

32014-6-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DAMIAN T. JOHNSON, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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Division III
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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in giving jury instruction No. 14 regarding transferred intent.
2. The trial court miscalculated defendant's offender score by including a point for defendant committing the offenses herein while on federal probation.
3. The trial court erred in imposing a lifetime no contact crime-related prohibition regarding Aleksey Kozubenko as part of defendant's sentence.

II.

ISSUES PRESENTED

- (1) Did the trial court create a mandatory presumption that relieved the State of its burden of proof by instructing the jury on transferred intent?
- (2) Did trial court miscalculate defendant's offender score by including one point because defendant was on federal probation when he committed the current crimes?
- (3) Did the trial court improperly impose a lifetime no contact crime-related prohibition with respect to Aleksey

Kozubenko based upon the conviction for Second Degree Assault?

III.

STATEMENT OF THE CASE

The Respondent accepts the Appellant's statement of the case for purposes of this appeal only.

IV.

ARGUMENT

A. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE DOCTRINE OF TRANSFERRED INTENT.

Appellant claims that the State failed to establish that the doctrine of transferred intent applied to Count II, the assault on Aleksey Kozubenko. The doctrine of transferred intent was recognized by the Washington Supreme Court as viable and embodied in RCW 9A.36.011. An assault “does not, under all circumstances, require that the specific intent match a specific victim.” *State v. Elmi*, 166 Wn.2d 209, 216, 207 P.3d 439 (2009). Appellant's argument assumes that the evidence showed that he was unaware that Aleksey Kozubenko was in the truck during the assault. Appellant argues that this Court should adopt the perspective of the three dissenting justices in *Elmi* that transferred intent

only applies to assaults which include an actual battery against an unintended victim. Here, appellant contends that he cannot be charged with assaulting Aleksey Kozubenko since he was not injured.

Appellant's argument fails on two bases. First, unlike *Elmi*, where it was undisputed that the defendant was unaware of some of his asserted victims, the jury could find from the evidence presented herein that appellant was aware of the presence of both Kozubenko brothers.

Each of the two victims testified that they drove up and parked so that the bed of their truck was directly opposite the trunk of defendant's vehicle. RP 26, 31-32, 48-49. The reasonable inference from the testimony is that defendant exited his vehicle to discharge his weapon at the victims' truck as it tried to escape because the victims ducked down as the bullets peppered their truck. RP 27, 51-52. After the exchange of the money for the drugs, Denis Kozubenko started to exit defendant's vehicle when defendant ordered him to stop and then pulled out his gun. RP 51. Defendant told Denis Kozubenko to stop or he would shoot or kill Kozubenko. RP 51. Denis Kozubenko saw the gun and immediately was scared so he sprinted back to the truck where Aleksey Kozubenko was waiting with the engine running. RP 51. Defendant exited his vehicle and fired his gun at the truck with two occupants. RP 88. As Denis Kozubenko came even with the back end of the truck, he heard gunshots.

RP 51. Denis Kozubenko continued hearing gunshots as he opened the door to enter the passenger side of the truck. RP 51.

The evidence established that defendant fired 3-5 shots at the fleeing Kozubenko brothers based upon the testimony of the testimony of John Verner and the multiple bullet holes located in the truck. RP 54, 88. The forensic investigation of the shooting scene located eight spent nine-millimeter shell casings in the street fired in the direction of the fleeing truck. RP 94-96, 104. Forensic examination of the Kozubenko's truck revealed that it sustained multiple bullet holes impacting it from the side and rear. RP 103-106. The evidence before the jury was that defendant fired at least eight shots at the fleeing Kozubenko brothers. Each fired shot manifesting defendant's intent to inflict great bodily harm.

In aiming and firing his gun at the escaping truck it is reasonable to infer that defendant watched Denis Kozubenko run to and enter the passenger side door of the truck. It is also reasonable to infer from the evidence that defendant observed that there was another individual, Aleksey Kozubenko, in the truck since it immediately sped away as soon as Denis Kozubenko gained entry to the passenger side. Hence, defendant knew that there was another potential assault victim in the direction he was discharging his firearm. From this body of evidence, the jury could

have reasonably inferred that Mr. Johnson saw and intended to inflict great bodily harm upon each of the Kozubenko brothers.

The jury likely did draw the reasonable inferences above-noted since Mr. Johnson did not present evidence or argue a distinction between the intended and unintended victims. The defense theory of the case presented to the jury was that Mr. Johnson was not the individual who had fired the gun at the Kozubenko brothers. RP 147-156.

Despite the theory of the case argued to the jury, assuming, *arguendo*, that defendant's theory was that he fired the gun at Denis Kozubenko, yet was unaware of the presence of Aleksey Kozubenko in the truck, the holding in *State v. Elmi*, is directly controlling. Appellant cites to the arguments made in the Court's Dissenting Opinion; however, it is the Majority's opinion that is the binding precedent. The *Elmi* Majority held that the intent to cause great bodily harm can transfer from an intended victim to an uninjured, unintended victim. The trial court properly instructed the jury on the doctrine of transferred intent based upon the body of evidence presented in this case.

B. THE JURY INSTRUCTION REGARDING TRANSFERRED INTENT DID NOT CREATE A MANDATORY PRESUMPTION THAT RELIEVED THE STATE OF ITS BURDEN OF PROOF.

Appellant contends that the transferred intent instruction given by the trial court created a mandatory presumption that shifted the State's burden of proof and deprived him of his due process rights. A mandatory presumption is one that *requires* the jury to find a presumed fact from the proven fact. *State v. Deal*, 128 Wn.2d 693, 699, 911 P.2d 996 (1996). Whether a jury instruction creates a mandatory presumption is determined by examining whether a reasonable juror would interpret the presumption as mandatory. *Id.*, 128 Wn.2d at 701. A mandatory presumption violates a defendant's due process rights only if it relieves the State of its burden to prove the essential elements of the charged crime beyond a reasonable doubt. *Id.*, 128 Wn.2d at 701.

Here, the transferred intent instruction given is based upon the language approved by the Washington Supreme Court in *State v. McGonigle*, 14 Wash. 594, 602, 45 P. 20 (1896).

The rule is thus laid down by 1 Bish. Cr. Law (8th Ed.) § 328: "If one, with the intent to kill a particular individual, shoots or strikes at him, and, by accident, the charge or blow takes effect on another, whom it deprives of life, *** the party unintentionally causing the death is guilty, the same as if he had meant it, of the felonious homicide." The same rule applies to arson, robbery, and nearly all other crimes the perpetration of which is *malum in se*. The

instruction of the court almost literally followed the rule announced by section 99 of Kerr on the Law of Homicide, which is as follows: “Where a person, with malice aforethought, attempts to kill one person, but, by mistake or misadventure, kills another instead, the law transfers the felonious intent to the object of his assault, and the homicide so committed is murder.” See, also, Whart. Cr. Law (9th Ed.) § 382; Archb. Cr. Prac. § 29.

State v. McGonigle, supra. The trial court’s transferred intent instruction is structured in the same manner as the instruction approved above. The instruction provides the jury with a discretionary prerequisite to actually transferring the *mens rea* to the unintended victim. Specifically, that the evidence proves that the defendant acted with the intent to kill another, so the jury cannot find defendant guilty of intending to assault Aleksey Kozubenko until it is found beyond a reasonable doubt that he intended to assault Denis Kozubenko. Even then, the jury is not mandated to find defendant guilty of the assault absent it finding that the State has proved all the other elements of the crime beyond a reasonable doubt. Finally, the instruction is premised upon the word “if,” not “shall,” so there is no mandatory presumption that relieves the State of its burden of proving the *mens rea* for the crime charged concerning Aleksey Kozubenko. The instruction permits the jury to plug in its finding of the defendant’s *mens rea* with respect to Denis Kozubenko into the equation for Aleksey Kuzubenko akin to an underlying felony providing the *mens rea* for a

felony murder charge. The trial court committed no error in instructing the jury on the doctrine of transferred intent.

C. RCW 9.94A.529(19) APPLIES SOLELY TO COMMUNITY CUSTODY IMPOSED FOR WASHINGTON CONVICTIONS SENTENCED UNDER THE SENTENCING REFORM ACT (“SRA”).

Appellant claims that the trial court committed error when it included one point for the defendant committing the current offenses while on federal probation based upon his federal conviction out of Arizona. This Court has already ruled that the RCW 9.94A.529(19) applies solely to community custody imposed for Washington convictions sentenced under the Sentencing Reform Act (“SRA”). Accordingly, the trial court should not have included one point in its offender score calculation for defendant being on federal probation at the time of committing these offenses.

D. RCW 9.94A.505(8) PROVIDES THAT THE TRIAL COURT MAY IMPOSE CRIME-RELATED PROHIBITIONS.

Appellant also contends that the trial court committed error when it imposed a condition-of-sentence no contact order for life with respect to Aleksey Kozubenko, but not Denis Kozubenko. RCW 9.94A.505(8) provides that crime-related prohibitions may be made effective up to the

statutory maximum for the crime of conviction. *State v. Armendariz*, 160 Wn.2d 106, 118-120, 156 P.3d 201 (2007). Here, defendant was convicted of the second degree assault of Aleksey Kozubenko. Second degree assault is a class B felony with a statutory maximum sentence of 120 months or 10 years. Accordingly, the no contact prohibition imposed pursuant to defendant's conviction for the second degree assault of Aleksey Kozubenko is statutorily limited to 10 years.

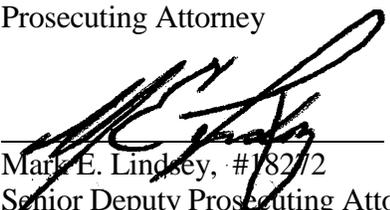
V.

CONCLUSION

For the reason stated, the convictions should be affirmed and the case remanded to impose adjusted sentences as noted herein.

Respectfully submitted this 4TH day of April, 2014.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,)
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DAMIAN T. JOHNSON,)
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 Appellant,)
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NO. 32014-6-III
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on April 4, 2014, I e-mailed a copy of the Respondent's Brief in this matter, pursuant to the parties' agreement, to:

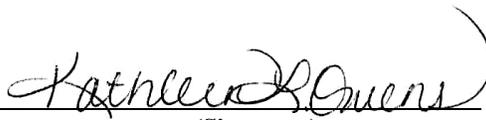
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4/4/2014
(Date)

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(Place)


(Signature)