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No. 56460-9-I

Wilson

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
2006 OCT 27 - PM 4:57

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Richard McDermott

APPELLANT'S SUPPLEMENTAL BRIEF

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A. AUTHORITY TO FILE SUPPLEMENTAL BRIEF

By order of October 4, 2006, this Court directed the parties to address the cases of State v. Allen, 2001 Wash. App. LEXIS 532 (2001), and Commonwealth v. Melton, 436 Mass. 291, 295, 763 N.E.2d 1092, 1096 (2002), in relation to the issue of the application of the doctrine of “transferred intent” to the defendant’s convictions for three counts of first degree assault. State v. Elmi, COA No. 56460-9 (Order of October 4, 2006).

B. ARGUMENT

THE DOCTRINE OF TRANSFERRED INTENT CANNOT APPLY TO SUPPORT CONVICTIONS FOR FIRST DEGREE ASSAULT AS TO THE COUNTS INVOLVING THE CHILDREN.

(1). First degree assault required proof that Mr. Elmi possessed specific intent to assault the named child complainants. Because the named complainants in counts 3, 4 and 5 of this case were not subjected to assault by actual battery, the State was required to prove that Mr. Elmi specifically intended to assault them. Because the State conceded at trial that Mr. elmi was not aware of the children’s presence, the convictions on those assault counts must be reversed. Mr. Elmi maintains this

argument, originally advanced in his Appellant's Opening Brief.
See Appellant's Opening Brief, at pp. 21-31.

Of the three forms of assault, assault by actual battery requires only the general intent to do the physical act constituting the assault, and does not require specific intent. State v. Hall, 104 Wn. App. 56, 62, 14 P.3d 884 (2000). In contrast, assault by attempting to inflict bodily injury (attempted battery) requires the specific intent to cause bodily injury, and assault by placing a person in reasonable apprehension of harm ("common law" assault) requires the specific intent to create apprehension of harm. State v. Daniels, 87 Wn. App. 149, 155, 940 P.2d 690 (1997) (citing State v. Eastmond, 129 Wn.2d 497, 500, 919 P.2d 577 (1996); State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995)).

Thus in Byrd, the Court stated,

the State must prove the Defendant acted with an intent to create in his or her victim's mind a reasonable apprehension of harm.

State v. Byrd, 125 Wn.2d at 714 (citing State v. Austin, 59 Wn. App. 186, 192-93, 796 P.2d 746 (1990)).

The term "specific intent" means the intent to produce a result in addition to the intent to do the physical act which the crime requires, State v. Esters, 84 Wn. App. 180, 184, 927 P.2d 1140

(1996), while the term "general intent" means the intent to do the physical act which the crime requires. State v. Nelson, 17 Wn. App. 66, 72, 561 P.2d 1093, review denied, 89 Wn.2d 1001 (1977).

If Mr. Elmi had actually struck the named complainants in counts 3, 4 and 5, his intent to batter would be the only intent required to convict. Daniels, 87 Wn. App. at 155. Such facts would place this case within the ambit of State v. Wilson, 125 Wn.2d 212, 883 P.2d 320 (1994). The Wilson Court's understanding of the requirements for conviction for assault makes sense only in that case, which involved assault by actual battery, in which the two "unintended victims" in question were actually subjected to harmful touching. Wilson, 125 Wn.2d at 215, 218-19.

But the present case was not contended as involving involve actual battery. 5/3/05RP at 37. Therefore, proof of assault of the children required proof of specific intent to assault those individuals.

Any other construction of the assault statutes would be strained and would lead to absurd results, which are disfavored. State v. Votava, 149 Wn.2d 178, 187, 66 P.3d 1050 (2003); State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003); State v. McDougal, 120 Wn.2d 334, 350, 841 P.2d 1232 (1992). If the

intent to batter a specific person, which is required for attempted assault (an offense which involves the failed effort to commit the completed crime), could be transferred to every other person the defendant also failed to hit with his poor shot, the defendant's "victims" could be unlimited in number, even where the defendant was not aware of those persons' presence. Thus a defendant who shoots at person A in an attempt to harm him, but fails to hit his mark and sends the bullet flying harmlessly through the air, could be convicted of assault as to every person in the world that the bullet also failed to strike. Applying the doctrine of transferred intent to the offense of attempted battery authorizes precisely this result, with no restriction whatsoever on the number of possible victims that would support multiple charges and convictions.

Similarly, if the defendant's intent to cause apprehension in a person could be transferred to other persons besides the person in whom he intended to cause apprehension, then a defendant who fires a shot in order to cause apprehension in a particular person, would be guilty of assault as to any other person or persons situated blocks away who heard the shot and got down on the ground in reasonable fear of being hit by a bullet. Such persons could number in the hundreds, and thus the number of assault

convictions -- and consecutively served firearm enhancements -- could be of a similar number, despite the defendant's lack of intent as to those individuals and his even notwithstanding his ignorance of their presence in the area. If the doctrine of transferred intent applies to unknown victims in cases of assault by causing apprehension of harm, nothing whatsoever prohibits this result.

Not only are these results absurd, but construction of the assault statutes to allow such results violates the rule of lenity, given the ambiguity in the assault statutes. See State v. Jacobs, 154 Wn.2d 596, 600-01, 115 P.3d 281 (2005) ("If a statute is ambiguous, the rule of lenity requires us to interpret the statute in favor of the defendant absent legislative intent to the contrary"). The decision in State v. Allen, 2001 Wash. App. LEXIS 532 (2001), infra, interpreted the second degree assault statute as providing that assault merely requires a defendant to intend to assault another and that "another" be assaulted, but does not require that the person the defendant intended to assault be the same person assaulted. State v. Allen, at pp. *14-15.

Given the adoption of other criminal statutes, such as the law against reckless endangerment, RCW 9A.36.045(1), which provides for criminal penalty on the basis of creating danger to

unknown victims, the second degree assault statute is at best ambiguous as to whether it permits conviction based on persons of whose presence the defendant was unaware. In such circumstances, the rule of lenity clearly applies. Indeed, the United States Supreme Court has applied the rule of lenity in a similar context. In the case of Ladner v. United States, 358 U.S. 169, 3 L.Ed.2d 199, 79 S.Ct. 209 (1958), the defendant was convicted by a jury of two violations under a federal statute of assaulting two federal officers with a deadly weapon by wounding both officers with a single discharge from a shotgun. Ladner v. United States, 358 U.S. at 170-71. The Supreme Court held that the defendant could be punished under the rule of lenity for only one violation of the statute, since the wording of the statute was ambiguous as to whether one offense was committed under these facts, and held that an interpretation that there were as many assaults as officers affected would result in punishments totally disproportionate to the act of assault. Ladner v. United States, 358 U.S. at 178.

(2). The reasoning of the case of State v. Allen should not be followed in this case (1) because it relies on a Washington Supreme Court case that only applied transferred intent in the context of a case of actual battery, and alternatively (2) because Allen involved “actual victims” of assault. This Court has directed the parties to address the case of State v. Allen, 2001 Wash. App. LEXIS 532 (2001).¹

Assuming that Allen was correctly decided consistent with the published case law requiring proof of specific intent to assault known victims where the assault charge is not based on assault by actual battery, see Part B.(1), supra, Allen is nonetheless distinguishable. The Allen case relied for its holding on evidence showing the occurrence of assaultive harm to the victims in that case, which is not present in Mr. Elmi’s case.

¹RAP 10.4(h) provides that unpublished decisions may not be cited by a party. This Court’s order of October 4, 2006 directed the parties to address the Court’s reasoning in Allen. State v. Elmi, COA No. 56460-9 (Order of October 4, 2006). Unpublished opinions have no precedential value and, therefore, may not be considered. See State v. Bays, 90 Wn. App. 731, 954 P.2d 301 (1998); State v. Sigman, 118 Wn.2d 442, 444 n.1, 826 P.2d 144, 24 A.L.R.5th 856 (1992); State v. Fitzpatrick, 5 Wn. App. 661, 668, 491 P.2d 262 (1971).

(i) The decision in the Allen case is not supported by State v. Wilson, which only addressed application of the doctrine of transferred intent in cases of assault by actual battery.

The Court in Allen cited State v. Wilson, 125 Wn.2d 212, 883 P.2d 320 (1994), for the proposition that the doctrine of transferred intent is unnecessary to convict a perpetrator of assaulting an unintended victim because the offense of second degree assault does not match specific intent with a specific victim. State v. Allen, at p. *14 (citing RCW 9A.36.021(1) and Wilson, 125 Wn.2d at 219). As argued, the Wilson Court's understanding of the requirements for conviction for assault makes sense only in that case, which involved assault by actual battery, in which the two "unintended victims" in question were actually subjected to harmful touching. Wilson, 125 Wn.2d at 215, 218-19. But Mr. Elmi had no specific intent as to these named victims. Nothing in Wilson or any other published Washington case authorizes conviction for assault by attempted battery, or by causing apprehension, without the required mental state of specific intent to batter or to cause apprehension in those victims.

(ii) Allen relied for its transferred intent ruling on evidence that the named victims in that case were actual victims of assault because they testified that they in fact apprehended imminent harm.

This Court may reject appellant's arguments that the doctrine of transferred intent cannot apply in the present case, and adopt reasoning similar to that in State v. Allen. Even if the Court does so, the reasoning of that case does not apply to the facts here, because the Allen Court required that intent could only be transferred to persons who were actually assaulted.

In that case, the defendant fired multiple gunshots into a house in an attempt to "get" the owner of the house; although the bullets did not hit anyone, two people in the house (not the owner) got down on the floor during the shooting. State v. Allen, at p. *1. The facts of the case indicate that Allen "intended to assault Phil Sanders," although the opinion does not expressly indicate whether Allen knew or did not know that the two other persons were in the house at the time of the shooting. State v. Allen, at p. *14 n. 2. Allen was apparently charged with assault committed by attempted battery or by causing apprehension of harm. State v. Allen, at pp. *10-11, 14.

This Court rejected the appellant's argument that his intent to assault the owner of the house could not be transferred to the two persons, Sutterman and Sanders, that were in the house but that he did not subjectively intend to assault. The Court stated that

[T]he perpetrator who intends to assault one person, but actually assaults a different person, is guilty under the terms of the second degree assault statute, RCW 9A.36.021. Wilson, 125 Wn.2d at 219. In other words, once the intent to assault another is established, the mens rea is transferred under the statute to any unintended victim. Wilson, 125 Wn.2d at 218. . . . Even though Allen may not have intended to assault Debbie Sutterman and Jason Sanders, they were the unintended victims of Allen's intended assault on Phil Sanders. Therefore, under a literal interpretation of RCW 9A.36.021, Allen assaulted Debbie Sutterman and Jason Sanders.

State v. Allen, at pp. *14-15. In so stating, the Court held that intent can be transferred to any unintended "victim." State v. Allen, at p. *15. The Court was imposing the requirement of the presence of an actual victim, in order for the defendant's assaultive intent to be transferred to that person named as a victim. A review of the decision in Allen indicates that for this Court, the dispositive fact was that the complainants in the case qualified as "unintended victims of Allen's intended assault on Phill Sanders" because they "both apprehended harm during the shooting" State v. Allen, at pp. *15-16. The Court noted that the trial court found that both

Sutterman and Sanders got down on the floor during the shooting, and cited the trial court's written findings:

14. Debbie Sutterman heard seven gunshots. She realized that the house was being shot at after about three shots, and she got down on the floor.
15. Jason Sanders heard six or seven gunshots and got down on the floor during the shooting.

State v. Allen, at p. *16. Because Sutterman and Sanders reacted to the gunshots by getting down on the floor after the first shot was fired but before the final shot hit the house, this Court found that a rational trier of fact could find beyond a reasonable doubt that Debbie they experienced reasonable apprehension and imminent fear of bodily injury during the shooting. State v. Allen, at pp. *16-17. Therefore, the defendant's intent to cause Phil Sanders to apprehend imminent harm could be transferred to Sutterman and Sanders, since they qualified as actual victims of his intent and his actions by virtue of apprehending imminent harm as a result.²

²The Court noted the definition of assault by causing apprehension of harm, as stated in the Pattern Jury Instructions:

An assault is . . . an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

(Emphasis added.) State v. Allen, at p. *14 (citing 11 Washington Pattern Jury Instructions: Criminal 35.50, at 453 (2d ed. 1994)). "Imminent" is defined as

The Allen trial court's specific findings of fact were based on evidence supplied by Sutterman and Sander's actual testimony at trial, and the trial court found that they reacted during a cascade of gunshots by getting down on the floor to avoid what they perceived to be imminent contact from still incoming bullets. State v. Allen, at pp. *16-17.

These facts supported the conclusion that Sutterman and Sanders were unintended "victims" of assault by causing apprehension of harm. Any defendant's actions, to qualify as assault under this definition, must cause the persons allegedly assaulted to actually apprehend imminent harm. State v. Eastmond, 129 Wn.2d 497, 503-04, 919 P.2d 577 (1996). The named persons in Allen actually feared that the appellant's conduct -- his physical action of shooting bullets from a gun -- was about to result in projectiles striking them. Sutterman apprehended that such contact was imminent and experienced fear of the bodily injury such contact would cause, and thus she took action to avoid the contact by getting "down on the floor" after three -- of six or seven -- gunshots. In Sanders' case, because he took the action of

"about to occur at any moment: impending." WEBSTER'S SECOND NEW COLLEGE DICTIONARY 553 (1986).

getting down on the floor "during" the shooting and "before the final shot hit the house," the facts as to him also supported a conclusion that he feared imminent harm. See State v. Allen, at pp. *16-17.

In contrast, the present case does not include evidence that would allow a trier of fact to conclude that the three children apprehended imminent harm from incoming bullets; instead, at best, the evidence showed that the children were upset by their mother's reaction to some event after it occurred. This is in fact twice divorced from what would be required to render them unintended "victims" of assault for purposes of the Allen Court's application of the transferred intent doctrine. Even if they were upset by the shooting after it occurred, this would not show that they apprehended harm imminently about to occur. And in this case, there was not evidence even of those facts, or even that they noticed the shooting; rather, the evidence showed that the children were upset by their mother, Ms. Aden's, "reaction."

Of course, the children in this case did not testify. According to the trial testimony, Ms. Aden and the children were in the living room. 4/14/05RP at 52. Ms. Aden was watching television from the couch, and the children were on the floor or in a small chair. 4/14/05RP at 55. Around 9:30 or 10 p.m, Ms. Aden heard a voice,

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

Ms. Aden testified that she then heard gunshots. 4/14/05RP at 59. After she heard the gunshots the glass window shattered. 4/14/05RP at 59-60. Ms. Aden screamed, and the children "reacted to how I reacted." 4/14/05RP at 60. The testimony was as follows:

Q: What was the reaction of the kids?

A: I mean, I screamed and they reacted to how I reacted, but you couldn't really --- I don't know how they identified it with shots, really, but they reacted to my reaction, which was, Oh my God, let's move and go to another room.

Q: Okay. Is it possible that they were reacting to what they were hearing, too?

A: It was, I think, a little fast and I was freaked out, so, I mean they were all young and didn't know what gunshots were, so I think it was my reaction that had them freaked out.

4/14/05RP at 60. Even if the children were upset by what had occurred, there was no evidence that they perceived imminent harm, only that they reacted with upset after the occurrence.

Therefore they are not victims of assault, and therefore, per Allen, the doctrine of transferred intent cannot apply to them.

For example, in State v. Bland, 71 Wn. App. 345, 358, 860 P.2d 1046 (1993), the defendant approached Jefferson, who was in a car, and pointed a gun at his chest. As Jefferson sped away, the defendant fired a shot toward his car to attempt to batter him or to cause him apprehension of harm, sending a bullet through the window of a nearby house. The bullet broke the window and sprayed shattered glass onto Carrington, who was sleeping. State v. Bland, 71 Wn. App. at 348-49. The State charged the defendant with a count of second degree assault as to Carrington, arguing that the defendant's intent to assault Jefferson transferred to Carrington and that Bland caused Carrington to suffer reasonable apprehension of harm. State v. Bland, 71 Wn. App. at 355-58. However, because Carrington did not experience fear and apprehension before the bullet came through the window, since he was asleep, and no evidence was presented that he feared future injury thereafter, the Court held that the verdict could not be affirmed under a theory of assault by causing apprehension of imminent

harmful contact. State v. Bland, 71 Wn. App. at 355.³

Like Mr. Carrington in the Bland case, there was no evidence that the children in the present case had apprehension of imminent harm. Because the children were not, therefore, victims of assault, they cannot be unintended victims so as to support application of the doctrine of transferred intent, under the reasoning of Allen. Of course, unlike Allen, the present case involved a general verdict, but even if the case had been decided in a bench trial or by special interrogatories to a jury, the evidence does not support a finding that Kamal, Asha, or Ahmed perceived imminent harm from bullets coming at them, such as did the unintended “victims” in Allen. Even fully assuming arguendo that the children were upset -- no matter how substantial that upset might have been -- that fact proves nothing other than their distress caused by an event that had occurred. The children did not testify that they perceived imminent harm. As the State assessed the trial evidence in its concession of error -- though that concession to legal error

³The appellant in Bland apparently did not challenge the application of the doctrine of transferred intent to an assault offense not involving assault by actual battery. The case cited in support of application of the doctrine was a case involving actual battery. Bland, 71 Wn. App. at 355 (citing State v. Clinton, 25 Wn. App. 400, 403, 606 P.2d 1240 (applying transferred intent doctrine to find assault of victim where defendant swung metal pipe at victim's husband and

has now been withdrawn – there was, in this case, insufficient evidence that “the children were in apprehension and imminent fear of bodily injury at the time the shots were fired.” Brief of Respondent of 5/16/06, at p. 15.

If the case of Allen establishes a rule regarding application of the doctrine of transferred intent in cases of assault committed by causing apprehension of imminent harm, it is that such apprehension of harm is necessary to render the complainants “unintended victims” of assault for purposes of applying, or “transferring” the defendant’s assaultive intent to them, where the defendant’s conduct was done with the intent to cause apprehension. State v. Allen, at pp. *16-17. This only makes sense, since conviction for an offense always requires proof of every element of the offense. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 368 (1970). Thus, in an assault case, per Allen, there must be proof beyond a reasonable doubt that the defendant intended to cause apprehension of harm, and that, as a result, such apprehension was created in persons so as to qualify them as actual “victims.” See RCW 9A.36.021; State v.

accidentally hit victim), review denied, 93 Wn.2d 1026 (1980)).

Eastmond, 129 Wn.2d at 503-04 (elements of this assault are intent to cause apprehension of imminent harm and reasonable apprehension of such harm in the victim).

Finally, it must be noted that Mr. Elmi has argued in his Appellant's Opening Brief that the three common law definitions of assault create alternative means of committing the offense of assault. Appellant's Opening Brief, at pp. 31-40. The Supreme Court has granted review in a case for purposes of deciding this issue. See State v. Smith, 124 Wn. App. 417, 426-27, 102 P.3d 158 (2004), review granted, 154 Wn.2d 1020, 116 P.3d 399 (2005). That assignment of error, in addition to the assignment of error that the transferred intent instruction relieved the State of proving every element of the charged offenses, see Appellant's Opening Brief, at pp. 29-31, becomes all the more important if this Court rejects Mr. Elmi's arguments regarding application of the doctrine of transferred intent. Even if that doctrine properly applies in this case, there are no assurances that the jury used the same assaultive intent it may have found for purposes of the assault count involving Ms. Aden to find the defendant guilty of assault of the children. The intent that suffices for one form of common-law

assault cannot be different from the result that occurs – or else the combination of the two findings would not amount to an offense.

Thus a defendant's assault with intent to cause bodily injury, and the result of placing a person in reasonable apprehension of harm, would not amount to the crime of assault by causing apprehension of harm. State v. Eastmond, 129 Wn.2d at 503-04; see also Arizona v. Johnson, 205 Ariz. 413, 417-18, 72 P.3d 343 (2003) (jury instruction on transferred intent improperly allowed jury to convict the defendant of assault on bystander by combining his intent to actually batter the officer he struck with a gunshot with the bystander's apprehension of harm, which is the intent from one form of assault paired with the result from another form of assault) (interpreting transferred intent statute).

Therefore, even if Allen governs, and even if there had been evidence showing the children were actual "victims" of assault, there is no special verdict form in this case showing what particular intent and what "assaultive harm" were found to have been committed and occurred in the case of the children, thus this Court cannot assume the intent and harm found were matching so as to result in a complete offense.

(3). The Massachusetts case of *Melton* involved victims of whose presence the defendant was fully aware and each of whom the defendant subjectively intended to assault, and in addition, its discussion of transferring intent to unintended victims, offered in dicta, should be rejected. The case of *Commonwealth v. Melton*, 436 Mass. 291, 295, 763 N.E.2d 1092, 1096 (2002), involving four counts of assault, involved a defendant who shot his gun into a car that he was fully aware was occupied by at least four persons, and whom the court deemed to be subjectively intended victims of the defendant's assaultive conduct. *Commonwealth v. Melton*, 436 Mass. at 292-93.

For this reason, the *Melton* decision has no application to the issue presented in Mr. Elmi's case, which involves assault counts predicated on persons as to whose presence the defendant was unaware.

In addition, the *Melton* court's discussion in dicta regarding the application of the doctrine of transferred intent as an alternative theory of guilt contradicts Mr. Elmi's argument that transferred intent can only be applied to cases involving actual battery.

Alternatively, because the *Melton* court's approval of that

doctrine required, as did Allen, the existence of actual victims of assault, the doctrine does not apply to Mr. Elmi's case, wherein there was no testimony from the children that they apprehended imminent harm.

(i) Melton relied for its decision on the fact that the defendant knew of the presence of all the persons assaulted and subjectively intended to either batter all of them, or to cause all of them apprehension of imminent harm.

The defendant in Melton fired a gun into a car knowing that it was occupied by at least four persons. He had previously engaged in a fight with his rival gang enemy, Marcellus, after Marcellus pulled up in a Honda and Marcellus and "his [four] companions got out." Melton, 436 Mass. at 292. After the police broke up the fight, Marcellus and his group left in their car, and they dropped off one occupant at his home. Approximately twenty minutes later, Melton's Chrysler pulled alongside the Honda, and the defendant reached out the rear passenger side window and fired, shattering the window. Melton, 436 Mass. at 293. "None of the occupants of the vehicle was hit by the bullet. They were hit by fragments of broken glass." Melton, 436 Mass. at 293.

Melton was charged in the alternative with assault by

“attempted battery” or assault by “immediately threatened battery.” Melton, 436 Mass. at 294 (citing Commonwealth v. Gorassi, 432 Mass. 244, 247, 733 N.E.2d 106 (2000)). The jury returned verdicts of guilty specifying that the defendant was guilty of “attempted battery.” Melton, 436 Mass. at 294-95.

Although it is unclear why the concession needed to be made, Melton apparently conceded that the evidence was sufficient to establish the “immediately threatened battery” form of assault as to all four victims, because he intentionally engaged in menacing conduct that reasonably caused the victims to fear an imminent battery. Melton, 436 Mass. at 295. The appellate court noted that “[a] single shot in the direction of a group of people is intentionally menacing conduct that can cause each person reasonably to fear an imminent battery.” Melton, 436 Mass. at 295. This holding is entirely justifiable – the defendant stuck his hand out of the window and then fired a gun at his rival gang members, and fired. The court concluded the evidence at the trial below showed that Melton knew of all the persons presence, intended to put them all in apprehension of imminent harm, and that he did so.

The court also found sufficient evidence to support attempted battery of all four of the vehicle occupants. Melton had

argued that because it is physically impossible to hit four victims with a single shot, he could not have had the intent to batter four people. Melton, 436 Mass. at 295. The court rejected this argument, reasoning that “a person can intend things that are hopelessly unrealistic.” Melton, 436 Mass. at 295-96. The court also noted that the jury could infer that Melton intended to harm all the occupants, since they were all in a rival gang and had all just been involved in the earlier altercation, following which Melton apparently saw them all enter the car and drive away. Melton, 436 Mass. at 296.

The Melton case has no application to the facts in Mr. Elmi’s case. The defendant in Melton was obviously aware of the presence of all of the multiple persons as to whom he was convicted of assault. Melton, 436 Mass. at 292-94. There were facts upon which the jury could find that he subjectively intended to assault all of them, by trying to shoot all of them, or by putting them all in fear of imminent harm. Id. Mr. Elmi, in contrast, had no subjective intent to assault the three children who were, to his ignorance, present in Ms. Aden’s home. The only aspect of the Melton case that is relevant to the issues in this case is the court’s subsequent discussion, in dicta, of the concept of “transferred

intent.”

(ii) Melton's acceptance, in dicta, of the principle of transferred intent in cases of non-battery assault suffers from the same deficiencies argued above, or alternatively, it applies a requirement of the existence of “actual victims”, as did Allen, which are not present in this case.

In dicta, the Melton Court went on to discuss the “concept of ‘transferred intent.’” First, the court described the doctrine as follows: “The principle of transferred intent applies to satisfy the element of intent when a defendant harms both the intended victim and one or more additional but unintended victims.” Melton, 436 Mass. at 296. The court cited cases from other jurisdictions, all of which involved unintended or unknown victims who were subjected to actual harmful battery as a result of the defendant’s intent to batter a known or intended victim, including Washington’s case of State v. Wilson.⁴ Melton, 436 Mass. at 296-97.

⁴Melton, 436 Mass. at 296-97 (citing United States v. Sampol, 204 U.S. App. D.C. 349, 636 F.2d 621, 674 (D.C. Cir. 1980) (evidence sufficient to support two convictions of murder in the first degree where defendant killed two people, even though defendant only intended to kill one of them, noting that “there are even stronger grounds for applying the principle [of transferred intent] where the intended victim is killed by the same act that kills the unintended victim”); State v. Worlock, 117 N.J. 596, 616-617, 569 A.2d 1314 (1990) (same); State v. Hinton, 227 Conn. 301, 306-311, 630 A.2d 593 (1993) (transferred intent doctrine applicable to support three counts of murder even if defendant only intended to

However, the court continued on to state that the fact that the victims in the cited cases were actually struck or injured did not mean that the unintended victims must be struck or injured in order for the doctrine of transferred intent to apply. Melton, 436 Mass. at 298. Analyzing the case before it under the alternative theory of transferred intent, and therefore assuming for purposes of the analysis that Melton subjectively intended only to batter Marcellus, the court stated that Melton attempted to batter Marcellus, and all the other persons in the car "were aware of the shot, several of them were struck by shattered glass from the bullet piercing the rear window, and all suffered at least the same fear as the intended

kill one victim); State v. Fennell, 340 S.C. 266, 276, 531 S.E.2d 512 (2000) (where defendant shot and killed intended victim but one bullet struck and seriously injured an unintended victim, doctrine of transferred intent supported convictions of both murder of intended victim and assault and battery with intent to kill unintended victim); Ochoa v. State, 115 Nev. 194, 981 P.2d 1201, 1205 (Nev. 1999) (same); State v. Gillette, 102 N.M. 695, 705, 699 P.2d 626 (Ga. App. 1985) (defendant, who delivered poisoned drink to one intended victim, guilty of three counts of attempted murder when intended victim and two others consumed it); State v. Henley, 141 Ariz. 465, 467, 687 P.2d 1220 (1984) (transferred intent doctrine would support two counts of aggravated assault where single shot intended for one victim struck two persons); Mordica v. State, 618 So. 2d 301, 303 (Fla. Dist. Ct. App. 1993) (where defendant kicked fellow inmate and inadvertently kicked officer who was attempting to break up fight, defendant's convictions of two batteries upheld); State v. Livingston, 420 N.W.2d 223, 229 (Minn. Ct. App. 1988) (where defendant commanded his dog to bite intended victim and dog attacked two other persons as well, transferred intent applicable to support three counts of assault); and State v. Wilson, 125 Wn. 2d 212, 217-218, 883 P.2d 320 (1994) (where defendant shot at and missed both intended victims but struck and injured two unintended victims, he committed four assaults because he met statutory requirement that he act "with intent to inflict great bodily harm" and statute did not require that "the specific intent match a specific victim"))).

victim.” Melton, 436 Mass. at 299. Therefore, the court reasoned, they were all victims of the attempted battery, “even if the perpetrator's intent focused on only one of them.” Melton, 436 Mass. at 299.

This reasoning must be rejected. If the defendant subjectively intended to batter only Marcellus, then allowing him to be found guilty of attempted battery of all the other people his bullet failed to strike, under a theory of transferred intent, would result in allowing him to be found guilty of assault by attempted battery of every other person he failed to shoot, with a resulting unlimited number of victims and assault counts. The court equated this foregoing reasoning with application of the principle of transferred intent in cases of assault by causing apprehension of imminent battery, and in doing so exposed the weaknesses of application of the doctrine in both instances:

An attempted but unsuccessful battery is criminal not because it actually harms the victim -- indeed, the victim can be completely unaware of the attempt -- but rather because it imperils the victim. . . . The suggestion that they were not victims of any crime, when they all suffered the very peril that the crime of assault by means of a dangerous weapon is intended to address, is contrary to common sense. Similarly, it would be anomalous to hold that, had the defendant merely waved the gun in the direction of the Honda with a menacing gesture or remark, he would be guilty

of four assaults by means of a dangerous weapon (because his intentionally menacing conduct would have been directed at and instilled fear in four people), but that an actual shot at those same four people could only constitute a single assault. Rather, a person is a victim of assault if he is at risk of battery from the defendant's attempted battery on anyone, just as the person would be a victim of assault if he were placed in fear of battery from the defendant's intentionally threatened battery on anyone.

Melton, 436 Mass. at 299-300. The court's reasoning is less analysis than it is emotional appeal supported by untenable legal assertions. Placing four people in grave peril may well be "an offense," such as reckless endangerment. The question is whether it is assault by attempted battery. The opposing argument would not be that the court should limit the number of "convictions" to the number of victims the defendant intended to hit, and there would be no suggestion that these persons were not victims of "any" crime. The argument would be that the four persons other than the defendant were not victims of assault by attempted battery, because the defendant (in the court's hypothetical) only tried to shoot Marcellus, but did not try to shoot them.

Similarly, the court's reasoning does not accurately reflect Washington law. Placing a person "in peril" or actual danger is not an element of any of the three forms of common law assault that

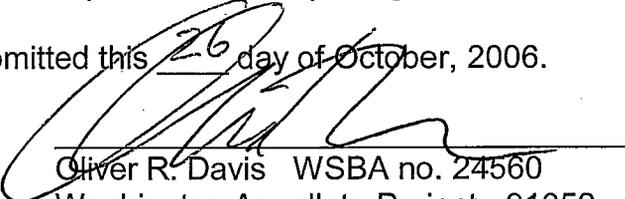
are a part of the assault statutes. See State v. Rivas, 97 Wn. App. 349, 352, 984 P.2d 432 (1999), review denied, 140 Wn.2d 1013, 5 P.3d 9 (2000).

The Melton Court's alternative, hypothetical-based "decision" under a theory of transferred intent makes sense, with regard to assault by causing apprehension of harm, only if it can be compared to the requirement in Allen that the named complainants all perceived imminent harm and thus were all "actual victims" of assault. The Melton court, in its previous discussion, appeared to interpret the facts of the case as showing that the occupants of the car did perceive imminent harm. Once again, however, the children named as "victims" did not perceive imminent harm. For this reason, neither Allen nor Melton provide support for Mr. Elmi's convictions for assault of the children in the present case.

C. CONCLUSION

Based on the foregoing, Mr. Elmi requests that this Court reverse his convictions as requested in the Opening Brief.

Respectfully submitted this 26 day of October, 2006.



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	NO. 56460-9-1
Respondent,)	
)	
v.)	
)	
ALI ELMI,)	
)	
Appellant.)	

CERTIFICATE OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 27TH DAY OF OCTOBER, 2006, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S SUPPLEMENTAL BRIEF** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 27TH DAY OF OCTOBER, 2006.

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