

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON,)	Case No.: 20CR50067
)	
Plaintiff,)	DEFENDANT'S MEMORANDUM
)	RE TRANSFERRED INTENT
vs.)	
)	
ALAN SWINNEY,)	
)	
Defendant.)	

MEMORANDUM OF LAW

In this case, the government would have this court apply the common law doctrine of transferred intent to the offense of assault in the second degree. *See* ORS 163.175(1)(b). That request is flawed for the following reasons.

I. STATE V. WESLEY, 254 OR APP 697, 295 P3D 1147 (2013), STANDS FOR THE PRINCIPAL THAT AN ATTEMPTED MURDER OF PERSON A THAT RESULTS IN THE DEATH OF PERSON B CONSTITUTES FELONY MURDER OF PERSON B; IT DOES NOT ESTABLISH A GENERAL RULE ALLOWING TRANSFERRED INTENT

Wesley appears to offer the only precedential guidance in the modern era as to whether the common law doctrine of transferred intent has any applicability in Oregon post 1971. With regard to the charge of murder, *Wesley* is unequivocal: the doctrine applies. 254 Or App at 709. However, a close reading of *Wesley* forecloses applying the doctrine to this case. In *Wesley*, both the defendant and another man, Smith, shot at a car operated by WJW that had stopped to pick up Anderson. *Id.* at 700. Although it was Anderson the two sought to murder, a bullet from Smith's firearm fatally struck WJW, while Anderson went unscathed. *Id.* None of *Wesley's*

1 rounds (he fired a shotgun) struck either WJW or Anderson. *Id.* Nevertheless, he was charged
2 with murder and convicted at trial on the State's proffered theory of transferred intent; he
3 challenged the verdict. *See id.* at 702. The appellate court concluded that the doctrine survived in
4 that circumstance because to hold contrary would produce absurd results, and would "not assume
5 that the legislature intended to produce such an anomalous, and constitutionally problematic,
6 result." *Id.* at 709. Understanding the court's reasoning is vital.

7 Wesley's challenge rested on the observation that at common law, the doctrine applied to
8 first-degree murder, but the 1971 Criminal Code's abolition of the principles of malice and
9 premeditation with regard to murder, as well as by eliminating the distinction between first- and
10 second-degree murder, coupled with the lack of any adoption or reference to the doctrine in the
11 Criminal Code, effectively abolished the doctrine with regard to murder. *Id.* at 704.

12 The court first looked at the murder statute established in 1971, and noted that a homicide
13 becomes a murder in three circumstances: (1) when it "is committed intentionally[.]" (2) when it
14 "is committed recklessly under circumstances manifesting extreme indifference to the value of
15 human life; or" (3) when it

16 "is committed by a person, acting either alone or with one or more persons, who
17 commits or attempts to commit arson in the first degree, burglary in the first
18 degree, escape in the first degree, kidnapping in the first degree, rape in the first
19 degree, robbery in any degree or sodomy in the first degree and in the course of
an in furtherance of the crime he is committing or attempting to commit, or in the
immediate flight therefrom, he, or another participant if there be any, causes the
death of a person other than one of the participants."

20 *Id.* (quoting ORS 161.115 (1971)). The last is the so-called "felony murder" rule. The principle
21 behind that rule is it allows the intent to commit some other violent felony is imputed to a
22 defendant who causes the death of another while committing or attempting to commit certain
23 enumerated felonies.

24 The court next looked to the commentary, which it concluded "indicate[d] that the
25 legislature believed that, in light of the state's abolition of the death penalty, the distinction

1 between first-degree murder and second-degree murder was no longer needed.” *Id.* First-degree
2 murder historically

3 “had included three branches: any killing done ‘purposefully and of deliberate and
4 premeditated malice’ * * *; a killing arising in the course of committing rape,
5 arson, robbery or burglary (the felony-murder doctrine) * * *; the third branch is a
6 killing of a police officer without justification when the officer is acting in the line
7 of duty.”

8 *Id.* (quoting the Commentary at §88). Second-degree murder had historically included four
9 categories: (1) purposeful malicious killing done without deliberation; (2) “*a killing arising out*
10 *of ‘any felony other than rape, arson, robbery or burglary’*”; (3) depraved heart killings; and (4)
11 killing somebody during a duel. *Id.* (emphasis added). Prior to 1971, the degree of murder a
12 person risked conviction for depended on the nature of the non-homicide felony they intended to
13 commit. Transferred intent applied to a death resulting from the commission or attempted
14 commission of *any* felony.

15 “As noted, under the prior scheme, certain ‘felony murders’ had been classified as
16 first-degree murder—that is, when the underlying felony was rape, arson, robbery
17 or burglary—or classified as second-degree murder was any other felony. *The*
18 *commentary clarified that the legislature intended to make significant changes in*
19 *the felony-murder doctrine following the trend to abolish the doctrine insofar as it*
20 *applied to any felony, but specifically retain the doctrine as it applied to the*
21 *serious felonies specified in ORS 161.115(1)(c) of the revised Criminal Code:*
22 *arson, burglary, escape, kidnapping, rape, sodomy, and robbery.”*

23 *Id.* at 705–06 (emphasis added).

24 In Oregon, the principle of transferred intent is itself limited to circumstances when
25 somebody ends up dead. Prior to 1971, a person could be guilty of murder regardless of which
felony they attempted, so long as another person ended up dead; the only question was, what
degree of murder? That is to say, because any completed crime necessarily includes an inchoate
attempt, and because inchoate attempts all necessarily involve a specific intent to complete the
attempted crime, that specific intent to commit the felony established the necessary intent to
sustain the murder. After 1971, however, a person could no longer be guilty of murder if a
person’s death was caused by any felony not articulated in the felony-murder subsection of the

1 murder statute. Said another way, in enacting the 1971 Criminal Code, the legislature abolished
2 the doctrine of transferred intent except as provided in the ORS 161.115(1)(c) (1971).

3 The problem with Wesley’s case was that he was not alleged to have been attempting any
4 of those articulated felonies which would rise to the level of felony murder. The appellate court,
5 relying on Article I, section 16, of the Oregon Constitution, which requires that “all penalties
6 shall be proportionate to the offense,” concluded that although it is not articulated in the statute,
7 the crime of attempted murder of one person that results in the death of another person
8 constitutes felony murder:

9 “It is inconceivable that the legislature would conclude that a person who
10 commits homicide while intending to commit one of the listed Class A or B
11 felonies punishable by maximum sentences of 10 or 20 years should be liable for
12 murder, whereas a person who commits homicide while intending to commit a
13 *murder*, albeit of a different individual—which, if completed, would be subject to
14 a harsher sentence—should be acquitted of murder. Put another way, would the
15 legislature have intended that a person who intends to kill one person but kills
16 another be acquitted of murder, while a person who intends to rob a person but in
17 the course of doing so kills another be convicted of murder? We think not,
18 particularly in light of the maxim ‘when one plausible construction of a statute is
19 constitutional and another plausible construction of a statute is unconstitutional,
20 courts will assume that the legislature intended the constitutional meaning.’”

21 *Id.* at 707–08 (quoting *State v. Kitzman*, 323 Or 589, 602, 920 P2d 134 (1996)).

22 “In sum, were defendant correct that killing a person in the course of killing o
23 attempting to kill another person is not murder, but killing a person in the course
24 of committing various other felonies that are less ‘serious’ than murder (in that
25 they carry lesser penalties) is murder, that would create a proportionality problem
of constitutional magnitude. Where neither the text of any statute in the Criminal
Code, nor the commentary to the 1971 Criminal Code, suggests that the
legislature intended to abolish the ‘elementary principle of criminal law’
embodied in the doctrine of transferred intent, *Johnson*, 7 Or at 211, we will not
assume that the legislature intended to produce such anomalous, and
constitutionally problematic, result.”

Id. at 709.

 The purpose of *Wesley* is entirely to demonstrate that felony murder, which is the basis
for the doctrine of transferred intent in Oregon’s criminal law, survives in limited form following
the enactment of the Criminal Code of 1971. Whereas a person can no longer be convicted of

murder when death results from the commission of a felony unarticulated in the murder statute, Wesley judicially adds one offense to that very statute, intentional murder and its inchoate attempt. It does so because to do otherwise would violate the Oregon Constitution. It makes no further comment, and is not persuasive at all, in determining whether the doctrine of transferred intent applies to the crime of assault in the second degree. If anything, it is antithetical to the government's request.

II. PRECEDENT CITED THUS FAR DEMONSTRATES THAT THE COURT WOULD BE WRITING NEW LAW SHOULD IT CONCLUDE TRANSFERRED INTENT APPLIES TO ANYTHING BUT FELONY MURDER

Wesley refers to the doctrine of transferred intent as an “elementary principal of criminal law.” *Id.* at 704 (citing *State v. Johnson*, 7 Or 210, 211 (1879)). It cites to other support, as does the government in its memorandum. From Wesley:

- Blackstone, 4 *Commentaries of the Laws of England* 201 (1796): “The common-law doctrine of transferred intent is a bedrock principle of English common law: ‘[I]f one shoots at A and misses him, but kills B, this is murder; because of the previous felonious intent, which the law transfers from one to the other.’” Wesley, 254 Or App at 703.
- *Gladden v. State*, 273 Md 383, 384–85, 330 A2d 176 (1976): “The petitioner, in fresh pursuit, followed, and as they circled the truck Gladden, at intervals, wildly shot of four or five shots from his .45 caliber gun *without hitting his intended target*. One of the projectiles struck the window sill of the premises at 2327 Barclay Street, two others struck nearby homes, and one, transitioning the window at 2325 Barclay Street, pierced the chest of William Jeffrey Nixon, 12 years of age, a resident there, who was seated on the living room couch.” (Emphasis added).
- *State v. Murray*, 11 Or 413, 5 P 55 (1884): Defendant charged with murder.
- *State v. Grayson*, 126 Or 560, 568, 270 P 404 (1928): “[I]f, in attempting to shoot Albert Grayson or Sullivan, the shot went wild and killed Myrtle Grayson, the defendant would, if the other elements of the crime as they related to the two men were present, be just as guilty as if he had intended to shoot the woman.”
- *State v. Johnson*, 7 Or at 211: “The defendant, James Johnson, was jointly indicted with Archie Brown and Joseph Swards for the crime of murder in the killing of Louis Joseph, while in the commission of a robbery.”

The government, in turn, cites to:

- 1 • *The Queen v. Saunders & Archer*, 75 Eng Rep 706 (1576): Defendant charged with murder of Person B when he had intended to murder Person A.
- 2 • *Regina v. Salisbury*, 75 Eng Rep 158 (1553): Defendant charged with murder of an innocent bystander who was inadvertently struck and killed by a bullet during a gunfight.
- 3 • *Poe v. Maryland*, 341 Md 523, 526 (1996): Defendant charged with murder after shotgun blast did not kill intended target, instead killed the intended target's daughter.
- 4 • *People v. Sanchez*, 26 Cal 4th 834, 838, 29 P3d 209 (2001): Defendant charged with murder after, with the intent to kill a rival gang member, "[a]s defendant's car made its third pass by the house in the course of several minutes, shots were exchanged and Mr. Estrada, an innocent bystander, was hit and killed by a single stray bullet."
- 5 • *Commonwealth v. Gaynor*, 538 Pa 258, 260, 648 A 2d 295, (1994): Defendant convicted of murder after two rivals had been shooting at each other in an arcade, "[n]either actor was struck by the bullets but, inside the store, one youngster was dead, and two other children wounded."
- 6 • *People v. Russell*, 91 NY 2d 280, 287, 693 NE 2d 193 (1998): Defendant charged with murder after engaging in a gun battle with two other individuals. "During the course of the battle, Patrick Daly, a public school principal looking for a child who had left school, was fatally wounded by a single stray nine millimeter bullet that struck him in the chest."

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State v. Aguilar, 176 Wash App 264, 275, 308 P3d 778 (2013), cited by the government, is the only case necessary of any deeper look. Defendant concedes that the doctrine of transferred intent applies to the crime of assault in the second degree in Washington, *see* RCW 9A.36.021(1)(e), but cautions against any conclusion the doctrine applies to Oregon's second-degree assault statute.

First, as is stated in *Aguilar*, "[t]he second degree assault elements relevant here are (1) an assault and (2) *intent to commit a felony*." *Aguilar*, 176 Wash App at 275 (citing to RCW 9A.36.021(1)(e) (emphasis added)). This statutory structure is similar to the concept of felony murder. In Washington's case, if a person has the specific intent to commit a felony, yet nonetheless commits an assault, the intent to commit the felony can be imputed to the *mens rea* for the assault, just as in Oregon, if a person has the intent to commit certain felonies, yet nonetheless a person dies, that person can be charged with felony murder with the intent to commit the felony establishing the necessary intentional mental state for murder.

1 Second, the element of “intent to commit a felony” is not an element in Oregon’s second-
2 degree assault statute. Without that element, the doctrine cannot apply.

3 Third, unlike this case, at the time the Washington trial court made its decision in
4 *Aguilar*, binding jurisdictional precedent had already established that unique version of
5 transferred intent. *Id.* (citing *State v. Clinton*, 25 Wash App 400, 403, 606 P2d 1240 (1980) and
6 *State v. Wilson*, 113 Wash App 122, 131, 52 P3d 545 (2002)). If anything, *Aguilar* strengthens
7 Defendant’s position that transferred intent does not apply to second degree assault in Oregon.

8 **III. THE OREGON CRIMINAL CODE PURPOSELY LEFT OUT**
9 **TRANSFERRED INTENT AS A CULPABLE MENTAL STATE**

10 In 1967, the Oregon legislature created the Criminal Law Revision Commission for the
11 purpose of revising the State’s law of crime and criminal procedure. Forward to Proposed
12 Oregon Criminal Procedure Code, Final Draft and Report (1972). Phase I of the project
13 “replaced a century-old substantive criminal code,” and Phase II encompassed “the first general
14 modernization of our procedural laws since 1864[.]” *Id.*; *see also* Forward to Proposed Oregon
15 Criminal Code, Final Draft and Report (1970) (observing that “Oregon’s basic corpus of statutes
16 that comprise its substantive criminal ‘code’ is 106 years old, dating back to Deady’s Code of
17 1864.”).

18
19 Article 1, Section 2 of the final draft of the proposed criminal code is now codified at
20 ORS 161.035 and provides for its exclusive application to the construction and punishment of all
21 criminal offenses, whether defined by the criminal code or outside the criminal code:

22
23 “(1) Chapter 743, Oregon Laws 1971, shall govern the construction of and
24 punishment for any offense defined in chapter 743, Oregon Laws 1971, and
25 committed after January 1, 1972, as well as the construction and application of
any defense to a prosecution for such an offense.

“(2) Except as otherwise expressly provided, or unless the context requires
otherwise, the provisions of chapter 743, Oregon Laws 1971, shall govern the

1 construction of and punishment for any offense defined outside chapter 743,
2 Oregon Laws 1971, and committed after January 1, 1972, as well as the
3 construction and application of any defense to a prosecution for such an offense.”

4 ORS 161.035; Oregon Laws 1971, c.743, sec. 5.

5 Article 2, Sections 7-11 of the final draft establishes general principles of criminal
6 liability. Section 8 is now codified at ORS 161.095 and provides in part that “* * * a person is
7 not guilty of an offense unless the person acts with a culpable mental state with respect to each
8 material element of the offense that necessarily requires a culpable mental state.” ORS
9 161.095(2). Section 7 states that a “‘culpable mental state’” means “‘intentionally, knowingly,
10 recklessly or with criminal negligence as these terms are defined in subsections (7), (8), (9) and
11 (10) of this section.’” Oregon Laws 1971, c. 743, sec. 7. Subsection (7) was codified at ORS
12 161.085 and provides in pertinent part here:

13 “(7) ‘Intentionally’ or ‘with intent,’ when used with respect to a result or to
14 conduct described by a statute defining an offense, means that a person acts
15 with a conscious objective to cause the result or to engage in the conduct so
16 described.

17 “(8) ‘Knowingly’ or ‘with knowledge,’ when used with respect to conduct or to a
18 circumstance described by a statute defining an offense, means that a person acts
19 with an awareness that the conduct of the person is of a nature so described or that
20 a circumstance so described exists.

21 “(9) ‘Recklessly,’ when used with respect to a result or to a circumstance
22 described by a statute defining an offense, means that a person is aware of and
23 consciously disregards a substantial and unjustifiable risk that the result will occur
24 or that the circumstance exists. The risk must be of such nature and degree that
25 disregard thereof constitutes a gross deviation from the standard of care that a
reasonable person would observe in the situation.

“ (10) ‘Criminal negligence’ or ‘criminally negligent,’ when used with respect to a
result or to a circumstance described by a statute defining an offense, means that a
person fails to be aware of a substantial and unjustifiable risk that the result will
occur or that the circumstance exists. The risk must be of such nature and degree

1 that the failure to be aware of it constitutes a gross deviation from the standard of
2 care that a reasonable person would observe in the situation.”

3 (Emphasis added).

4 The Legislative Commentary to Sections 7 to 11 makes clear that only the four mental
5 states defined above are recognized and applied in the criminal code:

6 “Subsection (6) defines the term ‘culpable mental state.’ This must consist of one
7 of the following: ‘intentionally,’ ‘knowingly,’ ‘recklessly’ or with ‘criminal
8 negligence’ as defined in subsections (7), (8), (9) and (10). These are the only
9 culpable mental states proposed to be recognized or used in the revised Code.”

10 Legislative Commentary to Proposed Criminal Code at 9 (1971) (hereafter “Commentary”).

11 In adopting the culpable mental states of intentionally, knowingly, recklessly and with
12 criminal negligence, the legislature abandoned the mental states of willfully, neglectfully,
13 corruptly, maliciously, wrongfully, and wantonly. Commentary at 10. It concluded that
14 definitions for the latter group of mental states were “not clear, and have been difficult to apply.”
15 *Id.*

16 Accordingly, with criminal offenses that require “intent”—such as second-degree assault
17 under ORS 163.175(1) (b), which provides that “[a] person commits the crime of assault in the
18 second degree if the person * * **[i]ntentionally* causes physical injury to another by means of a
19 deadly or dangerous weapon”—the state is required to prove that the defendant acted with the
20 specific intent or “conscious objective” to cause a specific result to engage in a specific course of
21 conduct. *See* ORS 161.085(7) (“‘Intentionally’ or ‘with intent,’ when used with respect to a
22 result or to conduct described by a statute defining an offense, means that a person acts with a
23 *conscious objective to cause the result* or to engage in the conduct so described.”) (Emphasis
24 added). *See also State v. Crosby*, 342 Or 419, 428 (2007) (An intentional act is performed with a
25

conscious objective to cause a particular result or to engage in particular conduct described).
This long-established definition of “intent” is inconsistent with the doctrine of “transferred intent” which would allow a defendant to be guilty of a modern, specific-intent offense—such as second-degree assault under ORS 163.175(1)(b)—even though the defendant did not have the specific-intent or “conscious objective” described in the statute or charged in the indictment.

The reasons for allowing the doctrine of “transferred intent” in murder prosecutions are particular to murder prosecutions and are absent from non-murder, specific-intent prosecutions such as a prosecution for second-degree assault under ORS 163.175(1)(b). That is, the statutory context that persuaded the court of appeals to allow the “transferred intent” theory of liability for murder cases despite ORS 161.085(7)’s definition of intentionally or “with intent” is inapposite here.

Dated: October 3, 2021.

/s/ Joseph Westover
Joseph Westover, OSB 141427
jwestover@multnomahdefenders.org
Attorney for Defendant

1 **CERTIFICATE OF SERVICE**

2

3 I hereby certify that I served the foregoing

4 DEFENDANT’S MEMORANDUM RE TRANSFERRED INTENT

5 on:

6 Deputy District Attorney Nathan Vasquez
7 nathan.vasquez@mcda.us

8 and

9 Deputy District Attorney Reid Schweitzer
10 reid.schweitzer@mcda.us

11 by the e-mailing a full, true, and correct copy thereof to the individual(s) at the e-mail
12 address(es) shown above and via the Oregon File & Serve system on the date set forth below.

13 Dated: October 3, 2021.

14

15 /s/ Joseph Westover
16 Joseph Westover, OSB 141427
17 jwestover@multnomahdefenders.org
18 Attorney for Defendant

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