

**NO. 32860-1-III**

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**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III**

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**STATE OF WASHINGTON,**

**Respondent,**

**v.**

**MARCOS AVALOS BARRERA,**

**Appellant.**

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**BRIEF OF RESPONDENT**

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**I. ISSUES RELEVANT TO THE ASSIGNMENT OF ERROR**

A. Can transferred intent be used to elevate a misdemeanor assault to a felony assault when the victim of the transferred intent is in a class protected by felony assault statutes?

B. Did the trial court error in concluding there was sufficient evidence to send a self-defense instruction to the jury?

C. Was the jury required to credit the self-serving testimony of the defendant and conclude that the assault on a fellow inmate was self-defense when there was no outward sign of a threat?

**II. STATEMENT OF THE CASE**

Correction Officers Alex Aragon and Jose Ramirez went into B Dorm of the Grant County Jail to remove Anthony Vazquez from his cell and take him to visitation. RP 75. Two other inmates, Marcos Avalos Barrera and Steven Gomez, were on their hour out in the Dorm. *Id.* Officer Ramirez went up the stairs to retrieve Anthony Vazquez from his cell while Officer Aragon positioned himself to ensure inmate separation. RP 75-76.

Anthony Vazquez came down from the upper cell area, followed by Officer Ramirez. RP 76-77. Vazquez did not say anything and made no threatening gestures. RP 77. As Vazquez got to the bottom of the

stairs, Avalos Barrera got up and moved quickly around both the table and Officer Aragon toward Vazquez. *Id.* Avalos Barrera started striking Vazquez with haymaker-style punches. RP 79-80. Officer Aragon got between the two inmates to stop the fight. *Id.* In the process, Avalos Barrera also struck Officer Aragon. *Id.* Officer Aragon also was pushed and struck his elbow on the wall, leading to some swelling and a bruise. During this whole incident Vazquez did nothing aggressive and cooperated with the officer. RP 83-84. Avalos Barrera was charged with assault in the fourth degree for the assault on Anthony Vazquez and custodial assault for the assault on Officer Aragon. A jury convicted him on both counts. At trial Avalos Barrera testified that Anthony Vazquez threatened him while Vazquez was locked in his cell.

### III. ARGUMENT

***A. Transferred intent may be used when the intended crime is a gross misdemeanor but the victim is in a class protected by felony statutes.***

Appellant contends that intent to commit a misdemeanor assault on one victim cannot be, through transferred intent, elevated to a felony assault when the person assaulted is a member of a class protected by felony statutes. This is logically contrary to the Washington Supreme Court's holding in *State v. Brown*, 140 Wn.2d 456, 998 P.2d 321 (2000). Overruling the holding in *State v. Allen*, 67 Wn. App. 824, 840 P.2d 905

(1992), that assault in the third degree “requires knowledge or intent that the person assaulted was a law enforcement officer engaged in performing his official duties[,]” *Brown*, 140 Wn.2d at 464, the *Brown* Court held that in cases of assault in the third degree against a law enforcement officer, knowledge of the status of the victim is not an element of the crime.<sup>1</sup> If knowledge that a person is a law enforcement officer is not an element of the crime of assault in the third degree, intent to assault a law enforcement officer cannot be either. The law is clear that an intended misdemeanor assault becomes a felony assault in the third degree should it turn out that the person assaulted is a law enforcement officer performing official duties.

The State did not have to prove Marcos Avalos Barerra (Avalos Barerra) intended to assault a corrections officer, only that he intended an assault on one person and that the person he assaulted was a corrections officer. There was no dispute that Officer Aragon was a corrections officer. There was also no dispute that Avalos Barrera intended an assault, and no dispute that Officer Aragon was assaulted.

Avalos Barerra does not cite any cases for the proposition that transferred intent cannot cross the misdemeanor-felony line in assault cases. Assault in the second degree and assault in the third degree, both

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<sup>1</sup> Officer Aragon is a corrections officer. In this context there is no appreciable difference between assault in the third degree of a law enforcement officer and custodial assault.

felonies, do not require intent to commit a felony assault under certain alternative means. RCW 9A.36.021(1)(a) requires that the perpetrator “intentionally assaults another and thereby recklessly inflicts substantial bodily harm.” One who punches a person in the face and recklessly breaks the victim’s nose, even without intending to, is guilty of a felony assault and a most serious (strike) offense. RCW 9.94A.030. RCW 9A.36.031(d) and (f) do not even require an intentional assault, but only that the injury be inflicted with criminal negligence, either by a weapon or means likely to produce bodily harm, or in a manner that causes “bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.” It follows that intent to commit a misdemeanor can rise to a felony without the defendant actually intending to commit the aggravating act. This has never been held to violate due process or equal protection.

The lack of published cases regarding transferred intent regarding assault in the fourth degree cases is likely due to the fact that in Washington, the issue of transferred intent has not been controversial after *Brown*,<sup>2</sup> and is well settled law, along with the fact that most misdemeanor

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<sup>2</sup> The issue here is not novel and has been addressed in a number of unpublished Washington cases. See e.g. *State v. M.A.-F.*, noted at 154 Wn. App. 1010, 2010 Wash. App. LEXIS 45 (2010); *State v. Adams*, 110 Wn. App. 1053, 2002 Wash. App. LEXIS 398 (2002); *In re Pers. Restraint of Orange*, 110 Wn. App. 1086, 2002 Wash. App. LEXIS 1667 (2002), *aff'd in part and rev'd in part on other grounds* 152 Wn.2d 795,

assault cases are dealt with in district court and thus are not routinely reviewed by appellate courts. Established law is not the subject of published cases, which tends to address issues that are not yet well clearly resolved.

Avalos Barrera fails to explain how imposing transferred intent in this manner violates equal protection, nor does he tie the facts in this case to the law. “[T]he defendant has the burden of establishing that the constitutional mandate has been violated.” *State v. Trickel*, 16 Wn. App. 18, 26, 553 P.2d 139 (1976). “Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.” *State v. Soper*, 135 Wn. App. 89, 103, 143 P.3d 335 (2006). Equal protection analysis involves a three step inquiry:

(1) does the legislation apply alike to all persons within a designated class; (2) are there reasonable grounds to distinguish between those who fall within the class and those who do not; and (3) does the classification have a rational relationship to the purpose of the legislation.

*State v. Preston*, 66 Wn. App. 494, 500, 832 P.2d 513 (1992).<sup>3</sup> Here, Avalos Barrera fails to meet his burden to identify the designated class nor does he argue whether the grounds distinguishing the class members are

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799, 100 P.3d 291, 293 (2004). These cases are cited not as legal authority, but to show that this is not a novel issue. See *State v. Chacon Arreola*, 176 Wn.2d 284, 297 n1, 290 P.3d 983 (2012)

<sup>3</sup> There is no suspect or semi-suspect class or fundamental right at issue here, thus rational basis analysis applies.

reasonable or whether the classification has a rational relationship to the purpose of the law. Although not identified, the State presumes the designated class in this case is comprised of those who commit intentional misdemeanor assault and have their crimes elevated to a felony by non-intentional events, versus those who simply commit misdemeanor level assaults. This distinction is rational, holding people who commit intentional criminal acts liable for the harm inflicted, not just the harm intended. It encourages caution when criminal acts are committed.

This theory of criminal causation is well established in the various types of assault, felony murder, rape of a child, drive-by-shooting and many other crimes where the mens rea may be reckless, negligent or strict liability for the acts committed. For example assault 2 and assault 3, both felonies, do not require intent to commit a felony assault under certain alternative means. RCW 9A.36.021(1)(a) requires that the perpetrator “intentionally assaults another and thereby recklessly inflicts substantial bodily harm.” Thus if a defendant punches a person in the face, and recklessly breaks their nose, even without intending to, they are guilty of a felony assault and a most serious (strike) offense. RCW 9.94A.030. RCW 9A.36.031(d) and (f) do not even require an intentional assault, but only that the injury be inflicted with criminal negligence, either by a weapon or means likely to produce bodily harm, or in a manner that causes “bodily

harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.” Thus intent to commit a misdemeanor can easily rise to a felony without the defendant actually intending to commit the aggravating acts. This has never been held to violate due process or equal protection.

The court should reject this issue as insufficiently developed and unsupported by law.

***B. The trial court erred in even giving the self-defense instruction, as no reasonable juror could have found self-defense. The argument that the jury was somehow required to credit Avalos Barrera’s self-serving testimony is nonsensical.***

The State bears the burden of proving each and every element of a criminal offense beyond a reasonable doubt. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). The applicable standard of review is whether, after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). All reasonable inferences from the evidence must be drawn in

favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004), abrogated in part on other grounds by *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1353, 158 L. Ed. 2d 177 (2004). "Credibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

A defendant asserting a claim of self-defense bears the initial burden of producing some evidence that his or her actions occurred in circumstances amounting to self-defense. *State v. Douglas*, 128 Wn. App. 555, 562, 116 P.3d 1012 (2005). Once this threshold is met and a jury is instructed on self-defense, the State bears the burden of proving the absence of self-defense beyond a reasonable doubt. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). The absence of self-defense becomes another element of the offense that the State must prove. *State v. Woods*, 138 Wn. App. 191, 198, 156 P.3d 309 (2007).

The jury must assess the self-defense evidence from the perspective of a reasonably prudent person standing in the defendant's shoes, knowing all the defendant knows and seeing all the defendant sees. *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). "Courts must

inform the jury that the self-defense standard incorporates both objective and subjective elements: the subjective portion requires the jury to stand in the defendant's shoes and consider all the facts and circumstances known to the defendant, while the objective portion requires the jury to determine what a reasonably prudent person similarly situated would do." *Woods*, 138 Wn. App. at 198. The self-defense instructions properly informed the jury, in part, that "[t]he use of force upon or toward the person of another is lawful when used by a person who reasonably believes that *he is about to be injured and when the force is not more than is necessary.*" CP 134 (emphasis added).

Taking as true Avalos Barrera's testimony about a threat by Anthony Vazquez, there is still no evidence he was about to be injured, nor that the force used in response was not more than necessary. Witness testimony and video evidence place Avalos Barrera on the ground floor, away from the stairs. As he is brought from his second-floor cell, Anthony Vazquez does not make any threatening gestures or words toward Avalos Barrera. There are two corrections officers in the dorm. Avalos Barrera has to push past one of them to get to Anthony Vazquez. There is no evidence Avalos Barrera was about to be injured. Even if the threat were to be believed, there was no showing by Anthony Vasquez of intent to use immediate force. Evidence also showed any anxiety felt by

Avalos Barerra could have been resolved without use of force. There were two corrections officers in the immediate vicinity. All Avalos Barerra had to do was say something and measures could have been taken to prevent any assault. The force Avalos Barerra used was greater than necessary because no force was necessary. No jury could have found self-defense under these circumstances. It is not surprising that this jury did not. The trial court erred in even giving the self-defense instruction.

The above argument assumes that the testimony by Avalos Barerra is taken as true. However, the jury is not required to make that assumption. The jury is the sole judge of credibility. They were not required to accept Avalos Barrera's version as true. Viewed in the light most favorable to the State, Avalos Barrera lied about the threats by Anthony Vazquez and the resulting fear he felt. There was no evidence upon which to find self-defense. Even if the jury could have found self-defense, they were not required to so.

Avalos Barrera's argument should be rejected as against public policy. Jails house people who are dangerous and dishonest. That is what jails are for. If, as Avalos Barerra argues, a jury in an assault case must accept as true any inmate-defendant's claim that "he threatened me", jails would become *de facto* cage-fighting arenas, dangerous to inmates and law enforcement personnel alike. This is against public policy.

Public policy strongly disfavors permitting prison violence. Most correctional facilities are fraught with serious security dangers. Prisons are populated by persons who have chosen to violate the criminal law, many of whom have employed violence to achieve their ends. In such a volatile environment, public policy demands that violence between inmates be eliminated where possible.

Moreover, public policy also imposes nondelegable duty on those operating correctional facilities to maintain the health and safety of the prisoners incarcerated there. The execution of this duty would be rendered impossible were this court to permit inmates to engage in physical violence.

*State v. Weber*, 137 Wn. App. 852, 860, 155 P.3d 947 (2007) (internal citations omitted) Public policy dictates that the reasonable course of action for Avalos Barrera to take would have been to tell the two officers about the threat so they could handle the issue. There was no viable self-defense claim in this case, and even if there had been, the jury was not required to believe it.

#### **IV. CONCLUSION**

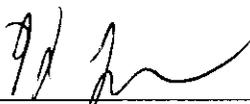
Transferred intent is a well-established doctrine in Washington. There is no reason it cannot elevate a misdemeanor to a felony under appropriate circumstances. There was no viable self-defense claim in this

case, and even if there were, the jury was not required to credit Avalos Barrera's self-serving testimony. The lower court should be affirmed

Dated this 26<sup>th</sup> day of August 2015.

Respectfully submitted,

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COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
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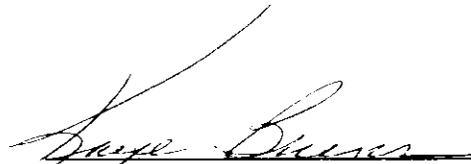
STATE OF WASHINGTON,	)	
	)	
Respondent.	)	No.32860-1-III
	)	
v.	)	
	)	
MARCOS AVALOS BARRERA,	)	DECLARATION OF SERVICE
	)	
Appellant.	)	
_____	)	

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this matter by e-mail on counsel for the Appellant, receipt confirmed, pursuant to the parties' agreement:

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Dated: August 27, 2015.

  
Kaye Burns