71956-4

FILED
May 21, 2015
Court of Appeals
Division I
State of Washington

No. 71956-4-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

LARRY D. DALEY, JR.,

Appellant.

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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Constitution

Washington Constitution

United States Supreme Court Decisions

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

Rules and Statutes

Other Authorities

A. ARGUMENT

1. In the complete absence of any information to identify the alleged victim, Mr. Daley's conviction for assault of "John Doe" must be reversed.

The trial court found Mr. Daley shot in the direction of the "crowd of unidentified people," and "[t]he name 'John Doe' is used in a representative sense to stand for simply one of these unidentified individuals." CP 21 (Finding of Fact 11). By statute, however, assault in the first degree is a specific intent offense that requires proof beyond a reasonable doubt that the defendant had the specific intent to assault an identified victim. RCW 9A.36.011(a); *State v. Elmi*, 166 Wn.2d 209, 218, 207 P.3d 439 (2009). In addition, where there are multiple potential victims, the constitutional protection against double jeopardy requires identification of an alleged victim to protect against successive prosecutions for the same incident. U.S. Const. amend. V; Const. art. I, § 9; *Brown v. Ohio*, 432 U.S. 161, 165-66, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); *In re Percer*, 150 Wn.2d 41, 56-57, 75 P.3d 488 (2003); *State v. Crank*, 105 Utah 332, 142 P.2d 178, 180 (1943).

The State did not charge Mr. Daley with assault against an unintended victim, and, therefore, the State's argument regarding transferred intent is inapposite. *See* Br. of Resp. at 14-15. Transferred intent applies only after the intent to inflict great bodily harm against an

intended victim is established, and the *mens rea* is transferred to an unintended victim. *Elmi*, 166 Wn.2d at 218; *State v. Wilson*, 125 Wn.2d 212, 215, 883 P.2d 320 (1994). For example, in *Elmi*, the defendant was convicted of four counts of assault in the first degree for firing a gun into a house knowing his estranged wife was inside, but not knowing three children were also inside the house. *Id.* at 216. The Court upheld the convictions on the grounds his intent to assault his wife transferred to the children. *Id*. at 218-19. Unlike the present case, the intended victim and the three unintended victims were all identified. Similarly, in *Wilson*, the defendant was convicted of four counts of assault in the first degree for firing a gun into a bar with intent to assault two people inside, but striking two unintended people instead, also on the grounds his intent to assault the intended victims transferred to the unintended victims. 125 Wn.2d at 218. As in *Elmi*, the two intended victims and the two unintended victims were identified.

The State relies heavily on *People v. Griggs*, 216 Cal.App.3d 734, 265 Cal.Rptr. 53 (1989), a California case decided under a significantly different statute. Br. of Resp. at 16-19. In *Griggs*, the defendant was convicted of assault with a deadly weapon in violation of California Penal Code section 245, subdivision (a)(2), which provides:

> Every person who commits an assault upon the person of another with a firearm is punishable by imprisonment in the state prison for two, three, or four years, or in a county jail for a term of not less than six months and not exceeding one year, or by both a fine not exceeding ten thousand dollars ($10,000) and imprisonment.

Id. at 739. Section 240 provides a statutory definition of assault: "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." *Id*. Unlike Washington, in California, assault with a deadly weapon is a general intent crime and may be committed by recklessness. *Id*. at 740. "The law is seeking to punish the reckless disregard of human life...." *Id.* at 742. Thus, the California statute encompasses conduct punishable in Washington as reckless endangerment, which is not a lesser included offense of assault in the first degree because of the different *mens rea*. *See* RCW 9A.36.050[1]; RCW 9A.08.010(1)(c)[2]; *State v. Prado*, 144 Wn. App. 227, 181 P.3d 901 (2008). Significantly, *Griggs* has not been cited in any published opinion outside

[1] RCW 9A.36.050 provides:
(1) A person is guilty of reckless endangerment when he or she recklessly engages in conduct not amounting to drive-by shooting but that creates a substantial risk of death or serious physical injury to another person.

[2] RCW 9A.08.010(1)(c) provides:
(c) RECKLESSNESS. A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

of California in the twenty-six years since its publication. The State's reliance on *Griggs* is misplaced.

The State dismisses the double jeopardy implications of an ambiguous and broad charge, on the grounds there is "no credible scenario" in which Mr. Daley could be prosecuted for additional assaults arising from the same incident. Br. of Resp. at 20-21. However, the court specifically referred to multiple potential victims in its finding that Mr. Daley "did assault more than one" of the unidentified people in the crowd, and "John Doe" "stand[s] for simply one of these unidentified individuals." CP 21 (Finding of Fact 11). Due to the complete lack of identifying information for "John Doe" and the presence of multiple potential victims, the State's dismissal of the double jeopardy implications is unpersuasive.

> [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187–88, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).

In the absence of sufficient evidence to identify the alleged victim in Count I, Mr. Daley's conviction for assault against John Doe must be reversed.

2. In the absence of sufficient evidence to establish Mr. Daley was the individual who shot at Detective Janes, Detective Huber, and Detective Hughey, his convictions for assault against the detectives must be reversed.

The trial court found that Mr. Daley assaulted the detectives by firing at them. CP 21 (Finding of Fact 12)[3]. However, none of the detectives testified that Mr. Daley was the person who shot at them.[4] In addition, no one saw Mr. Daley fire his gun after he ran across Fairview Avenue North and there was insufficient corroborating or circumstantial evidence to prove beyond a reasonable doubt Mr. Daley was the individual who shot at the detectives.

The State's contention that Detective Janes "obviously knew" Mr. Daley was shooting at him is unsupported by the detective's testimony. Br. of Resp. at 25. Detective Janes testified he was standing near Detective

[3] The trial court did not find Mr. Daley committed assault by pointing his gun at Detective Huber. The State does not assign error to the court's findings and they are verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

[4] The detectives testified that they were certain Mr. Daley was the person who shot in the direction of the crowd, but not that Mr. Daley was the person who shot at them. The State's contention that the detectives were certain Mr. Daley was the person who shot at them is unsupported by the record. *See* Br. of Resp. at 3 n.3, 8 n.4, 9-10.

Huber when he saw two muzzle flashes in his direction and felt and heard two bullets pass his head. 3/27/14 RP 76-79. However, he did not identify Mr. Daley as the person who fired the shots.

The State argues Detective Huber was assaulted by the same shots as Detective Janes. Br. of Resp. at 25-26. Again, however, Detective Huber did not identify Mr. Daley as the person who fired the shots.

The State also contends the security videotape corroborates the detectives' testimony. As noted, the detectives did not testify that Mr. Daley was the person who shot at them, and the videotape does not show Mr. Daley firing his gun.[5] On the other hand, the videotape corroborates Detective Hughey's testimony that "numerous other people" were running on Yale Avenue North in front and behind Mr. Daley. 3/20/14 RP 79.

Undoubtedly, the detectives faced a harrowing situation. However, they did not identify Mr. Daley as their assailant and the videotape does not show Mr. Daley firing his gun. Accordingly, the trial court's findings and conclusions that Mr. Daley assaulted the three detectives are unsupported by the evidence. Mr. Daley's convictions for assault, as charged in Counts 2, 3, and 4, must be reversed.

[5] Appendices D, E, and F to the Brief of Respondent purport to be screen shots from the security videotape. However, the State has altered and captioned the screen shots for purposes of appeal. Mr. Daley has separately filed a motion to strike the altered, captioned screen shots that are not part of the record on review and the State's argument thereon.

B. CONCLUSION

For the foregoing reasons and for the reasons set for in the Brief of Appellant, Mr. Daley respectfully requests this Court reverse his four convictions for assault in the first degree.

DATED this 21st day of May 2015.

Respectfully submitted,

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Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 71956-4-I
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	)	
LARRY DALEY, JR.,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF MAY, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] JACOB BROWN, DPA [paoappellateunitmail@kingcounty.gov] [jacob.brown@kingcounty.gov] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL

SIGNED IN SEATTLE, WASHINGTON THIS 21ST DAY OF MAY, 2015.

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