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SUPREME COURT
STATE OF WASHINGTON

NO. 80380-3 2008 APR 11 2-53

BY RONALD R. CARPENTER

CLERK

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALI ELMI,

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

LEE D. YATES
Senior Deputy Prosecuting Attorney
Attorney for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUE PRESENTED

Ali Elmi fired multiple shots through the plate glass window of the living room where his wife, her three-year-old son, and her three-year-old brother and five-year-old sister were all located. They had been watching television when Elmi fired a volley of shots into the living room, shattering the glass in the window and exploding the TV screen.

Elmi was convicted of the attempted premeditated murder of his wife, and three counts of assault in the first degree for the young children. May Elmi's intent to inflict great bodily harm upon his wife be transferred to the three child victims? Did Elmi assault the child victims?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Ali Elmi was convicted in King County Superior Court of attempted murder in the first degree (Count I) and assault in the first degree (Count II) for shooting at and trying to kill his estranged wife, Fadumo Aden. Elmi was also convicted in Counts III, IV and V of first degree assault against three young children, Kamal Nur, Asha Abdula, and Ahmed Abdula. Elmi was also convicted in

Count VI of Domestic Violence Misdemeanor Violation of a Court Order. CP 142-45. The Court of Appeals, Division I, affirmed Elmi's convictions in a published opinion, although the Assault in the First Degree conviction against Fadumo Aden in Count II was vacated on double jeopardy grounds. State v. Elmi, 138 Wn. App. 306, 156 P.3d 281 (2007). This Court granted review, limited to the transferred intent issue pertaining to the three first degree assault convictions involving the young children.

2. SUBSTANTIVE FACTS

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

in the curtains, the TV cabinet, and a kitchen cabinet. 17RP 139-42. Fortuitously, neither Aden nor the children were struck by Elmi's shots.

A more detailed recitation of the facts is contained in the State's brief filed in the Court of Appeals and in the opinion of the Court of Appeals.

C. ARGUMENT

1. THE DOCTRINE OF TRANSFERRED INTENT ESTABLISHES THAT THE CHILD VICTIMS WERE ASSAULTED.

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

There is also support in Washington law for the proposition that a defendant may be convicted of assaulting persons who are

not injured, but who are within close proximity of the person the defendant is trying to injure or kill. Thus, Elmi assaulted the children whom he directly endangered by his actions. Elmi should not receive a windfall merely because, fortuitously, none of the three children was struck by the volley of bullets he unleashed into the house.

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

Salamanca, at 825-26.

Like Salamanca, Elmi fired multiple shots into a confined space occupied by numerous individuals. While the young children were not hit, Elmi certainly caused fear, apprehension and terror among all the occupants in the room. On the 911 tape one hears

children screaming and a hysterical Fadumo Aden pleading for help. State's Ex. 6.

There is no requirement under Washington law that the shooter must be aware of the precise number of people he is shooting at, as long as there is reason to believe that the area he is directing his fire toward is occupied. For instance, if the victim's car in Salamanca had had blacked-out windows and the shooter had fired the same number of shots into the vehicle, Salamanca and his accomplice would still be guilty of multiple counts of assault, even though they had no way of determining exactly how many people were inside the car. Even if some of the occupants had been sleeping in the car, they would be victims of an assault even if the bullets missed them and they only woke up because of the shots. Like Salamanca and his accomplice, Elmi assaulted all of the occupants in the room when he repeatedly fired his gun as he attempted to kill Fadumo Aden. Elmi is guilty of first degree assault even though his bullets missed the children.

In State v. Bland, 71 Wn. App. 345, 860 P.2d 1046 (1993), the defendant fired at a car, missed, and struck the window of a nearby house, shattering glass on a person sleeping inside. Division I of the Court of Appeals held that a second degree assault

conviction could not be sustained under a transferred intent theory because the sleeping person in the home had not experienced fear and apprehension *before* the bullet entered his window. Bland, 71 Wn. App. at 355. In essence, this is Elmi's argument on appeal. He asserts that because there was no proof that the children were afraid until after the shooting, there was no assault because the fear and apprehension element required for common law assault could not be proved.¹

Bland is factually distinguishable. In Bland, there was but a single bullet that missed the sleeping individual in another house. Here, Elmi fired numerous shots into the living room, several of which penetrated the window, shattering the TV screen that the children were watching, and several bullets lodged inside the room. It can be inferred, as the Court of Appeals found, that Fadumo Aden and the children must have been terrified *during* the time the multiple gunshots were fired. Elmi, 138 Wn. App. at 320.

¹ There are three ways to commit an assault in Washington: (1) an unlawful touching with criminal intent (actual battery); (2) an attempt, with unlawful force, to inflict bodily injury upon another (attempted battery); and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting that harm (common law assault). State v. Walden, 67 Wn. App. 891, 893-94, 841 P.2d 81 (1992).

There was sufficient evidence to show that Elmi assaulted the three children. Elmi obviously intended, at a minimum, to create fear and apprehension among anyone present in the living room. Elmi's intent to assault was transferred from Fadumo Aden to the children. Thus, Elmi committed a common law assault against the children. He also committed an attempted battery against the children. His attempt to batter Fadumo Aden was transferred to the children. The trier of fact could reasonably find that the young children were afraid during the shooting, and that Elmi committed an attempted battery against everyone inside the living room. The elements required for assault in the first degree were thus satisfied, even though no actual battery or injury occurred.

Other jurisdictions have applied the doctrine of transferred intent to uphold convictions based on non-injured victims in assault and murder cases. In Short v. Oklahoma, 980 P.2d 1081 (Okla. Crim. App. 1999), the defendant was sentenced to death for the murder of an unintended target and also convicted of five counts of attempted murder. Short had thrown an explosive device through the patio door of a home where his estranged girlfriend was present. The residence was also occupied by two other adults and

two children. One of the adults was burned by the explosive, but the other adults and the children were able to escape the apartment unharmed. Unfortunately, fire spread quickly and killed a man living in an apartment beneath that of the girlfriend. Short was convicted not only of the murder of the man living in the apartment below, but of attempting to kill the adults and children in the upstairs apartment.

The Oklahoma Court of Appeals held that when Short threw the firebomb into the apartment, believing that he would cause the death of one or more of the inhabitants, his intent to kill was transferred to all of the victims, including those who escaped injury and who Short may not have even known were present. Short, 980 P.2d at 1098. The court applied the doctrine of transferred intent to uphold the convictions involving the uninjured victims. The court approved of an instruction to the jury stating that if Short intended to kill any one of the five victims, the element of intent was satisfied even though he did not intend to kill the other individuals. Id.

In State v. Hough, 585 N.W.2d 393 (Minn. 1998), the Supreme Court of Minnesota upheld multiple convictions of assault with a dangerous weapon against uninjured victims, even though the victims may not have been aware that a crime was occurring.

Hough and three friends set out to "shake up the community" in Barnsville, Minnesota, by firing shots into the home of the high school principal named Staska. Hough rolled down the passenger side window and fired seven rifle shots into Staska's home, then sped away. The bullets pierced the walls of the home. Staska and his wife were in their bedroom when they heard the shots, and their four children were sleeping in a nearby bedroom. Three bullets entered the bedroom of the children, one of them inches from a child's head. Hough was convicted of six counts of assault with a dangerous weapon, one for each member of Staska's family.

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

In analyzing whether a victim had to be aware that he was being assaulted, the Supreme Court of Minnesota stated:

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

When an assailant fires numerous shots from a semiautomatic weapon into a home, it may be inferred that they assume that it intends to cause fear of immediate bodily harm or death to those within the home. As the trial court noted, it was a natural and probable consequence that Hough's actions would endanger people other than Mr. Staska. Such intentional behavior is not excused simply because Hough claims he did not know others were present in the home or because others within the home were not immediately aware of the dangerous act.

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

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

In Commonwealth v. Melton, 436 Mass. 291, 763 N.E.2d 1092 (2002), the defendant was convicted of four counts of assault with a deadly weapon when he fired a single shot into a vehicle occupied by four people. The Supreme Court of Massachusetts rejected a claim that Melton could only be guilty of one count because he could only have injured one person with a single bullet. Even though nobody was injured during the shooting, Melton was held responsible for assaulting each person in the car based upon transferred intent. Melton, 763 N.E.2d at 1098-99. All four victims were imperiled by the shot, and all suffered the same fear as the intended victim. The court stated:

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

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

In State v. Gillette, 102 N.M. 695, 699 P.2d 626 (1985), the defendant tried to poison the mother of the children that he had abused. The poison, which the defendant put in a Dr. Pepper, was tasted by two other people, neither of whom suffered any injury. In upholding the defendant's conviction for attempted murder with

regard to the unintended, uninjured victims, the New Mexico Court of Appeals applied a transferred intent analysis:

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

Gillette, 699 P.2d at 705.

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

assaulting people around the intended murder victim. Bland, 48 P.3d at 1118-19.

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

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

The children in Elmi's case were assaulted with a deadly weapon. Elmi's intent to kill or to inflict great bodily injury upon Fadumo Aden was transferred to the children. Viewing the evidence in the light most favorable to the State, a reasonable jury could have found that the children were fearful during the time the

multiple shots were being fired. Furthermore, even if there was no fear and apprehension by the children until after the shooting stopped, Elmi is still guilty of an attempted battery against the children. Elmi intentionally attempted battery against Fadumo Aden, and that intent is transferred to the child victims. Under the circumstances of Elmi's case, an assault against the children occurred whether or not the children suffered any physical injury.

2. THE COURT OF APPEALS OPINION SHOULD BE AFFIRMED.

In the Court of Appeals' opinion, Judge Coleman correctly analyzed the transferred intent issue, and properly held that there was sufficient evidence to support the first degree assault charges involving the child victims. The Court of Appeals found that the first degree assault statute, RCW 9A.36.010, does not require that the intent to inflict great bodily harm be directed at a specific victim. Elmi's specific intent to inflict great bodily was transferred from Aden to the children; thus, there was an attempted battery against the children. Elmi, 138 Wn. App. at 316-17. This holding is fully consistent with this Court's opinion in Wilson, and with Salamanca.

The Court of Appeals also held that Elmi's intent to cause Aden apprehension of harm automatically transferred to the assaults against the children. The Court of Appeals found that common law assault (an act done with intent to create in another apprehension and fear of bodily injury, and which does create fear and apprehension in another) may also be transferred. Elmi, at 316. The Court of Appeals was correct that assault by creating fear and apprehension does not require that the intended victim and the person assaulted be one and the same.

The Court of Appeals found that Elmi had committed first degree assault, even without the doctrine of transferred intent, simply by examining the language of the first degree assault statute. Elmi, at 315-16. However, the Court of Appeals also found that the doctrine of transferred intent supported Elmi's convictions. Relying on the reasoning in Melton, Hough, and citing numerous other authorities from around the country, the court held that the mere fact that victims are not harmed during an assault by a defendant who is attempting to kill or injure another person, does not preclude criminal liability. Elmi, at 316-19. The Court of Appeals was absolutely correct.

There are strong public policy reasons to conclude that Elmi assaulted the child victims in this case. Elmi should not receive a windfall simply because the children were fortunate enough to escape the path of his bullets. The magnitude of Elmi's actions is no less serious with regard to the children. His convictions for first degree assault against the children should be affirmed.

D. CONCLUSION

The opinion of the Court of Appeals should be affirmed.

DATED this 14 day of April, 2008.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

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

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Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Oliver R. Davis, the attorney for the appellant, at Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101-3635, containing a copy of the Supplemental Brief of Respondent, in STATE V. ALI ELMI, Cause No. 80380-3, in the Supreme Court of the State of Washington.

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

U Brame
Name
Done in Seattle, Washington

4/11/08
Date