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NO. 29691-1-III
(Consolidated with 29657-1-III & 29657-2-III)

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

ANTHONY DELEON,

Defendant/Appellant.

APPELLANT'S REPLY BRIEF,

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A. TRANSFERRED INTENT

The issue of transferred intent appears to be in a state of flux.

Miguel Acevedo flashed a gang sign at a silver Taurus when it drove by the Sunnyside residence. Mr. Acevedo and Ignacio Cardenas were on the sidewalk. Angelo Lopez was in the house just coming out of the front door.

If, for sake of argument, there was a specific intent to assault Mr. Acevedo with a firearm, the question then becomes whether or not that specific intent should transfer to Mr. Cardenas, who was actually assaulted and suffered great bodily harm, and/or to Mr. Lopez, who merely expressed fear.

"… [A]ssault does not, under all circumstances, require that the specific intent match a specific victim." *State v. Elmi*, 166 Wn.2d 209, 207 P.3d 439 (2009). *Elmi* is a six (6) - three (3) decision.

As the State notes at p. 7 of its brief:

> There is, therefore, no requirement that a shooter must be aware of the precise number of people he or she is shooting at, as long as there is reason to believe that the area he is directing his fire towards is occupied.

The record reflects that shots were fired at Mr. Cardenas and Mr.

Acevedo. Mr. Acevedo ducked behind a car and was not injured. Mr. Cardenas failed to duck and suffered great bodily harm. Mr. Lopez did not testify that any shots were fired toward him or went past him.

The State's reliance upon *State v. Salamanca,* 69 Wn. App. 817, 851 P.2d 1242 (1993) is misplaced. In the *Salamanca* case there were five (5) people inside a car. Multiple shots were fired into the car. Clearly the number of people who were the subject of the shots were all within a limited space.

The State's argument, if extended to its logical conclusion, would mean that any person within the vicinity, who may experience fear as a result of hearing gunshots, would be an assault victim. Mr. Deleon asserts that such a result would be unjustified in the extreme.

No matter how the incident is viewed, Mr. Lopez cannot be considered a victim under the doctrine of transferred intent.

B. LESSER INCLUDED OFFENSE

The State's argument concerning the lesser included offense of second degree assault also misses the mark. The State's reasoning is circular and redundant.

The term "assault" constitutes an essential element of the crime of both first degree assault and second degree assault. *See: State v. Smith,*

159 Wn.2d 778, 788, 154 P.3d 873 (2007); *see also: State v. Elmi, supra,* 215.

An assault requires an intentional act. *See: State v. Krup,* 36 Wn. App. 454, 458-59, 676 P.2d 507 (1984).

Second degree assault under RCW 9A.36.021(c) or (e) clearly falls within the parameters of a lesser included offense of first degree assault. A firearm is a deadly weapon. *See:* WPIC 2.06. There is no limitation under subparagraph (e) concerning the predicate felony necessary for committing that particular means of second degree assault.

The State cites to *State v. Fernandez-Medina,* 141 Wn.2d 452, 6 P.3d 1150 (2000) in support of its argument. Mr. Deleon contends that the *Fernandez-Medina* case actually supports his position.

A careful reading of the factual predicates in *Fernandez-Medina* clearly shows that only second degree assault is committed when the alleged victim experiences apprehension of harm.

There can be no doubt that a drive-by shooting occurred. The result of the drive-by shooting was an assault. The degree of assault is dependent upon the degree of infliction of bodily harm on any alleged victim.

Insofar as Mr. Lopez and Mr. Acevedo are concerned, the only harm suffered by them was under the apprehension element of the assault definition.

Defense counsel's analysis of the lesser included offense was deficient and prejudicial to Mr. Deleon's case.

C. GANG AGGRAVATOR

RCW 9.94A.535(3) contains numerous aggravating circumstances which a jury may consider in connection with the State's notice that it will seek an enhanced sentence. Among those aggravators are the following subsections:

> (s) The defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group; and
>
> …
>
> (aa) The defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership.

RCW 9.94A.535(3)(s) has been the subject of considerable litigation. The various courts have ruled that there must be specific evidence pointing to the aggravating factor as opposed to mere generalizations.

See: State v. Bluehorse, 159 Wn. App. 410, 248 P.3d 537 (2011); *State v. Monschke,* 133 Wn. App. 313, 135 P.3d 966 (2006); *State v. Ryna Ra,* 144 Wn. App. 688, 175 P.3d 609 (2008); *State v. Yarbrough,* 151 Wn. App. 66, 210 P.3d 1029 (2009).

Recent case law addressing subparagraph (aa) attempts to differentiate subparagraph (aa) from subparagraph (s). *See: State v. Moreno, slip opinion,* 29692-0-III (February 12, 2013). Mr. Deleon contends that the dissent in the *Moreno* opinion is the better reasoned analysis of subparagraph (aa).

Mr. Deleon otherwise relies upon the argument contained in his original brief as to this particular issue.

D. SENTENCING CONDITIONS

The State's argument concerning sentencing conditions ignores Mr. Deleon's First Amendment right of association. The argument contained in his original brief supports his position that gang-related tattoos and gang-related clothing constitute an unreasonable restraint upon his First Amendment rights.

The colors blue and red are worn by people throughout the United States and in different societies. Telling Mr. Deleon that he cannot wear any red clothing, or any clothing containing the color red, is unreasonable.

Prohibiting an individual from wearing tattoos is also unreasonable. The myriad variety of tattoos available on the open market make this condition overly restrictive. The fact that certain tattoos may have some symbolism for a particular association (*e.g.*, Masons; anti-war advocates; various service clubs) obviously implicates an individual's First Amendment rights.

Mr. Deleon otherwise relies upon the arguments set forth in his original brief as to all of the issues raised.

DATED this 25th day of February, 2013.

Respectfully submitted,

s/Dennis W. Morgan

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DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	YAKIMA COUNTY
Plaintiff,	)	NO.09 1 00977 1
Respondent,	)	
	)	**CERTIFICATE OF SERVICE**
v.	)	
	)	
ANTHONY DELEON,	)	
	)	
Defendant,	)	
Appellant.	)	
	)	

I certify under penalty of perjury under the laws of the State of Washington that on this 25th day of February, 2013, I caused a true and correct copy of the *APPELLANT'S REPLY BRIEF* to be served on:

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