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Supreme Court No. \_\_\_\_\_  
COA No. 56460-9-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

ALI ELMi,

Appellant.

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FILED  
APPELLATE DIV. #1  
COURT OF APPEALS  
STATE OF WASHINGTON  
2007 JUL -2 PM 4:52

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

The Honorable Richard McDermott

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PETITION FOR REVIEW

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## **A. IDENTITY OF PETITIONER**

Mr. Elmi was the appellant in Court of Appeals No. 56460-9.

## **B. COURT OF APPEALS DECISION**

Mr. Elmi seeks review of the Court of Appeals decision of April 23, 2007 (reconsideration denied June 1, 2007), affirming his judgment and sentence. See Appendix A; Appendix B.

## **C. ISSUES PRESENTED ON REVIEW**

1. Whether there was sufficient evidence of first degree assault for counts 3, 4 and 5, where the defendant did not know the alleged victims were present in the house when he fired into it.

2. Whether the jury instructions on "transferred intent" and on the definition of assault relieved the jury of its obligation to find all of the elements of first degree assault as to counts 3, 4 and 5.

3. Whether the imposition of the firearm enhancements violated Mr. Elmi's double jeopardy protections.

## **D. STATEMENT OF THE CASE**

Mr. Elmi was convicted of attempted murder in the first degree of his estranged wife; assault in the first degree of his wife based on the same act; and three additional counts of assault in the first degree under a theory of "transferred intent," one count as

to each of three children who were, unbeknownst to Elmi, present in the house into which he fired several gunshots in an alleged attempt to kill Aden. CP 1, 11, 142, 221-30; 4/14/05RP at 51-52. The court merged the assault of the wife with the attempted murder, and sentenced Elmi to 699 months. CP 221-24, 227.

Mr. Elmi appealed. CP 219. The Court of Appeals rejected Mr. Elmi's arguments of insufficiency as to the attempted murder, concerning sufficiency and instructional error as to the assault counts as to the children, and his double jeopardy arguments. See Appendix A (decision), at pp. 1-13.

## **E. ARGUMENT**

This Court should accept review because the Court of Appeals decision is in conflict with cases from that Court and from the Supreme Court, and presents questions arising under the federal and state constitutions. RAP 13.4(b)(1), (2) and (3).

### **1. THERE WAS INSUFFICIENT EVIDENCE TO PROVE FIRST DEGREE ASSAULT AS TO THE COUNTS INVOLVING THE CHILDREN.**

**a. Criminal convictions must be supported by sufficient evidence.** In order to convict a defendant of a charged crime, the State bears the burden of producing evidence sufficient to prove

every element of the offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 363, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

A conviction unsupported by sufficient evidence violates a defendant's constitutional right to due process. U.S. Const. amend. 14;<sup>1</sup> Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979).

**b. The first degree assault statute cannot be interpreted to allow conviction for assault as to unknown persons who were not subjected to assault by actual battery as in State v. Wilson.** In order to convict Mr. Elmi of assault on counts 3, 4 and 5, the State had to prove, beyond a reasonable doubt, that, with the intent to inflict great bodily harm, he assaulted each of the children present in the house with a firearm. RCW 9A.36.011(1)(a); see CP 177. The jury was also instructed on the three forms of "assault" recognized in Washington: (1) actual battery; (2) attempted battery; and (3) an act done with intent to put another in "apprehension" of harm. CP 178. Finally, the jury was instructed that if a person assaults a particular individual with the intent to inflict great bodily harm and by mistake, inadvertence or indifference that assault with

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<sup>1</sup>The Fourteenth Amendment provides that "no person shall be deprived of life, liberty, or property without due process of law." U.S. Const. amend. 14.

a firearm took effect upon unintended individuals, the law provides that the intent to inflict great bodily harm with a firearm is transferred to the unintended individuals as well. CP 181.

This Court has allowed that a defendant may be found guilty of assault (in the form of actual battery) of “unintended victims” where he acts intentionally, and by his intentional act he mistakenly subjects a third person to battery. These were the circumstances in State v. Wilson, 125 Wn.2d 212, 213-14, 883 P.2d 320 (1994), in which the defendant fired a gun into the window of a bar, intending to shoot two persons with whom he had been arguing, but instead hit two different persons. Wilson was convicted by a jury of four counts of first degree assault, one count as to each of the four individuals. State v. Wilson, 125 Wn.2d at 214.

On initial review, the Court of Appeals ruled the trial court erred in “allowing proof of Wilson's intent to inflict great bodily harm on his intended victims to [also] support charges of assault in the first degree against the two unintended victims.” State v. Wilson, 125 Wn.2d at 214. However, the Supreme Court reversed, holding that conviction on the counts involving the two unintended victims was supported by the very language of the first degree assault statute, RCW 9A.36.011. Wilson, at 218-19. The Court stated:

[O]nce the intent to inflict great bodily harm is established, usually by proving that the defendant intended to inflict great bodily harm on a specific person, the *mens rea* is transferred under RCW 9A.36.011 to any unintended victim. . . . Hensley and Hurles . . . were the unintended victims of Wilson's intentional assault on Jones and Judd.

Wilson, 125 Wn.2d at 218-19. The Wilson Court's reading of the first degree assault statute makes sense in that case, which involved actual battery in which two "unintended victims" were subjected to harmful touching. Wilson, 125 Wn.2d at 215, 218-19.

In a case involving one or both of the other two forms of common law assault, however, the interpretation of the statute, to allow that conviction does not require that the intent match a particular victim, cannot hold true. See State v. Dunbar, 117 Wn.2d 587, 590, 817 P.2d 1360 (1991) (where a crime is defined in terms of causing a particular result, a defendant must have specifically intended to accomplish that criminal result) (citing W. LaFave & A. Scott, Criminal Law § 6.2(c), at 500 (2d ed. 1986)).

As the State agreed in its initial concession of error, nothing in Wilson or any other Washington case authorizes conviction for assault by attempted battery, or by causing apprehension, without the required mental state of intent to batter or to cause

apprehension in particular, known victims. Brief of Respondent, at pp. 13-19. If Mr. Elmi had actually struck the named complainants in counts 3, 4 and 5, that fact in combination with his intent to batter would place this case within the ambit of State v. Wilson. 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. Any construction of the assault statutes to allow conviction in the present case 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 person, which is required for assault by attempted battery (an offense which involves the failed effort to batter), 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.

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. 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").

**c. Even if intent can be transferred in cases involving non-battery assault – assault by causing apprehension of harm or by attempting, but failing to batter a person – *Wilson* imposed a requirement there be actual victims of assault to be paired with the defendant’s intent, even if intent need not match the victim.** The State of Washington initially conceded error in this case on the question of transferred intent and agreed that the convictions on the three assault counts must be reversed. Brief of Respondent, at pp. 13-19. Thereafter the Court of Appeals ordered the parties to address the unpublished case of State v. Allen, 2001 Wash. App. LEXIS 532 (2001) (Coleman, J., unpublished), and invited the State to withdraw its concession of error. State v. Elmi, COA No. 56460-9 (Order of Coleman, J., October 4, 2006). The parties submitted extensive briefing discussing this case. See Appellant’s Supplemental Brief, at pp. 1,5, 7-19, 24, 28; Supplemental Brief of Respondent, at p. 5; Appellant’s Supplemental Reply Brief, at pp.1-7. In the Court of

Appeals' opinion, without referring to the case by name, the Court reasoned consistent with Allen<sup>2</sup> that Wilson authorized that intent could be transferred in a case of assault committed by intentionally causing apprehension of harm, if there were actual "victims" of assault to whom intent could be transferred. Decision, at pp. 11-12. The Court concluded the children in Elmi's case "experienced apprehension of imminent bodily harm." Decision, at 12.

**d. There was no evidence that the children were "victims" of assault.** Even if the Court of Appeals was correct that, under Wilson, intent can be transferred in case of assault by means other than actual battery, this case contains no evidence that the children in counts 3, 4 and 5, by experiencing apprehension of imminent harm or otherwise, were "victims" of

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<sup>2</sup>The Court of Appeals ordered the parties to address the unpublished case of Allen, a case in which 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. Judge Coleman held that "once the intent to assault another is established, the *mens rea* is transferred under the statute to any unintended victim," and held that Sutterman and Debbie Sanders "were the unintended victims of Allen's intended assault on Phil Sanders." State v. Allen, at pp. \*14-15 (citing Wilson, 125 Wn.2d at 218). The decision in Allen indicates that for the Court, the dispositive fact was that the complainants in the case qualified as "unintended victims of Allen's intended assault on Phil Sanders" because they "both apprehended harm during the shooting" since they reacted to the gunshots by getting down on the floor after the first shot was fired but before the final shot hit the house – therefore they experienced apprehension of imminent injury. State v. Allen, at pp. \*16-17 (Emphasis added.).

assault – a requirement imposed by this Court in Wilson. Wilson, 125 Wn.2d at 218-19 (holding that the defendant’s “*mens rea* is transferred under RCW 9A.36.011 to any unintended victim”) (Emphasis added.). 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.

Of course, the children in this case did not testify. According to the trial testimony, the wife (Ms. Aden) and the children were in the living room. 4/14/05RP at 52. 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. 4/14/05RP at 57-58. 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. The 911 tape, which was identified and admitted as State's exhibit 6, merely indicates that the children were upset at that time, including by having fear for their mother's safety. CP 234-40 (State's exhibit 6). Thus, even if the children were upset by what had occurred, or upset about danger to their mother, there was no evidence that they perceived imminent harm to themselves, only that they reacted with upset after the occurrence. Therefore they are not victims of assault, and therefore, per Wilson, the doctrine of transferred intent cannot apply and the evidence is insufficient to convict on those counts.

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. The bullet missed him and went through the window of a nearby house, spraying 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. 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, 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.<sup>3</sup> See also State v. Nicholson, 119 Wn. App. 855, 84 P.3d 877 (2003) (trial court erred in permitting State to argue that apprehension element of assault was met if victim's mother, rather than victim, was placed in apprehension), overruled in part on other grounds by State v. Smith, 159 Wn.2d 778 (2007).

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<sup>3</sup>The 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 (defendant swung metal pipe at victim's husband and accidentally hit victim), review denied, 93 Wn.2d 1026 (1980)).

Here, 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 Wilson. Of course, 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 the children perceived imminent harm from bullets coming at them. Even 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 original concession of error -- though the concession to legal error was later 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, at p. 15. Even if Wilson applies to this case, the evidence of assault was insufficient, because of the absence of evidence that the children were victims of assault.

**2. THE “TRANSFERRED INTENT” INSTRUCTION AND THE INSTRUCTION DEFINING THE FORMS OF ASSAULT RELIEVED THE STATE OF ITS BURDEN OF PROVING EVERY ELEMENT OF THE THREE ASSAULT COUNTS INVOLVING THE CHILDREN.**

In this case, jury instruction 20 on “transferred intent” erroneously instructed the jury that it could convict the defendant without finding that he intended to assault the children. CP 181. Mr. Elmi has argued that this instruction allowed conviction in a case not involving actual battery, as in Wilson. But Mr. Elmi also argued that the three common law definitions of assault created alternative means of committing the offense of assault. Appellant’s Opening Brief, at pp. 31-40. 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. See Arizona v. Johnson, 205 Ariz. 413, 417-18, 72 P.3d 343 (2003) (jury instruction on transferred intent improperly allowed jury to convict defendant of assault on bystander by combining his intent to 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 Wilson applies to non-battery assaults, and even if there had been evidence showing the children apprehended harm, 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.

This is constitutional error under the Fourteenth Amendment’s due process clause. Neder v. United States, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); State v. Brown, 147 Wn.2d 330, 340, 58 P.3d. 889 (2002). Under

federal unanimity law, although a State Legislature may define different acts or mental states as alternative means of committing an offense, when the alternative means are so disparate as to constitute separate offenses, the Fourteenth Amendment right to due process requires jury unanimity. Schad v. Arizona, 501 U.S. 624, 632-33, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991); U.S. Const., amend. 14. Furthermore, although this Court's recent decision in State v. Smith, 159 Wn.2d 778, 155 P.3d 873 (2007), held that the common law definitions of assault do not create alternative means of committing the crime of assault, the transferred intent instructions in the present case, combined with the instruction defining all three forms of assault, relieved the State of its burden of proof as to first degree assault, and leaves this Court with no way of knowing whether the jury may have relied on a form of common law assault as to which Wilson's transferred intent reasoning cannot apply, as argued supra. Indeed, the jury may well have relied on a theory of assault by attempted battery, given that this was the State's theory of the case, and of all three forms of assault, that form is the one as to which it is least tenable to

decide that a defendant may be found guilty of assaulting wholly unknown victims.<sup>4</sup>

### **3. THE FIREARM ENHANCEMENTS VIOLATED DOUBLE JEOPARDY PROTECTIONS.**

The double jeopardy clause includes protection against multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717, 726, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), overruled on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989); U.S. Const. amend. 5; Wash. Const. art. I, § 9. A fact that exposes a person to increased punishment is an element of the offense punished. Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 2536, 159 L.Ed.2d 403 (2004). Blakely's reasoning leads inescapably to the conclusion that crimes involving firearm elements, such as those charged in the present case, when further "enhanced" by firearm penalties, violate double jeopardy because such crimes include double punishment for the act of being armed with a firearm. The addition of a firearm enhancement to each of the convictions

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<sup>4</sup>The Court of Appeals concluded that persons who were in a "zone of danger" created by the defendant's conduct could be persons as to whom the defendant would be criminally liable for assault by attempted battery. Decision, at p. 10 and n. 6. But the act of placing a person in a zone of danger is not assault, it is reckless endangerment. See RCW 9A.36.050(1).

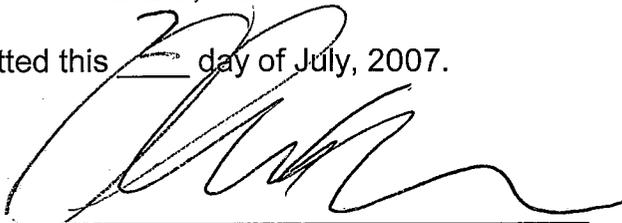
placed him twice in jeopardy for the use of a gun and violated the state and federal constitutions.

In addition, the imposition of multiple deadly weapon enhancements for possession of a single weapon violates double jeopardy protections. When a single act yields multiple punishments, double jeopardy principals are offended unless the Legislature has expressed its intent for such a result. Whalen v. United States, 445 U.S. 684, 689, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980); U.S. Const. amend. 5; Wash. Const. art. I, § 9. But nowhere in its language does the firearm enhancement statute require the imposition of a separate enhancement for each crime where a single act of firearm possession has occurred. At the very least, the rule of lenity requires the conclusion that the Legislature did not intend the stacking of enhancements for a single weapon. See Whalen, 445 U.S. at 694.

**F. CONCLUSION**

Mr. Elmi respectfully requests that this Court grant review and reverse his convictions on counts 3, 4 and 5.

Respectfully submitted this 2 day of July, 2007.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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

DIVISION ONE

Published Opinion

FILED: April 23, 2007

**RECEIVED**  
APR 23 2007  
Washington Appellate Project

**COLEMAN, J.** — Moments after Fadumo Aden looked out a living room window and saw her estranged husband, Ali Elmi, standing outside, Elmi fired three bullets into the living room, narrowly missing Aden and three young children. Elmi appeals his conviction for the attempted murder of Aden, arguing that there was insufficient evidence of intent to kill and premeditation. He also appeals his convictions for assaulting the children, arguing that the State failed to prove the requisite statutory and common law intent for those assaults and that the convictions violate his right to a unanimous verdict.

Because there was sufficient evidence of intent to kill and premeditation, we affirm Elmi's conviction for attempted murder. And because Elmi's intent toward Aden

transferred to the children either by operation of the assault statute or the doctrine of transferred intent, we affirm his convictions for the assaults against the children. The conviction for assaulting Aden, however, violates double jeopardy and must be vacated.

### FACTS

Fadumo Aden and Ali Elmi separated during the Spring of 2002. On the afternoon of May 18, 2002, they had a "very heated" argument over the phone. Aden testified that Elmi called her a "bitch" and a "slut" during the argument and that she abruptly hung up on him.<sup>1</sup>

After the argument, Aden drove to her mother's house. Around 10 p.m., Aden and her three-year-old son, three-year-old brother, and five-year-old sister were watching television in her mother's living room when she heard arguing outside. She briefly parted the curtains and saw several people trying to hold Elmi back. Moments later, she heard gunshots and the sound of breaking glass. She screamed and moved the children to the kitchen, where she called 911.

Police later found three bullet holes in the living room window. They also found bullet holes in the curtains, the television screen, and a kitchen cabinet. Four shell casings were found outside the house within five to ten feet of the window. Although Aden testified that she did not see the faces of the people in the yard, she told the 911 operator that Elmi was the person being restrained in the yard just before the shooting.

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<sup>1</sup> There were two trials in this case. At the second, Aden could not recall whether Elmi threatened her during the argument. She also could not recall whether Elmi called and argued with her a second time prior to the shooting. She conceded, however, that she testified to receiving such a call in Elmi's first trial. The testimony from the first trial was admitted solely for purposes of assessing Aden's credibility.

The 911 tape, which was played for the jury, begins with the sound of children screaming and an hysterical Aden pleading for help. Aden repeatedly tells the operator that shots have been fired and that windows have been broken. Aden says that she does not know whether Elmi is still outside, that she has locked the door, and that she does not want to go near the window. There are intermittent sounds of distress from the children throughout the recording. At one point, a child can be heard saying, "He's going to kill my mommy."

Based on these facts and other evidence linking Elmi to the gun used in the shooting, the State charged him with attempted first degree murder and four counts of first degree assault with a deadly weapon—one count for assaulting Aden and three counts for assaulting the children.

The children did not testify at trial. When asked how the children reacted to the shooting, Aden testified:

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.

.....  
It was, I think, a little fast and I 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.

Report of Proceedings (April 14, 2005) at 60. Aden did not specify at what point she removed the children from the room, but testified that it may have been during, rather than after, the shooting.

The court instructed the jury regarding the three common law forms of assault—battery, attempted battery, and placing another in reasonable apprehension of harm. The court also instructed the jury on transferred intent. The jury convicted Elmi as

charged. The court merged the convictions for the attempted murder and assault of Aden but did not vacate either conviction.

### ANALYSIS

#### I.

Elmi first contends that his attempted murder conviction is not supported by sufficient evidence. Evidence is sufficient if, after reviewing it in the light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A sufficiency claim admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. Salinas, 119 Wn.2d at 201. Intent may be inferred from conduct, State v. Varga, 151 Wn.2d 179, 201, 86 P.3d 139 (2004), and this court must defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

The crime of attempted murder requires specific intent to cause the death of another person. State v. Dunbar, 117 Wn.2d 587, 590, 817 P.2d 1360 (1991). Elmi asserts there was insufficient evidence for the jury to find that he intended to kill Aden. He argues that “[w]ithout evidence of some unusually serious prior altercation or a threat to kill, [there] was insufficient evidence of intent to kill [Aden.]” Brief of Appellant, at 17.

But it is not necessary for the State to show that Elmi verbalized or acted out his intent beforehand. See State v. Gallo, 20 Wn. App. 717, 729, 582 P.2d 558 (1978). Rather, intent to kill may be inferred from all the circumstances surrounding the event.

Gallo, 20 Wn. App. at 729. Proof that a defendant fired a weapon at a victim is a sufficient basis for finding an intent to kill. State v. Hoffman, 116 Wn.2d 51, 84–85, 804 P.2d 577 (1991) (“Proof that a defendant fired a weapon at a victim is, of course, sufficient to justify a finding of intent to kill.”). Viewed in a light most favorable to the State, the location and number of the bullet holes, the timing of the shots in relation to Aden’s appearance at the window, the proximity of the shell casings to the living room window, and the heated argument earlier in the day strongly support an inference of intent to kill.

Elmi also argues that there was insufficient evidence of premeditation. This argument is meritless. Premeditation is “the deliberate formation of and reflection upon the intent to take a human life.” State v. Robtoy, 98 Wn.2d 30, 43, 653 P.2d 284 (1982). It involves some degree of thinking beforehand and “weighing or reasoning for a period of time, however short.” State v. Ollens, 107 Wn.2d 848, 850, 733 P.2d 984 (1987) (quoting State v. Brooks, 97 Wn.2d 873, 876, 651 P.2d 217 (1982)). While premeditation cannot be inferred from intent to kill, State v. Commodore, 38 Wn. App. 244, 247, 684 P.2d 1364 (1984), it can be inferred from circumstantial evidence, including evidence of motive, procurement of a weapon, stealth, and the method of killing. State v. Gentry, 125 Wn.2d 570, 598–99, 888 P.2d 1105 (1995); State v. Ortiz, 119 Wn.2d 294, 312, 831 P.2d 1060 (1992). In this case, the protection order, the heated argument, the transportation of a weapon to the scene, the evidence of people attempting to restrain the shooter, and the number of shots provide sufficient evidence for a rational trier of fact to find premeditation beyond a reasonable doubt.

II.

Elmi next contends that instructing the jury on transferred intent improperly relieved the State of its burden of proving certain elements of the first degree assaults against the children.<sup>2</sup> We disagree.

To prove the assaults against the children, the State had to prove both the statutory mens rea of intent to inflict great bodily harm and the mental state for the applicable common law means of committing assault—intent to inflict bodily injury or intent to create apprehension of harm.<sup>3</sup> Because there was no evidence that Elmi knew the children were in the living room with Aden or that he intended to harm them, the State sought to satisfy the intent elements for the assaults against the children via transferred intent. Whether and how intent could be transferred in this case is largely controlled by State v. Wilson, 125 Wn.2d 212, 218, 883 P.2d 320 (1994).

In Wilson, the defendant fired three bullets through a tavern window. Two of the bullets hit unintended victims and resulted in convictions for first degree assault. The issue before the Wilson court was whether, under the first degree assault statute, “an intent to inflict great bodily harm upon an intended victim transfers to an unintended victim.” Wilson, 125 Wn.2d at 216. The court held that transferred intent is unnecessary when a statute does not require that intent match a specific victim. When intent must match a specific victim, the doctrine of transferred intent may transfer intent

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<sup>2</sup> Although Elmi did not object to the transferred intent instruction at the second trial, the State does not contest his claim that the issue is one of constitutional magnitude that can be raised for the first time on appeal.

<sup>3</sup> There was no battery in this case; therefore, only the attempted battery and reasonable apprehension of harm forms of assault are at issue.

56460-9 -1/7

from intended to unintended victims. Wilson, 125 Wn.2d at 219. Noting that the first degree assault statute requires specific intent to inflict great bodily harm but does not require that such intent match a specific victim, the Wilson court concluded that Wilson's intent toward his intended victim transferred to his unintended victims by operation of the statute. Although the court did not expressly address the statute's effect on the common law layer of intent, it implicitly did so by stating, "Reading the various assault statutes, in combination with the common law definitions for assault, we are persuaded that Wilson assaulted [the unintended victims] when . . . [he] discharged bullets from a firearm into the [unintended victims.]" Wilson, 125 Wn.2d at 218 (emphasis added).<sup>4</sup>

Applying Wilson here, the statutory intent for Elmi's assault against Aden, i.e., intent to inflict great bodily harm, did not have to match a specific victim; therefore, proof of Elmi's intent as to Aden satisfied the statutory intent element for the assaults against Aden and the children.

The same is true of the two applicable common law mental states. The mental state for the reasonable apprehension form of assault is intent to create apprehension of harm. The instruction defining the reasonable apprehension form of assault stated:

An assault is also an act 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.

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<sup>4</sup> It is technically incorrect to say that the statute "transfers" intent; rather, the statute simply allows prosecution for intended and unintended victims. For simplicity's sake, we refer to the statutory mechanism as a statutory "transfer" of intent.

Instruction 17 (emphasis added). This form of assault does not require that the intended victim and the person who suffered the assault be the same person. Because Elmi's common law intent did not have to match a specific victim, his intent to cause Aden apprehension of harm automatically transferred to the assaults against the children.<sup>5</sup> Therefore, it was unnecessary for the jury to resort to the doctrine of transferred intent as to that form of assault.

We reach the same conclusion regarding the attempted battery form of assault.

Instruction 17 defined that form of assault as follows:

An assault is also an act done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

.....

Nothing in this definition requires that the intended victim and the actual victim be the same person. We see no reason why Wilson's reasoning and holding as to first degree assault committed by the battery form of assault would not apply equally to first degree assaults committed by attempted battery.

But even if we were to conclude otherwise, we would still affirm based on the doctrine of transferred intent. As noted above, that doctrine applies when intent must match a specific victim. Wilson, 125 Wn.2d at 219. Elmi argues that the doctrine should not apply when unintended victims suffer no injury or the defendant is unaware of their presence. We disagree and instead concur with the Massachusetts Supreme

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<sup>5</sup> The authorities Elmi cites merely hold that the attempted battery and reasonable apprehension forms of assault require specific intent; they do not hold that the specific intent must match a specific victim. See State v. Byrd, 125 Wn.2d 707, 887

Court's reasoning in Commonwealth v. Melton, 436 Mass. 291, 763 N.E.2d 1092 (2002).

We recognize that, in most of the cases cited above, the unintended victims were actually struck, injured, or killed by the defendant. That fact, however, has nothing to do with intent or with transferred intent. It merely affects whether the crime is one of assault and battery or only assault. . . .

Beyond the metaphysics of transferred intent, we note that treating the defendant's actions as four assaults by means of a dangerous weapon is consistent with the purposes underlying the common law of assault. 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 conduct here (a shot into a car full of people, fired at point blank range from a passing vehicle traveling at high speed) placed four people in equally grave peril. Limiting the number of convictions to the precise number of victims the defendant intended to hit ignores the additional persons whose lives were placed at risk by the defendant's attempt to batter his intended 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.

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. The peril and the 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, 436 Mass. at 298-300 (footnote omitted).

We also reject Elmi's argument that transferred intent should apply only if the defendant was aware of the unintended victims' presence. Courts in other jurisdictions have generally rejected such a limitation, particularly where the defendant fired a gun into a place where unintended victims were likely to be present. See, e.g., Culler v. State, 277 Ga. 717, 720, 594 S.E.2d 631 (2004):

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P.2d 396 (1995); State v. Daniels, 87 Wn. App. 149, 940 P.2d 690 (1997); State v. Austin, 59 Wn. App. 186, 796 P.2d 746 (1990).

(appellants intentionally fired bullets into a house occupied by three people. . . . When an unintended victim . . . is subjected to harm due to an unlawful act intentionally aimed at someone else . . . , the law prevents the actor from taking advantage of his own misdirected wrongful conduct and transfers the original intent from the one against whom it was intended to the one who suffered harm. Accordingly, it is of no import that appellants were unaware that [the victim] was in the home.)

(Footnotes omitted.) State v. Hough, 585 N.W.2d 393, 396–97 (Minn. 1998):

(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 the assailant 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.)

State v. Mullins, 76 Ohio App. 3d 633, 602 N.E.2d 769 (1992) (“the proximity of the victim and the knowledge of the perpetrator about the ultimate victim are immaterial”);

State v. Carter, 84 Conn. App. 263, 268–69, 853 A.2d 565 (2004) (agreeing with Mullins).<sup>6</sup> We see no basis in logic or law for limiting transferred intent in the manner Elmi suggests.

Elmi also argues that “construction of the assault statutes to allow [transferred intent] violates the rule of lenity[.]” Supplemental Brief of Appellant, at 5. The rule of lenity could potentially apply to the analysis in Wilson since it was based on statutory construction and a “literal” reading of the statute. But this court is bound by Wilson; therefore, Elmi’s lenity argument is more properly made to the Supreme Court.

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<sup>6</sup> Elmi’s concern regarding limitless liability overlooks the fact that courts can restrict the reach of transferred intent by limiting unintended victims to those in a zone of danger or confined space, such as a car or home.

Furthermore, even if the rule of lenity led to a conclusion that the statutory and common law intents had to match a specific victim, that would only mean that intent could not transfer by operation of the statute. Intent could still be transferred via the doctrine of transferred intent .

### III.

Elmi contends that his convictions for assaulting the children are not supported by sufficient evidence because the State failed to prove the common law elements of the reasonable apprehension and attempted battery forms of assault. The State initially conceded that point but has since withdrawn its concession. We conclude the evidence was sufficient for both forms of assault.

As to the reasonable apprehension form of assault, the State had to prove that, with specific intent to create an apprehension of imminent harm, Elmi caused the children to experience apprehension of imminent harm. Specific intent "can be inferred as a logical probability from all the facts and circumstances." Wilson, 125 Wn.2d at 217. While there was no direct evidence that Elmi intended to frighten Aden, there was circumstantial evidence from which the jury could have concluded as a matter of logical probability that Elmi intended all of the likely results of firing a gun at her, including putting her in apprehension of harm. As discussed above, that intent transferred by statute to the assaults against the children.

The evidence was also sufficient for a jury to conclude that the children were put in reasonable apprehension of imminent bodily harm. It is undisputed that the children were watching television in the living room when multiple bullets came through the living room window. One of those bullets hit the television screen. Aden then screamed and

ushered the children to the kitchen for their protection. Those acts clearly signaled to the children that they were in physical danger. Indeed, the 911 tape begins with the sound of children screaming. As the recording progresses, Aden hysterically and repeatedly states that shots have been fired and makes it clear that the shooter may still be outside. The children continue, intermittently, to make sounds of distress. The tape thus supports inferences that the children were either in apprehension of imminent bodily harm when they first entered the kitchen or developed such apprehension while listening to their mother's conversation with the 911 operator.

To prove an assault by attempted battery, the State had to prove that Elmi "inten[ded] to inflict bodily injury upon another." Instruction 17. The verdicts on the attempted murder and assault against Aden demonstrate that the jury found the common law mental state for an attempted battery, i.e., that Elmi intended to inflict bodily injury on Aden. That intent transferred to the assaults against the children.

In short, we conclude that both of the applicable forms of common law assault were supported by sufficient evidence.<sup>7</sup>

#### IV.

Elmi next argues, and the State concedes, that his convictions for the attempted murder and assault of Aden violate double jeopardy. Although the trial court found a double jeopardy violation, it did not vacate the assault conviction; instead, the court simply declined to impose punishment on that count. The parties agree that the court

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<sup>7</sup> Given our conclusion and given the State Supreme Court's recent decision that the common law forms of assault are not alternative means of committing statutory assault, State v. Smith, No. 76433-6 (Wash. Mar. 15, 2007), Elmi's unanimity argument fails.

was required to vacate the lesser of the two offenses, i.e., the assault count involving Aden. We concur and direct the court on remand to vacate the assault conviction.

State v. Weber, 127 Wn. App. 879, 884–88, 112 P.3d 1287 (2005), affirmed, 159 Wn.2d 252, 149 P.3d 646 (2006).

V.

Elmi argues that adding a sentence enhancement for use of a firearm in an assault with a firearm violates double jeopardy. He also contends that multiple firearm enhancements imposed for use of a single firearm violate double jeopardy. These arguments are controlled by our decisions in State v. Nguyen, 134 Wn. App. 863, 142 P.3d 117 (2006) and State v. Husted, 118 Wn. App. 92, 95, 74 P.3d 672 (2003).

Remanded for proceedings consistent with this opinion.

Columan, J

WE CONCUR:

Schindler, ACT      Grosse, J



RICHARD D. JOHNSON,  
Court Administrator/Clerk

*The Court of Appeals  
of the  
State of Washington  
Seattle  
98101-4170*

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CASE #: 56460-9-1  
State of Washington, Respondent v. Ali Elmi, Appellant

Counsel:

Enclosed please find a copy of the Order Denying Motion for Reconsideration entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

For counsel's information, the Supreme Court has determined that a filing fee of \$200.00 will be required in that court.

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

LAM

Enclosure

c: The Hon. Richard F. McDermott

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 v. )  
 )  
 ALI ELMI, )  
 )  
 Appellant. )

NO. 56460-9-1  
DIVISION ONE

ORDER DENYING MOTION  
FOR RECONSIDERATION.

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The appellant, having made a motion for reconsideration, and the panel having determined that the motion should be denied; now, therefore, it is hereby ORDERED that the motion for reconsideration is denied.

Dated this 1<sup>st</sup> day of June 2007.

Colleen J  
Judge

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STATE OF WASHINGTON  
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**DECLARATION OF SERVICE**

Today, I deposited in the mail of the United States of America a properly stamped and addressed envelope directed to each attorney/party of record for  respondent: Lee Davis Yates - King County Prosecuting Attorney,  appellant and/or  other party, containing a copy of the document filed under cause no. **56460-9-I** to which this declaration is affixed/attached.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

  
MARIA ARRANZA RILEY, Legal Assistant  
Washington Appellate Project

Date: July 2, 2007

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