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No. 56460-9-1

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THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ALI ELMI,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Richard McDermott

APPELLANT'S REPLY BRIEF

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A. SUMMARY OF ARGUMENT AND STATE'S CONCESSIONS

Mr. Elmi was convicted of attempted murder in the first degree of his estranged wife Fadumo Aden; assault in the first degree of Ms. Aden; three additional counts of assault in the first degree, one count each as to Aden's three year old son Kamal Nur, Aden's five year old sister Asha Abdulla, and Aden's three year old brother Ahmed Abdulla; and one count misdemeanor violation of a protection order. The felony verdicts included firearm findings on the felony counts. CP 1, 11, 142, 221-30; 4/14/05RP at 51-52.

Mr. Elmi appealed. CP 219. In its responsive briefing, State has indicated to the Court that it wishes to concede Mr. Elmi's assignments of error no. (2) that that there was insufficient evidence of specific intent as to the first degree assault convictions in counts 3, 4 and 5, where the defendant did not know the alleged victims were present in the house; and assignment of error no. (5) that the first degree assault conviction on count 2 which violated double jeopardy should have been vacated, rather than merely not sentenced. Brief of Respondent (May 18, 2006), at pp. 1-2, 13-19.

Absent order of the Court of Appeals to further address those issues, Mr. Elmi will not present additional written argument

regarding assignments of error nos. (2) or (5) in his reply brief herein.

B. REPLY ARGUMENT

In April and May of 2002, there was an "issue" between Ms. Aden and Mr. Elmi concerning Mr. Elmi's desire that Ms. Aden renew their car's license plate tabs so that he could drive the car. 4/14/05RP at 44-45.

When Ms. Aden looked out the curtains of the large picture window in the living room of her house, she saw figures or shadows, and a car behind a tree, and could hear the car running. 4/14/05RP at 57-58. She testified at trial that she could not make out anyone's face or identity, but there appeared to be two people having an argument. 4/14/05RP at 58-59.

Ms. Aden testified she did not see who had shot the bullets. 4/14/05RP at 61. Although she admitted telling the 911 operator it was Mr. Elmi who fired the shots, she testified the operator was insisting she identify someone and she felt forced to say a name. 4/14/05RP at 62. Ms. Aden testified that she honestly did not see Mr. Elmi that night. 4/25/05RP at 23. She testified that she "said on the 911 tape that it was him because it was the first person that crossed my mind." 4/25/05RP at 46.

Ms. Aden was also merely impeached with an admission that she had given a statement to Detective Gary Murray from Kent three days after the incident, stating that the defendant had fired the shots. 4/14/04RP at 67-69. She also admitted making a similar statement, identifying Mr. Elmi as the shooter, to Detective Jesse Anderson on May 29, 2002. 4/14/04RP at 69-71. Ms. Aden stated that when she spoke with Detectives Murray and Anderson, she “didn’t want to say I couldn’t see anything after I had provided a description of what I thought I’d seen, so I followed what I’d said in the 911 tape.” 4/25/05RP at 46.

1. THERE WAS INSUFFICIENT EVIDENCE OF INTENT TO KILL OR PREMEDITATION.

In connection with its argument that sufficient evidence was produced to support both intent to kill and premeditation, the State exaggerates its description of the relationship between the defendant and the complainant, and of the nature of the act of shooting, in a manner that tends to support a finding of intent by Mr. Elmi to kill Ms. Aden, and premeditation. Respondent State of Washington describes the circumstances at the time of the incident between the defendant and Ms. Aden as a “bitter separation.” Brief

of Respondent, at p. 11. This depiction does not appear in the transcript. The respondent also states that

Elmi armed himself with a handgun after an angry dispute with Fadumo Aden earlier in the day, broke free of people trying to restrain him prior to the shooting, fired point blank into the area where Fadumo Aden had been standing in the picture window, and it was only fortuitous that she was not struck by one or more of the bullets. A jury could rationally conclude that Elmi had sufficient time to reflect and that he did indeed intend to kill Fadumo Aden.

Brief of Respondent, at p. 10. Mr. Elmi respectfully suggests that this assessment of the evidence imprecisely characterizes the trial record.

First, the State's briefing does not accurately describe the evidence of the telephone conversation between the defendant and Ms. Aden earlier on the day of the incident. When Ms. Aden and her friend Ms. Nur were at SeaTac Mall, Ms. Nur received a call on her cellular telephone and handed the phone to Ms. Aden, saying that it was Mr. Elmi. 4/14/05RP at 47-48. The State's briefing also characterizes Ms. Aden's testimony as being that Mr. Elmi was "very angry" with Ms. Aden during the conversation; this language, also, was not uttered by Ms. Aden. Ms. Aden testified that Mr. Elmi was unhappy about the car tabs not having been renewed. 4/14/05RP at 48-50. Her testimony was that she did not "recall him

saying, I will kill you or any sort of thing that I recall.”¹ 4/14/05RP at 50-51.

Second, this passage implies that there was evidence of a direct and rapid sequence of events in which Mr. Elmi spoke with Ms. Aden on the telephone and then quickly and reactively procured and armed himself with a firearm. In fact, Mr. Elmi’s conversation with Ms. Aden occurred on the morning of the day of the incident. There was no evidence of Mr. Elmi’s actions, if any (Mr. Elmi disputed the identity of the shooter) after the conversation, until such time as the night of that date. Deputy Juvet testified that Ms. Aden told him that when she looked out the window of the house, before the shots, she saw “four nondescript males trying to hold back a black male.” 4/26/05RP at 36-37. There was no evidence that people were trying to prevent the shooter from firing a gun.

¹Importantly, by agreement of the parties and as the jury was specifically instructed, only Ms. Aden’s trial testimony, and her statements in the 911 tape and to Deputy Juvet, which the court had admitted as excited utterances, were available to the jury to be considered for the truth of the matter asserted. CP 168; 5/3/05RP at 72. The remainder of Ms. Aden’s statements were solely available to be considered by the jury only for evaluating the credibility of Ms. Aden. CP 168; 5/3/05RP at 72. It was only among these statements that were not admitted for the truth of the matter asserted, that Ms. Aden stated she had told Detective Anderson that Mr. Elmi had threatened to kill her when she spoke with him on the morning of the 18th. 4/25/05RP at 30-31.

Furthermore, of the four bullets that had been fired, only three traveled through the window. 4/25/05RP at 134-40. The State asserts that the shots were fired from "point blank" range, Brief of Respondent, at p. 10, but on the one hand ignores that the bullets were fired 5 to 10 feet from the window, yet were at the same time so inaccurately aimed such that one bullet failed to even enter the large window and hit the house's exterior wall, and that among the others one hit the television and another hit a kitchen cabinet. 4/25/05RP at 134-40, 43-47. In these circumstances, the evidence fails to prove beyond a reasonable doubt that there was intent to kill. The crime of murder is defined by the result of death, thus "the crime of attempted murder requires the specific intent to cause the death of another person." State v. Dunbar, 117 Wn.2d 587, 590, 817 P.2d 1360 (1991). Specific intent to kill a person must be proved "as an independent fact and cannot be presumed from the commission of the unlawful act." State v. Louthier, 22 Wn.2d 497, 503, 156 P.2d 672 (1945). This means that the defendant's act of shooting cannot by itself constitute sufficient evidence of intent to kill, as opposed to intent to injure. Cf. State v. Woo Won Choi, 55 Wn. App. 895, 898-99, 906, 781 P.2d 505 (1989), review denied, 114 Wn.2d 1002 (1990) (evidence of intent

to kill was sufficient where the defendant and the victim had an angry physical altercation during gambling at a casino, and the defendant immediately followed the victim in his car when he left the establishment, pulled his car up next to the victim's, raised a gun, and fired at him) ("[e]vidence of intent to kill is to be gathered from all of the circumstances of the case, including not only the manner and act of inflicting the wound, but also the nature of the prior relationship and any previous threats").

Here, the shooting of the firearm alone, from outside a house through a window, in the absence of any prior threat to kill or any violent relationship between Mr. Elmi and Ms. Aden, is insufficient to prove that Mr. Elmi intended to kill Ms. Aden. This evidence of the defendant's conduct alone may establish intent to assault, but it does not show intent to kill any person. Intent exists only where a known or expected result is also the defendant's purpose or objective. State v. Caliguri, 99 Wn.2d 501, 505, 664 P.2d 466 (1983) (citing RCW 9A.08.010(1)(a)). The evidence in this case in fact shows that the shooter, standing as close as five or ten feet from the "large picture window", did not even fire all the shots through the window itself. 4/14/05RP at 57-58; 4/25/05RP at 146-47. Without evidence of some unusually serious prior

altercation or a threat to kill, this was insufficient evidence of intent to kill in the present case. See also State v. Hale, 65 Wn. App. 752, 757, 829 P.2d 802 (1992) (clear and unequivocal threat to kill constituted necessary independent evidence of intent to kill).

Neither does the evidence support premeditation, under the State's own cited authority that premeditation is shown by motive, procurement of a weapon, stealth, and the method of killing. Brief of Respondent, at p. 11 (citing State v. Ortiz, 119 Wn.2d 294, 312, 831 P.2d 1060 (10992). Premeditation can be proved by circumstantial evidence only where the inferences drawn by the jury are reasonable and the evidence supporting the jury's verdict is substantial. State v. Pirtle, 127 Wn.2d 628, 643, 904 P.2d 245 (1995); State v. Luoma, 88 Wn.2d 28, 33, 558 P.2d 756 (1977). Evidence of the shooter's conduct of firing of a gun into and toward a window does not allow a reasonable inference of deliberate formation of and reflection upon the intent to take a human life. The defendant's conviction for first degree attempted murder must be reversed.

**2. THE "TRANSFERRED INTENT"
INSTRUCTION RELIEVED THE STATE
OF ITS BURDEN OF PROVING
EVERY ELEMENT OF THE THREE
ASSAULT COUNTS.**

The appellant agrees with the State's concession of error that the evidence was insufficient to show the specific intent necessary for the assault convictions as to the children that the shooter did not know were present in the house with Ms. Aden. However, Mr. Ali Elmi wishes to continue to contend that jury instruction 20 on "transferred intent" erroneously had the effect of instructing the jury that it could convict the defendant without finding the required element of specific intent. CP 181. He argues this was constitutional error, because assault by attempted battery or by causing apprehension of harm requires proof of specific intent as to the named victims, a rule which applies to both first and second degree assault since each of these offenses must be supported by the basic crime of assault. As observed in State v. Byrd,

the omission of a specific intent instruction impermissibly allowed the jury to find the defendant guilty of second degree assault on the mere basis of his intentional drawing of the gun, a physical act he admitted, without finding any actual intent to injure or cause fear.

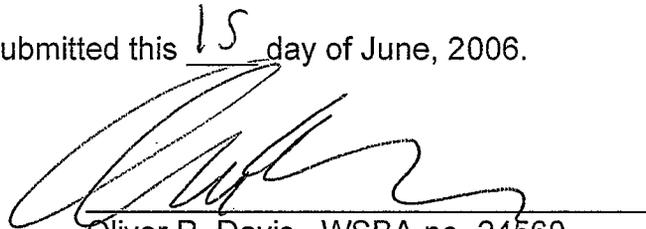
State v. Byrd, 125 Wn.2d 707, 715, 887 P.2d 396 (1995); see also
State v. Eastmond, 129 Wn.2d 497, 503, 919 P.2d 577 (1996).

The transferred intent instruction in this case erroneously instructed the jury that this intent could substitute for the intent required to convict Mr. Elmi on counts 3, 4 and 5.

C. CONCLUSION

Based on the foregoing and on his Opening Brief, Mr. Elmi respectfully requests that this Court reverse his judgment and sentence.

Respectfully submitted this 15 day of June, 2006.



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STATE OF WASHINGTON,)	
)	NO. 56460-9-I
Respondent,)	
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v.)	
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ALI ELMI,)	
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Appellant.)	

CERTIFICATE OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 15TH DAY OF JUNE, 2006, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S REPLY BRIEF** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

KING COUNTY PROSECUTOR'S OFFICE
APPELLATE UNIT
KING COUNTY COURTHOUSE
516 THIRD AVENUE, W-554
SEATTLE, WA 98104

U.S. MAIL
 HAND DELIVERY

SIGNED IN SEATTLE, WASHINGTON THIS 15TH DAY OF JUNE, 2006.

x _____ *gml*

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