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No. 67777-2-I

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JONTAE ROBERT CHATMAN,

Appellant.

APPELLANT'S OPENING BRIEF

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2012 MAR 14 AM 10:40

FILED
COURT OF APPEALS DIV. I
STATE OF WASHINGTON

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence for the jury to find that Chatman intended to kill David Route, Paige Sauer or Noah Sauer.
2. The trial court seated an alternate juror without determining her continued impartiality, requiring reversal and remand for a new trial.

Issues Pertaining to the Assignments of Error

1. Was there sufficient evidence that Chatman intended to kill David Route, Paige Sauer or Noah Sauer?
2. Did the trial court seat an alternate juror without determining her continued impartiality, requiring reversal and remanding for a new trial?

B. STATEMENT OF THE CASE

On April 7, 2009, Jontae Chatman learned that his close friend Ron Preston was shot and seriously wounded. 7/13/10 RP 48-50; 7/15/10 RP 81; 7/20/10 RP 93; 7/21/10 RP 16. Mario Spearman had harassed Chatman and Preston for years because he believed the two had “snitched” to the police about his illegal activities. 7/3/10 RP 54; 7/15/10 RP 103. Chatman believed that Spearman was “out to get” him, and feared for his life. 7/15/10 RP 113, 118. According to Pastor Robert Jeffrey of the New Hope Missionary Baptist

Church, Chatman had repeatedly told him he was terrified of Spearman, and every time Chatman left Pastor Jeffrey's office, the pastor feared he would never see Chatman alive again. 9/24/10 RP 14.

After learning of the attack on Preston, Chatman met with codefendants, Antoine Davis, Dominick Reed and Reed's friend Nester Ovidio Mejia. 7/13/10 RP 50-54. They decided to look for Spearman so they could avenge Preston's shooting and prevent further bloodshed. 7/13/10 RP 54-60.

Reed drove the group to SeaTac, and made a U-turn when he spotted Spearman's car, a Cadillac with tinted windows. 7/13/10 RP 68-69. Reed said that because of the tinted windows, he could not see who was in the car, but he recognized the car as Spearman's. 7/13/10 RP 69. When both cars stopped at a stoplight, Chatman, Davis, and Ovidio got out of the car, and Chatman shot at Spearman at least 20 times with an AK-47. 7/6/10 RP 124; 7/7/10 RP 236; 7/13/10 RP 73, 76; 7/19/10 RP 156. Chatman aimed only at Spearman, and tried to miss the front seat passenger. 7/15/10 RP 106. Because the windows were tinted, Chatman was unaware that there were also two back seat passengers. 7/13/10 RP 69; 7/15/10 RP 106; 7/26/10 RP 85.

Spearman died as a result of the shooting. 7/20/10 RP 82. The front seat passenger's leg was injured by a stray bullet, and the two backseat

passengers were unharmed. 7/7/10 RP 171, 231; 7/12/10 RP 10; 7/20/10 RP 10, 27-32.

The State charged Chatman, (and Davis, Ovidio and Reed¹) with one count of first-degree murder and three counts of first-degree attempted murder. CP 14-25.

At trial, the lead detective in the case testified that Chatman admitted he shot Mario Spearman, and explained that he tried to avoid shooting the passenger. 7/15/10 RP 106. The State also called a trajectory analyst as a witness. 7/14/10 RP 178-88. His analysis showed that the shooter was at all times aiming at the driver. 7/26/10 RP 48.

During closing argument, the State explained its theory of the case was that Chatman was the principal and Davis and Ovidio were guilty as accomplices. 7/26/10 RP 35-39. As to the attempted murder counts, the prosecutor acknowledged that Chatman tried to avoid hitting anyone but the driver and that the State's trajectory analysis supported that claim. 7/26/10 RP 42, 48. But the State argued that Chatman and his accomplices were guilty of the attempted murder of the three passengers on a "transferred intent" theory. 7/26/10 RP 34.

¹ Reed pled guilty to lesser crimes and testified against the others. 7/13/10 RP 116.

After the jury had been deliberating for more than a day, the court and the parties discovered that one juror had performed independent legal research for the case. 7/28/10 RP 173-75. The juror acknowledged her misconduct, and assured the court that she had not told any other jurors that she performed outside research. 7/28/10 RP 177. All parties agreed with the court's decision to dismiss this juror and replace her with an alternate. 7/28/10 RP 179. When the alternate arrived, the court instructed the jury to begin deliberations anew, but did not determine whether the alternate juror had remained impartial during her day-and-a-half absence. 7/28/10 RP 181.

The jury convicted Davis, Chatman, and Ovidio of the first-degree murder of Spearman as charged in count 1. CP 110. Although it acquitted them of the first-degree attempted murder of the passengers, it found them guilty of the lesser-included offense of second-degree attempted murder for those three counts.² The jury instructions as to those counts read as follows:

Count 2:

To convict the defendant, JONTAE CHATMAN, of the crime of Attempted Murder in the Second Degree, a lesser crime of Murder in the First Degree, as charged in Count Two, each of the following elements of the crime must be proved beyond a reasonable doubt:

² The jury also found the defendants were armed with a firearm for each count.

(1) That on or about April 7, 2009, ***the defendant did an act that was a substantial step toward the commission of Murder in the Second Degree of David Route;***

(2) That the act was done with the intent to commit Murder in the Second degree; and

(3) That the act occurred in the State of Washington.

Supp. CP ____, Instruct. 37, Ct.'s Instruct. To the Jury, Sub. No. 51A, filed 7/26/10.

Count 3:

To convict the defendant, JONTAE CHATMAN, of the crime of Attempted Murder in the Second Degree, a lesser crime of Attempted Murder in the First Degree, as charged in Count Three, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about April 7, 2009, ***the defendant did an act that was a substantial step toward the commission of Murder in the Second Degree of Paige Sauer;***

(2) That the act was done with the intent to commit murder in the second degree; and

(3) That the act occurred in the State of Washington.

Supp. CP ____, Instruct. 38, Ct.'s Instruct. To the Jury, Sub. No. 51A, filed 7/26/10.

Count 4:

To convict the defendant, JONTAE CHATMAN, of the crime of Attempted Murder in the Second Degree, a lesser crime of Attempted Murder in the First Degree, as charged in Count Four, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about April 7, 2009, ***the defendant did an act that was a substantial step toward the commission of Murder in the Second Degree of Noah Sauer;***

(4) That the act was done with the intent to commit Murder in the Second Degree; and

(5) That the act occurred in the State of Washington.

Supp. CP ____, Instruct. 39, Ct.'s Instruct. To the Jury, Sub. No. 51A, filed 7/26/10.

The court sentenced Chatman to 757 months in prison. Chatman had no prior convictions. Chatman appealed. CP 39-40.

C. ARGUMENT

1. *THERE WAS INSUFFICIENT EVIDENCE THAT CHATMAN INTENDED TO KILL DAVID ROUTE, PAIGE SAUER OR NOAH SAUER*

The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d. 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. *Id.*; U.S. Const. amend. XIV; Const. art. I, § 3; *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). On appellate review, evidence is sufficient to support a conviction only if, "after viewing

the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 2781, 61 L.Ed.2d 560, *reh’g denied*, 444 U.S. 890, 100 S.Ct. 195, 62 L.Ed.2d 126 (1979); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The State failed to prove Counts 2, 3 & 4 because Chatman specifically intended to avoid shooting any passenger, and tried (largely successfully) to shoot only the driver.

The criminal attempt statute provides, in part, “A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.” RCW 9A.28.020(1). Hence, the elements of attempt are: intent to commit the substantive crime and taking a substantial step in the commission of that crime. *State v. Chhom*, 128 Wn.2d 739, 742, 911 P.2d 1014 (1996). Consequently, attempted murder occurs when a person takes a substantial step in causing another person’s death with the intent to cause that person’s death. *See State v. Smith*, 115 Wn.2d 775, 782, 801 P.2d 975 (1990).

There is no doubt that the State proved that Chatman intended to kill Mario Spearman. But as the State acknowledged, Chatman intended not to shoot, let alone kill, the front seat passenger. And he was apparently unaware that anyone was even in the backseat, presumably because the car’s windows

were tinted. The prosecutor made it clear he could not prove that Chatman intended to kill Route or Ms. Sauer and Noah. Instead, he relied on some vague notion of transferred intent. 7/26/10 RP 56-57. He referred the jury to the “transferred intent” instruction but, as argued below, no such instruction was given to the jury.

It is true that generally, RCW 9A.32.050 does not require specific intent to kill a specific victim. But, here, the State alleged a specific victim as to each count. Under the jury instruction, the jury had to find that Chatman was guilty of taking a substantial step to kill each of the persons specifically enumerated in the jury instructions. If the State wanted the jury to consider the doctrine of transferred intent he was required to ask the jury to instruct on that theory. WPIC 10.01.01 would have been the proper instruction. It states:

If a person acts with intent to kill another, but the act harms a third person, the actor is also deemed to have acted with intent to kill the third person.

See also State v. Elmi, 166 Wn.2d 209, 207 P.3d 439 (2009) (specific transferred intent instruction given); *State v. McGonigle*, 14 Wn. 594, 45 P. 20 (1896) (specific transferred intent instruction given).

Moreover, the instruction makes it clear that in Washington the third person must actually be “harmed.” That is, as in other jurisdictions, Washington law does not permit the doctrine to be applied to inchoate crimes – like attempt. *See, e.g., People v. Bland*, 48 P.3d 1107, 1116 (Cal. 2002);

State v. Hinton, 630 A.2d 593, 602 (Conn. 1993); *Ford v. State*, 625 A.2d 984, 999 (Md. 1993).

In *Bland*, the California Supreme Court addressed the precise issue before the Court here: “whether transferred intent applies to attempted murder charges when the defendant kills his sole intended target and shoots but does not kill others.” *Bland*, 48 P.3d at 1112. The court answered the question in the negative, holding that although transferred intent may be applied to the completed crime of murder, “the doctrine does not apply to an inchoate crime like attempted murder.” *Bland*, 48 P.3d at 1110. Thus, whether a defendant is guilty of the attempted murder of the surviving victims “depends on his mental state as to those victims and not on his mental state as to the intended victim.” *Id.*

The California Supreme Court quoted a leading treatise in explaining its reasoning:

[T]ransferred intent should not apply at all to *attempted* homicides, as the assailant can be punished directly for an attempt on the intended victim: “If, without a justification, excuse or mitigation D with intent to kill A fires a shot which misses A but unexpectedly inflicts a non-fatal injury upon B, D is guilty of an attempt to commit murder, but the attempt was to murder A whom D was trying to kill and not B who was hit quite accidentally. And so far as the criminal law is concerned there is no transfer of this intent to the other so as to make D guilty of an attempt to murder B.”

Bland, 48 P.3d at 1116 (quoting *Perkins & Boyce*, Criminal Law (3d ed. 1982), ch. 7 § 8, p. 925) (emphasis in original). “The crime of attempt sanctions what the person intended to do but did not accomplish, not unintended and unaccomplished potential consequences.” *Bland*, 48 P.3d at 1116-17.

The Connecticut Supreme Court agreed that while transferred intent can be applied to murder, it cannot be applied to attempted murder. *Hinton*, 630 A.2d at 598 (transferred intent applies to murder), 601 (transferred intent does not apply to attempted murder). Among other reasons, the court recognized that the rule of lenity requires this reading of the attempt statute. *Id.* at 601-02.

The California court further explained that applying transferred intent to attempted murder would create insurmountable difficulties in defining scope, and would lead to limitless liability. *Bland*, 48 P.3d at 1117.

The world contains many people a murderous assailant does not intend to kill. ... [H]ow can a jury rationally decide which of many persons the defendant did not intend to kill were attempted murder victims on a transferred intent theory? To how many unintended persons can an intent to kill be transferred?

Id. at 1118.

In this case, for example, the State’s transferred intent theory would have supported dozens of charges and convictions for the attempted murder

of every person in the vicinity of Mario Spearman's murder. This standard is unworkable. *Bland*, 48 P.3d at 1117-18. Scholars have similarly pointed out that "using the doctrine of transferred intent to multiply liability for attempted murder gives the government a free ride by relieving it of its constitutional burden of proving the accused's guilt on every element of the offense beyond a reasonable doubt." John P. Einwechter, *New Developments in Substantive Criminal Law Under the Uniform Code of Military Justice*, 1998 Army Law, 20, 23-24. That is why Washington has developed WPIC 10.01.01, a specific instruction that limits the application of the doctrine only to those who are harmed.

This does not mean no liability attaches for the intended victims; it just means that attempted murder is the wrong crime to charge in such circumstances. *Ford*, 625 A.2d at 1000 n.14. For example, the State probably could have charged Chatman with reckless endangerment or drive-by shooting for the passengers in this case, in addition to charging him with first-degree murder for the driver. *See* RCW 9A.36.045(1) (drive-by shooting); RCW 9A.36.050 (reckless endangerment).

The State's failure to properly instruct the jury means the jury could only consider whether or not Chatman had the intent to kill the other passengers in the car. And, there was no evidence to support their conclusion that Chatman had the requisite intent to kill as to those three persons.

2. *THE TRIAL COURT SEATED AN ALTERNATE JUROR WITHOUT DETERMINING HER CONTINUED IMPARTIALITY, REQUIRING REVERSAL AND REMAND FOR A NEW TRIAL*

After the jury had been deliberating for more than a day, the court and the parties discovered that one juror had performed independent legal research for the case. 7/28/10 RP 173-75. The juror acknowledged her misconduct, and assured the court that she had not told any other jurors that she performed outside research. 7/28/10 RP 177. All parties agreed with the court's decision to dismiss this juror and replace her with an alternate. 7/28/10 RP 179. When the alternate arrived, the court properly instructed the jury to begin deliberations anew, but did not determine whether the alternate juror had remained impartial during her day-and-a-half absence from the courtroom. 7/28/10 RP 181. This failure constitutes reversible error.

Under CrR 6.5, "the trial judge shall take appropriate steps to protect alternate jurors from influence, interference or publicity, which might affect that juror's ability to remain impartial and the trial judge may conduct brief voir dire before seating such alternate juror for any trial or deliberations." The rule "clearly contemplate[s] a formal proceeding which may include brief voir dire to ensure that an alternate juror who has been temporarily excused and recalled has remained impartial." *State v. Stanley*, 120 Wn. App. 312, 314, 85 P.3d 395 (2004). The requirement is not rule-based; it "relate[s] directly to a defendant's constitutional right to a fair trial before an

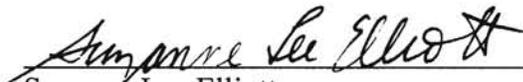
impartial jury.” *State v. Ashcraft*, 71 Wn. App. 444, 462, 859 P.2d 60 (1993). Accordingly, the State must prove that a court’s failure to comply with this requirement is harmless beyond a reasonable doubt. *Id.* at 466 (citing *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705, *reh’g denied*, 386 U.S. 987, 87 S.Ct. 1283, 18 L.Ed.2d 241 (1967)).

The State cannot make that showing here. As explained above, the State failed to present sufficient evidence to prove counts 2, 3, and 4. As to count one, then, “[t]here was substantial evidence to support the verdict reached but the evidence was not so overwhelming as to necessarily lead 12 fair-minded jurors to only one conclusion” as to the other three counts *Ashcraft*, 71 Wn. App. at 467. Thus, the State cannot prove beyond a reasonable doubt that the failure to ensure an impartial jury was harmless. The remedy is reversal and remand for a new trial. *Id.*

D. CONCLUSION

This Court should vacate Counts 2, 3 and 4. In addition, it should grant a new trial on Count 1.

Respectfully submitted this 12th day of March, 2011.


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