sanders's decision to contest only the allegation that he intended to kill, the parties at trial focused particular attention on a few details that seemed to bear most directly on that issue. First, the Lanceys testified that, in the apartment just before he produced the knife, Sanders had said words to the effect that he was not intimidated by Leon's presence, and could kill both of them if he chose to. T. 18, 69, 71-73, 109, 199, 213-14, 240-41. The defense disputed that Sanders had said those words, and noted that Arlene had failed to mention them in her first statement to the police just days after the stabbing, even though she did in that statement attribute other statements to Sanders. T. 213, 316-17. Moreover, the defense emphasized that neither Arlene nor Leon gave a consistent account of Sanders's precise words. T. 111, 213-14, 379-82.

Second, the State contended that Sanders had surreptitiously armed himself with a knife taken from a set in Arlene's apartment, and had concealed it while asking Leon and Arlene to

let him back in the apartment. T. 29, 53. The defense challenged that aspect of the evidence also, noting that in her initial statement to the police, Arlene had said that she saw Sanders take the knife from the set when the three returned to the apartment. T. 207-10, 315-16. Later, when confronted with that discrepancy between her statement and Leon's statement, Arlene denied that she had seen Sanders take the knife from the set. T. 317-19, 322.

Third, the State noted that both Leon and Arlene had each suffered at least one serious stab wound. Leon suffered three stab wounds, one of which involved the knife blade entering his back and exiting under his arm, and another of which cut his neck. T. 121-23. Arlene was stabbed in the neck, and testified that the blade entered her mouth, cutting her tongue and knocking out some teeth. T. 201. The defense disputed that those wounds, serious though they were, necessarily proved an intent to kill. Given Sanders's large size, the defense contended that had Sanders intended to kill, he would have succeeded in doing so. T. 395-96.

Fourth, the State argued that Sanders's decision to return to Arlene's apartment even after moving all of his property out, and his effort to lure Arlene into the apartment under the pretense that he had locked himself out of it, bespoke a degree of premeditation consistent with an intent to kill. T. 403-06.

The defense sought to cast doubt on the claim that Sanders had only pretended to be locked out, by casting doubt on Leon's and Arlene's testimony that he threw his keys on the bed as soon as they entered the apartment with him. Specifically, counsel elicited Arlene's testimony that Sanders's keys were not found on the bed. T. 223. Indeed, counsel argued that a photograph introduced in evidence suggested that Sanders had, in fact, put his key on a kitchen table, as Arlene had asked him to do. T. 383-84. Moreover, even assuming that Sanders lied to get Arlene into the apartment, the defense argued that that circumstance was just as consistent with an intent to commit a non-fatal assault on Arlene. T. 394-95.

Finally, the State sought to attribute significance to Hansen's testimony about Sanders's statements. T. 398, 412-13. The defense contended that the inmate testimony was not credible. The court seems to have adopted the defense view of that testimony, insofar as the court's written decision makes no mention of the inmate testimony in explaining Sanders's attempted murder conviction, and insofar as, at sentencing, the court stated that it had given the inmate testimony "little, if any, credibility in [the] decision-making process." S. 28.

SUMMARY OF THE ARGUMENT

To convict Sanders of Arlene's attempted murder, the State had to prove that Sanders had the conscious object of causing her death. Here, the circumstantial evidence offered by the State on the element of purpose to kill failed to exclude all rational conclusions other than guilt. In particular, the State failed to exclude the rational conclusion that Sanders had a purpose to attack and injure Arlene, but not kill her. Thus, the State introduced insufficient evidence to convict Sanders of her attempted murder.

I. THE STATE INTRODUCED INSUFFICIENT EVIDENCE TO CONVICT SANDERS OF THE ATTEMPTED MURDER OF ARLENE LANCEY.

At the close of the case, the defense argued that the State had not proven beyond a reasonable doubt that Sanders had a purpose to kill. T. 375-97. In explaining its verdict convicting Sanders of that crime, the court identified several factors as significant. First, the court noted circumstances indicating that Sanders sought the opportunity that day to launch an attack on Arlene in private. Thus, the court found that Sanders

had removed all his belongings from the apartment ... and therefore had no cause to return to that apartment with Arlene Lancey; that prior to leaving the apartment the first time he took a butcher knife from the kitchen of Ms. Lancey and concealed it on his person; that while outside of the apartment building, the defendant specifically sought out Arlene Lancey; that upon finding her he made up an excuse to get her to accompany him back to her apartment; that there was no reason for him to return to the apartment in that all of his belongings had been removed and he simply could have handed her the keys ... or as he claimed, could have left them in the apartment if he indeed had unintentionally locked himself out.

App. 11-12.

Second, the court noted circumstances indicating that Sanders's attack was directed at Arlene specifically. Thus, the court found that, upon their return to the apartment, Sanders

immediately pulled out the butcher knife that he [had] previously concealed and made a stabbing motion towards her; that it was only

the actions of Leon Lancey that prevented him from in fact stabbing Arlene Lancey in her apartment; that when Arlene Lancey escaped from the apartment he immediately followed her into an apartment where she had attempted to take refuge; that he purposely broke the door and immediately began stabbing her while she [lay] defenselessly on the floor; that [she] never had a weapon; that the defendant stabbed [her] multiple times, one of which was most serious; that the only reason why he was unable to complete the crime of attempted murder was the fact that [Leon] reappeared and claimed he had notified the police.

App. 12.

Finally, the court found that Sanders "had a motive to inflict bodily harm including death on Arlene Lancey." App. 12. Namely, Sanders "perceived, most likely incorrectly, that she had either stolen items from him or that she had wrongfully ordered him out of her apartment when he had no job and only a temporary place to stay." Id.

In order to convict Sanders of attempted murder, the State had to prove beyond a reasonable doubt that he had the purpose to cause Arlene's death. RSA 629:1, I; State v. Duguay, 142 N.H. 221, 225 (1997). The criminal code defines the element of purpose as encompassing a "conscious object" to cause the result - here, death - that defines the crime. RSA 626:1, II(a). Thus, to convict, the State had to prove that Sanders had the conscious object of causing Arlene's death.

To prevail on appeal when raising a challenge to the sufficiency of evidence, "the defendant must show that, viewing

the evidence in the light most favorable to the State, no rational trier of fact could have found guilt beyond a reasonable doubt." State v. Fuller, 147 N.H. 210, 213 (2001). "Because persons rarely explain to others the inner workings of the minds or mental processes, a culpable mental state must, in most cases, as here, be proven by circumstantial evidence." State v. Laudarowicz, 142 N.H. 1, 4 (1997) (citation omitted).

At no time did Sanders admit to having a purpose to kill Arlene. Hansen testified only that Sanders had said words to the effect that he intended to kill Leon, and the court in any event chose not to give weight to the inmate informant testimony. If believed, Arlene's and Leon's testimony that Sanders said that he could kill them if he wanted to does not actually assert that he wanted to kill them. At most, it constitutes circumstantial evidence of a purpose to kill. Therefore, to prove that Sanders had a purpose to kill Arlene, the State had to rely on circumstantial evidence. "When the evidence presented is circumstantial, it must exclude all rational conclusions except guilt in order to be sufficient to convict." State v. Silva, 158 N.H. 96, 99 (2008).

Here, the court erred in finding sufficient evidence to support the finding, beyond a reasonable doubt, that Sanders formed a purpose to kill. All of the conduct and circumstances on which the court relied is equally consistent with the

formation of a purpose to commit first degree assault, but not kill. First degree assault, as charged here, encompasses the offense of purposely causing bodily injury to another by means of a deadly weapon. RSA 631:1, I(b). The act of causing injury by means of a deadly weapon alone cannot prove the crime of attempted murder, for to conclude otherwise would wholly subsume that variant of first degree assault within the offense of attempted murder. See State v. Thomas, 154 N.H. 189, 192 (2006) ("The element of intent distinguishes attempted murder from first degree assault and reckless conduct. Attempted murder requires intent to kill, while attempted first degree assault requires only intent to cause serious bodily injury....").

None of the considerations relied on by the court to prove the disputed element suffice to exclude all rational conclusions except an intent to kill. All of the circumstances establishing that Sanders armed himself with the knife and sought to lure Arlene to the apartment are as consistent with a purpose to attack and injure her, as with a purpose to kill her. Similarly, all of the evidence demonstrating Sanders's focus on Arlene does nothing to demonstrate the purpose - whether to kill or to injure - underlying that focus. Finally, equally consistent with the hypothesis of intent to injure as with the hypothesis of intent to kill is the evidence relating to Sanders's motive. Evidence that he believed she had stolen from him, or that she had

wrongfully ordered him to leave the apartment, could give rise at least as readily to a purpose to injure as to a purpose to kill.

This Court's recent decision in Thomas provides inferential support for Sanders's claim that the State introduced insufficient evidence to prove his purpose to kill. In that case, "Thomas used a knife to repeatedly stab his girlfriend ... in their apartment after accusing her of having an affair the night before." 154 N.H. at 190. Like Sanders, Thomas argued at trial that he did not intend to kill. Id. at 193. Unlike in Sanders's case, the prosecution in Thomas's case did not rely wholly on circumstantial evidence to prove a purpose to kill, as witnesses testified that Thomas "said he was going to kill both" victims. Id.

On appeal, Thomas did not allege insufficient evidence to support the verdict, but rather claimed error in the court's refusal to instruct the jury on first degree assault and reckless conduct, as lesser-included offenses of the charged attempted murder. Id. at 192. That claim required this Court to consider whether the record contained sufficient evidence to support a verdict on the lesser-included offenses, and thus to support an instruction on the lesser offenses. After reviewing the record, this Court concluded that, "[b]ased upon the evidence adduced at trial, we find that the issue of intent was sufficiently disputed to provide a rational basis for the jury to conclude that the

defendant acted only recklessly or with a purpose to cause only serious bodily injury." Id. at 193; see also id. at 195 (to same effect).

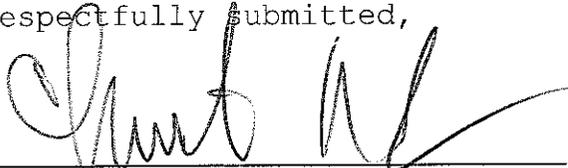
As noted above, when, as here and unlike in Thomas, the evidence of a purpose to kill is circumstantial, that evidence "must exclude all rational conclusions except guilt in order to be sufficient to convict." Silva, 158 N.H. at 99. Here, though, as in Thomas, a rational basis existed for the factfinder to conclude that Sanders did not form an intent to kill. Here, therefore, applying the sufficiency standard specific to cases involving only circumstantial evidence on an essential element, this Court should find that the evidence does not exclude all rational conclusions except guilt. This Court must therefore reverse Sanders's conviction for attempted murder.

CONCLUSION

WHEREFORE, Mr. Sanders respectfully requests that this Court vacate his conviction for the attempted murder of Arlene Lancey.

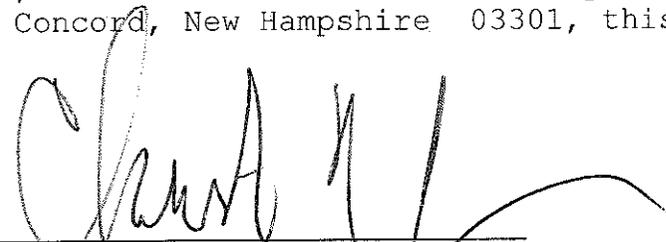
Oral argument waived.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing brief have been mailed, postage prepaid, to the Office of the Attorney General, 33 Capitol Street, Concord, New Hampshire 03301, this 21st day of December, 2009.



Christopher M. Johnson

DATED: December 21, 2009