

NO. 47648-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT MATTHEW OSTASZEWSKI,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 14-1-00280-5

SUPPLEMENTAL BRIEF OF RESPONDENT

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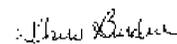
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DATED July 21, 2016, Port Orchard, WA



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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the two convictions, first degree assault and drive-by shooting, constitute the same criminal conduct for sentencing purposes?

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Robert Matthew Ostaszewski was charged by second amended information filed in Kitsap County Superior Court with attempted first degree murder, first degree assault, and drive-by shooting. CP 40. He was convicted of first degree assault and drive by shooting with firearm special verdict with regard to first degree assault. CP 98-99.

Post trial, Ostaszewski moved for a new trial. CP 101-02. Among the issues raised in that motion is an assertion that trial counsel was ineffective for failing to argue that the two convictions constitute same criminal conduct. CP 103. After hearing, the trial court denied the new trial motion. Supp. CP 170. The trial court ruled that the two crimes are not the same criminal conduct and that trial counsel was not ineffective for failing to argue that they were. *Id.* Ostaszewski appealed that ruling.

It should be noted that Ostaszewski has raised the same alleged error in his opening brief. Appellant's Opening Brief at 12. There, as

here, Ostaszewski argues that counsel's ineffective assistance in not raising the issue in the trial court cures the fact that the issue was not preserved for review. Opening Brief at 13-14; Supp. Brief at 5. Save for the inclusion of some additional facts and reply to the state's first response, Ostaszewski's Supplemental Brief reiterates the same legal argument advanced in his Opening Brief.

B. FACTS

The state relies on the factual statement in the Respondent's Brief. Additional facts will be included in the argument section where appropriate.

II. ARGUMENT

A. OSTASZEWSKI FAILS IN HIS BURDEN TO ESTABLISH THAT THE TWO CRIMES ARE SAME CRIMINAL CONDUCT WHERE THERE IS NO IDENTITY OF INTENT OR VICTIM.

Ostaszewski argues that the trial court erred in ruling that the two crimes are not same criminal conduct. He argues, here and in his Opening Brief, that the error resides in the failure to appreciate that his intent objectively viewed did not change from one crime to the next. He argues that the three shots fired were not differentiated for the jury. He claims

that his view of his intent, objectively viewed, should decide the issue. This claim is without merit because, as argued in the state's Response, the two crimes are not the same with regard to both victim and intent.

First, there is disagreement as to some of Ostaszewski's factual assertions in his supplemental argument. He claims that there is "no evidence that anyone—other than [the victim] Mr. Johannessen—was placed in substantial risk." Supp. Brief at 4. In fact, the evidence established that the incident occurred in the afternoon in the parking lot of a busy Fred Meyer store. Further, the incident occurred near the store's busy gas pumps. Witness Heather Lucy, a Fred Meyer employee, testified that the gas station has 14 pumps. 2RP 129. Ms. Lucy said that depending on the time of day, the gas pumps are "fairly busy." 2RP 127. From Ms. Lucy's vantage point at the gas station, she clearly saw Ostaszewski level his gun at Mr. Johannessen. 2RP 131. She heard the shots fired. 2RP 132. She saw Mr. Johannessen get shot. 2RP 133. She did not feel safe until the police arrived. 2RP 134. Thus at least one other person was placed in fear by Ostaszewski's gun firing behavior being close at hand. Certainly, by reasonable inference, others were also nearby.

One such person was witness Roberta Kowald. She was getting gas at the time of the incident. 2RP 140. She heard shots and saw Mr.

Johannessen fleeing. *Id.* She saw Ostaszewski pointing the handgun at the pumps where the other guy was fleeing. 2RP 142. She said of Ostaszewski that “[h]e was calmly pointing a gun towards the people that were standing at the gas pumps.” 2RP 143.

Additionally, deputy sheriff Will Sapp testified to his duties post-incident. 2RP 202. One duty was to secure the crime scene with crime scene tape. 2RP 205. This was necessary “because it’s a parking lot—there was a lot of people there.” *Id.* It is clear, then, that at least Ms. Lucy and Ms. Kowald were people who were placed at risk by Ostaszewski’s reckless firing from his van. It is an eminently reasonable inference from all the evidence that Ostaszewski acted in the busy parking lot of a busy business. Further, no inference is required to appreciate Ms. Kowald’s observation that Ostaszewski was pointing his gun at other “people” at the gas pumps. At bottom, the record reflects that multiple people were placed at risk by Ostaszewski’s reckless firing.

Next, Ostaszewski claims that the issue is convoluted by the failure of the state and the trial court to seek unanimity with regard to his multiple shots. He is correct that such is required:

To ensure jury unanimity in multiple acts cases, we require that either the state elect the particular criminal act upon which it will rely for conviction, or that the trial court instruct the jury that all of them must agree that the same underlying criminal act has been proved beyond a reasonable doubt.

State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988), citing *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173. Ostaszewski is also correct that either a *Petrich* instruction or an election is required in a multiple acts case like the present one. However, he is incorrect in asserting that the state did not “formally elect.” Ostaszewski does not say what is meant by the modifier “formally.” This omission is important because the state did in fact elect which gun shots went to which counts. We are left to speculate on what Ostaszewski means by the word “formally” in this context.

In closing argument, the state, in discussing instruction number 8 on attempted murder, said “Now in the state’s case, this instruction is charged and relates to the first shot when Josh is up at the vehicle.” RP, 2/6/15 at 824. Again, in discussing instructions on assault one, Mr. Bacus said “Instruction 18 relates to the second count. This relates to the second two shots from the vehicle.” *Id.* at 826. And, again, with regard to drive-by, Mr. Bacus argued that all the shots mattered. He noted that “just other cars and people being in the area would meet this element [the substantial risk to another person element]. He was shooting towards gas pumps.” *Id.* at 829. He also noted that “there were three shots from the vehicle.” Thus, the state elected: shot one was attempted murder, shots two and three constituted assault one, and all three shots were recklessly

discharged from a vehicle creating substantial risk to anyone present. Not only does this election sufficiently allocate the shots with regard to Mr. Johannessen, it clearly communicates to the jury that there were other victims of the drive-by count.

Moreover, the election equally clearly comports with the Supreme Court's take on the drive-by shooting statute. *See Bowman v. State*, 162 Wn.2d 325, 172 P.3d 681 (2007). As the state argued in its Response, the *Bowman* Court held that drive-by shooting and homicide are "two separate and distinct crimes." *Id.* at 332. The court said

It is plain to see that the drive-by shooting statute does not criminalize conduct that causes bodily injury or fear of such injury. Rather, the statute criminalizes specific reckless conduct that is inherently dangerous and creates the risk of causing injury or death. Although a drive-by shooting may cause fear of bodily injury, bodily injury, or even death, such a result is not required for conviction. Drive-by shooting does not require a victim; it only requires that reckless conduct creates a risk that a person might be injured. Further, unlike in the case of assault, homicide can be committed without reckless discharge of a firearm.

Id. Thus, not only is there no concurrence of intent elements, the two crimes herein have different victims. Assault one had as its victim Joshua Johannessen; the drive-by shooting embraced anyone who might be at risk by Ostaszewski's reckless behavior. Thus, neither criminal intent nor victim are the same for the purposes of RCW 9.94A.589(1)(a). Presently, Ostaszewski argues that his intent was the same with regard to Mr. Johannessen but essentially ignores that the state in this case, supported by

the Supreme Court's analysis, proceeded under the theory that the drive-by conviction related to victims other than Mr. Johannessen.

Moreover, this argument is not displaced by the fact that the legal issue being decided in *Bowman* was merger or double jeopardy. Supp. Brief at 3. The above quoted holding is simply not that particular. Whatever the context that led the Supreme Court to the task, the Court thoroughly parsed the drive-by statute in a manner that applies to any issue in which the actual meaning and import of the statute is in issue. That *Bowman* was a merger case does not change the language of or meaning of the statute.

Ostaszewski fails in his burden to prove the concomitance of time, place, intent, and victim. The two convictions are not same criminal conduct and trial counsel was not ineffective for not arguing that they were.

III. CONCLUSION

For the foregoing reasons, Ostaszewski's conviction and sentence should be affirmed.

DATED July 21, 2016.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "John L. Cross". The signature is written in a cursive style with a large initial "J" and "C".

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