

[Cite as *State v. Reese*, 2007-Ohio-4319.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NOS. C-060576
		C-060577
Plaintiff-Appellee,	:	TRIAL NOS. B-0601265
		B-0601713
vs.	:	
		<i>DECISION.</i>
JASON REESE,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: August 24, 2007

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Thomas J. Boychan, Jr.*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Michaela M. Stagnaro, for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

HILDEBRANDT, Judge.

{¶1} Defendant-appellant, Jason Reese, appeals the judgment of the Hamilton County Court of Common Pleas convicting him of three counts of felonious assault, each with multiple gun specifications.

I. A Disagreement in a Bar

{¶2} In February 2006, Reese joined two acquaintances, Andrew Hrezo and Curtis Williams, at a saloon. After the three had been drinking awhile, Williams made disparaging remarks to a female bar patron, Diana Victoriano. Victoriano was at the bar with her boyfriend, Ryan Skelskey, and four of Skelskey's friends, including Horace Ralston and Bennie Beckman. When Williams continued to make remarks about Victoriano, Skelskey and his friends became angry.

{¶3} At this point, two different accounts unfolded. According to Victoriano and her friends, after some hostile words were exchanged, Hrezo, Williams, and Reese left the bar. Victoriano and Skelskey also wanted to leave the bar after the confrontation, but did not want to get "jumped" on the way to their car, so they asked Ralston, Beckman, and others to walk them to their car. When they left the bar, they saw Hrezo, Williams, and Reese cross a nearby street.

{¶4} Ralston verbally engaged Hrezo, Williams, and Reese, took his shirt off, and asked them if they wanted to fight. Hrezo, Williams, and Reese moved quickly to Hrezo's car as Ralston and others approached. As they got into the car, Reese pulled a gun out and warned Ralston to back up. But Ralston continued to approach with his hands in the air. Reese got in the car, rolled down the window, and fired three shots—one bullet grazed Ralston's ear, one bullet went through Ralston's arm, and one bullet

entered the windshield of George Fiorini's vehicle. (One of the bullets that hit Ralston also hit Fiorini's car a second time.) Fiorini was not otherwise involved; he just happened to be driving by.

{¶5} In a somewhat different version of the events, Hrezo, Williams, and Reese all claimed that after Williams made his disparaging remarks about Victoriano, Ralston intervened and threatened to pull a knife out and stab them. They left the bar and proceeded to walk quickly to their car, but Ralston and others followed. Reese pulled his gun out because, he maintained, Ralston was waving a knife at him and threatening to stab him.

{¶6} Reese also stated that he warned Ralston and the others to back up and let them leave, but the men continued to approach. After Hrezo, Williams, and he got in the car, Reese testified, Ralston and Beckman surrounded the car and blocked their ability to drive away. Reese admitted to then rolling down the window to fire "warning shots," but he did not know that any of the bullets had hit Ralston or Fiorini's vehicle.

{¶7} Reese was charged with one count of felonious assault with three gun specifications in case number B-0601265, as well as two counts of felonious assault, with two gun specifications for each count, in case number B-0601713. A jury found him guilty on all charges. Reese was sentenced to four years' incarceration for the felonious assault in case number B-0601265, with one-year, three-year, and five-year gun specifications (the trial court chose the one-year gun specification rather than the three-year gun specification to be consecutive to the underlying sentence and consecutive to the five-year gun specification), for a total of ten years' incarceration. In case number B-0601713, Reese was sentenced to two years' incarceration for both felonious assaults, with three-year terms for the gun specifications on each assault. These sentences were

concurrent with each other and with the sentences in case number B-0601265, for a total sentence of ten years' incarceration. Reese now appeals.

II. Sufficiency and Weight of the Evidence

{¶8} In his first assignment of error, Reese claims that there was insufficient evidence to convict him, and that his convictions were against the manifest weight of the evidence.

{¶9} When reviewing the sufficiency of the evidence to support a criminal conviction, we must examine the evidence admitted at trial in the light most favorable to the state. We must then determine whether that evidence could have convinced any rational trier of fact that the essential elements of the crime had been proved beyond a reasonable doubt.¹

{¶10} A review of the weight of the evidence puts the appellate court in the role of a “thirteenth juror.”² We must review the entire record, weigh the evidence, consider the credibility of the witnesses, and determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice.³ A new trial should be granted only in exceptional cases where the evidence weighs heavily against the conviction.⁴

{¶11} Reese was found guilty of three counts of felonious assault. The felonious-assault statute, R.C. 2903.11(A), provides that “[n]o person shall knowingly do either of the following: (1) Cause serious physical harm to another * * *; (2) Cause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance.”

¹ See *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

² See *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

³ *Id.*, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211.

⁴ *Id.*

{¶12} In case number B-060173, Reese was convicted under both subsections of the statute. The state offered evidence that, after a verbal confrontation at the saloon, Reese pulled a gun from his pants and aimed it at Ralston, warning him not to come any closer. Everyone admitted that Ralston did not stop and continued both to dare Reese to fight and to proceed closer. Hrezo, Williams, and Reese then entered the car, but Reese pulled down his window and fired three bullets. One grazed Ralston’s ear and one hit him in the arm.

{¶13} Reese’s testimony differed only in that he maintained that Ralston had threatened to stab them. Reese also contended that he was only firing warning shots when he rolled the window down, because Ralston and Beckman had surrounded the car.

{¶14} But Reese argues that he had met his burden of proving that he had acted in self-defense, and, in the alternative, that he had not caused Ralston any serious physical harm.

{¶15} To establish self-defense, a defendant must show “(1) that [he] was not at fault in creating the situation giving rise to the affray; (2) [he] had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; and (3) [he] must not have violated any duty to retreat or avoid the danger.”⁵

{¶16} Reese’s arguments fail because he could not demonstrate the third element of self-defense—that he did not violate “any duty to retreat.” Once Reese had entered the car and had avoided the danger from Ralston, his affirmative defense ended.

⁵ See *State v. Melchior* (1978), 56 Ohio St.2d 15, 381 N.E.2d 195. See, also, *State v. Thomas* (1997), 77 Ohio St.3d 323, 326, 673 N.E.2d 1339.

But he then rolled down the window and fired three shots. Thus, Reese did not demonstrate that he had acted in self-defense.

{¶17} Reese's other argument, that he did not cause serious physical harm to Ralston, is not persuasive. The state presented evidence that one of the bullets went completely through the muscle of Ralston's arm. That injury satisfied the element of serious physical harm.

{¶18} We conclude that a rational factfinder, viewing the evidence in a light most favorable to the state, could have found beyond a reasonable doubt that Reese had knowingly caused or attempted to cause physical harm to Ralston with a deadly weapon. Therefore, the evidence presented was legally sufficient to sustain the convictions.

{¶19} Moreover, our review of the record does not persuade us that the jury clearly lost its way and created a manifest miscarriage of justice in finding Reese guilty. Therefore, his convictions in case number B-0601713 were not against the manifest weight of the evidence.

III. Doctrine of Transferred Intent

{¶20} Reese also argues, under case number B-0601265, that he did not knowingly cause or attempt to cause physical harm to Fiorini, and that the doctrine of transferred intent did not apply.

{¶21} The doctrine of transferred intent provides that where an individual is attempting to harm one person and as a result accidentally harms another, the intent to harm the first person is transferred to the second person, and the individual attempting

harm is held criminally liable as if he both intended to harm and did harm the second person.⁶

{¶22} In the present case, Reese was convicted of felonious assault for knowingly attempting to cause physical harm to Fiorini. Reese did not intend to harm Fiorini or to damage his vehicle. Thus the issue was whether Reese should have been held criminally liable for an attempt to cause physical harm to Fiorini based on his intent to assault Ralston.

{¶23} We hold that the doctrine of transferred intent was properly applied to the offense involving Fiorini. Where the defendant shoots wildly in a business district and one of the shots enters the passenger compartment of an occupied automobile, the conviction for attempting to cause serious physical harm should stand. The fact that there was no physical harm to Fiorini's person is irrelevant; the statute did not even require physical harm to the intended victim. If Reese had merely struck the intended victim's car, the conviction would have been proper. Under the law, the unintended victim is accorded the same protection as the intended victim. The intent is what is transferred, not the harm.

{¶24} Accordingly, we overrule the first assignment of error.

IV. Sentencing on Gun Specifications

{¶25} In his second assignment of error, Reese argues that the trial court erred by improperly imposing consecutive terms on the one-year and five-year gun specifications.

⁶ See *State v. Crawford*, 10th Dist. No. 03AP-986, 2004-Ohio-4652, citing *State v. Mullins* (1992), 76 Ohio App.3d 633, 636, 602 N.E.2d 769.

{¶26} Reese was convicted of three gun specifications in case number B-0601265. Under R.C. 2929.14(D)(1)(a), a trial court cannot impose more than one sentence for the charged gun specifications in addition to the underlying sentence. But this provision only refers to the six-year gun specification under R.C. 2941.144, the three-year gun specification under R.C. 2941.145, and the one-year gun specification under R.C. 2941.141.

{¶27} The General Assembly has also provided in R.C. 2929.14(E)(1)(a) that any person convicted of a five-year gun specification, for discharging a firearm from a motor vehicle under R.C. 2941.146, must serve a consecutive sentence in addition to any sentence imposed for a conviction on either the one-year or the three-year gun specification. Thus, the trial court was correct in imposing consecutive sentences on the one-year and five-year gun specifications.

{¶28} Although Reese argues that the imposition of multiple terms for the gun specifications violated his rights under the Double Jeopardy Clause of the United States Constitution, we rejected a similar argument in *State v. Reid*.⁷ Accordingly, we overrule the second assignment of error and affirm the judgment of the trial court.

Judgment affirmed.

CUNNINGHAM, J., concurs.

PAINTER, P.J., concurs in part and dissents in part.

PAINTER, P.J., concurring in part and dissenting in part.

{¶29} I concur with everything except for the majority's misinterpretation of the transferred-intent doctrine.

⁷ 1st Dist. No C-060465, 2006-Ohio-6450, jurisdictional motion overruled, 113 Ohio St.3d 1468, 2007-Ohio-1722, 864 N.E.2d 564.

{¶30} In case number B-0601265, Reese was convicted of one count of felonious assault, a second-degree felony, with three gun specifications, after two of the bullets he fired had penetrated Fiorini’s vehicle. Reese argues that he did not knowingly cause or attempt to cause physical harm to Fiorini, and that the doctrine of transferred intent did not apply because he was defending himself. Although we have declined to rule that Reese acted in self-defense when he fired his gun at Ralston, Reese’s arguments about the doctrine of transferred intent have merit.

{¶31} The doctrine of transferred intent is a legal fiction that was established to impose liability on a defendant who, intending to kill one person, mistakenly kills another instead.⁸ The purpose of the rule is “to insure the adequate punishment of those who accidentally kill innocent bystanders, while failing to kill their intended victims. * * * The transferred intent doctrine is born of the sound judicial intuition that such a defendant is no less culpable than a murderer whose aim is good.”⁹

{¶32} Simply put, the doctrine of transferred intent provides that where an individual is attempting to harm one person and as a result accidentally harms another, the intent to harm the first person is transferred to the second person, and the individual attempting harm is held criminally liable as if he both intended to harm and did harm the same person.¹⁰

{¶33} The origin of the doctrine of transferred intent has been traced to the medieval criminal law of England.¹¹ In *The Queen v. Saunders & Archer*, defendant

⁸ See *People v. Suesser* (1904), 142 Cal. 354, 367, 75 P. 1093.

⁹ See *People v. Birreauta* (1984), 162 Cal. App.3d 454, 460, 208 Cal.Rptr. 635.

¹⁰ See *State v. Crawford*, 10th Dist. No. 03AP-986, 2004-Ohio-4652, citing *State v. Mullins* (1992), 76 Ohio App.3d 633, 636, 602 N.E.2d 769.

¹¹ *Mixon*, Application of Transferred Intent to Cases of Intentional Infliction of Emotional Distress (1983), 15 Pac.L.J. 147; see, also, *People v. Scott* (1996), 14 Cal.4th 544, 59 Cal.Rptr.2d 178, 927 P.2d 288.

John Saunders intended to poison his wife so he could marry another woman.¹² He placed poison in an apple and gave it to her. Sadly, she gave part of the apple to their young daughter, who ate it and died.¹³ Saunders did not intend to kill his daughter, but he was nonetheless guilty of her murder.¹⁴ The court “transferred” his intent to kill his wife to the death of his daughter.¹⁵ The doctrine of transferred intent became part of the common law in many American jurisdictions and now exists in various forms in both criminal law and tort law.¹⁶

{¶34} In the present case, Reese was convicted of felonious assault for knowingly attempting to cause physical harm to Fiorini. Reese did not intend to harm Fiorini or to damage his vehicle. Thus the issue was whether Reese should have been held criminally liable (with a felonious-assault conviction, rather than one for criminal damaging) for the damage caused to Fiorini’s vehicle.

{¶35} Although the Ohio Supreme Court has applied the doctrine of transferred intent when the defendant “intentionally acts to harm someone but ends up accidentally harming another,”¹⁷ the court has not decided whether the doctrine of transferred intent should be used to impose criminal liability upon a defendant when the resulting harm or injury is not the same type of harm intended. For instance, if Reese had shot at Ralston, missed, and hit Fiorini, then the resulting harm (injury to person) would have been the same as the intended harm. But in this case, the resulting harm—damage to Fiorini’s vehicle (injury to property)—was not the same as the intended harm (injury to person).

¹² See *The Queen v. Saunders & Archer* (1576), 2 Plowd. 473, 474, 75 Eng.Rptr. 706.

¹³ *Id.*

¹⁴ *Id.* at 474.

¹⁵ *Id.*

¹⁶ See, generally, Keeton, Prosser and Keeton on Torts (5 Ed.1984) 37-38.

¹⁷ See *In re T.K.*, 109 Ohio St.3d 512, 2006-Ohio-3056, 849 N.E.2d 286, at ¶15.

{¶36} A review of the case law leads me to conclude that the doctrine of transferred intent applies only if the harm intended is the same as the resulting harm. In *State v. Bryant*, the South Carolina Supreme Court held that the doctrine of transferred intent “applies only in the situation of the same intended harm inflicted on an unintended victim.”¹⁸ In that case, the defendant slammed a police officer against a patrol car during a struggle while resisting arrest.¹⁹ The defendant was convicted of resisting arrest and assault and battery, as well as malicious damage to personal property.²⁰ The court held that the intent to assault and batter the police officer could not be transferred to the property damage, since the harm caused was different than the type of harm intended.²¹

{¶37} Similar to South Carolina, the state of Arizona has a transferred-intent statute that allows intent to be transferred from one victim to another if the resulting harm to the unintended victim is the same type of harm contemplated for the intended victim.²²

{¶38} The New York Court of Appeals has also held that the doctrine of transferred intent should not be used for attempt crimes.²³ The court reasoned that “because an attempt charge always involves an uncompleted crime, the transferred intent doctrine is ordinarily not implicated.”²⁴ Although the New York court was deciding whether the transferred-intent doctrine codified under N.Y. Penal Law 125.25(1) applied to attempted murder, I find its analysis to be persuasive.

¹⁸ See *State v. Bryant* (1994), 316 S.C. 216, 218, 447 S.E.2d 852.

¹⁹ *Id.* at 219.

²⁰ *Id.* at 218.

²¹ *Id.* at 219.

²² See Ariz.Rev.Stat. Ann. 13-203(B).

²³ See *People v. Fernandez* (1996), 88 N.Y.2d 777, 673 N.E.2d 910.

²⁴ *Id.* at 783.

{¶39} And a number of jurisdictions have rejected the doctrine of transferred intent in relation to the crime of attempted murder of the unintended victim.²⁵ “As several of these cases reason, transferred intent is inapplicable where no death results and the defendant is charged with attempted murder of the intended victim, because the defendant committed a completed crime at the time he shot at the intended victim regardless of whether any injury resulted to the unintended victim.”²⁶

{¶40} The rationale behind these decisions is the belief that the doctrine of transferred intent “should apply only when, without the doctrine, the defendant could not be convicted of the crime at issue because the mental and physical elements do not concur as to either the intended or actual victim.”²⁷ The doctrine thus should not be employed to “multiply criminal liability, but to prevent a defendant who has committed all the elements of a crime (albeit not upon the same victim) from escaping responsibility for that crime.”²⁸

{¶41} These cases are persuasive. The majority’s analysis cites no cases to support its conclusion. Here, the doctrine was used to improperly multiply criminal liability. Reese was guilty of the felonious assault of Ralston, and of criminal damaging for the unintended, but also criminal, damaging of Fiorini’s car.

{¶42} Although Reese attempted to cause physical harm to Ralston, he did not intend to harm Fiorini. And while he committed two counts of felonious assault when he fired his gun and hit Ralston twice, the only harm suffered by Fiorini was damage to

²⁵ See, e.g., *Jones v. State* (1923), 159 Ark. 215, 251 S.W. 690; *People v. Chinchilla* (1997), 52 Cal.App.4th 683, 60 Cal.Rptr.2d 761; *People v. Calderon* (1991), 232 Cal.App.3d 930, 283 Cal.Rptr. 833; *State v. Hinton* (1993), 227 Conn. 301, 630 A.2d 593; *Ford v. State* (1993), 330 Md. 682, 625 A.2d 984; *State v. Williamson* (1907), 203 Mo. 591, 102 S.W. 519; *State v. Mulhall* (1906), 199 Mo. 202, 97 S.W. 583; *Fernandez*, 88 N.Y.2d 777, 673 N.E.2d 910; *State v. Shanley* (1905), 20 S.D. 18, 104 N.W. 522.

²⁶ See *Bell v. State* (Fla.App.2000), 768 So. 2d 22, 28, citing *Chinchilla*, 60 Cal.Rptr.2d at 764-65; *Calderon*, 283 Cal.Rptr. at 836-37; *Fernandez*, 88 N.Y.2d 777, 673 N.E.2d at 914.

²⁷ See *Ford*, 330 Md. at 711.

²⁸ *Id.* at 714.

his vehicle—if he had been injured, then transferred intent would have applied. I would hold that the more appropriate charge for the damages to Fiorini’s vehicle would have been criminal damaging,²⁹ which prohibits a person from causing or creating a “substantial risk of physical harm to any property of another without the other person’s consent.”

{¶43} I would hold that the doctrine of transferred intent does not apply when the crime charged is an attempt offense, and when the type of harm intended and the type of harm that resulted are not the same. The holding would apply to the situation here—with the present set of facts, the transferred-intent doctrine should not have been used to convict a person of felonious assault, when there was neither intent to harm a person nor intent to inflict the type of harm that resulted.

{¶44} Because Reese’s felonious-assault conviction in case number B-0601265 was based on insufficient evidence, I would reverse that conviction and discharge Reese from further prosecution for that offense.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

²⁹ R.C. 2909.06.