

No. 66058-6-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ANTOINE DAVIS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to support the attempted murder convictions on counts 2, 3, and 4.

2. When the trial court replaced a juror who committed misconduct with an alternate, it failed to determine on the record whether the alternate juror had remained impartial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To prove an individual is an accomplice to attempted murder, the State must show beyond a reasonable doubt that the defendant knew he was facilitating the commission of attempted murder, which in turn requires intent to kill. In this case, Jontae Chatman repeatedly shot and killed Mario Spearman as Mr. Spearman sat in the driver's seat of his car, and appellant Antoine Davis knew about and encouraged this crime. Mr. Chatman did not know there were backseat passengers in Mr. Spearman's car; he knew there was a frontseat passenger and tried to avoid shooting him. No evidence was presented that Antoine Davis knew there were any passengers in Mario Spearman's car, which had tinted windows. Did the State fail to prove Mr. Davis committed attempted murder of the three passengers?

2. When a court replaces a juror with an alternate after deliberations have commenced, it must determine on the record the alternate juror's continuing impartiality. Where a court fails to perform this required task, reversal is required unless the State can prove beyond a reasonable doubt the error was harmless. Here, the court replaced a deliberating juror with an alternate without ascertaining the alternate's continuing impartiality on the record. Where the State's case against Mr. Davis depended largely on the testimony of a co-defendant whose story had changed repeatedly, and where the evidence of three of the four counts was insufficient regardless, must all of the convictions be reversed and the case remanded for a new trial?

C. STATEMENT OF THE CASE

Appellant Antoine Davis and his friend Jontae Chatman were extremely sad to learn that their close friend Ron Preston was shot and seriously wounded on April 7, 2009. 7/13/10 RP 48-50; 7/15/10 RP 81; 7/20/10 RP 93; 7/21/10 RP 16. Mr. Davis, Mr. Chatman, and Mr. Preston had been harassed for years by Mario Spearman, a neighbor who believed the three had "snitched" to police about his illegal activities. 7/13/10 RP 54; 7/15/10 RP 103. The three knew that Mario Spearman was "out to get" them, and

they feared for their lives. 7/15/10 RP 113, 118. According to Pastor Robert Jeffrey of the New Hope Missionary Baptist Church, Mr. Chatman had repeatedly told him he was terrified of Mr. Spearman, and every time Mr. Chatman left Pastor Jeffrey's office, the pastor feared he would never see Mr. Chatman alive again. 9/24/10 RP 14.

When Mr. Chatman heard about the shooting of Mr. Preston, he sobbed uncontrollably. 7/20/10 RP 93. Not only had Mr. Preston been shot, but "word on the street was that Mario was going to shoot all of them." 7/14/10 RP 151; 7/15/10 RP 104. Later that day, Mr. Chatman and Mr. Davis met with their friend Dominick Reed and Mr. Reed's friend Nestor Ovidio Mejia. 7/13/10 RP 50-54. They decided to look for Mario Spearman so they could avenge Mr. Preston's shooting and prevent further bloodshed. 7/13/10 RP 54-60.

Mr. Reed drove the group to SeaTac, and made a U-turn when he spotted Mr. Spearman's car, a Cadillac with tinted windows. 7/13/10 RP 68-69. Mr. Reed said that because of the tinted windows, he could not see who was in the car, but he recognized the car as Mr. Spearman's. 7/13/10 RP 69.

When both cars stopped at a stoplight, Mr. Chatman, Mr. Davis, and Mr. Ovidio got out of the car, and Mr. Chatman shot at Mr. Spearman at least 20 times with an AK-47. 7/6/10 RP 124; 7/7/10 RP 236; 7/13/10 RP 73, 76; 7/19/10 RP 156. Although Mr. Davis and Mr. Ovidio also had guns, neither shot at Mr. Spearman or the car. 7/8/10 RP 13; 7/12/10 RP 66; 7/19/10 RP 156; 7/21/10 RP 24. Mr. Chatman aimed only at Mr. Spearman, and tried to miss the frontseat passenger. 7/15/10 RP 106. Because the windows were tinted, Mr. Chatman was unaware that there were also two backseat passengers. 7/13/10 RP 69; 7/15/10 RP 106; 7/26/10 RP 85.

Mario Spearman died as a result of the shooting. 7/20/10 RP 82. The frontseat passenger's leg was injured by a stray bullet, and the two backseat passengers were unharmed. 7/7/10 RP 171, 231; 7/12/10 RP 10; 7/20/10 RP 10, 27-32.

The State charged Mr. Chatman, Mr. Davis, Mr. Ovidio and Mr. Reed with one count of first-degree murder and three counts of first-degree attempted murder. CP 14-16. Mr. Reed pled guilty to lesser crimes and testified against the others. 7/13/10 RP 116.

At trial, the lead detective in the case testified that Mr. Chatman admitted he shot Mario Spearman, and explained that he

tried to avoid shooting the passenger. 7/15/10 RP 106. The State also called a trajectory analyst as a witness. 7/14/10 RP 178-88. His analysis showed that the shooter was at all times aiming at the driver. 7/26/10 RP 48.

During closing argument, the State explained its theory of the case was that Mr. Chatman was the principal and Mr. Davis and Mr. Ovidio were guilty as accomplices. 7/26/10 RP 35-39. As to the attempted murder counts, the prosecutor acknowledged that Mr. Chatman tried to avoid hitting anyone but the driver and that the State's trajectory analysis supported that claim. 7/26/10 RP 42, 48. But the State argued that Mr. Chatman and his accomplices were guilty of the attempted murder of the three passengers on a "transferred intent" theory. 7/26/10 RP 34.

After the jury had been deliberating for more than a day, the court and the parties discovered that one juror had performed independent legal research for the case. 7/28/10 RP 173-75. The juror acknowledged her misconduct, and assured the court that she had not told any other jurors that she performed outside research. 7/28/10 RP 177. All parties agreed with the court's decision to dismiss this juror and replace her with an alternate. 7/28/10 RP 179. When the alternate arrived, the court instructed the jury to

begin deliberations anew, but did not determine whether the alternate juror had remained impartial during her day-and-a-half absence. 7/28/10 RP 181.

The jury convicted Mr. Davis, Mr. Chatman, and Mr. Ovidio of the first-degree murder of Mr. Spearman as charged in count 1. CP 110. Although it acquitted them of the first-degree attempted murder of the passengers, it found them guilty of the lesser-included offense of second-degree attempted murder for those three counts. CP 113-14, 116-17, 119-20. The jury found the defendants were armed with a firearm for each count. CP 111, 115, 118, 121.

The court sentenced Mr. Davis to 767 months' confinement based on an offender score of one. CP 23. Mr. Davis appeals. CP 7-19.

D. ARGUMENT

1. THE STATE FAILED TO PROVE ATTEMPTED MURDER, REQUIRING REVERSAL OF THE CONVICTIONS ON COUNTS 2, 3, AND 4.

a. Due Process requires the State to prove each element of the offense charged beyond a reasonable doubt. The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120

S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. Id.; U.S. Const. amend. XIV; Const. art. I, § 3; City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). On appellate review, evidence is sufficient to support a conviction only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

b. The State failed to prove Mr. Davis was an accomplice to attempted murder on counts 2, 3, and 4, because the State's undisputed evidence showed the shooter intended to shoot only the driver and to avoid the passengers, and the State presented no evidence that Mr. Davis even knew about the passengers. Mr. Davis was convicted of three counts of second-degree attempted murder. The State's theory of the case was that Mr. Davis was an accomplice and that Mr. Chatman was the principal in an attempted murder of all three passengers in the car. The State failed to prove

these counts because Mr. Chatman specifically intended to avoid shooting any passengers, and tried (largely successfully) to shoot only the driver. And no evidence was presented that Mr. Davis, as an accomplice, had any knowledge of the passengers at all. For each of these independent reasons, the State failed to prove attempted murder on counts 2, 3, and 4.

“A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.” RCW 9A.28.020(1) (emphasis added). A person is guilty of murder in the second degree if, “with intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person.” RCW 9A.32.050. A person is liable as an accomplice, if, “[w]ith knowledge that it will promote or facilitate the commission of the crime,” he encourages or aids another in commission of the crime. RCW 9A.08.020 (emphasis added).

Even setting aside accomplice liability for the moment, the State failed to prove that Jontae Chatman, the principal, committed attempted murder against the passengers. A fortiori the State failed to prove Mr. Davis committed attempted murder as Mr. Chatman’s accomplice.

Mr. Chatman's intent – and the intent of his codefendants – was to kill Mario Spearman. Mr. Chatman successfully killed Mr. Spearman, and sufficient evidence supports the convictions for all defendants on count one. But as the State acknowledged, Mr. Chatman intended not to shoot, let alone kill, the frontseat passenger. And he was apparently unaware that anyone was even in the backseat, presumably because the car's windows were tinted. Thus, the State failed to prove the necessary mens rea for the attempted murder counts.

The State argued at trial that Mr. Chatman, as principal, and Mr. Davis, as his accomplice, were guilty of attempted murder based on "transferred intent." In other words, they intended to kill Mario Spearman, so regardless of their mental state as to the passengers, their intent as to the driver transferred to everyone in the car. But our supreme court has never held that transferred intent can be applied to the crime of attempted murder, and states that have addressed the issue have held that the doctrine may not be applied in the context of this crime.¹ See, e.g., People v. Bland,

¹ In State v. Elmi, our supreme court held that the doctrine of transferred intent may be applied in assault cases. State v. Elmi, 166 Wn.2d 209, 207 P.3d 439 (2009).

48 P.3d 1107, 1116 (Cal. 2002); State v. Hinton, 630 A.2d 593, 602 (Conn. 1993); Ford v. State, 625 A.2d 984, 999 (Md. 1993).

In Bland, the California Supreme Court addressed the precise issue before the Court here: “whether transferred intent applies to the attempted murder charges when the defendant kills his sole intended target and shoots but does not kill others.” Bland, 48 P.3d at 1112. The court answered the question in the negative, holding that although transferred intent may be applied to the completed crime of murder, “the doctrine does not apply to an inchoate crime like attempted murder.” Bland, 48 P.3d at 1110. Thus, whether a defendant is guilty of the attempted murder of the surviving victims “depends on his mental state as to those victims and not on his mental state as to the intended victim.” Id.

The California Supreme Court quoted a leading treatise in explaining its reasoning:

[T]ransferred intent should not apply at all to attempted homicides, as the assailant can be punished directly for an attempt on the intended victim: If, without justification, excuse or mitigation D with intent to kill A fires a shot which misses A but unexpectedly inflicts a non-fatal injury upon B, D is guilty of an attempt to commit murder, but the attempt was to murder A whom D was trying to kill and not B who was hit quite accidentally. And so far as the criminal law is concerned there is no transfer of this

intent one to the other so as to make D guilty of an attempt to murder B.

Bland, 48 P.3d at 1116 (quoting Perkins & Boyce, Criminal Law (3d ed. 1982), ch. 7 § 8, p. 925) (emphasis in original). “The crime of attempt sanctions what the person intended to do but did not accomplish, not unintended and unaccomplished potential consequences.” Bland, 48 P.3d at 1116-17.

The Connecticut Supreme Court agreed that while transferred intent can be applied to murder, it cannot be applied to attempted murder. Hinton, 630 A.2d at 598 (transferred intent applies to murder), 601 (transferred intent does not apply to attempted murder). Among other reasons, the court recognized that the rule of lenity requires this reading of the attempt statute. Id. at 601-02.

The California court further explained that applying transferred intent to attempted murder would create insurmountable difficulties in defining scope, and would lead to limitless liability. Bland, 48 P.3d at 1117. “The world contains many people a murderous assailant does not intend to kill. ... [H]ow can a jury rationally decide which of many persons the defendant did not intend to kill were attempted murder victims on a transferred intent

theory? To how many unintended persons can an intent to kill be transferred?” Id. at 1118. In this case, for example, the State’s transferred intent theory would have supported dozens of charges and convictions for the attempted murder of every person in the vicinity of Mario Spearman’s murder. This standard is unworkable. Bland, 48 P.3d at 1117-18. Scholars have similarly pointed out that “using the doctrine of transferred intent to multiply liability for attempted murder gives the government a free ride by relieving it of its constitutional burden of proving the accused’s guilt on every element of the offense beyond a reasonable doubt.” John P. Einwechter, New Developments in Substantive Criminal Law Under the Uniform Code of Military Justice, 1998 Army Law. 20, 23-24.

This does not mean no liability attaches for the unintended victims; it just means that attempted murder is the wrong crime to charge in such circumstances. Ford, 625 A.2d at 1000 n.14. For example, the State probably could have charged Mr. Davis, Mr. Chatman, and Mr. Ovidio with reckless endangerment or drive-by shooting for the passengers in this case, in addition to charging them with first-degree murder for the driver. See RCW 9A.36.045(1) (drive-by shooting); RCW 9A.36.050 (reckless

endangerment). But Mr. Davis and his co-defendants are not guilty of attempted murder.

Even if Mr. Chatman's convictions for attempted murder were proper on a transferred intent theory, Mr. Davis cannot be liable for those crimes as an accomplice. Accomplice liability requires knowledge that one is facilitating the crime in question. RCW 9A.08.020; State v. Cronin, 142 Wn.2d 568, 578-79, 12 P.3d 752 (2000). To hold otherwise "impermissibly establishes strict liability for any crime committed by the principal, contrary to legislative intent." State v. Stein, 144 Wn.2d 236, 245, 27 P.3d 184 (2001). Here, the State proved Mr. Davis knew he was facilitating the murder of Mario Spearman, but it did not come close to presenting sufficient evidence that Mr. Davis knew he was facilitating the attempted murder of the passengers.

In sum, there are too many levels of indirection to support the convictions on counts 2, 3, and 4. The crimes are triply inchoate: the State has layered accomplice liability on top of transferred intent on top of attempt. For the reasons set forth above, these convictions cannot stand.

c. Reversal and dismissal is the appropriate remedy. In the absence of evidence from which a rational trier of fact could find

beyond a reasonable doubt Mr. Davis committed attempted murder, the judgment may not stand. State v. Spruell, 57 Wn. App. 383, 389, 788 P.2d 21 (1990). The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits a second prosecution for the same offense after a reversal for lack of sufficient evidence. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969)). The appropriate remedy for the error in this case is reversal of the attempted murder convictions on counts 2, 3, and 4, and dismissal of those charges with prejudice. The firearm verdicts on those counts must also be vacated, and the case remanded for resentencing on count 1 only.

2. THE TRIAL COURT SEATED AN ALTERNATE JUROR WITHOUT DETERMINING HER CONTINUED IMPARTIALITY, REQUIRING REVERSAL AND REMAND FOR A NEW TRIAL.

After the jury had been deliberating for more than a day, the court and the parties discovered that one juror had performed independent legal research for the case. 7/28/10 RP 173-75. The juror acknowledged her misconduct, and assured the court that she had not told any other jurors that she performed outside research. 7/28/10 RP 177. All parties agreed with the court's decision to

dismiss this juror and replace her with an alternate. 7/28/10 RP 179. When the alternate arrived, the court properly instructed the jury to begin deliberations anew, but did not determine whether the alternate juror had remained impartial during her day-and-a-half absence from the courtroom. 7/28/10 RP 181. This failure constitutes reversible error.

Under CrR 6.5, “the trial judge shall take appropriate steps to protect alternate jurors from influence, interference or publicity, which might affect that juror’s ability to remain impartial and the trial judge may conduct brief voir dire before seating such alternate juror for any trial or deliberations.” The rule “clearly contemplate[s] a formal proceeding which may include brief voir dire to insure that an alternate juror who has been temporarily excused and recalled has remained impartial.” State v. Stanley, 120 Wn. App. 312, 315, 85 P.3d 395 (2004). The requirement is not just rule-based; it “relate[s] directly to a defendant’s constitutional right to a fair trial before an impartial jury.” State v. Ashcraft, 71 Wn. App. 444, 462, 859 P.2d 60 (1993). Accordingly, the State must prove that a court’s failure to comply with this requirement is harmless beyond a reasonable doubt. Id. at 466 (citing Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)).

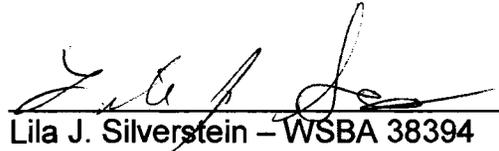
The State cannot make that showing here. As explained above, the State failed to present sufficient evidence to prove counts 2, 3, and 4. And although the State presented sufficient evidence to prove Mr. Davis was an accomplice to Mr. Spearman's murder, the conviction hinged largely on the jury's finding Dominick Reed credible. As to count one, then, "[t]here was substantial evidence to support the verdict reached but the evidence was not so overwhelming as to necessarily lead 12 fair-minded jurors to only one conclusion." Ashcraft, 71 Wn. App. at 467. Thus, the State cannot prove beyond a reasonable doubt that the failure to ensure an impartial jury was harmless. The remedy is reversal and remand for a new trial. Id.

E. CONCLUSION

For the reasons above this Court should reverse Mr. Davis's convictions on counts 2, 3, and 4, and remand for dismissal of those charges with prejudice. A new trial should be granted on count 1.

DATED this 26th day of April, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lila J. Silverstein", is written over a horizontal line.

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DIVISION ONE**

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Respondent,)	
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v.)	NO. 66058-6-I
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ANTOINE DAVIS,)	
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Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, JOSEPH ALVARADO, STATE THAT ON THE 26th DAY OF APRIL, 2011, I CAUSED THE ORIGINAL **BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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