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FILED
SID J. WHITE
MAY 28 1993
CLERK, SUPREME COURT
By Chief Deputy Clerk

4/22

IN THE SUPREME COURT OF FLORIDA

BARRY JEROME EDLER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 81,656

INITIAL BRIEF OF PETITIONER ON THE MERITS

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

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PRELIMINARY STATEMENT

This case is before the Court on discretionary review of a certified question of great public importance. In the district court, this case was consolidated from two separate appeals, First DCA Nos. 92-281 and 92-282. The first was an appeal from judgments and sentences on three counts of aggravated battery, the second an appeal from a judgment and sentence of possession of a firearm by a convicted felon. Herein, references to the record in No. 92-281 appear as (R1:[page number]), while references to the record in No. 92-282 appear as (R2:[page number]).

STATEMENT OF THE CASE

The state charged Edler with three counts of aggravated battery, and possession of a firearm by a convicted felon. (R1:262-265) On December 10, 1991, Edler went to trial first on the aggravated battery charges, before Circuit Judge Frank L. Bell. (R1:1,30) At the conclusion of the state's case, defense counsel moved for judgment of acquittal, which was denied, then rested without presenting evidence. (R1:222) During final instructions, the court instructed the jury on transferred intent. (R1:249-250) The jury found Edler guilty of aggravated battery as charged on all three counts, and the state announced it would seek a habitual offender sentence. (RI:257-258, 267, 271) At the sentencing hearing, the state offered evidence of Edler's seven prior felony offenses, and the court found him to be a habitual offender. (RI:274-275) The court also entered a written order to that effect. (R306-308) The court adjudicated Edler guilty of the offenses, and imposed consecutive 30-year habitual offender sentences with three-year mandatory minimum terms. (R280-284, 299-304)

Edler then went to trial on January 24, 1992, on the severed charge of possession of a firearm by a convicted felon, again before Judge Bell. (R2:1, 21) The state moved to introduce the transcribed testimony of Christopher Sanders from Edler's trial on the other counts in this case, taken December 10, 1991. (R2:21) Defense counsel objected and argued that the state had made no effort to secure the attendance of Sanders, a U.S. Army soldier who had returned to his post in Germany after his

testimony in December. (R2:27) The court admitted the transcribed testimony. (R2:29) The court also admitted records establishing Edler's seven prior felonies. (R2:100-101)

The jury found Edler guilty of possession of a firearm by a convicted felon, as charged. (R2:197, 217) The defense acknowledged that the judgments and sentences introduced by the state in an earlier sentencing hearing on the severed counts applied to this count as well, but maintained an objection to habitualization because the convictions were not sequential. (R2:201) The court found Edler to be a habitual offender and sentenced him to 30 years in state prison, consecutive to the three consecutive 30-year sentences imposed on the severed counts. (R2:202, 219-226) The court also imposed a three-year mandatory minimum term for possession of a firearm, also consecutive to the three consecutive three-year terms on the other counts. (R2:202, 221)

Timely notices of appeal was filed, and the Office of the Public Defender was appointed to represent Edler on appeal. (R1:234, 240; R2:317-322)

The First DCA consolidated the two cases and issued a single opinion. The court rejected most of Edler's arguments, some on the merits and some without comment. However, the court did find error in the stacking of minimum mandatory terms for use of the firearm. Slip op. at 3. The court also certified the following question of great public importance:

> MAY CONSECUTIVE ENHANCED SENTENCES BE IMPOSED UNDER SECTION 775.084, FLORIDA STATUTES, FOR CRIMES GROWING OUT OF A SINGLE CRIMINAL EPISODE?

STATEMENT OF THE FACTS

Aggravated Battery Trial

A shooting occurred July 29, 1991, on a street corner in Pensacola. Witnesses referred to this area as "the blocks," evidently a popular gathering area on a street featuring bars and nightspots. (R1:177, 187) William Snow testified that he, his brother Delarian, and two women, their friends Betsy and Barbara, stood around their cars parked on the street there and talked. (R1:139) A man identified by the brothers as Edler approached the group and started to talk to Barbara. (R1:140, 145, 207) After a few minutes, William Snow told the man to leave. (R1:140) The man walked away muttering, according to William. (R1:140)

About 30 minutes later, William saw the same man across the street, hitting his hand with a fist and pointing at William. (R1:141) After 20 or 30 more minutes, the Snows and their friends decided to leave. (R1:141) As William and Delarian approached their respective cars, the man walked toward William and said, "Yes, player, I want some of you." (R1:142) William responded, "Come and get me." (R1:142) The man produced a sawed-off shotgun, and pointed it at William. (R1:143) He swung it back and forth between Delarian, who was at the door of his Jeep, and William, at the door of his car. (R1:143) William tried to stall the man, who told Delarian to get out of his Jeep and walk over next to his brother. (R1:144) The man fired at William's chest, and William flipped over the hood of his car, landing on the other side. (R1:145) He was not hit by the shot. (R1:155) William moved to the rear of his car and, while

crouching, told the man he would see him again. (R1:146) The man fired a second shot. (R1:155) At this point, Delarian was running by William in an attempt to get away. He was struck in the back by buckshot. (R1:205, 210) Delarian said that as the man continued to back away and start to run, he fired a third shot. (R1:205) William described only two shots. Sandra Robinson, a bystander, said she was also hit by the second shot. (R1:162)

Christopher Sanders, another brother of William and Delarian Snow, testified that he heard and saw events from a short distance away. (R1:182) He turned in the direction of the sound of the first shot, and saw a man fire a second shot at his brother William. (R1:182) Delarian was running past William when the second shot rang out, Sanders said. (R1:189) He said he knew Edler from their school days, and identified him as the shooter. (R1:178-179) Shortly after the shooting, Sanders saw William talking to a police officer at a convenience store. (R1:183) He gave Edler's name to the officer. (R1:184) Sanders testified that his brothers did not know Edler before that evening. (R1:193)

Robinson testified that after the shooting, she saw Edler at a hotel, and told him he had shot her. (R1:165) According to Robinson, Edler said he was sorry he had hit her, and that she'd been struck because "the boy" ran in her direction. (R1:174) Edler also said that he thought he'd hit the guy he was shooting at, and that he had hidden the gun. (R1:165)

Delarian Snow was treated for buckshot wounds to the back, and released. (R1:206) He said that at the time of trial, he thought he still had two fragments in his back. (R1:206) Sandra Robinson testified that she received wounds in the left shoulder and back, and both calves. (R1:163) She eventually received hospital treatment the night of the shooting. (R1:165-166) William Snow received pellet wounds on his right elbow, but declined treatment. (R1:150) He said the injury wasn't serious enough for a hospital bill. (R1:150)

Possession of Firearm Trial

This conviction rests largely on the same evidence adduced in the first trial. William and Delarian Snow both testified to events culminating in the two of them being hit by buckshot from a gun fired by a man they identified as Edler. (R2:112-144) Neither said they knew Edler before the shooting. (R2:126, 139) Barbara Jean Madison testified that the man who later committed the shooting had approached and tried to engage her in conversation, but she could not identify Edler as the man. (R2:61) In his testimony from the earlier trial, read to the jury in this trial, Christopher Sanders said he knew Edler by name and saw him commit the shooting. (R2:76-80) Sanders said he later found his brother William Snow talking to police officers, and gave the officers Edler's name. (R2:83) The Snows testified that they were shown a photograph at the police station, after they had learned Edler's name through Sanders. (R2:126-127, 139-144) Delarian Snow said the photograph depicted Edler. (R2:139) Sandra Robinson did not testify in this trial.

SUMMARY OF THE ARGUMENT

I. Consecutive overall sentences are not authorized under the habitual offender statute for crimes committed in a single episode and prosecuted in the same case. This argument is already before the Court in Brooks v. State, No. 80,768, in which the same certified question as in this case was first posed. The question, whether consecutive sentences are authorized under Section 775.084 for crimes growing out of a single episode, should be answered in the negative, and petitioner's four 30-year sentences ordered to run concurrently rather than consecutively.

II. The court erred in admitting the testimony of state witness Christopher Sanders from an earlier trial on severed counts in the same case. The state made no showing it had attempted to secure Sanders' attendance, voluntarily or otherwise, as required by the Florida Evidence Code. Additionally, the absence of evidence of a good-faith effort by the state to procure Sanders' attendance violated petitioner's Sixth Amendment right to confrontation of adverse witnesses. Because Sanders was a crucial identification witness, the district court incorrectly deemed this error harmless.

III. Petitioner was convicted of three counts of aggravated battery for a single shotgun blast which slightly injured three people. The conviction on the third count rests on the doctrine of transferred intent. The jury was instructed on the concept, and the prosecutor relied on it in closing argument, particularly as to Count III. Transferred intent applies only when the intended victim escapes the consequences of the accused's

intentional act, and an unintended victim suffers instead. Here, buckshot from a single round struck the two intended victims and one bystander. Transferred intent does not encompass the conviction involving the bystander. This harm may make the perpetrator liable for another offense, but not the specific intent crime of aggravated battery. Consequently, Count III must fall for lack of an essential element, intent.

IV. The state established an essential element of possession of a firearm by a convicted felon by introducing records of petitioner's convictions in a series of cases from 1988 and 1989, then produced the same convictions to establish his eligibility for an enhanced sentence as a habitual offender. The dual use of the prior record to establish the crime and then enhance its punishment violates the Double Jeopardy clauses of the United States and Florida Constitutions. It resulted in petitioner being put twice to punishment for the same combination of elements, his prior offenses plus the instant felony. The same two elements subjected him first to 15 years in prison for a second-degree felony, then double that for his status as a habitual offender. Thus, the sentence is unconstitutional. The majority opinion in Maeweather v. State, 616 So. 2d 16 (Fla. 1993), did not address the argument made herein.

ARGUMENT

I. CONSECUTIVE OVERALL SENTENCES ARE NOT AUTHORIZED UNDER SECTION 775.084, FLORIDA STATUTES, FOR CRIMES GROWING OUT OF A SINGLE CRIMINAL EPISODE.

The district court certified the same question as in Brooks v. State, 605 So. 2d 874 (Fla. 1st DCA 1992), rev. pending, No. 80,768:

> MAY CONSECUTIVE ENHANCED SENTENCES BE IMPOSED UNDER SECTION 775.084, FLORIDA STATUES, FOR CRIMES GROWING OUT OF A SINGLE CRIMINAL EPISODE?

For reasons explained more fully in the initial and reply briefs in Brooks, petitioner urges this Court to answer the question in the negative, and order that his sentences run concurrently. Since this is a "pipeline" case on this issue, the Brooks argument is presented in abbreviated form herein.

Consecutive overall sentences are not authorized under the habitual offender statute for crimes committed in a single episode and prosecuted in a single case. Habitual offender enhancement is like the three-year mandatory minimum term authorized under section 775.087(2), Florida Statutes. The factor authorizing the enhanced penalty, be it a firearm or a qualifying prior record, attaches to each crime committed in a single episode. Consistent with the law of firearm enhancement, the qualifying factor is subject to only one enhancement per criminal episode. Stacking of sentences creates impermissible multiple enhancements. Additionally, section 775.084(4), Florida Statutes, which calls for sentence enhancement on a case-by-case,

not crime-by-crime basis. Only one overall recidivist enhancement is authorized in each case.

Petitioner's four 30-year sentences under the habitual offender statute were all committed in a single episode, and prosecuted in a single case. The aggravated battery convictions stem from a single round of buckshot which struck three persons. The remaining conviction, possession of a firearm by a convicted felon, arose from the same incident. Therefore, the portion of petitioner's sentencing order mandating consecutive prison terms must be amended to reflect that the sentences are to be served concurrently.

II. USE OF THE SAME PRIOR OFFENSES AS AN ESSENTIAL ELEMENT OF AN OFFENSE AND THEN AS A BASIS FOR ENHANCEMENT OF THE SENTENCE FOR THAT OFFENSE VIOLATES THE DOUBLE JEOPARDY CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS.

The state established an essential element of possession of a firearm by a convicted felon, Count IV, by introducing records of Edler's convictions in Case Nos. 88-3887, 88-3888, 88-4862, 89-934, 89-935 and 89-936. (R2:100) The state produced the same convictions to establish Edler's eligibility for an enhanced sentence as a habitual offender. (R2:201)[1]

The dual use of the prior record to establish the crime and then enhance its punishment violates the Double Jeopardy clauses of the United States and Florida Constitutions. It resulted in petitioner being put twice to punishment for the same combination of elements, his prior offenses plus the instant felony. The same two elements subjected him first to 15 years in prison for a second-degree felony, then double that for his status as a habitual offender. Thus, the sentence is unconstitutional. This Court recently held to the contrary in Maeweather v. State, 616 So. 2d 16 (Fla. 1993). For reasons explained more fully below, petitioner submits that Maeweather does not control as to the argument made herein.

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[1]The defense acknowledged that the state's showing in the sentencing hearing on the aggravated batteries applied to this sentence as well. During that hearing, the state produced records of the same convictions introduced to prove an essential element in the trial on the firearm charge. (R1:274).

The Fifth Amendment to the U.S. Constitution prohibits multiple punishments for the same offense, as does Article I, Section 9 of the Florida Constitution. See generally, State v. Hegstrom, 401 So.2d 1343 (Fla. 1981). The state constitutional provision may grant broader protection than its federal counterpart. The Fifth District Court of Appeal observed that this Court has indicated that, if confronted with the question, it would hold that the state Double Jeopardy clause is defined by Ex Parte Lange, 85 U.S. (18 Wall.) 163, 21 L.Ed. 872 (1873). Wilkins v. State, 543 So.2d 800, 802 (Fla. 5th DCA), rev. denied, 554 So. 2d 1170 (Fla. 1989), citing to Carawan v. State, 515 So.2d 161 (Fla. 1987). In Carawan this Court quoted a passage from Lange which concluded with the proposition that "the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it." 515 So.2d at 164. The context of this statement in Lange suggests that the Court employed the word "offence" not in the contemporary sense of a statutorily defined offense, but in the sense of a common-law crime, a criminal act. In discussing whether the government could vacate a punishment already served and impose a new one, the Lange court stated: "To do so is to punish him twice for the same offense. He is not only put in jeopardy twice but put to actual punishment twice for the same thing." 21 L.Ed. at 878 (emphasis added).

This Court employed "one act" analysis in Cleveland v. State, 587 So.2d 1145 (Fla. 1991). There the defendant was convicted of attempted robbery with a firearm and use of a

firearm in the commission of a felony. The Court ruled this an improper cumulative punishment for the same act, holding that when robbery is enhanced for use of a firearm, the single act of use of the same firearm in commission of the same robbery cannot result in a separate conviction and sentence for use of a firearm in the commission of a felony. Id. at 1146.

Here, as in Cleveland, Edler has twice been put to punishment for the same thing, that is, the same combination of acts creating both the statutory offense and the grounds for sentence enhancement. The prior convictions constituted a substantive element of section 790.23, Florida Statutes (1991), possession of a firearm by a convicted felon. Harris v. State, 449 So.2d 892 (Fla. 1st DCA), rev. dismissed, 453 So.2d 1364 (1984). This same substantive element necessary to create the offense then served as an element essential to the sentence enhancement under section 775.084, Florida Statutes (1991). This dual use of the prior record distinguishes this sentence from the usual operation of recidivist statutes which have withheld double jeopardy challenges. For instance, in Cross v. State, 96 Fla. 768, 119 So. 380 (1928), the court wrote:

> The [recidivist] statute does not make it an offense or crime for one to have been convicted more than once. The law simply prescribes a longer sentence for a second or subsequent offense for the reason that the prior convictions taken in connection with the subsequent offense demonstrates the incorrigible and dangerous character of accused thereby establishing the necessity for enhanced restraint. The imposition of such enhanced punishment is not a prosecution of or punishment for the former convictions. The Constitution forbids such action. The enhanced punishment is an incident to the

> last offense alone. But for that offense it would not be imposed.

Id. at 386 (citation omitted). See also, Tillman v. State, 609 So. 2d 1295 (Fla. 1992). When, as occurred here, the subsequent offense requires proof of the prior convictions, additional use of these convictions for sentence enhancement results in two new punishments for the same factor. This is no connection of independent factors, the new crime and the old record, creating a synthesis of an enhanced punishment, as contemplated in Cross. Rather, the record serves to create the new crime, and both the new crime and the record create the enhancement. The same element is bootstrapped into two punishments for one offense, violating constitutional protections against twice being put to punishment for the same conduct.

Analogy to a hypothetical scenario may make this principle clearer. The process by which the prior offenses elevate a noncriminal act into a felony, then enhance the punishment for that felony, parallels the process by which use of a deadly weapon enhances a battery from a misdemeanor to a felony, then also serves as an essential element to the derivative crime of possession of a weapon in the commission of a felony. In the latter scenario, without the weapon there is no aggravated battery, thus no felony to which the crime of possession of a weapon in the commission of a felony could attach. Under Cleveland, supra, the residual weapon offense must fall as an improper cumulative punishment for the same act. In this case, without the prior record, there is no felony of possession of a firearm by a convicted felon, thus no felony to which habitual

felony offender enhancement could attach. Once the record creates the felony, it then creates the foundation for sentence enhancement, just as in the hypothetical, the weapon creates the felony, then provides another element essential to possession of a weapon in the commission of a felony. Through both operations, a single factor puts the offender twice to punishment.

This argument differs from the one this Court rejected Gayman v. State, 616 So.2d 17 (Fla. 1993). Gayman argued that enhancement of petit theft to a felony in addition to enhancement of the sentence under the habitual offender statute constituted double jeopardy because the legislature intended alternative but not dual enhancements. This Court rightly rejected the argument because felony petit theft relies on prior misdemeanors for enhancement, while habitual offender status relies on prior felonies. Thus, habitualization is independent of the prior thefts. Here, however, the substantive offense and the enhanced punishment both depend on the same prior offenses. This may have been true as well in Maeweather; the opinion is unclear on this point. In any event, habitual offender enhancement of the punishment for felony petit theft involves double jeopardy concerns wholly separate from habitual offender enhancement of the punishment for possession of a firearm by a convicted felon. Therefore, the Court was mistaken in concluding that the answer to the certified question in Maeweather was dictated by the result in Gayman.

In her concurring opinion in Maeweather, Justice Barkett recognized the distinction. Nonetheless, finding that Maeweather

did not receive two enhanced sentences for the same conduct, she joined with the result therein. The undersigned counsel has examined the briefs in Maeweather, and cannot determine whether the state relied on the same offens(es) as an essential element of the crime of possession of a firearm by a convicted felon and as the predicate offenses for habitual offender enhancement. This Court may take judicial notice of the briefs in Maeweather, No. 79,995. See Foster v. State, 603 So. 2d 1312, 1314 n.1 (Fla. 1st DCA 1992), rev. denied, 613 So. 2d 4 (Fla. 1993) (court takes notice of briefs filed in different case before court). Therefore, at least one member of this Court may conclude that on these facts, Edler was twice punished for the same conduct, i.e., his prior record of seven offenses used both to prove the crime and establish eligibility for a recidivist sanction.

For these reasons, Edler's sentence as a habitual offender on Count IV violates the Double Jeopardy clauses of the state and federal constitutions. The sentence should be vacated and a sentence for this count imposed without resort to section 775.084, Florida Statutes. Petitioner urges this Court to reexamine the double jeopardy implications of a habitual offender sentence for possession of a firearm by a convicted felon based on the same offenses used to establish the convict status for the substantive offense. Neither Gayman nor Maeweather answered the question posed herein.

III. A CONVICTION OF AGGRAVATED BATTERY AGAINST AN UNINTENDED VICTIM CANNOT REST ON THE SAME INTENT NECESSARY FOR A SEPARATE CONVICTION INVOLVING AN INTENDED VICTIM.

The evidence at trial showed that after pointing a shotgun at brothers William and Delarian Snow, Edler fired at William, slightly injuring him, Delarian and bystander Sandra Robinson. Consequently, Edler faced three counts of aggravated battery, charged in each count as a battery plus use of a deadly weapon. During closing arguments, the prosecutor told the jury that although the evidence showed only that Edler intended to harm the Snows and not Robinson, he committed aggravated batteries on all three:

> Then we have a person that is out there and she's totally innocent. She is not involved in the incident whatsoever, and she ends up getting shot on the backside, on her calves and on her shoulder and her arms. She's just trying to run away from the scene, and as the defendant told her, the guy was running in your direction and I shot, that's how you got shot. That is how she got shot. But that still makes him guilty of aggravated battery on her. Even though he may not intentionally intended to shoot her, he intentionally intended to shoot William, and he also intentionally intended to shoot Delarian. He was shooting and pointing the gun at Delarian, also.
>
> The Judge will tell you if a person intentionally directs force against one person wrongfully, but instead hits another person, which is the case her, Sandra got hit, and if you don't think he was aiming at Delarian and Delarian got hit as a result of aiming at William. His intent is said to be transferred from on to the another and he's liable to the other though he didn't intend it in the first instance. So whether or not he intended to hit Sandra is not something for you to consider, because she got hit as a result of him intending to shoot William.

(R237). Then, the judge gave the instruction the prosecutor had anticipated:

> If a person intentionally directs force against one person wrongfully, but instead hits another person, his intent is said to be transferred from one to the (sic) another and he is liable to the other though he did not intend it in the first instance.

(R250) The jury found Edler guilty as charged on all three counts. In the district court, Edler argued that under the doctrine of transferred intent, the intent element of aggravated battery could not be divided among the intended victim, William Snow, and unintended victims Delarian Snow and Sandra Robinson. The court noted that the doctrine had been employed in analogous situations in Florida, then stated:

> While the court is aware of authority from other jurisdictions holding to the contrary, we are not persuaded by the reasoning employed in those cases given the particular facts of the instant case. We are particularly unwilling to disturb the aggravated battery convictions here in view of evidence that appellant intended to shoot Delarian, as indicated by the fact that appellant alternatively pointed his gun at William as well as Delarian Snow. Also, there was evidence that appellant fired a third shot, possibly indicating appellant's intent indiscriminately to strike person in Delarian's and Sandra Robinson's vicinity.

Slip op. at 5.

Petitioner accepts the district court's view of the facts as supplying legally sufficient of his specific intent to strike Delarian Snow. However, the court's conclusion that the evidence indicated specific intent to harm Sandra Robinson is unsupportable. Therefore, the conviction in Count III, which

rests on divisible intent and not transferred intent, must fall for lack of an essential element.

Black's Law Dictionary, Sixth Edition, contains the following entry for the transferred intent doctrine:

> If an illegal yet unintended act results from the intent to commit a crime, that act is also considered illegal. Under doctrine of "transferred intent," original malice is transferred from one against whom it was entertained to person who actually suffers consequence of unlawful act. Provenzano v. State, 497 So.2d 1177, 1181 [(Fla. 1986)]. For example, if a person intentionally directs force against one person wrongfully but, instead, hits another, his intent is said to be transferred from one to the other and he is liable to the other though he did not intend it in the first instance.

In Provenzano, the defendant arrived in court intending to kill two police officers, but following a confrontation with courtroom personnel killed a bailiff instead. The Florida Supreme Court analogized these facts to those of Coston v. State, 139 Fla. 250, 190 So. 520 (1939), in which the defendant gave a poisoned whiskey bottle to his intended victim. The victim gave it to another, and the bottle was passed along twice more before an unintended victim drank its contents and died. In Coston, as in Provenzano, the court held that the original malice may be transferred to the person who actually suffered the consequences of the unlawful act. Accord, Pressley v. State, 395 So.2d 1175 (Fla. 3d DCA 1981) (attempting to kill one person, defendant fired into group of people, killing another); Wright v. State, 363 So.2d 617 (Fla. 1st DCA 1978) (defendant fired gun at motorist who struck and killed pedestrian while attempting to evade shots). The principle also appears in the standard jury

instructions on first-degree murder, like aggravated battery a specific intent crime: "If a person has a premeditated design to kill one person and in attempting to kill that person actually kills another person, the killing is premeditated." Fla. Std. Jury Instr. (Crim.), Murder - First Degree, F.S. 782.04(1)(a).

Like the holdings in Provenzano and Coston, the standard jury instruction contemplates that the attempt to commit the offense against the intended victim failed, and in his or her place, an unintended victim suffered the consequences of that intent. The intent is transferred from the intended victim to the actual victim; it does not reside in both. This is consistent with the common understanding of "transfer" as a verb. A transferred employee no longer works in her former location or department, but in the one to which she is transferred. A case transferred from juvenile division of a circuit court to the felony division becomes wholly within the purview of the felony division. Dictionary definitions carry the same connotation.

The conviction on Count III rests not on transferred intent but on divisible intent, a term coined in this case to define a single mental state supplying an essential element for separate crimes involving intended and unintended victims. Divisible intent is a concept foreign to accepted principles of criminal responsibility, and wholly inconsistent with specific intent. As stated above, aggravated battery is a specific intent crime, which, as charged here, requires specific intent to commit a battery -- to touch, strike or cause bodily harm to another. State v. Horvatch, 413 So.2d 469 (Fla. 1982); Russell v. State,

373 So.2d 97 (Fla. 2d DCA 1979). Here, the element of specific intent is necessary to sustain convictions for batteries against the intended victims, the Snow brothers. That element cannot also be transferred to a third victim, Robinson, for the intended victims were also hit. The doctrine of transferred intent does not apply to these circumstances. Even if the intent could be transferred from one victim to another, the conviction on the count from which it is transferred would fall for lack of an essential element. Only if intent is divisible can the specific intent to commit one crime supply the essential element of several other crimes as well. To reiterate, transferred intent is distinguishable from divisible intent, and the latter wholly lacks legal support.

To prohibit conviction of a specific intent crime when the same intent is an essential element of another crime does not reward the offender because an unintended victim has suffered the consequences of the intentional act. The policy behind transferred intent is to prevent a benefit to one who strikes an unintended victim. See Coston v. State, 139 Fla. at 253-54, 190 So. at 522. One who strikes his intended victim(s) is liable for that act; here, the aggravated battery convictions in Counts I and II remain viable. Additionally, when that act also results in others being struck or endangered, the offender has acted with culpable negligence or reckless indifference with regard to the other victims. Depending on the harm inflicted, he or she may be convicted of culpable negligence as a second-degree misdemeanor (no injury; s. 784.05(1), Fla. Stat.); culpable negligence as a

first-degree misdemeanor (injury; s. 784.05(2)); second-degree murder (reckless indifference resulting in death; s. 783.04(2)); or manslaughter (culpable negligence resulting in death, s. 782.07). Here, the applicable charge for Count III, pertaining to Sandra Robinson, is culpable negligence resulting in injury, a first-degree misdemeanor.

The district court pointed to evidence of a third shot as "possibly" indicating Edler's intent to strike persons in the vicinity indiscriminately, thereby supporting the conviction in Count III. Slip op. at 5. In reply, there was simply no evidence that in firing these shots -- whether two or three -- Edler specifically intended to strike anyone but the Snow brothers. All three victims were hit by the second shot. The state presented Robinson's testimony that Edler told her she was struck accidentally. In closing argument, the prosecutor made no pretense of arguing an intent to strike other persons on the street, and instead relied on the transferred intent instruction. The absence of evidence of specific intent to strike Robinson means the state failed to provide competent, substantial evidence of an essential element of the crime. See Tibbs v. State, 397 So. 2d 1120, (Fla. 1981). Stated in the alternative, this missing element left the proof insufficient to form a basis upon which the jury could find guilt beyond a reasonable doubt. See Richardson v. State, 566 So. 2d 33, 34 (Fla. 1st DCA 1990); Brown v. State, 424 So. 2d 950, 955 (Fla. 1st DCA 1983). A jury is free to draw inferences only from legally sufficient evidence,

and here the evidence was insufficient for the jury to -- as stated below -- "infer the necessary intent." Slip op. at 4.

Several cases cited by the district court should be addressed. In Lee v. State, 141 So.2d 257 (Fla. 1962), the defendant was convicted of two counts of murder for firing a shot into a car carrying his estranged wife and her father. The court held that the evidence amply showed premeditation against the father-in-law as well as the wife, then briefly noted that transferred intent would also apply in this case. Id. at 259. However, in reciting the facts, including threats by the defendant against the father, the court disclosed independent evidence sufficient to support its conclusion that murder of the father-in-law was premeditated. Id. The several sentences in the opinion on transferred intent were thus dicta, subject to the usual dangers of expounding legal principles not necessary to the result reached. Brown v. State, 599 So. 2d 132 (Fla. 2d DCA 1992), concerned convictions for aggravated batteries against intended and unintended victims, but there is no indication the inapplicability of transferred intent on those facts was urged on appeal. Id. at 133-134 (Altenbrand, J., concurring). Finally, in Battles v. State, 498 So.2d 1028 (Fla. 1st DCA 1986), the district court affirmed two aggravated battery convictions for the defendant's act of throwing acid which struck both the intended victim and an unintended bystander. Although the court noted that the second conviction rested on transferred intent, the opinion contains no discussion on the question whether transferred intent applied to those circumstances. Perhaps the

issue was not raised. In any event, to petitioner's knowledge, no Florida appellate court had addressed this issue before the district court opinion here.

This case presents an opportunity for this Court to determine on a Statewide basis the applicability of transferred intent when charges arise from harm to both intended and unintended victims. As noted by the district court, courts in other jurisdictions have held transferred intent inapplicable under such circumstances. Slip op. at 5, n.3. Petitioner urges this Court to so hold here. The decision of the district court should be quashed on this point, and the case remanded for acquittal on Count III.

IV. THE TRIAL COURT ERRED IN ADMITTING THE TRANSCRIBED TESTIMONY OF AN ABSENT WITNESS WHOSE ATTENDANCE THE STATE HAD NOT ATTEMPTED TO PROCURE BY PROCESS OR OTHER REASONABLE MEANS, VIOLATING APPELLANT'S CONSTITUTIONAL CONFRONTATION RIGHTS.

During the trial on the firearm charge, the court admitted the transcribed trial testimony of state witness Chris Sanders over objection. Sanders had testified several weeks earlier in the trial on the aggravated battery counts severed from this charge, but had returned to his station in Germany as a soldier in the United States Army. (R2:21-25) The defense objected and asserted that the state made no effort to secure Sanders' attendance, relying instead on his status as a soldier on foreign soil. (R2:26-27)

The court erred. The state made no showing it had attempted to secure Sanders' attendance, voluntarily or otherwise, as required by the Florida Evidence Code. The absence of evidence of a good-faith effort by the state to procure Sanders' attendance also violated Edler's Sixth Amendment right to confrontation of adverse witnesses.

Section 90.804(1), Florida Statutes, defines unavailability for purposes of admission of an absent witness' prior testimony. The pertinent portion of the statute provides as follows:

" 'Unavailability as a witness' means that the declarant is absent from the hearing, and the proponent of his statement has been unable to procure his attendance or testimony by process or other reasonable means." Sec. 90.804(1)(c), Fla. Stat. (1991). The provision creates a two-prong test, the second prong placing a burden on the state to show that it has made an unsuccessful

attempt to secure the witness' attendance by reasonable means. Here, the state by its own admission made no attempt to secure Sanders' attendance. Clearly, the rule makes this the state's burden. It is not incumbent upon defense counsel to show how the state might reasonably have obtained the witness' presence. The trial court mistakenly perceived otherwise, questioning defense counsel how the state could compel Sanders to appear. (R2:27) This improper burden shifting alone rendered the court's ruling in error.

The court's ruling also violated the Confrontation Clause of the Sixth Amendment to the U.S. Constitution, with which the rule of evidence is intertwined. Before the prior testimony of an absent witness may be presented in a criminal trial, the Confrontation Clause requires a showing of unavailability. As the U.S. Supreme Court stated in Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980):

> The basic litmus of Sixth Amendment unavailability is established: "A witness is not 'unavailable' for purposes of the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial."
>
> Although it might be said that the Court's prior cases provide no further refinement of this statement of the rule, certain general propositions safely emerge. The law does not require the doing of a futile act. Thus, if no possibility of procuring the witness exists (as, for example, the witness' intervening death), "good faith" demands nothing of the prosecution. But if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation. "The lengths to which the prosecution must go to produce a witness is a question of

> reasonableness." The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness. As with other evidentiary proponents, the prosecution bears the burden of establishing this predicate.

Id. at 74-75 (citations omitted).

The facts of this case fall between those of the two leading Supreme Court decisions in this area. In Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968), the prosecutor in an Oklahoma armed robbery case made no effort to secure the presence of a codefendant, who had testified at a preliminary hearing but at the time of trial was in a federal prison in Texas. The Supreme Court rejected the notion that the state had made a showing of unavailability sufficient to justify admission of the codefendant's prior testimony, noting that the state made no effort to obtain the witness' presence and assumed his mere absence from the jurisdiction of the court adequately demonstrated impossibility to compel his attendance. Id. at 1321-1322. In Mancusi v. Stubbs, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972), the absent witness had taken permanent residence in Sweden. The Supreme Court held the predicate of unavailability stronger than in Barber, enough so that a federal habeas court was not warranted in upsetting the state trial court determination as to the witness' unavailability. Id. at 212-213. A federal appeals court has noted that Mancusi, rather than a retreat from the Barber test, is an application of the test to different facts. Government of the Canal Zone v. P. (Pinto), 590 F.2d 1344, 1349 n.7 (5th Cir. 1979).

Here, the absent witness was not a permanent resident of another nation but a member of the United States armed forces stationed abroad. There was, in the language of Roberts, at least a remote possibility that affirmative measures might have produced Sanders. Good faith demanded at least some effort from the prosecution. As in Barber, however, it undertook none, seeking instead to rely on Sanders' absence from the country, a circumstance the prosecutor had foreseen in opposing Edler's motion to continue the trial on the first three counts in this case. (R1:3) The state's conduct on this matter certainly cannot be deemed in good faith.

For these reasons, the trial court erred in admitting the transcribed testimony of Chris Sanders in Edler's trial for possession of a firearm by a convicted felon. The district court cited no authority for its rejection of this claim below, stating only that "[o]n these facts," it found no error. Slip op. at 3. The court also reached an unwarranted conclusion that the error was harmless "given the cumulative nature of Sanders' testimony." Alone among the state's witnesses, Sanders knew and identified Edler by name as the shooter. He supplied Edler's name to his brothers and to law enforcement, leading to inclusion of Edler's picture in a photographic lineup. Without his testimony, jurors may have concluded that the state had not established identity beyond a reasonable doubt. See Coy v. Iowa, 487 U.S. 1012, 1022, 108 S.Ct. 2798, 101 L. Ed. 2d 857 (1988) (harmlessness in denial of confrontation of trial witness must be determined on basis of remaining evidence). Had Sanders appeared for trial, the jurors

may have assessed his demeanor and found him incredible. Use of the transcribed testimony made either determination by the jury substantially less likely, and thereby weakened the chances of acquittal. Consequently, the district court incorrectly concluded that the state had established beyond a reasonable doubt that the error in admitting the prior testimony did not affect the verdict. Therefore, a new trial on this charge, Count IV, is required.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, petitioner requests that this Honorable Court quash the decision of the district court in part, and remand with appropriate directions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Laura Rush, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, FL, on this 28th day of May, 1993.

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

BARRY JEROME EDLER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO.: 92-281/92-282

Opinion filed March 30, 1993.

An Appeal from the Circuit Court for Escambia County. Frank Bell, Judge.

Nancy A. Daniels, Public Defender; Glen P. Gifford, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Laura Rush, Assistant Attorney General, Tallahassee, for Appellee.

SMITH, J.

Appellant seeks reversal of his convictions and enhanced sentences for three counts of aggravated battery and for

one count of possession of a firearm by a convicted felon.[1] We find only one of the several issues raised is meritorious; we affirm the convictions but remand for resentencing.

After a verbal exchange with William and Delarian Snow on a Pensacola street corner, appellant returned with a sawed-off shotgun. Evidence adduced at trial indicated that appellant fired at least two shots, and possibly a third shot, striking William and Delarian Snow and a bystander, Sandra Robinson. Fortunately, all three victims escaped serious injury.

Appellant was charged with three counts of aggravated battery and one count of possession of a firearm by a convicted felon, the latter of which was tried separately. Following a jury trial on the aggravated battery counts, appellant was found guilty as charged and was sentenced as a habitual felony offender. He was later found guilty of possession of a firearm by a convicted felon. For each of the aggravated battery counts, appellant received a 30-year sentence, the sentences to be served consecutively. Thus, appellant was given a 90-year sentence for the aggravated battery offenses, to which an additional 30-year consecutive sentence for the possession of a firearm by a convicted felon is added. In total, appellant was sentenced to 120 years.

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[1] On our motion, we have consolidated the appeal from the aggravated battery convictions and sentence, Case No. 92-281, and the appeal from the possession of a firearm by a felon conviction and sentence, Case No. 92-282.

The trial court also sentenced appellant to consecutive three-year minimum mandatory terms for all four offenses for use of a firearm. The state concedes that the stacking of these minimum terms was erroneous under Palmer v. State, 438 So. 2d 1 (Fla. 1983). Accordingly, the cause is remanded for resentencing on this point.

We find no error in the imposition of habitual offender sentences even though the prior offenses used for habitualization were also used to prove a past conviction, an element of the offense of possession of a firearm by a convicted felon. The double jeopardy argument raised by appellant has been rejected. Maeweather v. State, 599 So. 2d 733 (Fla. 1st DCA 1992), affirmed, 18 Fla. L. Weekly S120 (Fla. Feb. 11, 1993).

Appellant also claims that the trial court erred in allowing the prosecution to read, in the second trial, the testimony given by a witness to the shooting, Chris Sanders, in the first trial on the aggravated battery charges. We note that appellant had cross-examined Sanders in the first trial, and that Sanders, a member of the armed forces, had returned to his overseas post in Germany by the time the second trial had commenced. On these facts, we are not persuaded that the trial court erred in allowing the state to read Sander's prior testimony over the appellant's objection that the state had not made a sufficient attempt to secure Sander's live attendance at the second trial. However, even if error, we find the error was harmless given the cumulative nature of Sander's testimony.

Finally, we reject appellant's argument that two of the aggravated battery convictions, that is, those pertaining to the shooting of Delarian Snow and Sandra Robinson, improperly relied upon the doctrine of transferred intent. Appellant contends on appeal that because the intended victim, William Snow, was actually harmed by appellant, the doctrine cannot be used to supply the intent to harm another person. First, it should be observed that appellant made no specific argument or objection below as to the application of this doctrine, nor did he defend against the charges by asserting he intended no harm to Delarian Snow or Sandra Robinson.[2] Because the facts of this shooting incident were such that a jury could infer the necessary intent, we find it necessary to only briefly address appellant's argument that while intent may be transferred in an appropriate case, intent is not divisible so as to warrant conviction of crimes against both intended and unintended victims.

Appellant provides no direct authority for his argument but cites Provenzano v. State, 497 So. 2d 1177 (Fla. 1986), and Coston v. State, 139 Fla. 250, 190 So. 520 (1939), cases where the intended victim of a murder attempt was not killed but an unintended victim was, as setting the parameters

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[2] Appellant did not testify and called no defense witnesses in either trial; his argument to the jury and his cross-examination of state witnesses indicates that appellant was claiming a mistaken identity.

for the proper use of the transferred intent doctrine. However, we do not read Provenzano or Coston as precluding application of this doctrine in the instant case. Further, the doctrine has been employed without objection in cases analogous to the one at bar where the intended as well as supposedly unintended victims are actually harmed. See, Lee v. State, 141 So. 2d 257 (Fla. 1962), Battles v. State, 498 So. 2d 1028 (Fla. 1st DCA 1986), and Brown v. State, 599 So. 2d 132 (Fla. 2d DCA 1992). While this court is aware of authority from other jurisdictions holding to the contrary,[3] we are not persuaded by the reasoning employed in these cases given the particular facts of the instant case. We are particularly unwilling to disturb the aggravated battery convictions here in view of evidence that appellant intended to shoot Delarian, as indicated by the fact that appellant alternatively pointed his gun at William as well as Delarian Snow. Also, there was evidence that appellant fired a third shot, possibly indicating appellant's intent indiscriminately to strike persons in Delarian's and Sandra Robinson's vicinity.

We likewise find no merit in appellant's challenge of the imposition of consecutive habitual felony offender sentences. Brooks v. State, 605 So. 2d 874 (Fla. 1st DCA 1992).

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[3] See, for example, People v. Birreuta, 162 Cal. App. 3d 454, 208 Cal. Rptr. 635 (Cal. Ct. App. 1984), and People v. Czahara, 203 Cal. App. 3d 1474, 250 Cal. Rptr. 836 (Cal. Ct. App. 1988); compare, State v. Livingston, 420 N.W.2d 223 (Minn. Ct. App. 1988).

However, as we did in Brooks, we certify the following as a question of great public importance:

> MAY CONSECUTIVE ENHANCED SENTENCES BE IMPOSED UNDER SECTION 775.084, FLORIDA STATUTES, FOR CRIMES GROWING OUT OF A SINGLE CRIMINAL EPISODE?

Accordingly, appellant's convictions and habitual offender sentences are AFFIRMED, but the consecutively imposed minimum mandatory sentences for use of a firearm are VACATED and the cause is REMANDED.

BOOTH AND MINER, JJ., CONCUR.