FILED
Aug 23, 2013
Court of Appeals
Division III
State of Washington

No. No. 31225-9-III
(consolidated with 31187-2)

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

NICOLAS J. JAMES,

Defendant/Appellant.

Appellant's Brief

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A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to support the convictions for first degree assault.

2. The trial court erred in giving the jury an instruction on transferred intent.

3. The trial court erred in denying the defense motion to suppress statements made by Mr. James to the jail booking officer in response to interrogation after he had already invoked his right to remain silent.

4. The trial court erred in allowing Officer Jose Ortiz to testify as a gang expert.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Was Mr. James' right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove an essential element of the crime of first degree assault?

2. Was the transferred intent instruction improper because the alleged victims were already named in the to-convict instructions? Did the instruction further improperly relieve the State of its burden of proving Mr. James acted with the intent to cause bodily harm to each alleged victim named in the to-convict instructions?

3. Were the statements to the booking officer regarding gang affiliation obtained as the result of an impermissible custodial interrogation in violation of Mr. James' *Miranda* rights because the booking officer was eliciting responses that he knew would be used by the prosecutor at trial and would prove incriminating to a person being charged with first degree assault and drive-by shooting?

4. Did the trial court abuse its discretion in allowing Officer Ortiz to testify as an expert regarding gang-affiliation and gang-related activity?

C. STATEMENT OF THE CASE

On March 14, 2011, Maria Rincon lived in a trailer in Outlook, Washington with her husband and four children. RP[1] 211-15. One of her children had a friend staying with her on that date. RP 215. Two of Maria's sons who were living in the trailer at that time were Norteno gang members. RP 211-15, 270-71. The trailer was a known gang residence and had been shot at 4-5 times prior to March 14, 2011. RP 213, 355-56, 432.

Around 4:00 a.m. on March 14, 2011, the trailer was shot at again awakening all the occupants. RP 215-68. No one was injured. RP 249.

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[1] Citations to the record other than the sentencing hearing, which was numbered separately, will be designated "RP" followed by the page number.

After the shooting stopped, Maria's husband and one of her sons went outside but the shooters were gone. RP 216, 256.

Two sisters delivering newspapers heard the shooting and saw a charcoal Mitsubishi driving with its lights off coming from the direction of the fired shots. RP 354-56. They assumed the car had something to do with the shooting. One of the sisters called the police. They then followed the car for several miles until it did a U-turn and went the other way. RP 357-58. By that time the police had arrived. The sisters gave a description of the car and which way it had gone. RP 358, 381.

Police stopped the car a short time later. The four people in the car were Mr. James and the three codefendants consolidated in this appeal. RP 433-34, 470-72. The sisters were brought to the scene and identified the car as the one they had seen earlier. RP 435-36. No weapons or other contraband was found in the car. RP 530. After the suspects were arrested police checked the area where the Mitsubishi was first seen and discovered three weapons, weapons components and some ammunition lying along the road. RP 478-79, 540-41.

Mr. James and the others were arrested and read *Miranda* rights. RP 135-37. All four of them invoked their right to remain silent. RP 137. A corrections officer questioned them about gang affiliation when they

were booked into jail. He did not tell them they did not have to answer any questions. All four defendants admitted to being Sureno gang members. RP 114-19, 133.

Prior to trial Mr. James and the others moved to suppress the booking statements regarding gang affiliation. RP 146-53. The Court denied the motion finding the questioning by the corrections officer fell under the exception of routine booking questions. The court also found the evidence admissible because gang affiliation was not an element of any of the charges. RP 153-57. This evidence was subsequently introduced at trial. RP 601-05.

At trial, over defense objection, the Court allowed Officer Jose Ortiz to testify as a gang expert. RP 233, 784-835. The defense argued that any expert testimony that rival gangs engaged in acts of violence against each other was common knowledge to the jury particularly in the Yakima area where gang activity is prolific. Therefore, the testimony would not be helpful to the jury and was inadmissible under ER 702. RP 819-23. Ortiz testified at trial that one of the characteristic of the Sureno gang was to commit violent acts against rival gangs. RP 836-80. The State relied on this evidence when it argued in closing that Mr. James and

the others acted in conformity with those same characteristics when they shot at the trailer. RP 995, 1009.

No evidence was presented that Mr. James or any of his codefendants knew anyone in particular was inside the trailer at the time of the shooting. RP 209-881.

In the jury instructions each one of the trailer occupants was named as a victim in the seven to-convict instructions for first degree assault. RP 981-84. The trial court also provided the jury with instruction 15 over defense objection, which addressed transferred intent:

> If a person assaults a particular individual or group of individuals with a firearm with the intent to inflict great bodily harm and by mistake, inadvertence, or indifference, the assault with the firearm took effect upon an unintended individual or individuals, the law provides that the intent to inflict great bodily harm with a firearm is transferred to the unintended individual or individuals as well.

RP 927-32, 949-50, 972-73.

The State argued and the trial court concluded that *State v. Elmi* had approved the use of this instruction, and the factual situation in the current case was identical to that in *Elmi*. RP 949-50.

Mr. James was convicted of seven counts of first degree assault with a total of 21 firearm enhancements, drive-by shooting and unlawful possession of a firearm. CP 3375-99. He received a sentence of 1956 months. CP 3400-09. This appeal followed. CP 3410.

D. ARGUMENT

1. Mr. James's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove an essential element of the crime of first degree assault.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: "[T]he use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law." *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id*. "Substantial evidence" in the context of a criminal case,

means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *State v. Taplin*, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)).

In determining the sufficiency of the evidence, the test is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

While circumstantial evidence is no less reliable than direct evidence, *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997),

evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *Baeza*, 100 Wn.2d at 491, 670 P.2d 646. Specific criminal intent may be inferred from circumstances as a matter of logical probability." *State v. Zamora*, 63 Wn. App. 220, 223, 817 P.2d 880 (1991).

RCW 9A.36.011 provides in pertinent part:

> (1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:
>
> (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death . . .

RCW 9A.36.011(1)(a). The term "assault" is not defined in the criminal code, and thus Washington courts have turned to the common law for its definition. *State v. Aumick,* 73 Wash.App. 379, 382, 869 P.2d 421 (1994); *State v. Hupe,* 50 Wash.App. 277, 282, 748 P.2d 263, *review denied,* 110 Wash.2d 1019 (1988). Three definitions of assault are recognized in Washington:

> (1) an attempt, with unlawful force, to inflict bodily injury upon another [attempted battery]; (2) an unlawful touching with criminal intent [actual battery]; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting that harm [common law assault].

State v. Wilson, 125 Wash. 2d 212, 218, 883 P.2d 320 (1994).

Each of these three definitions of assault requires the specific intent to either create apprehension of bodily harm or to cause bodily harm as an essential element of the offense. *Id*.; *State v. Byrd*, 125 Wash. 2d 707, 713, 887 P.2d 396 (1995); *State v. Eastmond*, 129 Wn.2d 497, 502, 919 P.2d 577 (1996). The State must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld. *Winship,* 397 U.S. at 364.

Here, the to-convict instructions named each person inside the trailer as a victim in the seven counts of first degree assaults. First degree assault does not, under all circumstances, require that the specific intent match a specific victim. *State v. Elmi*, 166 Wash. 2d 209, 215, 207 P.3d 439 (2009). However, "[i]n criminal cases the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the 'to convict' instruction." *State v. Hickman*, 135 Wash. 2d 97, 102, 954 P.2d 900 (1998). Thus, in the present case the State was required to prove beyond a reasonable doubt that Mr. James or an accomplice acted with the specific intent to inflict great bodily harm on the particular individual named in each count.

The State failed to meet this burden. No evidence was presented that Mr. James or any of his codefendants knew who, if anyone, was inside the trailer at the time of the shooting. None of the alleged victims ventured outside the trailer until after the shooting had stopped. By then the perpetrators were gone. Therefore, not knowing who was in the trailer, it was impossible for Mr. James to have the requisite specific intent required to sustain any of his convictions for first degree assault.

2. The transferred intent instruction was improper because the alleged victims were already named in the to-convict instructions. The instruction further improperly relieved the State of its burden of proving Mr. James acted with the intent to cause bodily harm to each alleged victim named in the to-convict instructions.

The trial court provided the jury with instruction 15 over defense objection, which addressed transferred intent:

> If a person assaults a particular individual or group of individuals with a firearm with the intent to inflict great bodily harm and by mistake, inadvertence, or indifference, the assault with the firearm took effect upon an unintended individual or individuals, the law provides that the intent to inflict great bodily harm with a firearm is transferred to the unintended individual or individuals as well.

RP 927-32, 949-50, 972-73.

The State argued and the trial court concluded that *State v. Elmi* had approved the use of this instruction, and the factual situation in the current case was identical to that in *Elmi*. RP 949-50. The trial court was mistaken in both of these conclusions.

First, the *Elmi* court did not even address whether this instruction was appropriate. The Court instead found the basis for transferred intent was contained in the language of the assault statute:

> Because RCW 9A.36.011 encompasses transferred intent, the Court of Appeals did not need to analyze this matter under the doctrine of transferred intent. As such, we do not need to reach the doctrine of transferred intent either and proceed, instead, under RCW 9A.36.011.

Elmi, 166 Wash. 2d at 218.

Second, the facts in *Elmi* are not the same as this case. The holding in *Elmi* is predicated on the fact that the defendant had the specific intent to assault a particular person but some children were put in apprehension of harm as unintended victims. Elmi, 166 Wash. 2d at 218-19. The Court reached a similar result in *State v. Wilson*, where the defendant intended to inflict great bodily harm on a specific person, but instead assaulted an unintended victim. *Wilson*, 125 Wash. 2d at 218.

The facts in the present case are quite different. The State failed to show that Mr. James or his codefendants had the specific intent to assault a particular person present in the trailer. No evidence was presented that Mr. James or any of his codefendants even knew if anyone was inside the trailer at the time of the shooting. Applying the doctrine of transferred intent under this scenario would mean that a person commits first degree assault by firing guns at a building that happens to be occupied. *Elmi* and *Wilson* did not reach such a conclusion.

Most significantly, the transferred intent instruction at the very least contradicts the assault instructions and could have easily confused the jury. The inclusion of the terms "mistake, inadvertence, or indifference" conflicts with the higher mental state of specific intent required by the assault statute. It allowed the jury to convict based on mere recklessness or negligence and relieved the State of its burden of proving the requisite specific intent for each alleged victim. "[A] conviction cannot stand if the jury was instructed in a manner that would relieve the State of this burden." *State v. Brown*, 147 Wash. 2d 330, 339, 58 P.3d 889 (2002). Therefore, the assault convictions should be reversed.

3. <u>The statements to the booking officer regarding gang affiliation were obtained as the result of an impermissible custodial interrogation in violation of Mr. James' *Miranda* rights because the booking officer was eliciting responses that he knew would be used by the prosecutor at trial and would prove incriminating to a person being charged with first degree assault and drive-by shooting</u>.

State agents must give *Miranda* warnings before custodial interrogations. *Miranda v. Arizona,* 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In this case, it is undisputed that Mr. James was in custody when the jail booking officer asked about his gang affiliation drug use and that the booking officer was a state agent. It is also undisputed that Mr. James had previously been given *Miranda* warnings and had invoked his right to remain silent. The sole issue here is over the trial court's ruling that the question about gang affiliation was not an interrogation. Since the trial court's determination was factual, the standard of review is "clearly erroneous." *State v. Walton,* 64 Wash.App. 410, 414, 824 P.2d 533 (1992).

Courts have recognized that routine questions asked during the booking process may not be "interrogations" under *Miranda,* and *Rhode Island v. Innis,* 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980).

State v. Denney, 152 Wash. App. 665, 671, 218 P.3d 633 (2009). The routine question exception recognizes that such questions rarely elicit an incriminating response and do not involve the "compelling pressures which ... undermine the individual's will to resist and compel him to speak where he would not otherwise do so freely." *Id*. (citing *U.S. v. Booth,* 669 F.2d 1231, 1237 (9th Cir.1981) (quoting *Miranda,* 384 U.S. at 467, 86 S.Ct. 1602)); *State v. Wheeler,* 108 Wash.2d 230, 238, 737 P.2d 1005 (1987)). This limited exception to *Miranda* allowing background, biographical questions necessary to accomplish booking procedures does not encompass all questions asked during the booking process. *Id*.

When determining if the routine question exception applies, the court asks if the questioning party should have known that the question was reasonably likely to elicit an incriminating response. *Id*. (citing *State v. Willis,* 64 Wash.App. 634, 637, 825 P.2d 357 (1992)). This test is objective. *Id*. The subjective intent of the questioning agent is relevant but not conclusive. *Id*. The relationship between the question asked and the crime suspected is highly relevant. *Denney*, 152 Wash. App. at 671-72.

Herein, Steven Winmill, the booking officer, *actually knew* that the question regarding gang affiliation was reasonably likely to elicit an

incriminating response. He testified at the motion hearing that he knew the information would be made available to the prosecutor's office. RP 121. He also knew from personal experience that answers about gang membership could have criminal consequences because he had previously testified about such admissions in other criminal trials. RP 122, 130.

Both Officer Winmill and the prosecutor placed great emphasis on the legitimate purpose of the questionnaires and the good faith of the personnel administering them. While the State is correct that the questionnaires are important in ensuring inmate safety and that arguably there was no indication that Winmill sought an incriminating response, those factors are not determinative. *Denney*, 152 Wash. App. at 673. A legitimate question, asked with good intentions, will still violate a defendant's *Miranda* rights if it is reasonably likely to produce an incriminating response. *Id*. Additionally, the legitimate purposes of such questions would be advanced by the exclusion of incriminating responses. *Id*. Jail personnel will only be able to assess a defendant's safety concerns accurately if the defendant knows his responses will not later be used against him. *Id*.

The trail court's assertion that no interrogation occurred because gang affiliation was not an element of any of the charges is also flawed.

The State alleged throughout the trial that these crimes were committed to enhance Mr. James' status in the gang or for the benefit of the gang. In fact, the State sought and obtained enhancements based on this gang related motivation[2]. See CP 3384-99. Any fact that increases the penalty for a crime is an "element" that must be submitted to the jury. See *Alleyne v. United States*, __U.S.__, 133 S.Ct. 2151, 2155 (2013). Therefore, the gang allegations are elements.

In any event, whether an element or not, an admission of gang membership in the context of the State's theory of the case was clearly incriminating. Therefore, this Court should find that the trial court's determination that Mr. James' statements were admissible under the routine questioning exception was clearly erroneous because the questions were directly relevant to the charges against him and invited an incriminating response.

4. <u>The trial court abused its discretion in allowing Officer Ortiz to testify as an expert regarding gang-affiliation and gang-related activity.</u>

Under ER 702, the court may permit "a witness qualified as an expert" to provide an opinion regarding "scientific, technical, or other specialized knowledge" if such testimony "will assist the trier of fact." The

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[2] These enhancements were later dismissed pursuant to an arrest of judgment motion.

two key criteria for admission of expert testimony are a qualified witness and helpful testimony. *State v. Yates*, 161 Wash. 2d 714, 762, 168 P.3d 359 (2007).

Expert testimony is not admissible unless it will be helpful to the trier of fact, i.e. the subject matter is otherwise beyond common understanding. *State v. Allery*, 101 Wn.2d 591, 596, 682 P.2d 312 (1984). The jury herein, comprised of persons of ordinary experience and knowledge, could draw its own inferences from evidence presented by the State as to gang affiliation or gang-related motive. Testimony that rival gangs engage in acts of violence against each other was common knowledge to this jury particularly in the Yakima area where gang activity is prolific. The improper use of Officer Ortiz's expert" testimony placed emphasis on this subject in a manner which could only be prejudicial to the defendant.

The issue of helpfulness includes the question whether the prejudicial nature of the testimony is so great as to render the testimony inadmissible. *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). "As a general rule, profile testimony that does nothing more than identify a person as a member of a group more likely to commit the charged crime is inadmissible owing to its relative lack of probative value compared to the

danger of its unfair prejudice." *State v. Braham*, 67 Wash. App. 930, 936, 841 P.2d 785 (1992).

Officer Ortiz's testimony constituted an opinion as to the defendant's guilt of the crimes charged. No witness, lay or expert, may testify to his opinion as to the defendant's guilt whether by direct statement or inference. *Black*, 109 Wn.2d at 348. Admission of Officer Ortiz's testimony allowed the jury to hear an "expert" state that because the alleged incident appears gang related and that because gangs are known for violence and that because the defendant is a gang member, then he must be guilty. The proposed testimony invaded the province of the jury, was not helpful to the jury, and was highly prejudicial. Therefore, it should not have been admitted.

E. CONCLUSION

For the reasons stated, the convictions for first degree assault should be reversed. Pursuant to RAP 10.1(g)(2), Appellant also adopts by reference the assignments of error, issues and arguments set forth in the briefs of co-defendants Armando Lopez, Jaime Lopez and Jose Mancilla.

Respectfully submitted August 23, 2013,

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s/David N. Gasch
Attorney for Appellant

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on August 23, 2013, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or e-mailed by prior agreement (as indicated), a true and correct copy of brief of appellant:

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