

Supreme Court No. 80380-3
COA No. 56460-9-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALI ELMI,

Petitioner.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 APR 14 PM 4:55

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

The Honorable Richard McDermott

SUPPLEMENTAL BRIEF OF PETITIONER

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A. STATEMENT OF THE CASE

Mr. Elmi fired a gun at his estranged wife, Ms. Aden, when he saw her standing looking out the window of her house. The bullets went through the window but failed to strike Aden and lodged elsewhere. Elmi was convicted of attempted murder in the first degree of Aden, and was also convicted of assault in the first degree (assault with intent to inflict great bodily harm), based on the same act of attempting to shoot Aden.

In addition, the jury, which was given an instruction on "transferred intent," convicted Elmi of three additional counts of assault in the first degree: one count of as to each of three small children who were, totally unbeknownst to Elmi, also present in the house. CP 1, 11, 142, 221-30; 4/14/05RP at 51-52.

The court merged the assault of the wife with the attempted murder of the wife, and sentenced Elmi to 699 months. CP 221-24, 227.

In its Brief of Respondent in the Court of Appeals, the State conceded that there was no evidence to support conviction for any of the three common law forms of assault as to the children, since there was no proof that the children were subjected to intentional assault by actual battery, no proof that Elmi intended and

attempted but failed to assault the children, and no proof that he intentionally created apprehension of imminent harm in the children. Brief of Respondent of 5/16/06, at pp. 14-15. The State further argued that “no case supports the conclusion that the transferred intent doctrine would support conviction when there was no evidence that a defendant was even aware of the presence of other individuals, who were not injured during the assault on another person.” Brief of Respondent of 5/16/06, at pp. 15-16.

The Court of Appeals directed the parties to address the cases of State v. Allen, 2001 Wash. App. LEXIS 532 (2001), and Commonwealth v. Melton, 436 Mass. 291, 295, 763 N.E.2d 1092, 1096 (2002), in relation to the doctrine of “transferred intent,” and invited the State to withdraw its concession of error. State v. Elmi, COA No. 56460-9 (Order of October 4, 2006).

Following supplemental briefing, the Court rejected Mr. Elmi’s arguments of insufficiency and instructional error as to the assault counts involving the children as complainants. See State v. Elmi, 138 Wn. App. 306, 156 P.3d 281 (2007). This Court accepted review.

B. ISSUES PRESENTED FOR REVIEW

1. Whether there was sufficient evidence of first degree assault for the children in counts 3, 4 and 5, where the defendant did not know the children were present when he fired into a house aiming at but failing to shoot his estranged wife, where those complainants were not shot, they were not his attempted target, and he did not intend to cause them apprehension of imminent harm.

2. Whether, even if the intent to cause apprehension of harm need not match a known victim, there was sufficient evidence of first degree assault for counts 3, 4 and 5, where the named complainants did not suffer apprehension of imminent harm, and were therefore not victims of assault.

C. SUPPLEMENTAL ARGUMENT

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE DEFENDANT'S CONVICTIONS FOR ASSAULT IN COUNTS 3, 4 AND 5.

(1). Conviction for first degree assault in counts 3, 4 and 5 required proof that Mr. Elmi possessed specific intent to assault the named child complainants. Mr. Elmi was convicted of first degree assault as to the children named in counts 3, 4 and

5. An essential element of the crime of first degree assault is "assault." RCW 9A.36.011; State v. Wilson, 125 Wn.2d 212, 217-18, 883 P.2d 320 (1994).

"Assault" is not defined in any Washington statute, and instead, courts resort to the common law for the definition of that offense. State v. Aumick, 73 Wn. App. 379, 382, 869 P.2d 421 (1994); Peasley v. Puget Sound Tug & Barge Co., 13 Wn.2d 485, 504, 125 P.2d 681 (1942); see also RCW 9A.04.060 (common law provisions supplement criminal statutes).

Washington recognizes three forms of assault: (1) assault by actual battery; (2) assault by attempting to inflict bodily injury on another while having the apparent present ability to inflict such injury; and (3) "assault by placing the victim in reasonable apprehension of bodily harm." State v. Hall, 104 Wn. App. 56, 62, 14 P.3d 884 (2000) (citing State v. Byrd, 125 Wn.2d 707, 712-13, 887 P.2d 396 (1995)).

Of the three forms of assault, assault by actual battery requires only the general intent to do the physical act constituting the assault, and does not require specific intent. State v. Hall, 104 Wn. App. at 62. In contrast, assault by attempting to inflict bodily injury (attempted battery) requires the specific intent to cause

bodily injury, and assault by placing a person in reasonable apprehension of harm requires the specific intent to create apprehension of harm. State v. Daniels, 87 Wn. App. 149, 155, 940 P.2d 690 (1997).

The term "specific intent" means the intent to produce a result in addition to the intent to do the physical act which the crime requires, State v. Esters, 84 Wn. App. 180, 184, 927 P.2d 1140 (1996), while the term "general intent" means the intent to do the physical act which the crime requires. State v. Nelson, 17 Wn. App. 66, 72, 561 P.2d 1093, review denied, 89 Wn.2d 1001 (1977).

Thus in Byrd, this Court stated,

the State must prove the Defendant acted with an intent to create in his or her victim's mind a reasonable apprehension of harm.

State v. Byrd, 125 Wn.2d at 714 (citing State v. Austin, 59 Wn. App. 186, 192-93, 796 P.2d 746 (1990)). That specific intent is manifestly absent in Mr. Elmi's case, because he did not know the children were present in the house.

Neither State v. Wilson, supra, nor any concept of "transferred intent" solves the insufficiency of the evidence in this case. In fact, Wilson is completely consistent with a requirement,

in this case, for sufficiency purposes, that Mr. Elmi must have specifically intended to cause apprehension of harm in the named children.

In Wilson, the defendant entered a bar and started arguments with at least five people, including Jones and Judd. Wilson left the bar after threatening to harm Jones and Judd, and some minutes later, three bullets pierced the bar window, missing Jones and Judd but striking two other patrons, Hensley and Hurles. Wilson was found guilty of first degree assault of Jones, Judd, Hensley, and Hurles. Wilson, 125 Wn.2d at 216.

The Court of Appeals reversed the assault convictions as to Hensley and Hurles, concluding that “the doctrine of transferred intent does not apply under the assault statutes if the defendant successfully assaulted his or her intended victim.” Wilson, 125 Wn.2d at 216 (citing State v. Wilson, 71 Wn. App. 880, 863 P.2d 116 (1993)).

The State sought review of the decision reversing the convictions as to Hensley and Hurles, and this Court reinstated the convictions. Based on a reading of the language of RCW 9A.36.011, this Court concluded that “once the *mens rea* is

established, [the assault statute], not the doctrine of transferred intent,” provides that

any unintended victim is assaulted if they fall within the terms and conditions of the statute. Transferred intent is only required when a criminal statute matches specific intent with a specific victim. RCW 9A.36.011 does not include such a rigid requirement.

Wilson, 125 Wn.2d at 219. In reaching this conclusion, this Court was importing the “general intent” status of assault by actual battery into the first degree assault statute.

However, this assessment of the requirements for conviction under the first degree assault statute – i.e., the lack of a requirement that the intent match a particular victim -- makes sense only under the facts of Wilson, which involved assault by actual battery, in which the two “unintended victims” were actually subjected to harmful touching. See Wilson, 125 Wn.2d at 215, 218-19.

Unlike the other forms of common law assault, assault by actual battery (physical contact) does not require proof of specific intent to cause apprehension or inflict substantial bodily harm. State v. Daniels, 87 Wn. App. 149, 155, 940 P.2d 690 (1997). Instead, assault by actual battery is an intentional touching or striking of another person that is harmful or offensive, regardless

whether it results in any physical injury. WPIC 35.50. Thus, rather than "specific intent to inflict harm or cause apprehension . . . battery [merely] requires intent to do the physical act constituting assault." State v. Hall, 104 Wn. App. 56, 62, 14 P.3d 884 (2000).

There is no contention in the present case that the children were actually battered. 5/3/05RP at 37. Therefore, proof of assault of the children required proof of specific intent to assault those individuals. Just as the common law definition of assault by actual battery – and its lack of a specific intent requirement -- is imported into the first degree assault statute, so is the common law definition of assault by intentionally causing apprehension of harm – and its requirement of intent to cause apprehension in a specific person – imported into that statute. See Wilson. It would not be enough that Mr. Elmi accidentally caused his children to apprehend harm (which he did not do, see Part C.2, *infra*):

One cannot . . . commit a criminal assault by negligently or even recklessly or illegally acting in such a way (as with a gun or a car) as to cause another person to become apprehensive of being struck. There must be an actual intention to cause apprehension.

Byrd, 125 Wn.2d at 713 (citing Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law 611 (1972)).

Proof of assault of the children in this case required proof of specific intent to assault those individuals. Under this Court's reading of the first degree assault statute, and consistent with the principle that conviction for an offense requires proof of every element, Mr. Elmi's convictions for assault in counts 3, 4 and 5 must be reversed for insufficiency of the evidence. U.S. Const. amend. 14;¹ Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989).

(2). Even if the intent to cause apprehension could be “transferred” to unknown and unintended victims, there is insufficient evidence of completed crimes of assault in this case because the second half of the equation is absent – the children did not apprehend imminent harm, and they were therefore not “victims” of assault. This Court's leading case on the concept of “transferred intent” in assault cases, and the authority relied on by the Court of Appeals, is State v. Wilson, supra. See State v. Elmi, 138 Wn. App. at 315.

This Court stated in Wilson that “once the *mens rea* is

¹The Fourteenth Amendment provides that “no person shall be deprived of life, liberty, or property without due process of law.” U.S. Const. amend. 14.

established, [the assault statute], not the doctrine of transferred intent, provides that “any unintended victim is assaulted if they fall within the terms and conditions of the statute.” Wilson, 125 Wn.2d at 219. This Court in essence held that a completed punishable crime can be assembled from two component parts -- an intent, and a victim -- even though, at least as far as the crime of first degree assault by actual battery, the intent need not match the victim. The Court was imposing the requirement of the presence of an actual victim, in order for the defendant’s assaultive intent to be transferred to that person named as the complainant, and in order for a crime to exist.

In Mr. Elmi’s case, because the named complainants in counts 3, 4 and 5 were not battered, they were not victims of actual battery.

In addition, as argued in Mr. Elmi’s petition for review, the children were not victims of attempted battery, either by virtue of not having been shot (such a result would render the defendant guilty of assault as to every other person he also did not strike), not

by virtue of being in some zone of danger, as held by the Court of Appeals.²

Therefore, in order for the children to be victims of assault, this Court must be able to say that the children apprehended imminent harm. The perception must be that harm is "imminent," which term is defined as "about to occur at any moment: impending." WEBSTER'S SECOND NEW COLLEGE DICTIONARY 553 (1986). But the present case does not include evidence that would allow a trier of fact to conclude that the three children apprehended imminent harm from incoming bullets; instead, at best, the evidence showed that the children were upset by their mother's reaction to some event after it occurred. This is in fact twice divorced from what would be required to render them unintended "victims" of assault. Even if the children were upset by the shooting after it occurred, this would not show that they apprehended harm imminently about to occur. And in this case, there was not evidence even of those facts, or even that they noticed the shooting; rather, the evidence merely showed that the

²The Court of Appeals concluded that persons who were in a "zone of danger" created by the defendant's conduct could be persons as to whom the defendant would be criminally liable for assault by attempted battery. Decision, at p. 10 and n. 6. But the act of placing a person in a zone of danger is not assault,

children were upset by their mother, Ms. Aden's, "reaction."

Ms. Aden testified that she then heard gunshots. 4/14/05RP at 59. After she heard the gunshots the glass window shattered. 4/14/05RP at 59-60. Ms. Aden screamed, and the children "reacted to how I reacted." 4/14/05RP at 60. The testimony was as follows:

Q: What was the reaction of the kids?

A: I mean, I screamed and they reacted to how I reacted, but you couldn't really --- I don't know how they identified it with shots, really, but they reacted to my reaction, which was, Oh my God, let's move and go to another room.

Q: Okay. Is it possible that they were reacting to what they were hearing, too?

A: It was, I think, a little fast and I was freaked out, so, I mean they were all young and didn't know what gunshots were, so I think it was my reaction that had them freaked out.

4/14/05RP at 60. Even if the children were upset by what had occurred, there was no evidence that they perceived imminent harm, only that they reacted with upset after the occurrence.

Therefore they are not victims of assault, and therefore, per

Wilson, the doctrine of transferred intent cannot apply to them.

See, e.g., State v. Bland, 71 Wn. App. 345, 358, 860 P.2d 1046

(1993) (defendant who was sleeping did not experience

it is reckless endangerment. See RCW 9A.36.050(1).

apprehension of imminent contact since he only awoke after items landed on him).

The evidence in this case does not support a finding that the children perceived imminent harm from bullets coming at them. Even assuming that the children were upset -- no matter how substantial that upset might have been -- that fact proves nothing other than their distress caused by an event that had already occurred. The children did not testify that they perceived imminent harm. As the State assessed the trial evidence in its concession of error -- though that concession to legal error has now been withdrawn -- there was, in this case, no evidence that "the children were in apprehension and imminent fear of bodily injury at the time the shots were fired." Brief of Respondent of 5/16/06, at 15.

Such apprehension of harm is necessary to render the complainants "unintended victims" of assault for purposes of applying, or "transferring" the defendant's assaultive intent to them, where the defendant's conduct was done with the intent to cause apprehension. This only makes sense, since conviction for an offense always requires proof of every element of the offense. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 368 (1970).

The case of Commonwealth v. Melton, 436 Mass. 291, 295, 763 N.E.2d 1092, 1096 (2002), which the Court of Appeals required Mr. Elmi to address, involved four counts of assault, and a defendant who shot his gun into a car that he was fully aware was occupied by at least four persons, and whom the court deemed to be subjectively intended victims of the defendant's assaultive conduct. Commonwealth v. Melton, 436 Mass. at 292-93. For this reason, the Melton decision had no application to the issue presented in Mr. Elmi's case.

In dicta, the Melton Court went on to discuss the "concept of 'transferred intent.'" First, the court described the doctrine as follows: "The principle of transferred intent applies to satisfy the element of intent when a defendant harms both the intended victim and one or more additional but unintended victims." Melton, 436 Mass. at 296. The court cited cases from other jurisdictions, all of which involved unintended or unknown victims who were subjected to actual harmful battery as a result of the defendant's intent to batter a known or intended victim, including Washington's case of State v. Wilson. Melton, 436 Mass. at 296-97.

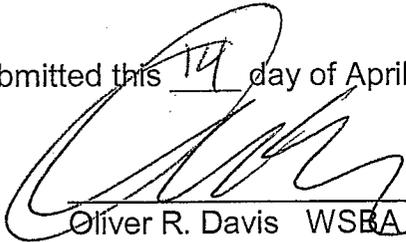
However, the court continued on to state that the fact that the victims in the cited cases were actually struck or injured did not

mean that the unintended victims must be struck or injured in order for the doctrine of transferred intent to apply. Melton, 436 Mass. at 298. Analyzing the case before it under the alternative theory of transferred intent, and therefore assuming for purposes of the analysis that Melton subjectively intended only to batter Marcellus, the court stated that Melton attempted to batter Marcellus, and all the other persons in the car “were aware of the shot, several of them were struck by shattered glass from the bullet piercing the rear window, and all suffered at least the same fear as the intended victim.” Melton, 436 Mass. at 299. Therefore, the court reasoned, they were all victims of the attempted battery, “even if the perpetrator’s intent focused on only one of them.” Melton, 436 Mass. at 299. However, the children in the present case were not placed in fear of imminent harm, and as argued previously, placing a person in a zone of “peril” is not sufficient to satisfy any of the three forms of common law assault that are a part of Washington’s assault statutes. For this reason, Melton does not provide support for Mr. Elmi’s convictions for assault of the children in the present case.

D. CONCLUSION

Based on the foregoing and on his Petition for Review, Mr. Elmi requests that this Court reverse his convictions on counts 3, 4 and 5.

Respectfully submitted this 19 day of April, 2008.



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