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Court of Appeals
Division II
State of Washington
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No. 51774-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

ERICK NATHAN CHAPMON,

Appellant.

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

REPLY BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711
tom@washapp.org

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A. ARGUMENT

Initially, Mr. Chapmon submitted that the \$200 filing fee was improperly imposed. The State has conceded that issue. Brief of Respondent at 29. This Court should accept the State's concession and strike the \$200 legal financial obligation.

1. **By naming a specific victim in the to-convict instructions, transferred intent was inapplicable.**

Mr. Chapmon submitted that, by naming specific victims in the to-convict instructions for second degree assault, the trial court erred in instructing on transferred intent because the doctrine of transferred intent was inapplicable. The State contends the transferred instruction was proper. But, by naming a specific victim in the to-convicts, the instruction was improper and Mr. Chapmon's convictions for second degree assault on Counts II and III must be reversed.

The State ignores two important points made in this Court's decision in *State v. Abuan*, 161 Wn.App. 135, 257 P.3d 1 (2011). First, in *State v. Elmi*, "our Supreme Court accepted review solely on the issue of transferred intent in first degree assault." *Id.* at 156, quoting *State v. Elmi*, 166 Wn.2d 209, 214, 207 P.3d 439 (2009).

It considered whether a defendant's specific intent to harm one victim transferred "to meet the intent element" against other, unintended victims. 166 Wn.2d at 216, 207

P.3d 439. The *Elmi* court concluded that it need not analyze the issue under the common law doctrine of transferred intent because the first degree assault statute itself “encompasses transferred intent.” 166 Wn.2d at 218, 207 P.3d 439.

The court reasoned that the first degree assault statute “provides that once [intent] is established, any unintended victim is assaulted *if they fall within the terms and conditions of the statute.*” *Elmi*, 166 Wn.2d at 218, 207 P.3d 439 (emphasis added). These “terms and conditions” include not only a mens rea intent element, but also an actus reus element of any of the three common law forms of assault, i.e., “(1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm.” *Elmi*, 166 Wn.2d at 215, 207 P.3d 439.

Abuan, 161 Wn.App. at 156-57 (internal footnote omitted). This Court went on to explain why this difference is important:

In contrast [to first degree assault], second degree assault, as charged in this case and defined in the jury instructions, means that “[a] person is guilty of assault in the second degree if he or she ... [a]ssaults another with a deadly weapon.” RCW 9A.36.021(1)(c). It does not expressly codify specific “intent to inflict bodily harm” and, thus, *Elmi*’s analysis of “statutory” transferred intent under the first degree assault statute is not controlling in cases involving only second degree assault under RCW 9A.36.021(1)(c). RCW 9A.36.011(1)(a).

Id. at 158. Thus, since Mr. Chapmon was charged in the same manner as the defendant in *Abuan*, the analysis regarding *Elmi* is inapplicable here.

Second, and more importantly, since the to convict instructions specifically named the victims, the State bore the burden of proving Mr. Chapmon intended to assault that named victim:

The trial court instructed the jury that to convict Abuan of second degree assault of Fomai, the State had to present sufficient evidence showing that Abuan “assaulted Fomai” with specific intent to cause bodily harm to “another” by use of a deadly weapon or with specific intent to create an apprehension of bodily harm in “another” and that Fomai experienced fear in fact. CP at 246, 239; *Eastmond*, 129 Wn.2d at 500, 919 P.2d 577; *Byrd*, 125 Wn.2d at 713, 887 P.2d 396. When the jury instruction identifies a victim, i.e., “Fomai,” thus specifying “another” as did the jury instruction here, it is the law of the case and there is no room for a transferred intent analysis without a transferred intent jury instruction. *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998) (stating that “jury instructions not objected to become the law of the case”).

Id. at 156. Thus, contrary to the State’s contention, transferred intent is inapplicable and the trial court erred in instructing on it.

The State’s reliance on the decision in *State v. Frasquillo*, 161 Wn.App. 907, 225 P.3d 813 (2011), is misplaced. First, there is nothing in the decision indicating that, as here, the to convict instructions named specific victims. Second, the decision failed to state under which alternative means of second degree assault the defendant was charged, if it was limited to “assaults with a deadly weapon” subsection or some other. And third, the decision failed to analyze why the

decision in *Elmi*, which limited itself to a statutory construction analysis of the *first* degree assault statute, applied to the second degree assault statute.

Frasquillo is inapplicable to Mr. Chapmon's case. The trial court erred in instructing the jury on transferred intent where specific victims were named in the to convict instructions. This Court should reverse Mr. Chapmon's assault convictions on Counts II and III.

2. The jury was only instructed on “deadly weapon” and not “firearm” for the special verdict thus imposition of firearm enhancements violated Mr. Chapmon’s right to a jury trial.

The special verdict jury instructions only instructed on “deadly weapon” not “firearm.” CP 106. As a consequence, the trial court violated Mr. Chapmon's right to a jury trial by imposing firearm enhancements. In its response, the State conflates the issue of notice with the issue of the wording of the jury instruction. Since the jury instruction only instructed on “deadly weapon,” only a deadly weapon enhancement could be imposed.

The State seems to feel the fact Mr. Chapmon was *charged* with using a firearm alleviates the error because he had notice. But notice is not the issue: the issue is the failure to submit an element of the offense to the jury. “The failure to submit a sentencing factor to a jury for a

finding thus violates a defendant's right to a jury trial under both the federal and state constitutions." *State v. Williams-Walker*, 167 Wn.2d 889, 897, 225 P.3d 913 (2010).

The State seems to believe the fact Mr. Chapmon used a firearm to commit the offense is important. But, once again, for the purposes of the special verdict, in all of the cases where the firearm enhancement was reversed and where the jury was instructed on "deadly weapon" only, the defendant had used a firearm to commit the underlying offense. *See e.g., Williams-Walker*, 167 Wn.2d at 893-894; *State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188, *reversed on other grounds sub nom, Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2 466 (2006).

Finally, the State argues a harmless error test applies relying upon the decision in *In re the Personal Restraint of Rivera*, 152 Wn.App. 794, 218 P.3d 638 (2009). But *Rivera* is inapplicable. *Rivera* involved an untimely post-conviction challenge to the imposition of a firearm enhancement. *Rivera*, 152 Wn.App. at 798-99. In finding the petition untimely, the Court looked only to the face of the judgment and sentence and found it valid on its face. *Id.* at 799-800. In *dicta*, the Court looked beyond the face of the judgment and reviewed the

information and special verdict. *Id.* Thus, *Rivera* has no application to Mr. Chapmon's matter.

Finally, contrary to the State's argument, Mr. Chapmon may raise the issue of a violation of his right to a jury trial for the first time on appeal. Any error implicating a criminal defendant's Sixth Amendment right to a jury trial may be raised for the first time on appeal. *State v. Hughes*, 154 Wn.2d 118, 143, 110 P.3d 192 (2005), *abrogated on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

The jury here was only instructed on "deadly weapon." Thus, the court's imposition of firearm enhancements violated Mr. Chapmon's right to a jury trial. The firearm enhancements must be reversed and remanded for imposition of deadly weapon enhancements.

B. CONCLUSION

For the reasons stated, Mr. Chapmon asks this Court to reverse his assault convictions on Counts II and III. Alternatively, Mr. Chapmon asks the Court to reverse the firearm enhancements and remand for the imposition of deadly weapon enhancements.

DATED this 19th day of July 2019.

Respectfully submitted,

s/Thomas M. Kummerow

THOMAS M. KUMMEROW (WSBA 21518)

Washington Appellate Project – 91052

1511 Third Avenue, Suite 610

Seattle, WA. 98101

(206) 587-2711

tom@washapp.org

Attorneys for Appellant

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PIERCE COUNTY PROSECUTOR'S OFFICE		
930 TACOMA AVENUE S, ROOM 946		
TACOMA, WA 98402-2171		
[X] ERICK CHAPMON	(X)	U.S. MAIL
407078	()	HAND DELIVERY
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PO BOX 7699		
CONNELL, WA 99326		

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X _____

Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

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