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NO. 56460-9-I

Yellow

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ALI MOHAMMED ELMI,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD McDERMOTT

SUPPLEMENTAL BRIEF OF RESPONDENT

NORM MALENG
King County Prosecuting Attorney

LEE D. YATES
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

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This supplemental brief addresses Elmi's convictions for three counts of Assault in the First Degree pertaining to the child victims. The State, having withdrawn its concession of error relating to such counts, offers the following argument in support of Elmi's assault convictions.

A. ARGUMENT

1. THE DOCTRINE OF TRANSFERRED INTENT ESTABLISHES THAT THE CHILD VICTIMS WERE ASSAULTED EVEN THOUGH THEY WERE NOT INJURED.

As set forth in the State's initial brief, Elmi tried to murder his wife, Fadumo Adem, by firing repeatedly into her residence. Two three-year-old children and one five-year-old child were with Aden at the time, watching television in the living room. 16RP 52-60. As gunshots exploded the glass of the living room window and penetrated the residence, Aden screamed and quickly moved the children to another room. 16RP 60; 17RP 22. Elmi's shots shattered the TV that Aden and the children had been watching. 16RP 60. There were three bullet holes through the front window, and damage below the window to the structure of the house. 17RP 135-36. There were bullet holes in the curtains, the TV cabinet,

and a kitchen cabinet. 17RP 139-42. Fortunately, and fortuitously, neither Aden nor the children were struck by the shots fired by Elmi. Elmi was convicted of attempted first degree murder for trying to kill Fadumo Aden, and three counts of assault in the first degree for assaulting the children.

It is well settled in Washington that a defendant who intends to kill one person but instead injures or kills a different person is legally responsible for the death or injury of the other individual. State v. Wilson, 125 Wn.2d 212, 883 P.2d 320 (1994); State v. Salamanca, 69 Wn. App. 817, 851 P.2d 1242 (1993). The intent required for the crime need not match a specific victim; under the Washington murder and assault statutes and case law, the mens rea is transferred to an unintended victim. RCW 9A.32.030(1)(a); RCW 9A.36.011(1)(a). Wilson, 125 Wn.2d at 218.

What is less clear under Washington law is whether a defendant may be convicted of assault for those individuals who are not injured, but who are within close proximity of the individual the defendant is trying to injure or kill. The State urges this Court to hold that transferred intent applies to this situation, and that an assault had been committed by Elmi upon the children directly endangered by his actions. Elmi should not receive a windfall

merely because, fortuitously, none of the three children was struck by the volley of bullets he unleashed into the house.

Two published Washington cases shed light on this issue, although they are not dispositive. In State v. Salamanca, 69 Wn. App. 817, 851 P.2d 1242 (1993), the defendant was convicted of five counts of first degree assault for being the driver of a car from which an accomplice fired multiple shots at five people in another vehicle, after becoming angry at the driver. Three shots hit the vehicle, one going through the back window, and a bullet fragment struck one of the occupants. The court upheld first degree assault convictions as to each of the victims. The court held that transferred intent, while not necessary to resolve the case, was consistent with the Washington assault statute. Salamanca, at 825-26.

Like Salamanca, Elmi fired multiple shots into a room occupied by multiple individuals. While the young children were not hit, he certainly caused fear, apprehension and terror among all the occupants in the room. There appears to be no requirement under Washington law that the shooter must be aware of the precise number of people he is shooting at, as long as there is reason to believe that the area he is directing his fire toward is occupied. For

instance, if the victim's car in Salamanca had had blacked-out windows and the shooter had fired the same number of shots into the vehicle, Salamanca and his accomplice would still be guilty of assault, even though they had no way of determining the exact number of people inside the car. Similarly, Elmi saw that Fadumo Aden was inside the residence, but she had moved behind a curtain when Elmi fired shots into the residence. Like Salamanca and his accomplice, Elmi assaulted all of the occupants in the room with a firearm in his attempt to kill Fadumo Aden. He is guilty of first degree assault even though he missed the children.

In State v. Bland, 71 Wn. App. 345, 860 P.2d 1046 (1993), the defendant fired at a car, missed, and struck the window of a nearby house, shattering glass on a person sleeping inside his home. This Court in Bland held that a second degree assault conviction could not be sustained under a transferred intent theory because the person in the home did not experience fear and apprehension before the bullet entered the window. Bland, 71 Wn. App. at 355. In essence, this is Elmi's argument on appeal. He asserts that because there was no proof that the children were afraid until after the shooting, there was no assault because the

fear and apprehension element required for assault could not be transferred.

Bland is factually distinguishable. In Bland, there was but a single bullet that missed the sleeping individual. Here, Elmi fired numerous shots at the residence, several of which penetrated the window, shattering the TV screen that the children were watching, and several bullets lodged inside the room. Fadumo Aden and the children must have been terrified *during* the time the multiple gunshots were fired. They obviously had a reasonable apprehension and fear of bodily injury. Thus, Elmi indeed created fear and apprehension among the child victims. Further, Elmi's intent to assault was transferred from Fadumo Aden to the children. Thus, the elements of common law assault were satisfied, even though no battery or injury occurred.¹

There was sufficient evidence to show that Elmi assaulted the three children. Under Wilson and Salamanca, Elmi's intent to

¹ This analysis is consistent with State v. Allen, Slip Op. No. 47084-1-1, filed 4-2-01. Allen was an unpublished case which the Court cited to the parties in its request for supplemental briefing. Allen fired bullets into a house in an attempt to assault a man named Sanders, but the bullets did not hit anyone. Two people in the house at the time of the shooting got down on the floor during the shooting. The court in Allen found that the uninjured victims had fear and apprehension during the shooting, and the defendant's convictions for first degree assault were upheld. The court distinguished the victims in Allen from that of the sleeping person in Bland, who was unaware until after the event that a shooting had occurred.

inflict great bodily injury on Fadumo Aden was transferred to the young children. Furthermore, the trier of fact could reasonably find that the young children were afraid during the shooting. All of the elements required for assault in the first degree were satisfied.

Other jurisdictions have applied the doctrine of transferred intent to uphold convictions based on non-injured victims in assault and murder cases. In Short v. Oklahoma, 980 P.2d 1081 (Okla. Crim. App. 1999), the defendant was sentenced to death for the murder of an unintended target and also convicted of five counts of attempted murder. Short had thrown an explosive device through the patio door of a home where his estranged girlfriend was present. The residence was also occupied by two other adults and two children. One of the adults was burned by the explosive, but the other adults and the children were able to escape the apartment unharmed. Unfortunately, fire spread quickly and killed a man living in an apartment beneath that of the girlfriend. Short was convicted not only of the murder of the man living in the apartment below, but of attempting to kill the adults and children in the upstairs apartment. The Oklahoma Court of Appeals held that when Short threw the firebomb into the apartment, believing that he would cause the death of one or more of the inhabitants, his intent

to kill was transferred to all of the victims, including those who escaped injury and who Short may not have even known were present. Short, 980 P.2d at 1098. The Court applied the doctrine of transferred intent to uphold the convictions involving the uninjured victims, including the children. The Court approved of an instruction to the jury stating that if Short intended to kill any one of the five victims, the element of intent was satisfied even though he did not intend to kill the other individuals. Short, 980 P.2d at 1098.

In State v. Hough, 585 N.W.2d 393 (Minn. 1998), the Supreme Court of Minnesota upheld multiple convictions of assault with a dangerous weapon against uninjured victims, even though the victims may not have been aware that a crime was occurring. Hough and three friends set out to "shake up the community" in Barnsville, Minnesota, by firing shots into the home of the high school principal named Staska. Hough rolled down the passenger side window and fired seven rifle shots into Staska's home and then sped away. The bullets pierced the walls of the home. Staska and his wife were in their bedroom when they heard the shots, and their four children were sleeping in a nearby bedroom. Three bullets entered the bedroom of the children, one of them inches from a

child's head. Hough was convicted of six counts of assault with a dangerous weapon, one for each member of Staska's family.

The convictions were upheld under Minnesota's assault statute, without the necessity of analyzing the case under a transferred intent theory. Minnesota's assault statute is similar to Washington's, and the common law definition of assault is also similar. Under Minnesota law, an assault is committed when one engages in an act with intent to cause fear in another of immediate bodily injury or death. Hough, 585 N.W.2d at 395-96. This is very similar to Washington's "fear and apprehension" requirement for assaults that do not involve actual or attempted battery. In analyzing whether a victim had to be aware that he was being assaulted, the Supreme Court of Minnesota stated:

It is clear to us that the legislature intended to forbid conduct that is done with the intent of causing fear in another of "immediate bodily harm or death," without regard to whether the victim is aware of the conduct. The crime is in the act done with intent to cause fear, not in whether the intended result is achieved. Further, the assailant's knowledge of the presence of a particular victim is not essential to sustain a conviction under the statute.

...

When an assailant fires numerous shots from a semiautomatic weapon into a home, it may be inferred that they assume that it intends to cause fear of immediate bodily harm or death to those within the

home. As the trial court noted, it was a natural and probable consequence that Hough's actions would endanger people other than Mr. Staska. Such intentional behavior is not excused simply because Hough claims he did not know others were present in the home or because others within the home were not immediately aware of the dangerous act.

Hough, 585 N.W.2d at 396-97.

Elmi's case is similar to State v. Hough. Elmi fired many rounds into the house trying to kill Fadumo Aden. He likely knew that children would be present with Ms. Aden, but even if he did not, he still committed first degree assault. Under the circumstances, he has assaulted all of the occupants of the house in the immediate vicinity of the gunshots. Even if the children did not experience fear and apprehension during the actual shooting, which they likely did, Elmi assaulted the children.

In Commonwealth v. Melton, 436 Mass. 291, 763 N.E.2d 1092 (2002), the defendant was convicted of four counts of assault with a deadly weapon when he fired a single shot into a vehicle occupied by four people. The Supreme Court of Massachusetts rejected a claim that Melton could only be guilty of one count because he could only have injured one person with a single bullet. Even though nobody was injured during the shooting, Melton was held responsible for assaulting each person in the car based upon

transferred intent. Melton, 763 N.E.2d at 1098-99. All four victims were imperiled by the shot, and all suffered the same fear as the intended victim. The court stated:

The peril and fear inflicted by such conduct is what makes one a victim of assault, and, as long as the defendant has the requisite mens rea with regard to any person, the defendant may be convicted of as many separate assaults as there are victims.

Melton, 763 N.E.2d at 1100.

State v. Gillette, 102 N.M. 695, 699 P.2d 626 (1985), was a bizarre case where the defendant tried to poison the mother of the children that he had abused. The poison, which the defendant put in a Dr. Pepper, was tasted by two other people, neither of whom suffered any injury. In upholding the defendant's conviction for attempted murder with regard to the unintended, uninjured victims, the New Mexico Court of Appeals applied a transferred intent analysis:

In the present case, defendant sent a poisoned drink to Kathleen intending to kill her. If the substance is ingested by the intended victim, as well as by others who work with her, defendant's felonious intent to kill is transferred to others who foreseeably would also ingest the poison. The intent of the defendant may be said to follow the container of poison and the defendant may be found guilty of attempted murder of each individual who ingested the poison.

Gillette, 699 P.2d at 705.

California has an interesting approach to transferred intent cases involving murder or assault. People v. Bland, 28 Cal.4th 313, 48 P.3d 1107 (2002), was a gang car shooting case where the defendant shot into a rival gang's car, killing one individual and wounding two others. Bland was convicted of murder and two counts of attempted premeditated murder for the injured victims. The California Supreme Court held that transferred intent did not apply to the attempted murder counts because those victims were not the intended targets. The specific intent to kill could not be transferred to the unintended victims. However, a defendant could be guilty of assault with a deadly weapon as to non-targeted members of a group. Bland, 48 P.3d at 1118. The court described a "kill zone" where a defendant could be held responsible for assaulting people around the intended victim. Bland, 48 P.3d at 1118-19.

In People v. Vang, 87 Cal.App.4th 554 (2001), a "kill zone" analysis was used by a California Court of Appeals to uphold eleven counts of attempted murder where two houses were targeted in gang shootings. The evidence supported a finding that the defendants intended to kill any occupant of the houses. Despite the fact that the defendants could not see the individuals in

the houses they were shooting at, attempted murder charges were upheld for all of the individuals in the residences. While California to some extent is more restrictive regarding transferred intent, convictions for assault against individuals who happen to be in the "kill zone" can be upheld under a transferred intent theory, regardless of whether or not they were injured. Certainly, the young children in Elmi's case were present in a "kill zone."

The children in Elmi's case were assaulted with a deadly weapon. Elmi's intent to kill or to inflict great bodily injury upon Fadumo Aden was transferred to the children. Viewing the evidence in the light most favorable to the State, a reasonable jury could have found that the children were fearful during the time of the actual shooting. Furthermore, even if there had been no fear and apprehension by the children until after the shooting stopped, Elmi is still guilty of assaulting the children. Under the circumstances of Elmi's case, the doctrine of transferred intent applies regardless of whether or not the children suffered any physical injury.

2. EVEN IF THE DEFINITION OF ASSAULT CREATED ALTERNATIVE MEANS OF COMMITTING THE CRIME, THE JURY VERDICTS WERE SUPPORTED BY SUBSTANTIAL EVIDENCE.

Elmi argues that because the standard WPIC three-part common law definition of assault was given as a jury instruction, the jury verdicts were not unanimous as to the three child victims. However, when the doctrine of transferred intent is applied to the child victims, it is clear that the jury must have concluded that an assault occurred either by an attempted battery or by acting with intent to place the children in fear and apprehension. Under the circumstances, there was substantial evidence supporting each relevant alternative means, and there was no danger that the jury was not unanimous.

The trial court's instruction no. 17, given without objection, defined an assault as an actual battery, an intent to inflict bodily injury (attempted battery), or an act with intent to create apprehension and fear of bodily injury which creates in another a reasonable apprehension and imminent fear of bodily injury. CP 178. It was undisputed that no actual battery occurred because no one was injured in the house, and the State never argued for conviction on that prong of common law assault. 22RP 35-40.

Because there was substantial evidence supporting the remaining two alternatives of common law assault, Elmi's convictions did not violate the unanimity requirement.

There is a split of authority in Washington on the issue of whether the three common law definitions of assault create alternative means of committing the crime. Division II of the Court of Appeals holds that the common law definition of assault does not create alternative means of committing the crime, and jury unanimity is thus not required. State v. Winings, 126 Wn. App. 75, 89-90, 107 P.3d 141 (2005); State v. Smith, 124 Wn. App. 417, 426-27, 102 P.3d 158 (2004), review granted, 154 Wn.2d 1020 (2005). This Court has held that the WPIC instruction defining common law assault does create alternative means for commission of the crime. State v. Nicholson, 119 Wn. App. 855, 860, 84 P.3d 877 (2003); State v. Rivas, 97 Wn. App. 349, 984 P.2d 432 (1999). The Washington Supreme Court may settle this issue when it issues its opinion in the Smith case, but this Court need not await that ruling to resolve Elmi's claim.

While there was no evidence that Elmi attempted to shoot the children or intended specifically to cause fear and apprehension in the children, the doctrine of transferred intent supplies the intent

required for assault. As previously discussed, transferred intent applies regardless of whether the children were injured or killed. Elmi intended an attempted battery against Fadumo Aden and intended to place her in fear and apprehension. Elmi's intent is transferred to the child victims. Given the number of shots, the jury could also infer that the child victims were afraid during the shooting. Thus, there was substantial evidence supporting an assault both by attempted battery and by acting with intent to create fear and apprehension in another.

Furthermore, although there was no evidence that an actual battery occurred, that portion of the assault definition instruction was superfluous, and thus any error was harmless. If one of the alternative means upon which a charge is based fails and there is only a general verdict, the verdict may stand if the reviewing court can determine that the verdict was founded upon one of the methods with regard to which substantial evidence was introduced. State v. Bland, 71 Wn. App. at 354. This Court can confidently conclude that the jury did not convict Elmi of an assault based on

an actual battery. Because there was substantial evidence that Elmi either committed attempted battery or intended to create fear and apprehension of bodily injury, no unanimity instruction was required. Elmi's claim that he was deprived of a unanimous jury verdict should be rejected.

3. THE FIREARM ENHANCEMENTS FOR THE ASSAULT CONVICTIONS DID NOT VIOLATE DOUBLE JEOPARDY.

Elmi contends that because an element of the underlying assault charges involves the use of a firearm, his firearm enhancements must be vacated. He claims that imposition of an additional penalty for the firearm enhancement violates double jeopardy, relying on the United States Supreme Court decision in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). This specific argument has recently been rejected by this Court in State v. Nguyen, ___ Wn. App. ___ (Slip Op. No. 55443-3-I, filed 9-11-06). Because Nguyen is controlling, this argument will not be further addressed.

4. MULTIPLE FIREARM ENHANCEMENTS FOR USE
OF A SINGLE FIREARM DO NOT VIOLATE
DOUBLE JEOPARDY.

Elmi asserts that since he only used one gun in the incident but was punished separately for enhancements involving each separate victim, that his consecutive firearm enhancements violate double jeopardy because the legislature did not intend such harsh punishment. However, RCW 9.94A.533(3)(e) expressly provides that all firearm enhancements shall be served in total confinement and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses for which a defendant is sentenced. The legislative intent to run firearm enhancements consecutively could not be more clear. See State v. Callihan, 120 Wn. App. 620, 85 P.3d 979 (2004); State v. DeSantiago, 149 Wn.2d 402, 416, 68 P.3d 1065 (2003). Because there is a clear and unambiguous expression of legislative intent for firearm enhancements to be punished consecutively, double jeopardy was not violated.

B. CONCLUSION

Elmi's convictions for three counts of Assault in the First Degree pertaining to the child victims should be affirmed.

DATED this 8 day of November, 2006.

Respectfully submitted,

NORM MALENG
King County Prosecuting Attorney

By: Lee D. Yates
LEE D. YATES, WSBA #3823
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certification 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 Oliver R. Davis, the attorney of record for the appellant, at the following address: Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101-3635, containing a copy of Supplemental Brief of Respondent, in STATE V. ALI MOHAMMED ELMI, Cause No. 56460-9-I, in the Court of Appeals, Division I, of 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.

L. Brame
Done in Seattle, Washington

11/8/06
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