

64929-9

64929-9

NO. 64929-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ROBERT BESABE,

Appellant.

2011 JUN 29 PM 4:43
COURT OF APPEALS
DIVISION I
CLERK

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JIM ROGERS

AMENDED BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

ANN SUMMERS
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL FACTS	2
2. FACTS OF THE CRIME	3
C. <u>ARGUMENT</u>	10
1. BESABE WAS PROPERLY CONVICTED OF MURDER IN THE FIRST DEGREE FOR THE DEATH OF THE BABY WHO WAS BORN ALIVE AND DIED AS A RESULT OF BESABE'S PREMEDITATED ACT	10
2. THE JURY WAS PROPERLY INSTRUCTED AS TO THE ELEMENTS OF MURDER IN THE FIRST DEGREE	18
3. THE JURY WAS PROPERLY INSTRUCTED AS TO THE DOCTRINE OF TRANSFERRED INTENT	23
4. THE COURT DID NOT COMMIT REVERSIBLE ERROR IN RESPONDING TO THE JURY QUESTION REGARDING INSTRUCTIONS 15 AND 30	28
5. THE JURY WAS PROPERLY INSTRUCTED AS TO THE CRIME OF ATTEMPTED MURDER IN THE FIRST DEGREE	33
D. <u>CONCLUSION</u>	37

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Snyder v. Massachusetts, 291 U.S. 97,
54 S. Ct. 330, 78 L. Ed. 2d 674 (1934)..... 32

United States v. Spencer, 839 F.2d 1341
(9th Cir. 1988) 14

Washington State:

Baum v. Burrington, 119 Wn. App. 36,
79 P.3d 456 (2003)..... 16

In re Personal Restraint of Benn, 134 Wn.2d 868,
952 P.2d 116 (1998)..... 32

In re Personal Restraint of Lord, 123 Wn.2d 296,
868 P.2d 835 (1994)..... 32

In re Personal Restraint of Pirtle, 136 Wn.2d 467,
965 P.2d 593 (1998)..... 31, 32

Meyer v. Burger King Corporation, 144 Wn.2d 160,
26 P.3d 925 (2001)..... 16

Seattle-First National Bank v. Rankin, 59 Wn.2d 288,
367 P.2d 835 (1962)..... 16

State v. Aumick, 126 Wn.2d 422,
894 P.2d 1325 (1995)..... 35

State v. Bergeron, 105 Wn.2d 1,
711 P.2d 1000 (1985)..... 26

State v. Brown, 132 Wn.2d 529,
940 P.2d 546 (1997)..... 19

<u>State v. Brown</u> , 147 Wn.2d 330, 58 P.3d 889 (2002).....	21, 27, 36
<u>State v. Carothers</u> , 84 Wn.2d 256, 525 P.2d 731 (1974).....	25
<u>State v. Clinton</u> , 25 Wn. App. 400, 606 P.2d 1240 (1980).....	27
<u>State v. DeRyke</u> , 149 Wn.2d 906, 73 P.3d 1000 (2003).....	35, 36
<u>State v. Dunn</u> , 82 Wn. App. 122, 916 P.2d 952 (1996).....	16, 17
<u>State v. Elmi</u> , 166 Wn.2d 209, 207 P.3d 439 (2009).....	26, 27
<u>State v. Guloy</u> , 104 Wn.2d 412, 705 P.2d 1182 (1985).....	21
<u>State v. Hoffman</u> , 116 Wn.2d 51, 804 P.2d 577 (1991).....	19, 20
<u>State v. Irby</u> , __ Wn.2d __ (2011 WL 241971, 3) (filed January 27, 2011).....	32
<u>State v. Jasper</u> , 158 Wn. App. 518, 245 P.3d 228, <u>review granted</u> , __ Wn.2d __ (2010).....	31
<u>State v. Johnson</u> , 56 Wn.2d 700, 355 P.2d 13 (1960).....	30
<u>State v. Johnson</u> , 100 Wn.2d 607, 674 P.2d 145 (1983).....	26
<u>State v. Levy</u> , 156 Wn.2d 709, 132 P.3d 1076 (2006).....	22, 23
<u>State v. Mak</u> , 105 Wn.2d 692, 718 P.2d 407 (1986).....	26

<u>State v. McCullum</u> , 98 Wn.2d 484, 656 P.2d 1064 (1983).....	25
<u>State v. McGonigle</u> , 14 Wash. 594, 45 P. 20 (1896).....	26
<u>State v. McHenry</u> , 88 Wn.2d 211, 558 P.2d 188 (1977).....	25
<u>State v. O'Hara</u> , 167 Wn.2d 91, 217 P.3d 756 (2009).....	21, 26, 36
<u>State v. Peterson</u> , 73 Wn.2d 303, 438 P.2d 183 (1968).....	25
<u>State v. Salas</u> , 127 Wn.2d 173, 897 P.2d 1246 (1995).....	21, 25
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	17
<u>State v. Scott</u> , 110 Wn.2d 682, 757 P.2d 492 (1988).....	21, 26
<u>State v. Shutzler</u> , 82 Wash. 365, 144 P. 284 (1914).....	33
<u>State v. Wilson</u> , 113 Wn. App. 122, 52 P.3d 545 (2002).....	27
 <u>Other Jurisdictions:</u>	
<u>Cuellar v. State</u> , 957 S.W.2d 134 (Tex.App. 1997).....	15
<u>People v. Bolar</u> , 109 Ill.App.3d 384, 440 N.E.2d 639 (1982).....	14
<u>People v. Hall</u> , 158 A.D.2d 69, 557 N.Y.S.2d 879 (N.Y. App. 1990).....	15

<u>Ranger v. State</u> , 249 Ga. 315, 290 S.E.2d 63 (1982)	14
<u>State v. Anderson</u> , 135 N.J. Super. 423, 343 A.2d 505 (N.J. App. 1975)	14
<u>State v. Cotton</u> , 197 Ariz. 584, 5 P.3d 918 (Ariz. App. 2000)	14, 15
<u>State v. Courchesne</u> , 296 Conn. 622, 998 A.2d 1 (2010).....	12
<u>State v. Lamy</u> , 158 N.H. 511, 969 A.2d 451 (2009).....	14
<u>State v. Soto</u> , 378 N.W.2d 625 (Minn. 1985)	13
<u>Williams v. State</u> , 316 Md. 677, 561 A.2d 216 (Md. App. 1989)	14

Constitutional Provisions

Washington State:

Const. art. I, § 22.....	31
Const. art. IV, § 16	22

Statutes

Washington State:

RCW 9A.04.110	10
RCW 9A.28.020	35
RCW 9A.32.010	11
RCW 9A.32.030	10

RCW 9A.32.060 12

Other Jurisdictions:

Model Penal Code § 210.0 (1980) 13, 20

Rules and Regulations

Washington State:

CrR 6.15..... 2, 30, 31

RAP 2.5..... 21, 25

RAP 7.2..... 29

Other Authorities

11 Washington Practice: Washington Pattern Jury
Instructions: Criminal 26.02 (3d Ed. 2008) 19

2 Wayne R. LaFave, Substantive Criminal Law,
sec. 14.1(c) (2d Ed.2003)..... 15

Sentencing Reform Act 3

WPIC 10.01.01..... 27

WPIC 26.02..... 19

WPIC 100.02..... 34

A. ISSUES PRESENTED.

1. One who causes the death of a person with premeditated intent is guilty of murder in the first degree. Common law has long provided that a baby who is born alive is a person. Was the defendant properly convicted of murder in the first degree where the evidence was undisputed that he caused the death of a person: a baby that was born alive?

2. The court must instruct the jury as to the elements of the crime charged in the "to convict" instruction, but the court need only give definitional instructions if they are proposed by a party and are helpful to the jury. Whether the victim is a "person" is not an element of the crime of murder in the first degree, but the definition of "person" could be helpful to the jury when that fact is in issue. Should the defendant's failure to request an instruction defining person that would have been helpful to the jury preclude him from raising that claim for the first time on appeal?

3. Where there is evidence that the defendant caused the death of one person with the intent to cause the death of another, the court may give a transferred intent instruction. In the present case, the court gave two transferred intent instructions, both of which were a correct statement of the law, and the

defendant did not object to the wording of either instruction. Should the defendant's failure to object to these instructions preclude him from challenging the instructions for the first time on appeal, particularly where any error was not prejudicial?

4. CrR 6.15(f) requires the trial court to consult with the parties before responding to a jury question. The record now reflects that the trial court did so. Even if the trial court had not, the error would not have been prejudicial in this case. Should the defendant's claim that the trial court violated CrR 6.15(f) be rejected?

5. The elements of attempted first degree murder are intent to commit first degree murder and a substantial step toward commission of that crime. Did the trial court properly instruct the jury where these elements were included in the "to convict" instruction for attempted first degree murder?

B. STATEMENT OF THE CASE.

1. PROCEDURAL FACTS.

A jury convicted Robert Besabe of two counts of murder in the first degree (Counts I and II), one count of manslaughter in the first degree (Count III) and one count of attempted murder in the

first degree (Count IV). CP 190-93. Because the crimes occurred in 1982, which was before the Sentencing Reform Act was enacted, the court sentenced Besabe to indeterminate sentences of 360 years to life on Count I, 320 months to life on Count II, and 240 months to life on Count IV, to be served consecutively. CP 219-22. No sentence was imposed on Count III for double jeopardy reasons. CP 195.

2. FACTS OF THE CRIME.

In 1981, Eleanor Velasco dated the defendant, Robert Besabe. RP 11/17/09 135-36. Both of them had emigrated from the Philippines. RP 11/17/09 50, 133-34. They dated for approximately one year, and then Eleanor broke up with Besabe. RP 11/17/09 136, 139, 144. Besabe was upset that Eleanor no longer wanted to date him, and he remained upset for months. RP 11/17/09 27, 88-89, 183. Besabe continued to call Eleanor after their relationship ended, and frequently came to her place of work. RP 11/17/09 144, 154.

Eleanor became close friends with Carolina Montoya, whom she met at work. RP 11/17/09 141-43. Eleanor moved into an apartment with Carolina on Capitol Hill. RP 11/17/09 145. Carolina

was pregnant, but not living with the baby's father. RP 11/17/09 146.

In phone conversations with Eleanor, Besabe expressed his hatred for Carolina. RP 11/17/09 149. He blamed Carolina for the break-up, and also disapproved of the fact that the father of Carolina's baby was African-American. RP 11/17/09 148. He expressed his fear that Carolina would encourage Eleanor to date African-American men, too. RP 11/17/09 148.

On August 15, 1982, Besabe confided to his brother's wife, Daisy Besabe (who was also Eleanor's sister), that he still wanted to reunite with Eleanor and that he hated Carolina because she was responsible for Eleanor not wanting to date him. RP 11/17/09 27-29. He also stated that he hated Carolina because she was dating an African-American man and he was afraid Eleanor would start dating African-American men as well. RP 11/17/09 27. He was crying and upset during this conversation. RP 11/17/09 27.

On the evening of August 16, 1982, Carolina drove to Eleanor's place of work to give her a ride home, as was their routine. RP 11/17/09 154-55. As they were driving on East Marginal Way near Eleanor's work, Carolina saw Besabe standing by the side of the road. RP 11/17/09 156. Although Eleanor told

Carolina to keep driving, Carolina said they should stop because his car might be broken down and he might need help. RP 11/17/09 157. She stopped and offered Besabe a ride. RP 11/17/09 157-58. Besabe accepted and entered the back seat of the two-door car. RP 11/17/09 158.

Besabe directed Carolina to drive toward Burien. RP 11/17/09 160. Besabe was quiet as the two women discussed plans for the upcoming baby shower. RP 11/17/09 160. After 10 or 15 minutes, Besabe directed Carolina to stop. RP 11/17/09 161. As Eleanor pulled the passenger seat forward to let Besabe out, she saw him pull out a gun and shoot Carolina in the head. RP 11/17/09 163. Carolina slumped against the driver's door. RP 11/17/09 164. Besabe then pointed the gun toward Eleanor's head and pulled the trigger. RP 11/17/09 164. She expected to die. RP 11/17/09 164. She felt a hot, stinging sensation on her head, then lost consciousness and slumped onto Carolina's lap. RP 11/17/09 164, 201.

Two teenagers walking by found Carolina and Eleanor slumped over in the car. RP 11/18/09 6-10, 21-26. One of them ran to his brother's house nearby and called 911. RP 11/18/09 7. The other teenager leaned in through the open passenger car door,

took some cash from a purse inside the car, and then spoke to Eleanor as she regained consciousness. RP 11/18/09 25-27.

Eleanor was frantic and told him she had been shot. RP 11/18/09 27. He flagged down a passing taxi, which also called for an ambulance and the police. RP 11/18/09 28. He left the scene as soon as the police arrived because he was a runaway. RP 11/18/09 31.

Eleanor recalled being awakened by a young man shaking her. RP 11/17/09 166. She had no injuries and believed the bullet had grazed her head. RP 11/17/09 165. She told the police that the shooter was her ex-boyfriend, Robert Besabe, and explained that he was angry with her for not wanting to date him. RP 11/18/09 56-57. She said that Carolina offered him a ride and when she stopped to let him out of the car he pulled out a gun, shot Carolina in the head, and then aimed at Eleanor but missed. RP 11/18/09 56-57.

Emergency personnel who arrived on the scene found Carolina with a bullet wound above her right eye, breathing in a slow and labored manner, indicating severe brain injury. RP 11/17/09 108. Carolina was obviously pregnant. RP 11/18/09 122.

She was transported to Harborview Medical Center. RP 11/18/09 124.

Carolina died six weeks later on September 23, 1982. RP 11/18/09 146. The bullet severely damaged her brain, traversing from right to left and then exiting out the back of her head. RP 11/18/09 148-55. Carolina's baby was born via emergency Cesarean section on August 16, 1982. RP 11/18/09 156. The baby weighed three and a half pounds and survived for two days before dying. RP 11/18/09 156-57. The baby died of hyaline membrane disease because its respiratory system was not sufficiently developed. RP 11/18/09 158-59. Based on the size of Carolina's uterus, the pregnancy was 30 to 32 weeks along when Carolina was shot in the head. RP 11/18/09 159.

Matthew Noedel, a forensics firearm examiner, examined the evidence in the case and concluded that it was largely consistent with Eleanor's account of the shooting. RP 11/19/09 37, 44, 93, 109-18, 142. In his opinion, Carolina was shot at close range, with the bullet entering her forehead, breaking apart, and then exiting the back of her head with a fragment of the bullet falling to the floor where it was found by the police. RP 11/19/09 109. A second bullet was fired from inside the car and exited out the windshield of

the car. RP 11/19/09 95-99, 106-14, 118. He opined that the hot, stinging sensation that Eleanor felt could have been muzzle gases from the gun being fired at close range to her head. RP 11/19/09 115-17.

Besabe disappeared from Seattle immediately after the shooting. When Daisy Besabe learned that Carolina Montoya had been shot on August 16, 1982, her husband, Albert (who was Besabe's brother), instructed her not to talk to anyone, including family members, about the shooting and she obeyed him. RP 11/17/09 31. She never saw Besabe again after the shooting. RP 11/17/09 32. Likewise, Besabe's sister, Dorothy Gutierrez, and his friend, Wilfredo Pablo, never saw Besabe after the shooting. RP 11/17/09 70, 95. When Dorothy asked her brother Albert what was going on, he told her to "drop it" and the family never discussed the matter again. RP 11/17/09 70. Eleanor never discussed the killing with anyone else because she felt responsible for the death of Carolina and her baby. RP 11/17/09 171-72; RP 11/18/09 56-57. She also never saw Besabe again. RP 11/17/09 171. The police never located Besabe in 1982. RP 11/18/09 91, 121-22.

In fact, Besabe left Washington sometime after August 16, 1982, and lived in California from 1989 to 2007 under the assumed name of Bobby Sanchez. RP 11/18/09 169.

On December 27, 2007, several members of the Guam police department took custody of Besabe at the Guam airport as he was being extradited from the Philippines to the United States. RP 11/19/09 145-48, 177-78, 203-06. During a cigarette break, Besabe told the officers that he hated life in the Philippines and wished to return to the United States to see his elderly mother. RP 11/19/09 153-57. He said he knew he would be arrested on an outstanding warrant when he applied for a passport at the embassy, but that it was his only way of returning to the United States. RP 11/19/09 157, 186. He told the officers that he was wanted for shooting two people. RP 11/19/09 159, 187-88, 208. He said that he was in the back seat of a car and shot the driver and passenger in the head, but the passenger lived. RP 11/19/09 159, 162, 187-88, 208.

At trial, the defense presented one witness, Wilfredo Pablo, who testified that he was a friend of Besabe's and never heard Besabe say anything negative about Carolina Montoya or African-Americans. RP 11/23/09 40-41.

C. ARGUMENT.

1. BESABE WAS PROPERLY CONVICTED OF MURDER IN THE FIRST DEGREE FOR THE DEATH OF THE BABY WHO WAS BORN ALIVE AND DIED AS A RESULT OF BESABE'S PREMEDITATED ACT.

Besabe argues that he could not be convicted of murdering Carolina Montoya's baby because the baby was an unborn fetus. Besabe's argument ignores the fact that the baby did not die in utero, but was born alive and survived for two days before succumbing to complications from his premature birth. Because the baby was born alive, it was a person and human being at the time of death. As such, the evidence at trial supports the jury's finding that Besabe committed murder when he caused the baby's death with the premeditated intent to cause the death of another person.

The crime of murder in the first degree as charged in this case is defined in RCW 9A.32.030 as follows:

- (1) A person is guilty of murder in the first degree when:
 - (a) With premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person.

RCW 9A.04.110(17) defines "person" as "any natural person and, where relevant, a corporation, joint stock association, or an

unincorporated association." However, RCW 9A.32.010 defines homicide as "the killing of a human being." Thus, for purposes of the crime of murder in the first degree, the term person is limited to a natural person. "Human being" is not statutorily defined.

In this case, the evidence amply supports the jury's conclusion that Besabe shot Carolina Montoya in the head with premeditated intent to cause her death, and also caused the death of Carolina's baby.¹ Neither Carolina nor the baby was killed instantly. Carolina survived for approximately six weeks. RP 11/18/09 146. The baby was born via emergency Cesarean section on the day of the shooting, and died two days later. RP 11/18/09 156-57. Having been born alive, the baby was a natural person. Besabe's premeditated act of shooting Carolina in the head with the intent to kill her also caused the baby's death two days later. Thus, Besabe was properly convicted of murder in the first degree as to both Carolina and the baby.

If the baby had died instantly while in utero and had not been born alive, Besabe would have been guilty of manslaughter in the first degree. That crime, as charged in the present case, is defined

¹ The jury was instructed on transferred intent. CP 157, 172.

in RCW 9A.32.060(1)(b), occurs when a person "intentionally and unlawfully kills an unborn quick child by inflicting any injury upon the mother of such child." However, Carolina's baby was not an unborn quick child when it died. Rather, the baby was born alive and was a natural person and human being when it died. Thus, Besabe was properly convicted of murder in the first degree.

The Connecticut Supreme Court recently addressed the precise question presented in this case: whether an infant who is born alive and who subsequently dies of injuries sustained in utero is a person for purposes of murder. State v. Courchesne, 296 Conn. 622, 998 A.2d 1 (2010). The facts in that case are similar to this case. Courchesne repeatedly stabbed Rodgers, who was eight months pregnant, in the chest and back. Id. at 627. She managed to escape from him, and ran a short distance before collapsing. Id. Rodgers was transported to a hospital where she was pronounced dead. Id. The hospital performed an emergency Cesarean section and the baby was born, exhibited a stable heart beat and respiration and was placed on life support. Id. at 627, 663. The baby survived for 42 days on life support and then died. Id. The cause of death was lack of oxygen to the brain, which she had suffered in utero because of the death of her mother. Id.

Courchesne argued that he could not be guilty of the murder of the baby because the baby was a fetus when he inflicted the injuries that resulted in her death, and thus not a "person." Id. at 663.

Relying on common law and the Model Penal Code definition of "human being," the Connecticut court concluded that a human being is "a person who had been born and is alive." Id. at 672. Thus, a viable fetus that dies in utero before being born alive is not a person. Id. However, an infant who is born alive and dies from injuries sustained in utero is a person. Id.; Model Penal Code § 210.0(1) (1980). Citing the Minnesota Supreme Court, the Connecticut Supreme Court noted that, "By 1850, the 'born alive' rule had widespread general acceptance by all jurisdictions in the United States [that] had considered the issue." Id. (citing State v. Soto, 378 N.W.2d 625, 628-29 n.7 (Minn. 1985)). The court concluded that an infant who is born alive and subsequently dies of injuries sustained in utero is a person for purposes of Connecticut's murder statute. 296 Conn. at 67.² Other states and jurisdictions

² The Connecticut court, however, remanded the matter for a new trial to determine whether the baby was brain dead at the time of birth, and thus was not truly born alive. 296 Conn. at 97. In the present case, however, the evidence is undisputed that baby boy Montoya was not placed on life support and was not brain dead at the time of birth. RP 11/18/09 157-59. Indeed, Dr. Reay testified that with the current advances in medical technology Carolina's baby would have survived if the same events happened today. RP 11/18/09 158.

have reached the same conclusion. U.S. v. Spencer, 839 F.2d 1341, 1343 (9th Cir. 1988) (baby born alive who died of fetal injuries is a human being for purposes of federal murder statute); State v. Cotton, 197 Ariz. 584, 589, 5 P.3d 918 (Ariz. App. 2000) (baby born alive who died from fetal injuries is a person for purposes of homicide statutes); Ranger v. State, 249 Ga. 315, 317, 290 S.E.2d 63 (1982) (baby born alive who died 12 hours later due to premature delivery caused by shooting of mother was human being for purposes of felony murder statute); People v. Bolar, 109 Ill.App.3d 384, 391-92, 440 N.E.2d 639 (1982) (baby born alive who died as a result of placental separation caused by defendant's reckless driving supported reckless homicide conviction); Williams v. State, 316 Md. 677, 681-83, 561 A.2d 216 (Md. App. 1989) (homicide conviction may be based on baby born alive who died due to prenatal injuries); State v. Lamy, 158 N.H. 511, 520-21, 969 A.2d 451 (2009) (recognizing continued application of common law born alive rule, but not applied to baby who showed no spontaneous signs of life upon delivery); State v. Anderson, 135 N.J. Super. 423, 429, 343 A.2d 505 (N.J. App. 1975) (twins born alive who died as a result of prenatal injuries sustained when mother was shot were persons for purposes of murder statute);

People v. Hall, 158 A.D.2d 69, 71-76, 557 N.Y.S.2d 879 (N.Y. App. 1990) (baby born alive who died due to prematurity caused by shooting of mother was person for purposes of homicide statutes); Cuellar v. State, 957 S.W.2d 134, 140 (Tex.App. 1997) (baby born alive who died from prenatal injuries sustained in automobile accident was person for purposes of vehicular manslaughter statute). See also 2 Wayne R. LaFave, *Substantive Criminal Law*, sec. 14.1(c), at 419-23 (2d Ed.2003).

The legislature's determination that the killing of an unborn quick child is manslaughter does not change the application of the born alive rule in this case. As explained by the Arizona Court of Appeals in State v. Cotton, *supra*:

By its terms, the fetal manslaughter statute applies only to the killing of an *unborn* child. It reflects a legislative decision to afford protection to unborn children that was not available under traditional homicide statutes because of the common law born alive rule. Absent any legislative history to the contrary, we presume that the legislature's adoption of section 13-1103(A)(5) merely reflects a desire to afford greater protection to the unborn fetus than was available under the common law, not less protection to a child who, despite the homicidal conduct of another, happens to survive past birth.

197 Ariz. at 588 (emphasis in original).

The Washington Supreme Court utilized the born alive rule, albeit without recognizing it as such, in the civil context in Seattle-First National Bank v. Rankin, 59 Wn.2d 288, 367 P.2d 835 (1962). In that case, the question presented was whether the plaintiff child could bring a malpractice action against a physician for injuries caused by the physician's negligence prior to birth. Id. at 291. Choosing to follow what it termed the "clear trend of recent decisions" in other jurisdictions, the court held that the child born alive could bring a separate civil action and recover damages for prenatal injuries. Id. See also Meyer v. Burger King Corporation, 144 Wn.2d 160, 167, 26 P.3d 925 (2001) (allowing separate action for prenatal injuries that occur simultaneously with mother's injury). In contrast, Washington courts have refused to recognize a cause of action for wrongful death of a nonviable³ fetus that was miscarried and not born alive. Baum v. Burrington, 119 Wn. App. 36, 79 P.3d 456 (2003).

State v. Dunn, 82 Wn. App. 122, 916 P.2d 952 (1996), does not require a different result. In that case, the State charged the mother of a newborn child with second degree criminal

³ Most states have ruled that a fetus becomes viable at either 20 or 24 weeks of gestation. Baum, 119 Wn. App. at 39 n.3.

mistreatment based on the mother's use of cocaine during the pregnancy. The court held that an unborn fetus is not a person or a child for purposes of the criminal mistreatment statute. Id. at 128. The court relied on "the typical definition" of a child as a "person from the *time of birth* to age 18." Id. at 128-29 (emphasis added). The court also held that the mother's act of using cocaine did not meet the statutory definition of "withholding a basic necessity of life." Id. at 129.

Dunn is inapposite. In that case, the harm prohibited by the criminal mistreatment statute, mistreatment, occurred when the baby was an unborn fetus. Thus, the baby was not a person when the crime was completed. In contrast, in this case, the harm prohibited by the murder statute, death of another person, occurred after the baby was born alive. In other words, Besabe did not cause the demise of an unborn fetus. Besabe caused the death of a child that was born alive and then died two days later.

A conviction is supported by sufficient evidence if, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Viewing the evidence in the light most favorable to the State,

substantial evidence supports the jury's finding that Besabe caused the death of the baby, who was a person because he was born alive, with the premeditated intent to cause the death of Carolina. Besabe was properly convicted in Count II of murder in the first degree.

2. THE JURY WAS PROPERLY INSTRUCTED AS TO THE ELEMENTS OF MURDER IN THE FIRST DEGREE.

Besabe argues that even if he could have been convicted of murdering Carolina's baby, the question of whether the baby was a person should have been added to the "to convict" instruction for murder in the first degree. The elements of the crime of murder do not differ depending on the identity of the victim. Person could have been further defined for the jury. However, because Besabe did not propose a definition of person that would have been helpful to the jury, he may not raise the trial court's failure to do so for the first time on appeal. Moreover, any error was harmless beyond a reasonable doubt.

The jury was instructed in Instruction 13 that the State was required to prove the following elements of murder in the first degree as to Count II:

- (1) That on or about August 16, 1982, the defendant acted with the intent to cause the death of Baby Boy Montoya or a third person;
- (2) That the intent to cause the death was premeditated;
- (3) That Baby Boy Montoya died as a result of the defendant's acts; and
- (4) That any of these acts occurred in the State of Washington.

CP 155. This instruction mirrors the approved pattern instruction in 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 26.02 (3d Ed. 2008) (WPIC). The pattern instruction does not require the jury to make a finding that the deceased was a person. WPIC 26.02.

The defense objected to Instruction 13, arguing that an additional element should be added to the instruction: "That Baby Boy Montoya was a person." CP 180; RP 11/24/09 10. The defense and the State both proposed that the jury be instructed that, "a person includes a natural person." CP 188. The court chose not to define person in the instructions.

Instruction 13 was a correct statement of the elements of the crime. The state supreme court has explicitly approved very similar instructions as a correct statement of the elements of first degree murder. State v. Brown, 132 Wn.2d 529, 586, 940 P.2d 546 (1997); State v. Hoffman, 116 Wn.2d 51, 107-08, 804 P.2d 577

(1991). No case has held that the victim's personhood is an element of the crime of murder in the first degree which must be included in the "to convict" instruction.

That is not to say that the State does not have the burden of proving that the victim was a person when that fact is in issue. Similarly, when self-defense is in issue, the State has the burden of proving the absence of self-defense. Nonetheless, the self-defense instructions do not become part of the "to convict" instruction. Hoffman, 116 Wn.2d at 109. Separate instructions are used to inform the jury as to the applicable law of self-defense, including the fact that the State bears the burden of proving the absence of self-defense beyond a reasonable doubt. Id.

In the present case, a separate instruction defining when a fetus becomes a person probably would have been helpful to the jury. Such an instruction could have been patterned after the Model Penal Code definition of human being: "A person is a human being who has been born and is alive." Model Penal Code, sec. 210.0(1) (1980). But no such instruction was proposed by the defense. The only definition proposed by the defense was, "A person is a natural person." CP 188. This instruction would have clarified nothing, and the trial court properly exercised its

discretion in refusing to give it. See State v. Guloy, 104 Wn.2d 412, 417, 705 P.2d 1182 (1985) (whether words in jury instructions require definition is within discretion of trial court).

Pursuant to RAP 2.5(a), a defendant may not raise an instructional error for the first time on appeal unless the error is a manifest constitutional error. See State v. Scott, 110 Wn.2d 682, 757 P.2d 492 (1988); State v. Salas, 127 Wn.2d 173, 181-83, 897 P.2d 1246 (1995). The failure to define individual terms is not a manifest constitutional error that may be raised for the first time on appeal. Scott, 110 Wn.2d at 690-91 (failure to define knowledge may not be raised for the first time on appeal). See also State v. O'Hara, 167 Wn.2d 91, 104-05, 217 P.3d 756 (2009) (failure to define malice may not be raised for the first time on appeal).

Even if this error was a constitutional error that could be raised for the first time on appeal, the error was harmless. An erroneous jury instruction is harmless if, from the record in a given case, it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict. State v. Brown, 147 Wn.2d 330, 332, 58 P.3d 889 (2002). The evidence was uncontroverted that the baby was a person who was born alive and survived for two days before dying of respiratory complications.

The failure to properly define person could not have affected the verdict. Any error was harmless beyond a reasonable doubt.

Finally, even if the to convict instruction could be construed as an unconstitutional comment on the evidence, reversal is not required. Under article IV, section 16 of the state constitution, a judge is prohibited from instructing the jury that a fact at issue has been established. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Any remark "that has the potential effect of suggesting that the jury need not consider an element of an offense" is a judicial comment on the evidence. Id. Judicial comments on the evidence are not prejudicial per se. Id. at 725. They are presumed prejudicial and the State has the burden to show that the defendant was not prejudiced. Id. In Levy, the state supreme court held that the trial court had commented on the evidence by instructing the jury that the victim's apartment was a building, an element that needed to be found by the jury in order to convict Levy of burglary. Id. at 721. However, the court found that the comment was not prejudicial because the question of whether the apartment was a building was not challenged, and "the jury could not conclude that White's apartment was anything *other than* a building." Id. at 726-27 (emphasis in original). Likewise, in the

present case, the facts that established that the baby was a person were not challenged. It was uncontroverted that the baby was born alive. As in Levy, if properly instructed the jury could not have concluded that the baby was anything other than a person. The State can meet its burden of showing that any comment was not prejudicial.

3. THE JURY WAS PROPERLY INSTRUCTED AS TO THE DOCTRINE OF TRANSFERRED INTENT.

For the first time on appeal, Besabe argues that the trial court gave confusing instructions as to the doctrine of transferred intent. However, Besabe did not clearly object to Instruction 15 and Instruction 30 at trial. Both instructions were a correct statement of the law. The claimed error is not a manifest constitutional error that can be raised for the first time on appeal. Moreover, even if the error could be raised, any alleged error was harmless.

The State initially proposed Instruction 15, which stated:

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

CP 157. The defense did not object to that instruction.

RP 11/23/09 57-60; RP 11/24/09 10-11. Subsequently, after the

State began closing argument, it proposed changes in the language of the court's instructions that would clarify that transferred intent was only relevant to the crime against the baby, Count II.

RP 11/24/09 22. To that purpose, the State proposed three changes. First, the State proposed that the language "or a third person" be removed from the "to convict" instruction as to Count I, the murder of Carolina Montoya. RP 11/24/09 22; CP 154.

Second, the State proposed that language be added to the transferred intent instruction, Instruction 15, that the instruction should only be applied to "Counts II and II-A." RP 11/24/09 22; CP 154. Third, the State proposed that the words "or a third person" be added to the first element of the "to convict" instruction for the lesser degree of murder in the second degree as to the baby, Instruction 26. RP 11/24/09; CP 168. Defense counsel objected, but when asked to clarify, counsel explicitly agreed that transferred intent was only relevant to Count II, and that her objection was to adding the "or a third person" language to the lesser degree instruction. RP 11/24/09 24.

The trial court agreed to make the changes proposed by the State, and added Instruction 30. RP 11/24/09 25-26; CP 172. As a result, Instruction 30, given *in addition* to Instruction 15, stated:

If a person acts with intent to kill another, but the act harms a third person, the actor is deemed to have acted with intent to kill the third person. This instruction applies to only Counts II and II-A.

CP 172.

A fair and careful review of the record reflects that Besabe did not object to the wording of either Instruction 15 or Instruction 30. Besabe's claim on appeal that giving both instructions was confusing is being raised for the first time on appeal. It is not, however, a manifest constitutional error that may be raised for the first time on appeal.

A defendant may not raise an instructional error for the first time on appeal unless the error is a manifest constitutional error. RAP 2.5(a); Salas, 127 Wn.2d at 181-83. Jury instructional errors that are manifest constitutional error include: directing a verdict, State v. Peterson, 73 Wn.2d 303, 306, 438 P.2d 183 (1968); shifting the burden of proof to the defendant, State v. McCullum, 98 Wn.2d 484, 487-88, 656 P.2d 1064 (1983); failing to define the "beyond a reasonable doubt" standard, State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977); failing to require a unanimous verdict, State v. Carothers, 84 Wn.2d 256, 262, 525 P.2d 731 (1974); and omitting an element of the crime

charged, State v. Johnson, 100 Wn.2d 607, 623, 674 P.2d 145 (1983), *overruled on other grounds by* State v. Bergeron, 105 Wn.2d 1, 711 P.2d 1000 (1985). In contrast, instructional errors that have been determined not to be manifest constitutional error include the failure to instruct on a lesser included offense, State v. Mak, 105 Wn.2d 692, 745-49, 718 P.2d 407 (1986); the failure to define individual terms, Scott, 110 Wn.2d at 690-91, 757 P.2d 492; and the failure to provide the full statutory definition of malice. O'Hara, 167 Wn.2d at 104-05.

In order to raise this issue for the first time on appeal, Besabe must establish that the error is truly of constitutional magnitude and must make a plausible showing that the error had practical and identifiable consequences in the trial. O'Hara, 167 Wn.2d at 98-99. Besabe cannot show manifest constitutional error here. Neither Instruction 15 nor 30 violate any explicit constitutional provision. Id. at 105.

Both instructions were a correct statement of the law. Transferred intent instructions were first approved by the state supreme court in 1896. State v. McGonigle, 14 Wash. 594, 45 P. 20 (1896). Transferred intent instructions have been approved in subsequent cases. State v. Elmi, 166 Wn.2d 209, 213,

207 P.3d 439 (2009); State v. Wilson, 113 Wn. App. 122, 131, 52 P.3d 545 (2002); State v. Clinton, 25 Wn. App. 400, 403, 606 P.2d 1240 (1980). Instruction 15 and Instruction 30, based on WPIC 10.01.01, are both correct statements of the law.

No court has held that in a case with multiple charges, some of which are based on a theory of transferred intent, the jury must be instructed to limit its consideration of transferred intent to particular charges. See Elmi, 166 Wn.2d 211-13 (transferred intent instruction not limited where one count of attempted murder and four counts of assault in the first degree). Thus, Instruction 15, which did not limit transferred intent to any particular counts, was a correct statement of the law. Instruction 30, which limited transferred intent to the murder charges based on the baby, was also a correct statement of the law. Both instructions were correct, and Besabe has failed to make any plausible showing how the inconsistency between them could have affected the verdict.

Even if this error was a constitutional error that could be raised for the first time on appeal, the error was harmless beyond a reasonable doubt. Brown, 147 Wn.2d at 332. There was overwhelming evidence that Besabe intended to kill Carolina Montoya when he fired a bullet into her forehead at close range.

There was also overwhelming evidence that Besabe intended to kill Eleanor Velasco when he fired a second bullet at her head at close range. The closing argument of the State made it clear that the concept of transferred intent applied to the charge of murder based on the death of the baby. RP 11/24/09 37, 84. There is no possibility that the jury misapplied transferred intent in this case. This Court can conclude beyond a reasonable doubt that any error in giving two instructions to the jury that both correctly stated the law of transferred intent was harmless error, if error.

4. THE COURT DID NOT COMMIT REVERSIBLE ERROR IN RESPONDING TO THE JURY QUESTION REGARDING INSTRUCTIONS 15 AND 30.

Besabe contends that the trial court committed reversible error when the court responded to a jury question without consulting the parties. The record now reflects that the court did not communicate with the jury without consulting with the parties. Moreover, even assuming the court had, the communication was not prejudicial error.

After several hours of deliberating, the jury asked for clarification as to whether the transferred intent instruction could be

applied beyond Count II. CP 177. The court answered in writing, on a form that states "Court's Response: (After affording all counsel/parties opportunity to be heard):" CP 178. The court's handwritten response to the jury states, "Please follow all of the instructions, including instruction 30." CP 178. The clerk's minutes of that day, November 30,⁴ reflect that the defendant and counsel were present at some point during the proceedings that day, but does not specify when. CP 241. The minutes reflect that none of the proceedings on that day were reported. CP 241.

On March 9, 2011, a hearing was held before the trial court, with trial and appellate counsel present, to settle the record pursuant to RAP 7.2(b). None of the lawyers had a specific recollection of discussing the jury's questions, but lawyers for both the prosecution and defense had a vague recollection of having discussed the matter. RP 3/9/11 5-6. The court stated that it was its normal practice to contact the parties before responding to a jury question, that it had *only once* responded to a jury question without requesting the parties' input, and had done so only because that case involved a disruptive pro se defendant. RP 3/9/11 5-7. The

⁴ The minutes are mislabeled "11/24/09."

trial court explicitly stated that its practice had always been to contact the parties except in that one instance. RP 3/9/11 6. The trial court entered an *agreed* report of proceedings, signed by all the attorneys, that reflects that the court consulted with the parties prior to responding to the jury's question. CP 243-44.

A trial judge should not answer a jury's inquiry without consulting the parties. CrR 6.15(f) provides that "the court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response." The trial court should give counsel an opportunity to address the court. State v. Johnson, 56 Wn.2d 700, 709, 355 P.2d 13 (1960). There is substantial evidence in the record that the trial court contacted the attorneys before answering the jury's question, and did not violate CrR 6.15(f).

However, even if the court had answered the jury's inquiry without consulting the attorneys, the court's error would not have been prejudicial under the circumstances. State v. Johnson, *supra*, is directly on point. In that case, involving multiple charges of theft and forgery, the jury asked the trial court to clarify which victim bank corresponded to one of the counts. *Id.* at 709. The court answered the jury note by telling them he could not comment on

the evidence or give them further information. Id. The state supreme court held that the trial court's communication with the jury without consulting with the parties was improper, but that the error was not prejudicial, concluding "the court communicated no information to the jury that was in any manner harmful to the appellant." Id. Likewise, in the present case, the court simply told the jury to follow the instructions. Because the instructions were not improper, the court's admonition to simply follow the instructions could not have been prejudicial.

Besabe argues that the trial court not only violated CrR 6.15(f), but also his right to be present under the state constitution. The question of the scope of the right to be present under article I, section 22 of the state constitution in regard to jury inquiries is pending in the state supreme court in State v. Jasper, 158 Wn. App. 518, 543, 245 P.3d 228, review granted, 170 Wn.2d 1025 (2010). Washington courts have repeatedly held that while a criminal defendant has the right to be present at all critical stages of the proceeding, a conference on a legal question, such as how to respond to a jury question, is not a critical stage requiring the defendant's presence, even in capital cases. In re Personal Restraint of Pirtle, 136 Wn.2d 467, 484, 965 P.2d 593 (1998) (right

to be present not violated when defendant absent for discussion of wording of jury instructions); In re Personal Restraint of Benn, 134 Wn.2d 868, 920, 952 P.2d 116 (1998) (right to be present not violated when defendant absent for motion for continuance); In re Personal Restraint of Lord, 123 Wn.2d 296, 306-07, 868 P.2d 835 (1994) (right to be present not violated when defendant absent for motions on legal matters). A critical stage is one where the defendant's presence "has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charges." In re Benn, 134 Wn.2d at 920 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 2d 674 (1934)). Bench conferences on legal matters are not a critical stage of the proceedings if the issues involve no disputed facts. Id.; State v. Irby, 170 Wn.2d 874, 882, 246 P.3d 796 (2011) (citing In re Benn, In re Lord, and In re Pirtle with approval).

Even if the trial court's actions were held to violate Besabe's constitutional right to be present, the error is still harmless.

Violation of the right to be present at a portion of the trial is trial error that is subject to harmless error analysis under both the state and federal constitution. Irby, 170 Wn.2d at 886; In re Benn, 134 Wn.2d at 921. There is no conclusive presumption of prejudice.

Irby, 170 Wn.2d at 886 (overruling State v. Shutzler, 82 Wash. 365, 144 P. 284 (1914)). This Court can conclude beyond a reasonable doubt that any improper communication was harmless. The trial court only instructed the jury to follow the instructions, which as discussed above, were a correct statement of the law. Besabe could not have been prejudiced by the court's response.

Besabe argues on appeal that the trial court's response to the jury question could have allowed the jury to apply transferred intent to all counts. Brief of Appellant, at 36-37. However, it was not the court's response to the jury question, but Instruction 15 that could have allowed the jury to apply transferred intent to all the counts. As argued above, Instruction 15 was a correct statement of the law. Moreover, Besabe did not object to Instruction 15. As such, his claim of prejudice should be rejected as an attempt to reframe an issue that may not be raised for the first time on appeal.

5. THE JURY WAS PROPERLY INSTRUCTED AS TO THE CRIME OF ATTEMPTED MURDER IN THE FIRST DEGREE.

Besabe was charged with and convicted of attempted murder in the first degree based on his action of firing the gun at Eleanor Velasco's head at close range. Besabe argues that the

"to convict" instruction failed to include the element of premeditated intent. Besabe did not object to the instruction at trial. The instructions were correct and did not omit an element of the crime. Thus, the alleged error is not a manifest error affecting a constitutional right that may be raised for the first time on appeal. Even if it was, the instructions properly set forth the elements of the crime.

Besabe did not object to the wording of Instruction 21, which set forth the elements for Count IV, the charge of attempted murder in the first degree. CP 163; RP 11/23/09 57-71; RP 11/24/09 10-12. Instruction 21 set forth the mental state for the crime of attempted murder in the first degree as follows: "That the act was done with intent to commit Murder in the First Degree." CP 163.⁵ Murder in the first degree was defined in Instruction 11 as follows: "A person commits the crime of Murder in the First Degree when, with premeditated intent to cause the death of another person, he causes the death of such person or a third person." CP 153. Instruction 16 defined premeditation. CP 158.

⁵ Instruction 21 mirrors WPIC 100.02, which sets forth the elements of attempt.

The "to convict" instruction must contain all the elements of the crime because it serves as the "yardstick" the jury uses to measure the evidence to determine guilt or innocence. State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). An attempt to commit a crime contains two elements: intent to commit a specific crime and a substantial step toward the commission of that crime. Id.; State v. Aumick, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995); RCW 9A.28.020(1). The "to convict" instruction for attempt must identify the crime alleged to have been attempted: in this case, murder in the first degree. DeRyke, 149 Wn.2d at 911. The "to convict" instruction for the attempt crime does not include the elements of the crime allegedly attempted. Id. at 911. The jury should receive a separate instruction that lists the elements of the crime attempted. Id.

In the present case, the jury was properly instructed as to the elements of the crime of attempt. The jury was also properly given a separate instruction that listed the elements of murder in the first degree. Read as a whole, the jury instructions properly informed the jury that they were required to find that Besabe acted with intent to commit murder in the first degree, which in turn required the premeditated intent to cause the death of another

person. The jury instructions did not relieve the State from proving an element of the crime. Besabe has failed to establish a manifest constitutional error--a constitutional error with practical and identifiable consequences--that may be raised for the first time on appeal. O'Hara, 167 Wn.2d at 98-99.

Moreover, even if this Court were to reject the holding on DeRyke and hold for the first time that "premeditated intent" must be included in the "to convict" instruction for the crime of attempted murder in the first degree, any error in this case was harmless. An erroneous "to convict" instruction is subject to harmless error analysis. DeRyke, 149 Wn.2d at 912. An erroneous instruction is harmless if, based on the record, the reviewing court concludes beyond a reasonable doubt that it could not have affected the verdict. Id.; Brown, 147 Wn.2d at 341.

The evidence was overwhelming that Besabe pointed the gun at Eleanor Velasco's head at such close range that she felt a burning sensation from gases released from the muzzle. This shot was fired after Besabe already shot Carolina Montoya in the forehead. The bullet narrowly missed and exited out the windshield of the car. Besabe told the officers in Guam that he thought he had killed the passenger. This Court can conclude beyond a

reasonable doubt that the evidence of premeditation was overwhelming and that any alleged error in the instructions did not contribute to the verdict.

D. CONCLUSION.

The convictions for two counts of murder in the first degree and attempted murder in the first degree should be affirmed.

DATED this 27th day of June, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
ANN SUMMERS, WSBA #21509
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Nancy Collins, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Amended Brief of Respondent, in STATE V. BESABE, Cause No. 64929-9-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

UBrame
Name
Done in Seattle, Washington

6/27/11
Date