NO. 49204-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER BILLINGS,

Appellant.

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

The Honorable Edmund Murphy, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

A. ASSIGNMENTS OF ERROR 1

Issues Pertainig to Assignments of Error 1

B. STATEMENT OF THE CASE 2

1. Procedural Facts 2

2. Substantive Facts 4

3. Jury Instructions, Closing Arguments & Jury Inquiries 6

C. ARGUMENTS 9

1. THE TRIAL COURT'S RESPONSE TO A DELIBERATING JURY'S INQUIRY CHANGED THE APPLICABLE LAW AND THEREBY NEGATED DEFENSE COUNSEL'S CLOSING ARGUMENT AS TO ONE OF THE CHARGED ASSAULTS, THUS DERPIVING BILLINGS OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN CLOSING ARGUMENT. 9

a. The Right to Effective Assistance of Counsel 10

b. The Law of Assualt 11

c. Law of the Case 13

d. Analysis 13

2. UNDER THE LAW OF THE CASE, THE EVIDENCE WAS INSUFFICIENT TO CONVICT BILLINGS OF ASSAULTING FRANK IN THE SECOND DEGREE. 17

D. CONCLUSION 19

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Bennett
161 Wn. 2d 303, 165 P.3d 1241 (2007) 17

State v. Byrd
125 Wn.2d 707, 887 P.2d 396 (1995) 12

State v. Calvin
176 Wn. App. 1, 316 P.3d 496 (2013)
review granted in part, remanded, 183 Wn.2d 1013, 353 P.3d 640 (2015) .. 13

State v. Chapin
118 Wn.2d 681, 826 P.2d 194 (1992) 18

State v. Colquitt
133 Wn. App. 789, 137 P.3d 892 (2006) 18

State v. Elmi
166 Wn.2d 209, 207 P.3d 439 (2009) 8, 10, 12, 14

State v. Frasquillo
161 Wn. App. 907, 255 P.3d 813
review denied, 172 Wn.2d 1016 (2011) 10, 13, 14, 18

State v. Hickman
135 Wn.2d 97, 954 P.2d 900 (1998) 13, 19

State v. Hobbs
71 Wn. App. 419, 859 P.2d 73 (1993) 15, 16

State v. Kyllo
166 Wn.2d 856, 215 P.3d 177 (2009) 11

State v. Ransom
56 Wn. App. 712, 785 P.2d 469 (1990) 15, 16

State v. Robinson
153 Wn.2d 689, 107 P.3d 90 (2005) 11

TABLE OF AUTHORITIES (CONT'D)

Page

State v. Smith
155 Wn.2d 496, 120 P. 3d 559 (2005) 17

State v. Smith
159 Wn.2d 778, 154 P.3d 873 (2007) 12, 17

State v. Thomas
109 Wn.2d 222, 743 P.2d 816 (1987) 11

State v. Walker
182 Wn.2d 463, 341 P.3d 976
cert. denied, 135 S. Ct. 2844, 192 L. Ed. 2d 876 (2015) 17

United States v. Cronic
466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) 11

FEDERAL CASES

In re Winship
397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) 17

Musacchio v. United States
136 S. Ct. 709, 193 L. Ed. 2d 639 (2016) 13

Strickland v. Washington
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) 11

RULES, STATUTES AND OTHER AUTHORITIES

RCW 9A.36.021 ..... 2, 11

U.S. Const. amend. VI 10

U.S. Cosnt. amend. XIV 17

Wash. Const. art. I, § 22 10

Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law 611 (1972) 12

A. ASSIGNMENTS OF ERROR

1. The trial court erred in responding to a jury inquiry regarding the scope of transferred intent.

2. Appellant was deprived of his right to effective assistance of counsel.

3. The evidence was insufficient to convict appellant of the second degree assault charge predicated on transferred intent.

Issues Pertaining to Assignments of Error

1. Did the trial court err and thereby deprive appellant of his right to effective assistance of counsel by answering in the affirmative, over defense objection, a jury inquiry asking whether transferred intent could still apply if the third-party victim was only placed in apprehension of fear by appellant's act, when the written instructions limited transferred intent to third-party victims actually harmed, and where defense counsel argued in closing that the jury could not convict on that count of assault because there was no actual harm shown?

2. Was the evidence insufficient to convict appellant of second degree assault with a deadly weapon predicated on transferred intent when the jury was instructed that transferred intent only applies if there is actual harm to the third-party victim and where there was no such actual harm shown here?

B. STATEMENT OF THE CASE

1. Procedural Facts

On April 8, 2015, the Pierce County Prosecutor charged appellant Christopher Billings with one count of second degree assault with a deadly weapon and one count of fourth degree assault. CP 1-2. The prosecution alleged that on April 5, 2015, Billings assaulted Scott Soden with a machete (second degree assault with a deadly weapon) and assaulted Angela Frank by spitting on her and punching her in the back of the head (fourth degree assault). CP 3.

On October 1, 2015, the prosecutor amended the assault involving Frank to second degree assault predicated on the intent to assault another. CP 4-5 (citing RCW 9A.36.021(1)(e)). On March 7, 2016, the prosecutor filed a second amended information, this time adding a count of witness tampering for allegedly attempting to induce Soden not to testify at trial. CP 37-38.

A trial was held March 3-11, 2016, before the Honorable Jerry Costello. ***CP 169-80.***[1] A jury acquitted Billings of the tampering charge, and could not reach unanimous verdicts on the assault charges. CP 70-74.

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[1] These are the Clerk's Papers page numbers counsel anticipates the Pierce County Superior Court Clerk will assigned to the Memorandum of Journal Entry, filed March 11, 2016 following the first trial. A supplemental designation was filed on February 21, 2017.

A third amended information was filed March 28, 2016, reverting to the original charges. CP 76-77. A fourth amended information was filed May 5, 2016, in which the prosecutor amending the second degree assault charge involving Soden to include both the "recklessly inflicts substantial bodily harm" and "deadly weapon" prongs of the statute, and once again amended the assault involving Frank up to second degree with a deadly weapon, and added an attempted robbery charge, alleging Billings tried to take property from Frank. CP 83-85. A fifth amended information was filed May 23, 2016, which did not change the charges, only the language used to present them. CP 86-88; 1RP 9-10.

A second trial was held May 23, 2016 – June 1, 2016, before the Honorable Edmund Murphy. 1RP 4-484. The robbery charge was dismissed for insufficient evidence upon conclusion of the prosecutor's case-in-chief. 1RP 351-55. A jury found Billings guilty of both second degree assaults and the deadly weapon allegations. CP 129-33; 1RP 469-82.

Billings was sentenced on June 8, 2016. His offender score for each count included one point for the other current conviction. CP 134-36. The trial court imposed concurrent 57-month standard range sentences, two consecutive 12-month deadly weapon enhancements, 18 month of

community custody with conditions, and $800 in legal financial obligations. CP 137-53; 2RP 17-18.

Billings appeals. CP 156-57. The trial court found Billings indigent for purposes of appeal. CP 161-62.

2. Substantive Facts

At about 5 a.m. on Sunday, April 5, 2015, 26-year old Scott Soden and 23-year-old Angela Frank were sitting in a parked car in a Puyallup mobile home/RV park. 1RP 37-40, 86. They went to the park to sell marijuana to one of the park's resident, Cody Wagner. 1RP 40-41. Wagner had retrieved the marijuana from Frank and taken it into his home, ostensibly to weigh it before paying them. 1RP 41-42.

While Wagner was away, Billings drove into the park and parked a couple of stalls away from the passenger side of the car Soden and Frank were in. 1RP 42-43, 90. Both Soden and Frank had known Billings since junior high. 1RP 42, 87.

Soden claimed that after Billings parked, Soden saw Wagner point Billings towards where he and Frank were parked. 1RP 63. Billings then approached brandishing a machete, opened the driver's door and accused Soden of stealing marijuana from him and demanded that he get out of the car. 1RP 43-45. Soden refused, and when Billings tried to pull him out, Soden braced his feet against the door jamb to stop him. 1RP 45-46.

Billings punched Soden a couple of time in the eyebrow area trying to get him outside, but Soden stayed put. 1RP 47-49.

Billings then got in the car and started swinging the machete around. 1RP 49-50. Soden jumped into the back seat intending to get a knife from his backpack to protect himself, but Billings kept swinging the machete, and when Soden raised his hands to protect his face, the machete cut his wrist to the bone, so Soden jumped out of the back-passenger side of the car and fled to where an onlooker, Elliott Harmon, was standing and told him he had been attacked by Billings. 1RP 50-54, 279. Harmon called 911 and eventually gave Soden the phone to explain what had happened. 1RP 56-57, 288-89.

Soden claimed that as he was talking to Harmon, he saw Billings go around to the passenger side of the car and try to pull Frank out by her arms, but when she resisted, Billings let go and fled with the machete to his car and drove away. 1RP 55, 75.

Frank confirmed that she and Soden were at the park to sell Wagner marijuana and that they were waiting for Wagner to return with the purchase money when Billings arrived. 1RP 88-89. According Frank, Billings first went to Wagner's home, and when he came out he was mad because he thought the marijuana they were selling Wagner had been stolen from him, and grabbed a machete from his car and started trying to

pop the tires on the car she and Soden were in. 1RP 90. Billings then went to the driver's door, opened it, accused Soden of stealing marijuana from him, and started swinging the machete at Soden. 1RP 91-92. Frank recalled Billings reaching in the with the machete and was swinging it inside the car, with Soden moving about to avoid getting hit, until the machete struck Soden's arm, which Frank opined prevented her from getting hit in the leg with the machete. 1RP 93, 95.

Frank recalled telling Billings she was going to call 911 if he did not stop. 1RP 93. At which point Billings came around to her side of the car and pulled her out as she was talking to 911, which cut off the call. 1RP 94, 96-98. He did not have the machete when he came to her side of the car. 1RP 99, 121. According to Frank, Billings stopped after she screamed and a park resident had come out to see what the commotion was about. 1RP 97, 99. Billings had fled the park before Frank reconnected with 911. 1RP 100.

Billings could not be located on April 5, 2015, but was arrested on April 7, 2015, for the alleged incident. 1RP 160, 241-42.

3. Jury Instructions, Closing Arguments & Jury Inquiries

The only objection to the written instruction the trial court provided the jury came from the prosecution, which took exceptions to the

court's refusal to instruct the jury on the definition of perjury. 1RP 371. The defense registered no exceptions. Id.

One of the instructions the jury received provides:

> If 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 114 ((Instruction 11). It was proposed by the prosecution, not the defense. CP 6-33 (defense proposed instructions); ***CP 181-229***[2] (Proposed Instruction 18.5).

During closing remarks, the prosecutor argued that Billings pulling Frank out of the car by her arms constituted an assault, but not a second degree assault as charged because he did not have possession of the machete, the deadly weapon, at the time. 1RP 395-96. The prosecutor conceded the arm pulling was only a fourth degree assault, but urged the jury to convict him of that if it could not agree he committed a second degree assault against Frank. 1RP 396, 400. The prosecutor then argued the jury should convict Billings of second degree assault with a deadly weapon against Frank, even though he never intended nor did he ever actually hit Frank with the machete. The prosecutor claimed that Billings' intent to strike Soden with the machete transferred to Frank, who's

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[2] These are the Clerk's Papers page numbers counsel anticipates the Pierce County Superior Court Clerk will assigned to the Plaintiff's Proposed Instructions to the Jury, filed June 6, 2016.

resulting apprehension and fear constitutes the assault necessary for the conviction, even though she suffered no physical harm. 1RP 397-98.

Defense counsel responded to this argument in his closing by noting that under Instruction 11, intent does not transfer to the third person unless there is "harm." 1RP 409-11, 414. Counsel argued that because there was no harm to Frank caused by Billings swinging the machete in the car, Billing intent to assault Soden does not transfer to Frank for purposes of the second degree assault charge involving her. Id.

The prosecutor responded in rebuttal that the "harm" required by Instruction 11 is not limited to bodily harm, but can also include "emotional harm" and "psychological harm." 1RP 441-42.

During deliberations, the jury submitted the following question to the court: "Can intent be transferred to a third party in regards to creating apprehension and fear? Reference instruction 11 + 12." CP 99. When the parties convened to discuss a response, the prosecutor note both defense counsel's claim in closing that physical harm to the third person is required for intent to transfer, and his rebuttal argument that it applies to all three types of assault. 1RP 459-60. The prosecutor noted that the decision in State v. Elmi, 166 Wn.2d 209, 207 P.3d 439 (2009), held the "transferred intent idea" is not limited to circumstances where the third party is actually "battered," but also applies to the other two forms of

assault, i.e., attempted battery and apprehension and fear of bodily injury. 1RP 460. On this basis, the prosecutor urged the court to answer the jury's question in the affirmative. Id.

Defense counsel urged the court to either answer the question in the negative, or instead to simply refer the jury back to the instructions it already received. 1RP 461-62, 464-65.

Over defense objection, the court concluded the jury should be told "Instruction #11 applies to all three paragraph of Instruction #12," which defines all three types of assault, and did so. CP 99; 1RP 466-67.

C. ARGUMENTS

1. THE TRIAL COURT'S RESPONSE TO A DELIBERATING JURY'S INQUIRY CHANGED THE APPLICABLE LAW AND THEREBY NEGATED DEFENSE COUNSEL'S CLOSING ARGUMENT AS TO ONE OF THE CHARGED ASSAULTS, THUS DERPIVING BILLINGS OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN CLOSING ARGUMENT.

The trial court gave the prosecution-proposed instruction defining "transferred intent." CP 114 (Instruction 11; ***CP 223***[3] (Proposed Instruction 18.5). No one objected. 1RP 371. Instruction 11 limits the scope of "transferred intent" to acts that cause "harm" to the third party. Id.; see State v. Frasquillo, 161 Wn. App. 907, 916, 255 P.3d 813, 818,

[3] See Note 2, supra.

review denied, 172 Wn.2d 1016 (2011) (noting instruction identical to Instruction 11 here "required that the victim be harmed in order for transferred intent to apply"). Based on this instruction, defense counsel argued the jury should acquit Billings of the second degree assault involving Frank because the law provided in jury instructions limited application of the "transferred intent" doctrine to third parties actually harmed. 1RP 409-11, 414. Despite Instruction 11, in rebuttal the prosecutor argued "transferred intent" could apply to all three types of assault. 1RP 441-42.

Not surprisingly, the jury recognized the conflicting arguments and asked for clarification from the trial court. CP 99. Noting the decision in Elmi, supra, the court implicitly instructed the jury that the prosecutor's argument was correct and defense counsel's wrong. It did so by changing the law provided so that transferred intent could apply to all three forms of assault, not just an actual battery. CP 99; 1RP 466-67. This was error that deprived Billings of his right to effective assistance of counsel during closing arguments. This Court should reverse.

a. The Right to Effective Assistance of Counsel

Defendants have the right to effective assistance of counsel at every critical stage of a criminal proceeding. U.S. Const. amend. VI; Wash. Const. art. I, § 22; United States v. Cronic, 466 U.S. 648, 654, 104

S.Ct. 2039, 80 L.Ed.2d 657 (1984); Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Robinson, 153 Wn.2d 689, 694, 107 P.3d 90 (2005); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). This includes the right to effective assistance of counsel during closing arguments. State v. Kyllo, 166 Wn.2d 856, 870, 215 P.3d 177, 184 (2009).

A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal. Kyllo, 166 Wn.2d at 862. Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

b. The Law of Assault

A person is guilty of second degree assault when, "under circumstances not amounting to assault in the first degree" he "[a]ssaults another with a deadly weapon." RCW 9A.36.021(1)(c); see CP 110 (Instruction 7, definition of second degree assault); CP 112 (Instruction 9, to-convict instruction for second degree assault involving Frank).

"Assault" is not defined by statute. Rather, Washington relies on the following three common law definitions:

> An assault is an intentional touching, striking, cutting, or shooting of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching, striking, cutting, or shooting is offensive, if the touching, striking, cutting, or shooting would offend an ordinary person who is not unduly sensitive.
>
> An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending, but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.
>
> An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

State v. Smith, 159 Wn.2d 778, 781-82, 154 P.3d 873 (2007). The court instructed Billings' jury on each definition. CP 115 (Instruction 12).

Specific intent is defined as intent to produce a specific result, as opposed to intent to do the physical act that produces the result. Elmi, 166 Wn.2d at 215; see CP 113 (Instruction 10, defining "intent or intentionally"). Specific intent either to (1) create apprehension of bodily harm or (2) cause bodily harm is an essential element of second degree assault. State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995) (quoting Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law 611 (1972)).

c. Law of the Case

At the prosecution's request, the jury was instructed on the doctrine of transferred intent as follows: "If 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 113 (Instruction 11); ***CP 223***. As explained in Frasquillo, supra, this instruction "required that the victim be harmed in order for transferred intent to apply."

Neither side objected to Instruction 11. "Under the [law of the case] doctrine jury instructions not objected to become the law of the case." State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900, 902 (1998), abrogated on other grounds by Musacchio v. United States, 136 S. Ct. 709, 193 L. Ed. 2d 639 (2016). Instruction 11 was the law of the case regarding "transferred intent" at Billings' trial. See State v. Calvin, 176 Wn. App. 1, 316 P.3d 496, 506 (2013), as amended on reconsideration (Oct. 22, 2013), review granted in part, cause remanded, 183 Wn.2d 1013, 353 P.3d 640 (2015) (Law of the case "is a broad doctrine that has been applie[s] to to-convict instructions and definitional instructions.").

d. Analysis

The jury inquired about the interplay between Instruction 11, explaining "transferred intent," and Instruction 12, which sets forth all three definition of assault employed in Washington. CP 99. As the both

attorneys and the trial court noted, the inquiry was the result of the conflicting arguments by counsel in closings about the expansiveness/limitations on application of the "transferred intent" doctrine. 1RP 459-60, 464-65.

Unfortunately, in analyzing how to respond, the trial court looked not at what it had already instructed the jury, as urged by defense counsel (1RP 465), but instead on how the law generally allows application of the doctrine of "transferred intent." This is apparent from the court's determination, in agreement with the prosecutor, that how Billings' jury could apply transferred intent was a "purely legal issue." 1RP 465-67.

Generally, "transferred intent" can apply to all three forms of assault. Frasquillo, 146 Wn. App. at 916 (citing Elmi, 166 Wn.2d at 218-19). But under the law of the case, here the prosecution was required to prove Frank was actually harmed rather merely placed in apprehension and fear. As discussed infra, it could not have met that burden because no actual harm came to Frank as a result of Billings wielding the machete, which was the only deadly weapon possible in the scenario described by Frank and Soden. Billings should have been acquitted of that charge because the evidence was insufficient to convict. See Argument 1, supra.

The trial court, however, tilted the playing field unfairly against Billings when it redefined the law *after* closings. This change completely

undermined Billings' defense to the alleged assault involving Frank. It is as if Billings had no legal representation on that charge at all during closing because by redefining the law the way it did, the court essentially informed the jurors they could disregard defense counsel's closing remarks on that charge.

The situation here is similar to the circumstances in State v. Ransom, 56 Wn. App. 712, 785 P.2d 469 (1990) and State v. Hobbs, 71 Wn. App. 419, 859 P.2d 73 (1993). In Ransom, the defendant was charged with possession of cocaine with intent to deliver. 56 Wn. App. at 712–13. The prosecution did not pursue accomplice liability against the defendant. Id. at 713. During deliberations, however, the jury asked:

> "If someone is an accessory to the actual or constructive or attempted transfer of a controlled substance from one person to another are they both guilty of the same?"

Id.

Over defense objection, the trial court gave an accomplice instruction. Id. This Court reversed, concluding that although the trial court had discretion to further instruct the jury after deliberations began, such instruction could not go beyond what had been or could have been argued to the jury. Id. at 714-15. The defendant was entitled to rely on the fact that the prosecution failed to pursue the distinct theory of criminal culpability known as "accomplice liability." Id.at 715.

Similarly, in Hobbs the prosecution acquiesced to an unnecessarily narrow venue element requiring it to prove the defendant committed the crime in King County. 71 Wn. App. at 420–21. During deliberations the trial court granted the prosecution's request to amend the instruction by deleting "King County" and inserting "State of Washington." Id. at 421. Both in the trial court and on appeal, defense counsel explained she knew the prosecution would be unable to prove the venue element and made strategic decisions on that basis. Id. at 424. This Court recognized that the trial court can give supplemental instructions during deliberations, but only to the extent they do not go beyond matters that had been, or could have been argued to the jury. Id. Because the defense had adapted its trial strategy to the prosecution's unopposed narrow venue undertaking, this Court found there was actual prejudice, and remanded for a new trial, noting the trial court's only viable options would have been to either hold the prosecution to the unopposed narrow venue element or declare a mistrial. Id. at 420, 425.

Just as in Ransom and Hobbs, Billings was prejudiced by the trial court mid-deliberation jury instruction broadening the scope of the transferred intent doctrine to include all three types of assault. CP 99. Billings' counsel had relied on the narrow scope of the transferred intent doctrine set forth in Instruction 11, as proposed by the prosecution, in

closing argument to assert the prosecution had failed to prove Billings committed a second degree assaulted against Frank. CP 114; 1RP 409-11, 414. Just as in Ransom and Hobbs, the mid-deliberation jury reinstruction here went beyond matters that had been or could have been argued in closing because it eliminated the previous valid defense argument against conviction on that charge. This Court should reverse.

2. UNDER THE LAW OF THE CASE, THE EVIDENCE WAS INSUFFICIENT TO CONVICT BILLINGS OF ASSAULTING FRANK IN THE SECOND DEGREE.

"The presumption of innocence is the bedrock upon which the criminal justice system stands." State v. Bennett, 161 Wn. 2d 303, 315, 165 P.3d 1241, 1248 (2007). Every defendant is entitled to the presumption, "which is overcome only when the State proves guilt beyond a reasonable doubt as determined by an impartial jury based on evidence presented at a fair trial." State v. Walker, 182 Wn.2d 463, 480, 341 P.3d 976, 986, cert. denied, 135 S. Ct. 2844, 192 L. Ed. 2d 876 (2015). Likewise, due process under the Fourteenth Amendment of the United States Constitution requires the prosecution to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Smith, 155 Wn.2d 496, 502, 120 P. 3d 559 (2005).

Evidence is insufficient to overcome the presumption of innocence and support a conviction unless viewed in the light most favorable to the prosecution, any rational trier of fact could find each essential element of the crime beyond a reasonable doubt. State v. Chapin, 118 Wn.2d 681, 691, 826 P.2d 194 (1992). In determining the sufficiency of evidence, existence of a fact cannot rest upon guess, speculation, or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006).

To convict Billings of committing second degree assault against Frank, the prosecution had to prove beyond a reasonable doubt:

> (1) That on or about the 5th day of April, 2015, the defendant assaulted Angela Frank with a deadly weapon; and
>
> (2) That this act occurred in the State of Washington.

CP 112 (Instruction 9).

As discussed supra, under the law of the case, the jury could rely on evidence that Billings intended to assault Soden only transferred to Frank if she was actually harmed by the deadly weapon – the machete. CP 114; Frasquillo, 161 Wn. App. at 916. Because there was no evidence presented that Frank suffered any actual harm as a result of Billings wielding the machete, the evidence was insufficient to convict as a matter of law. Therefore, this Court should reverse and dismiss the charge with

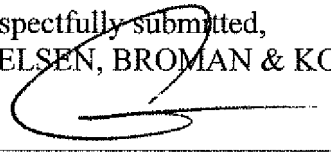
prejudice and remand for resentencing on the remaining conviction. See State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (dismissal with prejudice proper remedy for failure of proof).

D. CONCLUSION

The trial court committed reversible error by reinstructing the jury that the "transferred intent" doctrine is far broader than originally instructed, and thereby gutting the defense closing argument with regard to how that doctrine could not apply to the second degree assault charge involving Frank. This deprived Billings of his right to effective assistance of counsel during closing arguments and warrants reversal it eliminated an otherwise iron-clad defense to that charge. In addition, the evidence was insufficient to convict Billings of assaulting Frank in the second degree because there was no evidence that Frank was harmed by a deadly weapon. For both reasons, reversal and remand for resentencing is warranted.

DATED this 24th day of February 2017.

Respectfully submitted,
NIELSEN, BROMAN & KOCH



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