Case Note

Knowingly Exposing Another to HIV

Smallwood v. State, 680 A.2d 512 (Md. 1996).

I

Conduct having the potential to transmit the Human Immunodeficiency Virus (HIV) has recently been subject to increased criminal penalties.[1] In many instances, HIV-positive persons alleged to have knowingly exposed others to the risk of contracting the virus have been charged with and convicted of attempted murder,[2] an offense that requires proof of the defendant's specific intent to kill.[3] In these cases, prosecutors usually point to "extrinsic evidence" of the defendant's intent to kill—that is, evidence beyond the defendant's mere awareness of his HIV-positive status and the means of transmission.[4] Sometimes, however, the only evidence of intent is the defendant's own knowledge. In *Smallwood v. State*,[5] the Maryland Court of

1. *See* Lori A. David, *The Legal Ramifications in Criminal Law of Knowingly Transmitting AIDS*, 19 LAW & PSYCHOL. REV. 259, 259 (1995); Kimberly A. Harris, *Death at First Bite: A Mens Rea Approach in Determining Criminal Liability for Intentional HIV Transmission*, 35 ARIZ. L. REV. 237, 238 (1993). At least part of the impetus for greater criminalization was the passage in 1990 of the Ryan White Comprehensive AIDS Resources Emergency (CARE) Act, 42 U.S.C. § 300ff-47 (1994), which conditions "state emergency AIDS relief grants . . . upon a state's showing statutory capability to prosecute individuals infected with HIV who intentionally or knowingly infect or expose others." Stephen V. Kenney, Comment, *Criminalizing HIV Transmission: Lessons From History and a Model for the Future*, 8 J. CONTEMP HEALTH L. & POL'Y 245, 247 (1992).

2. For examples of cases in which HIV-positive defendants have been convicted of attempted murder for knowingly exposing others to the virus, see *Scroggins v. State*, 401 S.E.2d 13 (Ga. Ct. App. 1990), *State v. Haines*, 545 N.E.2d 834 (Ind. Ct. App. 1989); *State v. Caine*, 652 So. 2d 611 (La. Ct. App. 1995), *State v. Hinkhouse*, 912 P.2d 921 (Or. Ct. App. 1996); and *Weeks v. State*, 834 S.W.2d 559 (Tex. App. 1992, pet. ref'd). Over 200 AIDS-related criminal prosecutions have been brought in civilian and military tribunals. *See* Rorie Sherman, *Criminal Prosecutions on AIDS Growing*, NAT'L L.J., Oct. 14, 1991, at 3. Attempted murder is one of the most common charges in such prosecutions. *See* Donald H.J. Hermann, *Criminalizing Conduct Related to HIV Transmission*, 9 ST. LOUIS U. PUB. L. REV. 351, 365 (1990).

3. *See, e.g.*, State v. Kimbrough, 924 S.W.2d 888, 891 (Tenn. 1996).

4. Such evidence usually takes the form of statements by the defendant giving rise to an inference of an intent to kill. *See, e.g.*, *Caine*, 652 So. 2d at 613 (reporting that defendant said, "'I'll give you AIDS,'" before stabbing victim with syringe). In a few cases, however, the extrinsic evidence supporting such an inference is significantly weaker. *See, e.g.*, *Scroggins*, 401 S.E.2d at 18 (finding that defendant "sucked up excess sputum before biting" victim and then laughed when asked if he had AIDS).

5. 680 A.2d 512 (Md. 1996).

Appeals became the first court to tackle the question of "whether knowingly exposing someone to a risk of HIV-infection is *by itself* sufficient to infer . . . an intent to kill."[6] Refusing to follow the current judicial trend toward increasing liability,[7] the court answered the question in the negative.

The *Smallwood* decision has sparked an intense debate. Proponents, including gay rights advocates, AIDS activists, and defense attorneys, have applauded it as "stand[ing] for the proposition that persons with AIDS should be treated like everyone else in the criminal system."[8] They also contend that a conviction in *Smallwood* could have discouraged voluntary HIV testing, in that someone unaware of his or her HIV status cannot be guilty of *knowing* exposure.[9] Victims' rights groups and prosecutors, in contrast, accuse the *Smallwood* court of exalting legal technicalities over justice and ignoring the well-being of the public.[10] This Case Note will argue that, given the facts in *Smallwood* and the constraints imposed upon such prosecutions by the intent and causation requirements of traditional homicide statutes, the court's holding was the only legally proper result. Morally, however, the outcome was reprehensible and can only be corrected by state enactment of HIV-specific criminal statutes.

II

In *Smallwood*, the defendant, Dwight Ralph Smallwood, pleaded guilty to charges of raping and robbing three women.[11] The trial court also convicted Smallwood of attempted second degree murder and assault with intent to murder for exposing the women, through rape, to the risk of contracting HIV. Unlike most other attempted murder prosecutions for knowing exposure, however, there was no extrinsic evidence of intent. The only evidence produced by the State to support the charge that Smallwood intended to kill his victims was: (1) his knowledge of his HIV-positive status; (2) his awareness of the possibility of transmitting the virus through unprotected sex; and (3) his failure to use condoms during the rapes.

The Maryland Court of Appeals held the evidence insufficient to satisfy the intent requirement of the attempted murder charges, which required proof beyond a reasonable doubt that Smallwood intended to kill his victims "'under

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6. *Id.* at 517 n.4 (emphasis added).

7. *See* Amy Argetsinger, *Md.'s Top Court Says HIV Not Enough To Convict Rapist of Attempted Murder*, WASH. POST., Aug. 2, 1996, at A1.

8. *Id.*

9. *See id.*; David, *supra* note 1, at 260. *But see* IND. CODE ANN. § 35-42-2-6 (West 1996) (making reckless failure to know of HIV infection alternative mens rea for offense of battery by body waste).

10. *See* Argetsinger, *supra* note 7.

11. Smallwood did not challenge his conviction by the trial court on reckless endangerment charges. Smallwood's counsel conceded on appeal that, "[t]he most that can reasonably be inferred . . . is that he is guilty of recklessly endangering his victims by exposing them to the risk that they would become infected [with HIV] themselves." *Smallwood*, 680 A.2d at 514.

circumstances that would not legally justify or excuse the killing or mitigate it to manslaughter.'"[12] The court held that for circumstantial evidence to support the charge, "it must be shown that the victim's death would have been a natural and probable result of the defendant's conduct,"[13] as is the case when one fires a deadly weapon at a vital part of another person's body. The State had argued that Smallwood's actions were analogous to firing a deadly weapon, but the court rejected this analogy, reasoning that, although death by AIDS is one *natural* consequence of one occasion of unprotected sex, it is not a sufficiently *probable* result.[14] While the improbability of transmission was the main ground upon which the Court of Appeals rested its decision, it also noted that Smallwood's actions could be "wholly explained by an intent to commit rape and armed robbery."[15] Therefore, his actions alone could not support the inference that he also had an intent to kill. The court concluded that, in the absence of additional evidence of intent beyond Smallwood's knowledge of his HIV status, it was not possible to infer an intent to kill.

Although its reasoning was fallacious in some respects,[16] the *Smallwood* court reached the only legally proper result. Because Smallwood's conduct of engaging in unprotected nonconsensual sex can be explained by an intent to rape, the inference that Smallwood acted with *reckless indifference* as to whether his victims contracted HIV is a much stronger and more reasonable inference than that he acted with the specific intent to murder them.[17] Because there was no extrinsic evidence of Smallwood's intent, the most that can reasonably be inferred from his conduct is that he did not care whether he

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12. *Id.* at 515 (quoting State v. Earp, 571 A.2d 1227 (Md. 1990)).

13. *Id.* at 516.

14. *See id.*

15. *Id.*

16. Most notably, the court's emphasis on the objective, statistical, medical probability of HIV transmission undermined the basic nature of the intent requirement, which is a subjective inquiry into the particular defendant's state of mind. *See id.* at 515 ("'[I]ntent is subjective . . . .'") (quoting *Earp*, 571 A.2d at 1233). In defining "probable result" to mean only the objective probability of transmission, the court ignored the interrelation between the defendant's subjective belief regarding the probability of transmission and his intent. Other courts, in contrast, have properly stressed the importance of the defendant's belief in the probability of transmission—even in circumstances in which transmission was practically impossible. *See, e.g.*, State v. Smith, 621 A.2d 493, 510 (N.J. Super. Ct. App. Div. 1993) (holding that defendant could be convicted of attempted murder if "defendant himself believed that biting [victim] might infect him, regardless of whether that belief was a reasonable one").

Furthermore, even under the probabilistic approach, the *Smallwood* decision is still problematic in that it ignored the fact that the probability of HIV transmission varies with the circumstances of the exposure but does not necessarily correspond to an increased or decreased intent to kill. For example, the probability of transmission in a long-term consensual sexual relationship would be much greater than through just one sexual encounter. Yet, absent extrinsic evidence of intent, there would be no greater reason to believe that the defendant intended to kill his partner. The *Smallwood* approach, however, would impute greater criminal culpability to such a defendant.

17. Where an inference consistent with a defendant's innocence is "stronger, i.e., more logical and more reasonable," than an inference consistent with his guilt, a rational factfinder must draw the stronger inference consistent with innocence. *See* Smallwood v. State, 661 A.2d 747, 756 (Md. Ct. Spec. App. 1995) (Bloom, J., dissenting). A finding of reckless indifference would fail the intent requirement of the attempted murder charges, and would, therefore, be consistent with Smallwood's innocence of those charges.

infected his victims. Therefore, he can be convicted of reckless endangerment, but he cannot be guilty of attempted murder.

The problem with this outcome is that because reckless endangerment is typically a misdemeanor,[18] the punishment does not fit the crime. It is a fundamental principle of the criminal law that punishment be proportionate to the seriousness of an offense.[19] Knowingly exposing another person to the risk of contracting HIV through sexual intercourse—whether in the context of a rape or a consensual but uninformed encounter—is a serious wrong. "AIDS rape,"[20] for example, is a qualitatively different crime than rape because the victim is subjected to additional fears, stigmatization, and potential loss of life.[21] The same harms result when an individual who engaged in unprotected consensual sex later learns that his or her partner was HIV-positive. Therefore, although Smallwood's crime of knowingly exposing his rape victims to the risk of contracting HIV did not legally amount to the felony of attempted murder, the law should treat this act more seriously than a misdemeanor.

III

Smallwood's greatest significance lies in its demonstration that traditional criminal homicide statutes are unable to address adequately the offense of knowingly exposing another to HIV. The two main obstacles to such prosecutions are proof of intent and proof of causation. Intent is the main evidentiary problem in cases in which it is uncertain whether the victim will contract HIV. Such cases necessarily involve attempted homicide charges and, therefore, require proof of specific intent to kill. *Smallwood* illustrates the difficulty of proving such intent, particularly where there is no extrinsic intent evidence. Of course, intent must be established regardless of whether or not the victim contracts HIV. However, if it is known that the victim has contracted HIV, the requisite intent is not necessarily the intent to kill. Instead, the prosecution could bring a charge of: (1) manslaughter, for which proof of recklessness would suffice;[22] (2) depraved heart murder (if the jurisdiction

18. *See* MODEL PENAL CODE § 211.2 (1985) (defining reckless endangerment as misdemeanor). Under Maryland law, reckless endangerment is a misdemeanor punishable by up to a $5000 fine and five years imprisonment. *See* MD. ANN. CODE art. 27, § 12A-2(a)(1) (1996). In contrast, attempted second degree murder is a felony punishable by imprisonment for up to 30 years. *See id.* § 411A(a).

19. *See, e.g.*, JEREMY BENTHAM, *Of the Proportion Between Punishments and Offences*, *in* AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 165–74 (J.H. Burns & H.L.A. Hart eds., 1970).

20. I use this term to refer to a rape in which the offender is HIV-positive or has AIDS. Stefanie Wepner, in contrast, uses the term to denote the situation in which a person with HIV or AIDS intends to spread the virus through rape. *See* Stefanie S. Wepner, *The Death Penalty: A Solution to the Problem of Intentional AIDS Transmission Through Rape*, 26 J. MARSHALL L. REV. 941, 943–44 (1993).

21. *See id.* at 944. *But see* Argetsinger, *supra* note 7 (quoting gay rights activist who claims that "'HIV alone is not . . . a sufficient basis to treat *two identically horrible crimes* differently under the law'") (emphasis added).

22. *See* MODEL PENAL CODE § 210.3 (1985).

recognizes that offense, as does Maryland), for which proof of depraved indifference to human life is sufficient;[23] or (3) in the context of rape accompanied by the death of the victim from AIDS, felony-murder, for which proof of intent to commit the underlying felony of rape would suffice.[24] Hence, proof of intent is primarily an obstacle to prosecutions in which it is not known whether the victim will contract HIV.

Although prosecutors in states that delay prosecution until it has been determined that the victim actually contracted HIV can avoid the *Smallwood* problem of proving intent to kill, they still face the other main proof problem, causation, which need not be established in *Smallwood*-type attempt cases. To demonstrate causation in a homicide case, the prosecution must prove beyond a reasonable doubt that the defendant was HIV-positive at the time of his conduct and that it was the defendant's conduct that transmitted HIV to the victim.[25] In some jurisdictions, however, even if direct causation can be shown, the "year and a day" rule—which requires a victim to die within a year after the defendant's conduct in order for criminal liability for the death to attach—might preclude prosecution.[26] Furthermore, the delay involved in determining whether the victim contracts HIV can actually work to the defendant's advantage.[27] Finally, this "wait-and-see" approach does not redress the harm of knowingly *exposing* another to the risk of HIV infection. It only applies in cases of knowing *transmission*.

Jurisdictions that recognize a cause of action for attempted manslaughter[28] can avoid the proof problems associated with both intent and causation because recklessness satisfies the intent element for that crime and causation need not be proved. However, most jurisdictions view this offense as a logical impossibility because it requires a showing of intent to commit an unintentional killing.[29] A solution to this problem for jurisdictions that

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23. *See id.* § 210.2.

24. *See* Bruce v. State, 566 A.2d 103, 104 (Md. 1989).

25. For a more elaborate discussion of the difficulties involved in proving causation, see Harris, *supra* note 1, at 240–41; Jacob A. Heth, *Dangerous Liaisons: Criminalizing Conduct Related to HIV Transmission*, 29 WILLAMETTE L. REV. 843, 855 (1993).

26. *See* David, *supra* note 1, at 263.

27. In this context, delay works to the defendant's advantage in two ways. First, "[a]s the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade," Barker v. Wingo, 407 U.S. 514, 521 (1972), making acquittal more likely. Second, an HIV-positive defendant may die before it can be determined whether the victim has contracted the virus.

28. Although most jurisdictions reject such a charge, some states do recognize attempted manslaughter as a legitimate cause of action. *See* People v. Thomas, 729 P.2d 972 (Colo. 1986) (en banc); Taylor v. State, 444 So. 2d 931 (Fla. 1983).

29. *See, e.g.*, State v. Holbron, 904 P.2d 912, 919–22 (Haw. 1995) (discussing logical impossibility of attempted involuntary manslaughter and citing cases in accord). Attempted depraved heart murder is another charge unavailable to prosecutors in HIV-knowing-exposure cases because it is considered to be a logically impossible offense. *See, e.g.*, State v. Johnson, 707 P.2d 1174, 1180 (N.M. Ct. App. 1985). Similarly, in knowing-exposure cases, like *Smallwood*, that involve rape as the means of transmission, attempted felony-murder is not an available charge because it, too, is considered a legal fiction. *See, e.g.*, State v. Pratt, 873 P.2d 800, 812 (Idaho 1993).

generally do not recognize a charge of attempted manslaughter would be to do so in the narrow context of HIV-knowing-exposure cases.[30] This solution, however, smacks of judicial activism and could present separation of powers concerns if implemented without the approval of the state legislature.

In light of the difficulties involved under traditional criminal statutes in prosecuting HIV-infected persons who knowingly expose others to the virus, states that currently lack laws that make knowing exposure a felony should enact such statutes.[31] HIV-specific statutes are the best method for dealing with knowing exposure because, when properly drafted, they evade the proof problems associated with both intent to kill and causation while providing immunity to those who disclose their HIV-positive status to their sex partners.[32] The state need only show that the defendant knew or should have known that he had HIV, knew how the virus could be transmitted, and nonetheless engaged in conduct—without first obtaining the other person's informed consent—that could transmit the virus. *Smallwood* illustrates that in the absence of such statutes and in the absence of extrinsic evidence of intent to kill, states will simply have to settle for charging defendants who knowingly expose others to HIV with the misdemeanor of reckless endangerment.

Precisely because a misdemeanor conviction in such cases seems inadequate, it is understandable that victims' rights advocates argue that the *Smallwood* court should have upheld Smallwood's conviction. However, the court's obligation to protect the constitutional right of the defendant to have each element of a crime proved beyond a reasonable doubt precluded such judicial activism.[33] The state legislatures, however, do have the authority and the duty to enact laws to preserve the well-being of the public. In states that still lack these statutes, the legislatures should enact criminal statutes that specifically designate as a felony the knowing exposure of another to HIV.

—Jennifer Grishkin

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30. Some states that do not generally recognize a charge of attempted manslaughter nonetheless do so in limited circumstances. *See, e.g.*, People v. Foster, 225 N.E.2d 200 (N.Y. 1967) (sustaining plea to attempted manslaughter, generally invalid charge in New York, because defendant freely agreed to plead guilty to it). Of course, the difference between recognizing the charge of attempted manslaughter in knowing-exposure cases and permitting it in *Foster* is that the defendant consented to the state's use of such a charge in *Foster* but might not do so in a knowing-exposure prosecution.

31. Maryland enacted an HIV-specific statute in 1989. *See* MD. CODE ANN., HEALTH-GEN. I § 18-601.1 (1994). However, the statute addresses only knowing transmission, not knowing exposure. To prosecute Smallwood under this provision, the State would still have to prove that he either transferred HIV to his victims or attempted to transfer HIV. *See id.* § 18-601.1(a). This would require a showing of intent to transfer the virus, which leaves the State in the same position as proving intent to kill. Furthermore, knowing transmission is only a misdemeanor. *See id.* § 18-601.1(b). For examples of existing state statutes that make knowingly exposing another to HIV a felony, see GA. CODE ANN. § 16-5-60 (1996); S.C. CODE ANN. § 44-29-145 (Law Co-op. Supp. 1995); TENN. CODE ANN. § 39-13-109 (Supp. 1996).

32. *See* Heth, *supra* note 25, at 846, 861–62.

33. *See In re* Winship, 397 U.S. 358, 364 (1970) (holding that Due Process Clause requires "proof beyond a reasonable doubt of every fact necessary to constitute the crime . . . charged").