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Feb 24, 2014
Court of Appeals
Division III
State of Washington

NO. 32014-6-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

DAMIAN T. JOHNSON,

Defendant/Appellant.

APPELLANT'S BRIEF

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ASSIGNMENTS OF ERROR

1. The trial court erred in giving Instruction 14 on transferred intent. (CP 148; Appendix “A”)
2. The trial court miscalculated Damian T. Johnson’s offender score.
3. Imposition of the no-contact order for life, as to Aleksey Kozubenko, is error.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Did the doctrine of transferred intent, as applied to the facts and circumstances of the case, allow a jury to convict Mr. Johnson of second degree assault of Aleksey Kozubenko in violation of his right to due process?
2. Did the trial court miscalculate Mr. Johnson’s offender score by including a point for federal probation?
3. Did the trial court improperly impose a lifetime no-contact order as to Aleksey Kozubenko?

STATEMENT OF CASE

On February 24, 2013 Denis Kozubenko and Aleksey Kozubenko were engaged in purchasing oxycodone from Mr. Johnson. The transaction occurred near the intersection of Baldwin and Cincinnati in the City of Spokane. (Wilkins RP 23, ll. 5-8; ll. 11-18; RP 25, ll. 1-3; RP 44, ll. 4-8; RP 70, l. 21 to RP 71, l. 1)

Aleksey Kozubenko drove a pickup (PU) to the meeting. Denis Kozubenko got out of the pickup and walked to the car where the drug transaction occurred. He exchanged money for the pills. As he started to get out of the car Mr. Johnson pulled out a gun. He told Mr. Kozubenko to wait. (Wilkins RP 26, ll. 8-14; RP 50, ll. 4-7; ll. 21-24; RP 51, ll. 1-4)

Denis Kozubenko fled from the car and ran to the PU. He heard gunshots. He jumped in the PU and told his brother to drive. Bullets were hitting the truck. (Wilkins RP 25, l. 15; RP 27, ll. 4-6; ll. 9-11; ll. 18-19; RP 51, ll. 6-12; ll. 17-25)

John Verner, a nearby resident, saw an individual firing a gun. He heard three (3) to five (5) shots. (Wilkins RP 88, ll. 5-10; ll. 22-23)

The Kozubenkos, who shorted Mr. Johnson on the money on the night in question, later identified him from a photographic montage. (Wilkins RP 62, ll. 11-17; RP 77, ll. 12-17)

An Information was filed on March 26, 2013 charging Mr. Johnson with two (2) counts of attempted first degree murder, or, in the alternative, two (2) counts of first degree assault. (CP 6)

Several continuances were granted over Mr. Johnson's objection. All of the continuances, except one, were at the defense attorney's request. (CP 11; CP 12; CP 24; CP 30)

Defense counsel objected to Instruction 14 on transferred intent. (Wilkins RP 118, ll. 14-19)

A jury found Mr. Johnson guilty of first degree assault of Denis Kozubenko and second degree assault of Aleksey Kozubenko. The jury also determined that Mr. Johnson was armed with a firearm at the time of the offenses. (CP 168; CP 170; CP 171; CP 172)

Judgment and Sentence was entered on October 17, 2013. Mr. Johnson challenged the State's calculation of his criminal history. A challenge was also asserted by defense counsel to inclusion of one (1) point for his federal probation. (CP 220; Wilkins RP 169, ll. 4-9; ll. 20-22)

A no-contact order was entered for life as to both of the Kozubenkos.

Mr. Johnson filed his Notice of Appeal on October 17, 2013. (CP 218)

SUMMARY OF ARGUMENT

The doctrine of transferred intent only applies if another individual is harmed when there is a specific intent to assault a specific individual.

Instruction 14 improperly transferred the burden of proof to Mr. Johnson on the basis that it constitutes a mandatory presumption.

The trial court miscalculated Mr. Johnson's offender score. Federal probation is not a basis for imposing an additional point.

The trial court improperly imposed a lifetime no-contact order as to Aleksey Kozubenko. It exceeds the statutory maximum for the offense.

ARGUMENT

I. TRANSFERRED INTENT

Instruction 14, pertaining to transferred intent, is the basis by which the State was able to go forward with Count II of the Information. The State and the trial court relied upon *State v. Elmi*, 166 Wn.2d 209, 218, 207 P.3d 439 (2009).

The *Elmi* Court, even though it accepted review on the issue of transferred intent, determined that it did not have to reach that issue. The Court ruled at 218: "Because RCW 9A.36.011 encompasses transferred

intent ... we do not need to reach the doctrine of transferred intent ... and proceed, instead, under RCW 9A.36.011.”

The particular quote from the decision is a prime example of circular reasoning with no underlying basis in fact. Justice Madsen’s dissent in *Elmi* attacks that reasoning at 221:

„, [T]here is nothing in RCW 9A.36.011 to suggest that the legislature intended to codify a concept broader than **the common law doctrine** that would allow multiple first degree assault convictions to stand **where there is proof that the person the defendant intended to assault was in fact assaulted and no unintended victim received injury.**

(Emphasis supplied.)

The facts and circumstances of Mr. Johnson’s case match Justice Madsen’s analysis of RCW 9A.36.011. As she stated at 222:

... [T]he doctrine of transferred intent, whether at common law or as codified, is not and never has been intended to apply in the circumstances where no unintended victim is injured.

Justice Madsen relied upon *State v. Krup*, 36 Wn. App. 454, 458-59, 676 P.2d 507 (1984) which quoted WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW, 611 (1972). The particular language is set forth at 223: “There must be an *actual intention to cause apprehension* unless there exists the morally worse intention to cause bod-

ily harm”.

Instruction 14 parallels the common law and requires “harm to a third person.”

Mr. Johnson contends that the harm must be actual bodily harm.

As Justice Madsen pointed out in *Elmi*, at 228:

In cases where no victims suffer actual injury but the defendant “creates the substantial risk of death or serious physical injury to another person [(s)]” the legislature has created the crimes of drive-by shooting or reckless endangerment.

Mr. Johnson contends that the State’s use of transferred intent as defined in Instruction 14 amounts to a mandatory presumption in violation of the Fourteenth Amendment to the United States Constitution and Const. art. I, § 3.

It is reversible error to instruct the jury in a manner that relieves the State of its burden to prove beyond a reasonable doubt every essential element of a criminal offense. We analyze a challenged jury instruction by considering the instructions as a whole and reading the challenged portions in context. We review an alleged error in jury instructions *de novo*.

...

“A mandatory presumption is one that requires the jury ‘to find a presumed fact from a proven fact.’” To determine

whether a jury instruction creates a mandatory presumption, we examine whether a reasonable juror would interpret the instruction as mandatory.

Mandatory presumptions violate a defendant's right to due process if they relieve the State of its obligation to prove all of the elements of the crime charged beyond a reasonable doubt.

Even if a jury instruction includes an unconstitutional mandatory presumption, it does not necessarily require reversal. Such an erroneous instruction is subject to harmless error analysis. Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless beyond a reasonable doubt.

State v. Atkins, 156 Wn. App. 799, 807-08, 236 P.3d 297 (2010), quoting *State v. Hayward*, 152 Wn. App. 632, 632, 217 P.3d 354 (2009) (quoting *State v. Deal*, 128 Wn.2d 693, 699, 911 P.2d 966 (1996)).

Mr. Johnson's conviction of second degree assault as to Aleksey Kozubenko should be reversed and dismissed due to violation of his due process rights.

II. SENTENCING ERRORS

A. Offender Score

The trial court miscalculated Mr. Johnson's offender score. The

inclusion of one (1) point for federal probation is not authorized under the Sentencing Reform Act (SRA).

“A sentencing court acts without statutory authority under the Sentencing Reform Act of 1981 when it imposes a sentence based upon a miscalculated offender score.” *Personal Restraint of Johnson*, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997).

RCW 9.94A.525(19) provides:

If the present conviction is for an offense committed while the offender was under community custody, add one point. For purposes of this subsection, community custody includes community placement or postrelease supervision, as defined in Chapter 9.94B RCW.

RCW 9.94A.030(5) defines the term “community custody” as meaning

... that portion of an offender’s sentence of confinement in lieu of earned release time or **imposed as part of a sentence under this chapter** and served in the community subject to controls placed on the offender’s movement and activities **by the department**.

(Emphasis supplied.)

The definition of “community custody” requires that any sentence be imposed under the provisions of Chapter 9.94A RCW. It also requires

that the individual be subject to the control of the Department of Corrections (DOC).

DOC does not monitor individuals on federal probation. Federal probation is not imposed pursuant to the provisions of Chapter 9.94A RCW.

Furthermore, pursuant to RCW 9.94A.525(19), the provisions of Chapter 9.94B RCW must be considered.

RCW 9.94B.010(2) states: “This chapter supplements Chapter 9.94A RCW and should be read in conjunction with that chapter.”

RCW 9.94B.020 contains definitions of “community placement,” “community supervision,” and “postrelease supervision.”

As the introductory portion of RCW 9.94B.020 states: “In addition to the definitions set out in RCW 9.94A.030, the following definitions apply **for purposes of this chapter.**” (Emphasis supplied.)

Reading all of the subsections of RCW 9.94B.020 together, it is apparent that federal probation is not included within the definitions of the respective post-incarceration provisions.

Mr. Johnson is entitled to be resentenced with the correct offender score.

B. No-Contact Order

RCW 9A.20.021(1) provides, in part:

Felony. Unless a different maximum sentence for a classified felony is specifically established by a statute of this state, no person conviction of a classified felony shall be punished by confinement or fine exceeding the following:

...

(b) For a class B felony, by confinement in a state correctional institution for a term of ten years, or by a fine in an amount fixed by the court of \$20,000.00 or by both such confinement and fine

Second degree assault is a class B felony. *See*: RCW 9A.36.021.

The trial court entered no-contact/protection order as to both Denis and Aleksey Kozubenko. The lifetime no-contact order as to Denis Kozubenko is correct. The trial court exceeded its authority by imposing a lifetime no-contact order as to Aleksey Kozubenko.

In the absence of statutory authority authorizing a sentencing court to impose a no-contact order in excess of the maximum penalty for the underlying offense, it must be corrected.

CONCLUSION

Mr. Johnson's due process rights were violated by a mandatory presumption instruction. He is entitled to have his conviction for second degree assault reversed and dismissed.

Sentencing errors need to be corrected. A miscalculated offender score and improperly imposed no-contact order require reversal and resentencing.

DATED this 22nd day of February, 2014.

Respectfully submitted,

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APPENDIX “A”

INSTRUCTION NO. 14

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

NO. 32014-6-III

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DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	SPOKANE COUNTY
Plaintiff,)	NO. 13 1 01087 0
Respondent,)	
)	CERTIFICATE OF SERVICE
v.)	
)	
DAMIAN T. JOHNSON,)	
)	
Defendant,)	
Appellant.)	
)	

I certify under penalty of perjury under the laws of the State of Washington that on this 22nd day of February, 2014, I caused a true and correct copy of the *APPELLANT'S BRIEF* to be served on:

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E-FILE

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E-file (per agreement)

CERTIFICATE OF SERVICE

