

NO. 49204-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CHRISTOPHER BILLINGS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Edmund Murphy

No. 15-1-01351-1

BRIEF OF RESPONDENT

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR 1

 1. Did the trial court properly exercise its discretion where its response to the jury regarding transferred intent was both an accurate instruction on the law and well within matters argued at trial?..... 1

 2. Did the defendant fail to demonstrate that received ineffective assistance of counsel where the trial court's answer to the jury regarding transferred intent did not change the applicable law? 1

 3. Was the sufficient evidence to convict the defendant of assault in the second degree where defendant attacked the victims with a machete and physical harm is not required for transferred intent?..... 1

B. STATEMENT OF THE CASE..... 1

 1. Procedure 1

 2. Facts 3

C. ARGUMENT..... 5

 1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY PROVIDING THE APPROPRIATE LAW REGARDING TRANSFERRED INTENT IN RESPONSE TO A JURY QUESTION. 5

 2. DEFENDANT FAILS TO DEMONSTRATE INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THE SUPPLEMENTAL JURY INSTRUCTION DID NOT CHANGE THE APPLICABLE LAW..... 10

3. THE EVIDENCE WAS SUFFICIENT TO PROVE
BEYOND A REASONABLE DOUBT THAT
DEFENDANT ASSAULTED FRANK WITH A DEADLY
WEAPON. 13

D. CONCLUSION..... 16

Table of Authorities

State Cases

<i>In re Personal Restraint of Davis</i> , 152 Wn.2d 647, 672-3, 101 P.3d 1 (2004).....	10, 11
<i>Seattle v. Gellein</i> , 112 Wn.2d 58, 61, 768 P.2d 470 (1989).....	13
<i>State v. Berg</i> , 181 Wn.2d 857, 867, 337 P.3d 310 (2014).....	14
<i>State v. Calvin</i> , 176 Wn. App. 1, 316 P.3d 49 (2013).....	5, 6
<i>State v. Calvin</i> , 176 Wn. App. 1, 507, 316 P.3d 49 (2013).....	5
<i>State v. Camarillo</i> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990).....	14
<i>State v. Casbeer</i> , 48 Wn. App. 539, 542, 740 P.2d 335, <i>review denied</i> , 109 Wn.2d 1008 (1987).....	14
<i>State v. Crawford</i> , 159 Wn.2d 86, 99, 147 P.3d 1288 (2006).....	11
<i>State v. Elmi</i> , 166 Wn.2d 209, 207 P.3d 439 (2009).....	8, 12, 15
<i>State v. Frasquillo</i> , 161 Wn. App. 906, 916, 266 P.3d 813 (2011).....	8, 12, 15, 16
<i>State v. Goodman</i> , 150 Wn.2d 774, 781, 83 P.3d 410 (2004).....	14
<i>State v. Green</i> , 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980).....	13
<i>State v. Grier</i> , 171 Wn.2d 17, 246 P.3d 1260 (2011).....	10
<i>State v. Hobbs</i> , 71 Wn. App. 419, 424, 859 P.2d 73 (1993).....	5, 6, 7, 8, 9
<i>State v. Jeffries</i> , 105 Wn.2d 398, 418, 717 P.2d 722, 733 (1986).....	10
<i>State v. Joy</i> , 121 Wn.2d 333, 338, 851 P.2d 654 (1993).....	13
<i>State v. Langdon</i> , 42 Wn. App. 715, 718, 713 P.2d 120, <i>review denied</i> , 105 Wn.2d 1013 (1986).....	5
<i>State v. Mabry</i> , 51 Wn. App. 24, 25, 751 P.2d 882 (1988).....	13

<i>State v. McCullum</i> , 98 Wn.2d 484, 488, 656 P.2d 1064 (1983)	13
<i>State v. McFarland</i> , 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)	11
<i>State v. Partin</i> , 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)	13
<i>State v. Ransom</i> , 56 Wn. App. 712, 714, 785 P.2d 469 (1990)	5, 6, 8, 9
<i>State v. Salinas</i> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)	13
<i>State v. Thomas</i> , 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)	11
<i>State v. Wilson</i> , 144 Wn. App. 166, 183, 181 P.3d 887 (2008)	6
Federal and Other Jurisdictions	
<i>Strickland v. Washington</i> , 466 U.S. 668, 687, 104 S. Ct. 2054, 80 L. Ed. 2d 674 (1984)	10, 11
Statutes	
RCW 9A.36.021	14
Rules and Regulations	
CrR 6.15(f)(1)	5
Other Authorities	
WPIC 10.01.01	7, 15

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly exercise its discretion where its response to the jury regarding transferred intent was both an accurate instruction on the law and well within matters argued at trial?
2. Did the defendant fail to demonstrate that received ineffective assistance of counsel where the trial court's answer to the jury regarding transferred intent did not change the applicable law?
3. Was the sufficient evidence to convict the defendant of assault in the second degree where defendant attacked the victims with a machete and physical harm is not required for transferred intent?

B. STATEMENT OF THE CASE.

1. Procedure

On April 8, 2015, the State charged Christopher Billings, herein defendant, with Count I: Assault in the Second degree with a deadly weapon and Count II: Assault in the Fourth Degree. CP 1-2. The State amended Count II to Assault in the Second Degree with a deadly weapon on October 1, 2015 and added Count III: Witness Tampering on March 5th 2016. CP 4-5; 37-38.

On March 3, 2016, trial was held before the Honorable Judge Jerry Costello. CP 169-180. The jury was not able to reach a verdict on the assault charges, Counts I and II, and acquitted defendant of witness tampering, Count III. CP 70-74.

On May 23, 2016, the State amended charges to Count I: Assault in the Second Degree (with the specific language of “recklessly inflict substantial bodily harm” and/or with a deadly weapon), Count II: Assault in the Second Degree with a deadly weapon and added Count IV: Robbery in the First Degree. CP 86-88.

The second jury trial was held on May 23, 2016, before the Honorable Judge Edmund Murphy. 1RP 26. After both parties rested, the Court dismissed Count IV based on insufficient evidence. 1RP 351-355. The jury found defendant guilty of two counts of Assault in the Second Degree with a deadly weapon. CP 129-133; 1RP 469-482.

On June 8, 2016, the Court sentenced defendant to the high end of the standard range: 57 months in custody on both counts to run concurrently with 12 months for each deadly weapon sentencing enhancement each to run consecutively. CP 137-153; 2RP 17-18. The Court also imposed a chemical dependency evaluation and any

recommended treatment, 18 months of community custody and \$800 in legal financial obligations. 2RP 17-18.

Defendant filed his Notice of Appeal that same day. CP 156-157.

2. Facts

On April 5, 2015 at approximately 5 a.m., Scott Soden and Angela Frank went to the mobile home park located at 1033 East Main in Pierce County Washington to sell marijuana to Cody Wagner. 1RP 37-41. Soden and Frank gave Wagner the marijuana and waited in their vehicle for him to come back with the money. 1RP 44, 88-89.

As Soden and Frank waited, defendant drove up and parked near their vehicle. 1RP 43-44. Defendant walked up to their passenger side window with a 12" machete and ordered them out of their vehicle. 1RP 43-49. Defendant accused Soden of stealing his marijuana. 1RP 43-45. Defendant opened the driver's side door to where Soden was seated and ordered him out of the vehicle while holding up the machete. 1RP 41-46. Soden refused to exit the vehicle. 1RP 45-48. Defendant grabbed Soden and tried to pull him out. 1RP 46. Soden pushed his foot against the door hinge to stop from being dragged out. 1RP 46.

Defendant punched Soden at least once on the eyebrow. 1RP 47. Soden attempted to get to the backseat to retrieve a knife from his

backpack. 1RP 49-50. Defendant jumped in the vehicle after Soden and attacked him with the machete. 1RP 50-51, 93. Soden used his arms to block the machete from his face. 1RP 49-52, 93. Defendant cut Soden's left wrist straight to the bone and wide open. 1RP 50-53. Soden felt a jolt of pain through his entire body and the bottom of his hand went numb presumably from nerve damage. 1RP 59-60. Soden rolled out of the rear passenger door and ran for help. 1RP 43-55.

Angela Frank watched from the passenger seat as defendant attacked Soden with the machete. 1RP 91-93. Frank told defendant to stop and tried to call 911. 1RP 93. As Frank called 911, defendant grabbed her and lifted her out of the vehicle. 1RP 94-99. Frank screamed, "Don't touch me... get off me... help"! 1RP 282. Her call to 911 was disconnected. 1RP 126-133.

Defendant eventually let Frank go, ran to his vehicle with the machete and drove away. 1RP 55-56, 133. Frank called 911. 1RP 100.

Deputies found defendant's vehicle and the machete in an alley near the 900 block of 4th Avenue southwest. 1RP 146-158, 173. A K-9 unit lead deputies from defendant's vehicle to his apartment located above his parent's garage at the 800 block of 4th Avenue southwest. 1RP 146-158, 169-173. Deputies were not able to locate defendant that night. 1RP

170-180. However, deputies arrested the defendant two days later on April 7, 2015. 1RP 241.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY PROVIDING THE APPROPRIATE LAW REGARDING TRANSFERRED INTENT IN RESPONSE TO A JURY QUESTION.

A trial court has the discretion to give additional instructions to the jury after it has started deliberating. *State v. Langdon*, 42 Wn. App. 715, 718, 713 P.2d 120, *review denied*, 105 Wn.2d 1013 (1986); *see also* CrR 6.15(f)(1) (the court may give additional instruction on any point of law in response to jury questions during deliberations).

It is within the trial court's discretion whether to give supplemental instructions to the jury as long as those instructions "do not go beyond matters that *had been*, or *could have been*, argued to the jury." *State v. Calvin*, 176 Wn. App. 1, 507, 316 P.3d 49 (2013), *emphasis added*, citing *State v. Hobbs*, 71 Wn. App. 419, 424, 859 P.2d 73 (1993); *see also State v. Ransom*, 56 Wn. App. 712, 714, 785 P.2d 469 (1990).

The trial court's decision to amend the to-convict instructions following jury deliberations is reviewed for an abuse of discretion. *State v. Calvin*, 176 Wn. App. 1, 316 P.3d 49 (2013). The court abuses that discretion only when its decision is manifestly unreasonable or exercised

on untenable grounds or for untenable reasons. *State v. Wilson*, 144 Wn. App. 166, 183, 181 P.3d 887 (2008).

In *Calvin*, the trial court responded to the jury's question as to how the law defined "unlawful force" by giving a new definition that omitted the original "unlawful force" language. *State v. Calvin*, 176 Wn. App. at 507. The Court held that even though defense counsel made no argument regarding lawful force during trial, there was no abuse of discretion where defense counsel had not adapted his trial strategy the "unlawful force" language, he was given an opportunity to reargue the case but declined and the supplemental instruction correctly stated the law. *Id.*

"[The parties] may not argue theories they have not advanced and in support of which they have offered no instructions." *Ransom*, 56 Wn. App. at 714. In *Ransom*, the trial court responded to a jury question by providing an instruction on accomplice liability, although neither party pursued that theory or had an opportunity to argue it. *Id.* This Court held that it was reversible error because "the effect was to add a theory that the State had not elected and that defense counsel had no chance to argue." *Id.*

In *Hobbs*, the State unnecessarily included a venue element that required the jury to find that the defendant committed the crime in King County. *Hobbs*, 71 Wn. App. at 410-421. After deliberations, the trial court granted the State's motion to amend the instruction by deleting "King County" and inserting "State of Washington." *Id.* at 421. This Court found prejudice and remanded because defense counsel not only adapted

her strategy to the State's unnecessary venue element but was also never given an opportunity to reargue the new instruction. *Hobbs* at 425.

In this case, the trial court instructed the jury the following with regard to transferred intent:

If a person acts with intent to assault another, but if the act harms a third person, the actor is also deemed to have acted with intent to assault the third person.

CP 114 (Instruction No. 11); WPIC 10.01.01.

Both sides made arguments about transferred intent during closing arguments. 1RP 396-442. The State argued that defendant's intent to attack Soden with the machete transferred to Frank who was in the passenger seat during the attack. 1RP 396-399. Defense counsel argued transferred intent did not apply because actual or physical harm was required for transferred intent to apply. 1RP 409-411. In rebuttal, the State responded that harm is not limited to actual or physical injury but includes psychological or emotional harm. 1RP 442.

After the jury began deliberating, they submitted the following question to the court: "Can intent be transferred to a third party in regards to creating apprehension and fear?" CP 99; 1RP 459. After hearing arguments from both sides, the trial court concluded that transferred intent applies to all three types of assault. 1RP 469-467. The trial court instructed the jury that "Instruction 11 (transferred intent) applies to all three

paragraphs of Instruction 12 (the three types of assault). CP 99; 1RP 466-467.

The trial court properly exercised its discretion by instructing the jury on the proper law regarding transferred intent. The trial court's answer to the jury's question was not only an accurate instruction on the law, but also within matters thoroughly addressed by both sides.

First, the trial court correctly instructed the jury that transferred intent applies to all types of assault. CP 99; 1RP 466-467; *State v. Frasquillo*, 161 Wn. App. 906, 916, 266 P.3d 813 (2011); citing *State v. Elmi*, 166 Wn.2d 209, 207 P.3d 439 (2009) (transferred intent applies to all victims who are unintentionally harmed or put in apprehension of harm).

Second, the supplemental instruction was well within matters that both parties argued during trial. 1RP 396-442. Both the State and defense counsel made arguments regarding transferred intent at length during closing arguments. 1RP 396; 409; 414; 442. Specifically, the record reflects that defense counsel addressed transferred intent for approximately four pages. 1RP 408-412.

Defendant relies on *Ransom* and *Hobbs* in support of their argument. *Ransom*, 56 Wn. App. 712, 785 P.2d 469 (1990); *State v. Hobbs*, 71 Wn. App. 419, 859 P.2d 73 (1993), Brief of Appellant at 9-10. This case is clearly distinguishable. In *Ransom* and *Hobbs*, the trial court provided supplemental instructions regarding theories that were never

addressed at trial and that neither party had an opportunity to address.^{1 2} Here, the trial court did not provide a new jury instruction, but clarified that one instruction applied to another.³ Further, the clarifying instruction was well within matters addressed at trial. Transferred intent was argued by both parties at length during closing arguments. 1RP 396; 409; 414; 442. Moreover, defense counsel did not request an additional opportunity to reargue the issue following the trial court's clarifying instruction. This further reflects the extent to which the parties had already thoroughly addressed the issue at trial.

Thus, the trial court did not abuse its discretion where its response to the jury regarding transferred intent was both an accurate instruction on the law and within matters that were argued by both sides. As such, this Court should affirm defendant's conviction and dismiss his motion to reverse.

¹ In *Ransom*, the trial court provided a supplemental jury instruction regarding accomplice liability, a theory which neither party pursued at trial nor offered jury instructions. *State v. Ransom*, 56 Wn. App. 712, 785 P.2d 469 (1990).

² In *Hobbs*, the trial court changed an unnecessary venue element of "King County" to "State of Washington" after defense counsel had made a strategic decision not to address it at trial. *State v. Hobbs*, 71 Wn. App. 419, 859 P.2d 73 (1993).

³ The trial court responded to the jury question by instructing that instruction 11 (transferred intent) applies to all three paragraphs in instruction 12 (three forms of assault). CP 99; 1RP 466-467.

2. DEFENDANT FAILS TO DEMONSTRATE
INEFFECTIVE ASSISTANCE OF COUNSEL
BECAUSE THE SUPPLEMENTAL JURY
INSTRUCTION DID NOT CHANGE THE
APPLICABLE LAW.

To demonstrate a denial of the effective assistance of counsel, defendant must satisfy a two-prong test.

First, defendant must show that his attorney's performance was deficient. *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, 733 (1986) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2054, 80 L. Ed. 2d 674 (1984)). This prong requires showing that his attorney made errors so serious that he did not receive the "counsel" guaranteed to defendants by the Sixth Amendment. *Id.* Second, defendant must demonstrate that he was prejudiced by the deficient performance. *Id.* Satisfying this prong requires the defendant to show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *In re Personal Restraint of Davis*, 152 Wn.2d 647, 672-3, 101 P.3d 1 (2004), *see also State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011). A "reasonable probability" is a probability that is sufficient to undermine confidence in the outcome of the trial. *Strickland*, 466 U.S. at 694.

"The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below." *State v. McFarland*, 127 Wn.2d 322, 335, 899

P.2d 1251 (1995). Similarly, “[t]he defendant also bears the burden of showing, based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel’s deficient representation.” *Id.* at 337 (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

When asserting that an attorney’s performance was deficient, a criminal defendant must show that the attorney’s conduct fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88. Judicial scrutiny of an attorney’s performance must be highly deferential. *Id.* at 689. “[A] court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance...” *Id.* In evaluating an attorney’s performance, courts must make every effort to eliminate the distorting effects of hindsight. *Id.* Counsel’s performance is to be evaluated from counsel’s perspective at the time of the alleged error and in light of all the circumstances. *Davis*, 152 Wn.2d at 673.

To prevail on a claim for ineffective assistance of counsel, a “defendant must affirmatively prove prejudice, not simply show that ‘the errors had some conceivable effect on the outcome.’” *State v. Crawford*, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006) (quoting *Strickland*, 466 U.S. at 693). “In doing so, ‘the defendant must show that there is a reasonable probability that but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Id.*

Here, defendant fails to demonstrate that his attorney's performance was deficient or that he was prejudiced. Defendant argues only that he was deprived of the right to effective assistance of counsel because the trial court's answer to the jury changed the applicable law and defense counsel was not able to respond. Brief of Appellant at 9.

Defendant's argument is inapposite. The trial court's answer to the jury did not change the applicable law because the jury was never instructed that transferred intent only applied to a specific type of assault. As addressed previously, the trial court's answer clarified that transferred intent applied to all three types of assault, which was an accurate reflection of the law. *State v. Frasquillo*, 161 Wn. App. at 916; citing *State v. Elmi*, 166 Wn.2d 209, 207 P.3d 439 (2009) (transferred intent applies to all victims who are unintentionally harmed or put in apprehension of harm). Thus, defendant's claim fails where there was no change in the applicable law for either party to reargue.

Moreover, the record reflects that defense counsel thoroughly addressed transferred intent during trial. Specifically, counsel argued transferred intent at length during closing arguments and even objected to the clarification instruction. 1RP 414, 461-462, 464-465.

Thus, defendant's claim that he was denied the right to effective assistance of counsel fails where the trial court's answer to the jury regarding transferred intent did not change the applicable law. As such, this Court should dismiss defendant's claim and affirm his conviction.

3. THE EVIDENCE WAS SUFFICIENT TO PROVE
BEYOND A REASONABLE DOUBT THAT
DEFENDANT ASSAULTED FRANK WITH A
DEADLY WEAPON.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the State met the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993).

The sufficiency of the evidence is determined by whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt after viewing the evidence in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). A challenge to the sufficiency of the evidence admits the truth of the State's evidence. *Id.* at 201. "All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant" when the sufficiency of the evidence is challenged. *Id.* at 201 (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Criminal intent may be inferred from the conduct where "it is plainly indicated as a matter of logical

probability.” *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). The weight of the evidence is determined by the fact finder and not the appellate court. *Id.* at 783.

In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

Sufficiency of the evidence is reviewed de novo. *State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310 (2014).

Here, the State was required to prove, amongst other things, that defendant assaulted the Angela Frank with a deadly weapon. CP 112 (Instruction No. 9); see also RCW 9A.36.021.

The jury was instructed the following with regard to assault:

An assault is an intentional touching or striking or cutting of another person that is harmful or offensive, regardless of whether any physical injury is done to the person.

An assault is also an act 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 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 inflict bodily injury.

CP 112 (Instruction No. 12)

The jury was also instructed the following with regard to transferred intent:

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 112; (Instruction No. 18.5); WPIC 10.01.01.

In response to a jury question, the trial court further instructed the jury that Instruction No. 11 (transferred intent) applies to all three paragraphs in Instruction No. 12. (three types of assault). 1RP 466-467; CP 99.

Defendant challenges the sufficiency of the evidence regarding the defendant's conviction for assaulting Angela Frank with a deadly weapon. Brief of Appellant at 18. Specifically, defendant argues that the State needed to prove *actual* harm in order for transferred intent to apply. *Id.*

The law is clear that actual harm is not required for transferred intent. *State v. Frasquillo*, 161 Wn. App. 907, 916, 255 P.3d 813 (2011) citing *State v. Elmi*, 166 Wn.2d 209, 207 P.3d 439 (2009). The intent to assault one victim transfers to all victims who are unintentionally harmed or put in apprehension of harm. *Id.* Defendant even acknowledges this in his brief. Brief of Appellant at 14.

Thus, the State needed to prove that Frank was harmed, but not physically harmed, for the assault. As the State explained during closing argument, harm is not limited to bodily harm but may also be emotional or psychological for transferred intent to apply. 1RP 442-443. *State v. Frasquillo*, 161 Wn. App. at 916.

The record reflects ample evidence that defendant harmed Frank. Defendant held up a foot long machete and ordered her out of the vehicle. 1RP 44-45. Defendant tried to puncture their vehicle's tires and punched Soden in the face while trying to get them out of the vehicle. 1RP 44-45, 90. Defendant attacked Soden with the machete in the vehicle with Frank inside. 1RP 50, 289. Frank screamed, "Don't touch me... get off me...help!" 1RP 282, 93. Frank pleaded for defendant to stop as he attacked Soden with the machete. 1RP 51-55, 93-99. Frank even attempted to call 911 before she was grabbed by defendant. 1RP 51-55, 93-99.

The evidence was sufficient to prove that defendant assaulted Frank because transferred intent applies to all types of assault, not just where there is actual harm. As such, this Court should dismiss defendant's claim and affirm his conviction.

D. CONCLUSION.

The trial court did not abuse its discretion where its response to the jury regarding transferred intent was both an accurate instruction on the law and within matters that were argued by both sides.

Defendant's claim that he was denied the right to effective assistance of counsel fails where the trial court's answer to the jury regarding transferred intent did not change the applicable law.

The evidence was sufficient to prove that defendant assaulted Frank because transferred intent applies to all types of assault, not just where there is actual harm.

For the foregoing reasons, this Court should dismiss defendant's claims and affirm his conviction.

DATED: May 26, 2017.

MARK LINDQUIST
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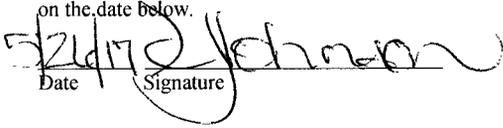


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Certificate of Service:

The undersigned certifies that on this day she delivered by ~~US mail~~ ^{efile} or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5/26/17
Date


Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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