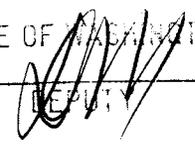


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 
DEPUTY

NO. 40622-5-II

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

MAURICIO JACINTO - LEON,

Appellant.

BRIEF OF RESPONDENT

AMIE HUNTER
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Deputy Prosecutor
for Respondent

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P.M. 1-18-2011

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I. ANSWERS TO ASSIGNMENTS OF ERROR

1. Defendant fails to show prejudice under ineffective assistance of counsel in failing to propose an instruction as to separate offenses, when the jury received sufficient evidence under the theory of transferred intent to find the defendant guilty.

II. ISSUES PERTAINING TO ANSWERS TO THE ASSIGNMENTS OF ERROR

1. Whether the outcome of the trial would have changed had the jury received the instruction as to separate offenses, when there was ample evidence of transferred intent to prove assault in the second degree in count four.

III. STATEMENT OF THE CASE

Procedural History

The State concurs with the Defendant's rendition of the procedural history.

Statement of Facts

On July 4, 2009, David Gonzales-Soto visited his cousin Martin Alvarez-Carranza and friend Abel Alvarez-Valadez at 701 Cherry Street in Kelso, Washington. 16 RP 42, 67; 17 RP 33.¹ The three were watching the local fireworks from the front porch of the house. 16 RP 43, 67. All

three stood near the front door under the porch light; with Martin and Abel standing to David's left.² 16 RP 44-45, 49, 63, 67-68; 17 RP 33. There were several cars parked in front of the residence. 16 RP 51. There were many people out that night, but most were lighting fireworks on Seventh Street and were not on Cherry. 16 RP 45, 60, 63, 68.

David testified at the same time the fireworks went off, he heard a shotgun fire. 16 RP 46. He looked in the direction of the shot and about sixty yards away he saw the Defendant firing in time with the fireworks. 16 RP 46, 57-58. David stated when he first saw the Defendant he fired upward from the door of his house down the alleyway. 16 RP 47, 56. He then fired again upwards in the other direction through the alleyway. 16 RP 47-48, 56. The third shot went between two buildings and the fourth was aimed at David, Martin and Able. 16 RP 48-49. David testified the Defendant went inside after the shots to reload. 16 RP 48. Before the fourth shot, David saw the Defendant aiming in his direction and said to Martin and Able, "[w]atch out, this guy is gonna shoot over here." 16 RP 49-50. The Defendant then fired the shot gun and David was hit in the

¹ For the sake of continuity the State will use the same references to the verbatim report of proceedings the Defendant uses. 16 RP – 4/5/10; 17 RP – 4/6/10 a.m.; 18 RP – 4/6/10 p.m.; 19 RP – 4/7/10.

hand by a shotgun pellet. 16 RP 49, 51. David yelled to the Defendant, “[m]an don’t be stupid man, I got hit over here.” 16 RP 59-60. The Defendant then went back inside his home, closed the door and turned off his light. 16 RP 52, 64.

David testified he had not met the Defendant before that night other than to say hello and there was no argument between them. 16 RP 52-53, 57. He did say he had some scarring from the pellet. 16 RP 54.

Abel Alvarez-Valadez testified similarly to David. He said they were standing under the porch light by the house and there was a lit street light next to the house. 16 RP 67-68, 71. He saw the Defendant come out of his house and fire down the alleyway. 16 RP 71. The Defendant then went back inside his house and shot down the alleyway again. 16 RP 71. The third shot went between the house and apartments. 16 RP 71. Abel testified after the third shot, the Defendant walked in their direction, broke open the shotgun, threw out the shell and reloaded. 16 RP 71-72, 76. He then looked at the men for two to three seconds, aimed and using both hands shot. 16 RP 71-72, 75-76. Abel said even though his car was the only thing between he and Defendant, he could see above his car and had

² The State also uses the first names of the victims for the sake of continuity and means

no difficulty seeing the Defendant. 16 RP 87. Abel testified if his car was not between them and the Defendant, all three of them would've been hit. 16 RP 83. Like David, Able didn't know the Defendant and there was no argument between them. 16 RP 79.

Martin Alvarez-Carranza also testified similarly to David and Able. Martin said the Defendant shot four times along with the fireworks and reloaded in-between. 17 RP 34, 36-38, 41, 49. Martin saw the Defendant look at them clearly and very serious just before he fired at them. 17 RP 38. He demonstrated the look on the Defendant's face for the jury, stating it was like he had some hate toward them. 17 RP 39. Martin clarified even though there was a car between he and the Defendant, the Defendant could see them well. 17 RP 45. Martin also confirmed Robert House was outside at the time of the shots and the Defendant fled inside his house after he hit them. 17 RP 42, 49. Additionally, Martin said he did not know the Defendant and there were no arguments between them. 17 RP 39, 43.

Robert House testified he was over talking at his neighbor's well-lit house approximately 20 minutes prior to the shooting. 17 RP 59-60.

no disrespect.

At the time of the shooting, House was outside near his vehicle, heading towards the house and noticed his friends, Martin, Able, and David, were still outside on their front porch. 17 RP 56. House was outside for approximately five minutes when he heard a loud boom right behind him and was instantly hit in the head, arms, and back with hot debris. 17 RP 56-57, 66. House estimated he was standing approximately 24 to 30 feet from the three men. 17 RP 69. Based upon the trajectory and where he was hit, Mr. House could tell the pellets ricocheted off the vehicle and hit him. 17 RP 58. Mr. House did not have any bruising and the pellets did not break his skin, but he found it offensive. 17 RP 58. House testified he did not know the Defendant and there were no issues between them. 17 RP 61-62.

The Kelso police responded to the area after the men called 911. The men pointed Officer Doug Lane in the direction of the Defendant's residence. 17 RP 116. Officers surrounded the Defendant's house, pounded on the wall, and yelled in English and Spanish for him to come outside. 17 RP 79, 123-124. Over a minute later, the Defendant came out of the house and after he was taken into custody, officers found a live twelve-gauge shotgun round in his right front pants pocket. 17 RP 81,

123, 127. Officers also detected an odor of alcohol coming from the Defendant. 17 RP 168.

Pursuant to a search warrant, a loaded shotgun was found inside the house under a blanket on the Defendant's bed. 17 RP 91-92, 95. Additionally, several spent shotgun shells were found; two were lying on the floor just inside the door, four inside in a trash bag, and one and live and one spent outside the front porch. 17 RP 88-90, 108; 18 RP 161, 190. Detective Voelker testified that when a shotgun is fired, the pellets will spread as they travel and the greater the distance the larger the spread. 17 RP 106.

Officer Doug Lane testified that when the three men pointed to the Defendant's home, he had a clear line of sight from the porch of 701 Cherry Street. 17 RP 116, 150. It was later measured to be just under 60 yards, or 175 feet. 18 RP 200. He noted the Defendant's home had a working motion activated light over the front door. 18 RP 166. Additionally, it was a clear night and the lunar calendar showed one night short of a full moon. 18 RP 167. Officer Lane also noticed Abel's Nissan Pathfinder had between seventy and one hundred pellet holes or indentations. 17 RP 117. Moreover, there were pellet holes in the men's

home and some were found on top the tarp on Mr. House's boat. 17 RP 58-59, 147-149. Officer Lane testified that Mr. House was in the line of fire based upon trajectory. 18 RP 166.

The Defendant testified he was born in Mexico, but had been in the United States for approximately 26 years. 19 RP 5-6. He stated he was aware of the shotgun as his friend had left it in the residence two years prior. 19 RP 7, 10-11. The Defendant stated early his friend was over and he drank three beers over a several hour period. 19 RP 25-26. After his friend left the Defendant took the shotgun outside on July 4th and shot into the air two times in celebration of the holiday. 19 RP 8-9. He stated he did not want to shoot anyone and did not have problems with anyone. 19 RP 9. He testified he never saw anyone out that night. 19 RP 9. The Defendant stated he had bad eyesight and he doesn't see letters and little things. 19 RP 27. He indicated his vision is the same whether day or night and is only foggy for small things. 19 RP 28. He said he has reading glasses, but not any distance issues. 19 RP 28-29.

The Defendant admitted he took his garbage out daily, but identified the two shells he fired as the ones on the floor and not those in

the garbage. 19 RP 10, 13. He seemed confused when questioned about the shells in the garbage. 19 RP 13-16.

During closing arguments, the State made it clear to the jury this entire case revolved around intent. 19 RP 56. It argued the Defendant assaulted David, Able, and Martin as they testified he looked directly at him, pointed the gun, and shot. 19 RP 59. It also went through the definition and instruction on transferred intent as it applied to Mr. House. 19 RP 59, CP 111. The State never argued the Defendant intended to assault Mr. House, but that Mr. House was hit when the Defendant intentionally assaulted the three other men. 19 RP 59. The State then argues whether the Defendant intended great bodily harm for the assault one or merely intended the assault for assault second. 19 RP 60-70. The State does briefly argue Assault three under the idea of criminal negligence for Mr. House and David because there was harm and the Defendant's actions were negligent in not taking care of where he aimed. 19 RP 71-72.

Defense counsel in closing argued the Defendant didn't see anyone around and had poor vision. 19 RP 75-76, 81. He argued the Defendant did not have any intent to assault, but was celebrating by firing into the air.

19 RP 81-83. He then spoke about the charge of Assault three. 19 RP 85. He conceded David was harmed and the act was negligent. 19 RP 85-86. However, he argued Mr. House did not suffer physical injury and there was insufficient evidence for bodily harm. 19 RP 86.

The court submitted the case to the jury with count one regarding Martin as Assault one, alternative Assault two, count two regarding David as Assault one, alternative Assault two, alternative Assault three, count three regarding Abel as Assault one, alternative Assault two, count four regarding Robert House as Assault one, alternative Assault two, alternative Assault three, and count five Alien in Possession of a Firearm. The court gave the jury a separate instruction telling them to consider the greater crimes first and then the lesser crimes. CP 95. CP 30-33, 88-125. Each of the assaults also had a firearm enhancement attached. CP 30-33. The Jury returned a verdict of guilty to counts one through four of the lesser offense of Assault two after being unable to reach a unanimous verdict as to the charges of Assault three, and guilty as to count five. 19 RP 97-99, CP 135.

IV. ARGUMENT

A. THE DEFENDANT FAILS TO SHOW PREJUDICE UNDER INEFFECTIVE ASSISTANCE OF COUNSEL

**SINCE THERE WAS SUFFICIENT EVIDENCE
UNDER A THEORY OF TRANSFERRED INTENT
TO FIND THE DEFENDANT GUILTY AND AN
INSTRUCTION TO CONSIDER CHARGES AS
SEPARATE CRIMES WOULD HAVE NO EFFECT
ON THE OUTCOME OF THE TRIAL.**

The Defendant argues trial counsel's failure to propose the WPIC 3.01 instructing the jury to consider the evidence separately for each count was ineffective assistance of counsel. Def. Brf at 7-13.

Both the Federal and Washington State Constitutions provide the right to assistance of counsel. See State v. Jury, 19 Wa.App. 256, 262, 576 P.2d 1302, 1306 (1978); see also U.S. CONST. AMEND. VI, WASH. CONST. ART. 1, § 22. "[T]he substance of this guarantee is that courts must make 'effective' appointments of counsel." Jury, 19 Wa.App. at 262, 576 P.2d at 1306 quoting Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). The test for determining effective counsel is whether, after considering the entire record, it can be said that the accused was afforded an effective representation and a fair and impartial trial? See Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987); State v. Myers, 86 Wn.2d 419, 424, 545 P.2d 538 (1976). Moreover, "[t]his test places a weighty burden on the defendant to prove

two things: first, considering the entire record, that he was denied effective representation, and second, that he was prejudiced thereby.” Jury at 263, 576 P.2d at 1307.

The first prong of this two-part test requires the defendant to show “that his . . . lawyer failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances.” State v. Visitacion, 55 Wa.App. 166, 173, 776 P.2d 986, 990 (1989) citing State v. Sardinia, 42 Wa.App. 533, 539, 713 P.2d 122 (1986). Counsel is considered ineffective if his representation falls below an objective standard of reasonableness. See State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). The second prong requires the defendant to show “that there is a reasonable probability that, but for the counsel’s errors, the result of the proceeding would have been different.” Visitacion at 173 citing State v. Sardinia, 42 Wa.App. 533, 539, 713 P.2d 122 (1986), In re Pers. Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). Moreover, counsel is presumed effective. See Strickland, 466 U.S. at 689, 104 S.Ct. 2052; State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). It is unnecessary to address both parts of the *Strickland* test if the defendant fails to show either part, and if it is easier to dispose

of an ineffectiveness claim on the grounds of lack of prejudice, the court should do so. State v. Standifer, 48 Wa.App. 121, 126, 737 P.2d 1308 (1987).

In the present case the Defendant fails to show prejudice under the *Strickland* test. The Defendant argues if the court gave WPIC 3.01 “defense counsel could have drawn the jury’s attention to the instruction...and advised the jury on the limited evidence it could consider to decide whether Jacinto-Leon assaulted House.” Def. Brf. at 11. Additionally, they cite to the limited evidence of intent as to House and argue defense counsel could have argued negligence under Assault three.

However, between the State and defense counsel, the jury was given just such an argument. During the State’s closing, the State argued the transferred intent from David, Able, and Martin resulted in an assault to House as he was hit with the pellets. 19 RP 59, CP 111. The instruction as to transferred intent states, “[i]f a person acts with intent to assault another, but the act harms a third person, the actor is also deemed to have acted with intent to assault the third person.” CP 111. Under transferred intent, the Defendant need not be aware of unintended victims, nor do the unintended victims have to be aware of the assault. See State v.

Elmi, 138 Wa.App. 306, 156 P.3d 281 (Div 1, 2007).

In State v. Elmi, 138 Wa.App. 306, 316, 156 P.3d 281 (Div 1, 2007), Division One held in the common law definition of assault when a person creates the apprehension and fear of bodily injury and which creates the fear in another, a defendant's intent did not have to match a specific victim and the intent towards a specific victim does transfer to an unintended victim under transfer intent.

In Elmi, the Defendant went to his separated spouse's house after an argument. Id. at 311. His wife, Aden and three children were home. Id. Aden heard a commotion outside, parted the curtains, and saw several people trying to hold Elmi back. Id. Moments later, she heard gunshots and the sound of breaking glass. Id. No one was hurt, but Aden screamed and hurriedly moved the children to another room. Id. Elmi was charged with attempted murder of Aden and assault one against each child. Id. at 312-13. Elmi appealed his conviction arguing there was insufficient evidence of an assault against the children because the children did not testify as to their fear and he did not know they were there. Id. at 314-19.

Applying State v. Wilson, 125 Wa.2d 212, 883 P.2d 320 (1994), Division One found the common law definition of assault did not require

that the intended victim and the person who suffered the assault be the same person. Id. at 316. It reasoned Elmi's intent to create apprehension and fear in Aden transferred to the assaults against the children. Id. Moreover, they clearly rejected Elmi's argument that transferred intent should apply only if the defendant was aware of the unintended victims presence, particularly in cases where a defendant fires a gun into a place where unintended victims were likely to be present. Id. at 318.

When showing prejudice under ineffective assistance, the Defendant must show the outcome would have been different if WPIC 3.01 was given. Under the idea of transferred intent and given the transferred intent instruction states the third person must be hurt, it is unreasonable to believe the jury verdict would be different had defense counsel argued each crime must be considered separately. It is obvious the jury carefully deliberated the level of the defendant's intent when they found him guilty of the lesser offense of assault two, but found he had the intent to assault rather than mere negligence under assault three. The facts in this case do not lend themselves to the separation of the assault intents as to David, Abel, and Martin since they were all standing together when the Defendant fired. At trial there was no evidence or argument House

was placed in fear of an assault or even knew the Defendant shot at him at the time of the offense. 19 RP 59. The jury was left two options, 1) the Defendant acted intentionally in assaulting the three men or 2) he acted negligently and hurt David and/or Mr. House. Thus, the jury must have found the Defendant intended to assault each of them at the same time with the shotgun when he looked and pointed at all three. The only possible explanation for the jury to find the defendant guilty of assault two against Mr. House given the evidence would be under transferred intent. Therefore, an instruction on separate crimes would not have changed the outcome.

Moreover, in closing, defense counsel argued Defendant never intended to assault the men, he never saw them, and fired in celebration of the fourth. 19 RP 75-76, 81-86. Counsel conceded the Defendant's acts were negligent and David was harmed resulting in an assault three. 19 RP 85-86. However, he argued there was no physical harm to House, so an assault three was inappropriate. 19 RP 86. Given the transferred intent instruction this was a reasonable argument and certainly a trial tactic.

In considering claims of ineffective assistance of counsel, the courts have declined to find constitutional violations when the actions of

counsel complained of go to the theory of the case or to trial tactics.” State v. Ermert, 94 Wa.2d 839, 849, 621 P.2d 121, 126 (1980). It is therefore unreasonable to believe the instruction would have changed counsel’s tactic as to the charge involving Mr. House. Defendant’s opinion that trial counsel could have argued the lesser offense of assault three regarding House seems unlikely had there been such an instruction. Differences of opinion regarding trial strategy or tactics are not sufficient to prove a claim of ineffective assistance of counsel. State v. Lord, 117 Wa.2d 829, 883, 822 P.2d 177 (1991).

B. COUNSEL’S DECISION NOT TO PROPOSE A SEPARATE OFFENSE JURY INSTRUCTION WAS NOT DEFICIENT.

Defendant argues the failure to proffer a separate offense jury instruction under WPIC 3.01 was deficient and amounted to ineffective assistance of counsel. Should this court determine the outcome of the trial would be different, counsel was effective as the jury instructions as a whole instruct the jury appropriately.

There is little case law concerning the omission of WPIC 3.01. The case law providing the most guidance concerns the severance of charges and whether a jury can compartmentalize the evidence.

To determine whether severance of charges is appropriate a court must consider whether a defendant will become embarrassed or confounded in presenting separate defenses; whether the jury may use the evidence of one of the crimes to infer a criminal disposition of the defendant and find him guilty of the other crime; or if the jury may cumulate the evidence of the various crimes and find guilt, when if considered separately, they would not find. State v. Bythrow, 114 Wa.2d 713, 718, 790 P.2d 154 (1990) quoting State v. Smith, 74 Wa.2d 744, 446 P.2d 571 (1968).

Courts decline to find severance necessary even when evidence of one count is not admissible in a separate court. See id. at 720-22. Moreover, courts look to the length of trial, the complexity of the issues, and the ease a jury can compartmentalize the evidence. See id. at 721, State v. Eastabrook, 58 Wa.App. 805, 795 P.2d 151 (Div 2, 1990).

In the present case, even using interpreters for half of the State's witnesses and an interpreter for the Defendant, the trial took only two and a half days.³ Additionally, all the charges related to the one incident on July 4th and the only issue was whether the Defendant acted intentionally.

The evidence the Defendant shot at the three men was admissible in the count involving Mr. House. Lastly, counsel does not point to any evidence the jury would need to compartmentalize or not consider in light of the charges involving Mr. House. Even under the test for severance there is no indication the jury would consider evidence inappropriately. As such, it was not error to omit WPIC 3.01.

Secondly, “[j]ury instructions are sufficient if when taken together, they allow the parties to argue their theories of the case, are not misleading, and accurately inform the jury of the applicable law.” State v. Bradford, 60 Wa. App 857, 860, 808 P.2d 174 (1991). The Court gave the jury instruction: “[i]n order to decide whether any proposition has been proved, you must consider all of the evidence...admitted that relates to the proposition.” CP 90. Additionally, the judge instructed the jury as to how they were to consider the alternative charges and in which counts. They were told to first consider the charges of Assault one, then Assault two, and the case of David and House then Assault three. CP 95, 124. Lastly, each count and alternative charge for each separate victim had a “to convict” instruction and separate verdict form. CP 97-109, CP 126-130.

³ The State means no disrespect to any non-English speaking witness, but only means to

While the instructions do not specifically state each count must be decided separately, taken together, they tell the jury to consider evidence as it relates to the proposition, to consider each count in turn with the greatest charge being first, and tells them the charges are based upon the action associated with the different victim and there were potential different actions for David and House. Between the instructions and counsels' closing arguments, the jury was given a picture of separate charges, separate considerations, and the evidence as to David, did not control the evidence as to House. Thus, it was not error to omit the instruction.

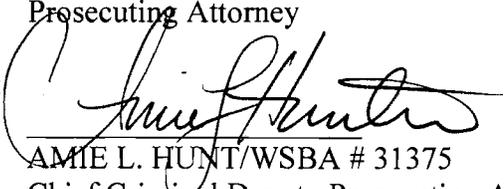
V. CONCLUSION

The State requests the Court affirm the trial court and deny the appeal based upon the above arguments.

Respectfully submitted this 18 day of January, 2011.

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convey that translation takes additional court time.

