NO. 45579-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

AARON G. CLOUD ,

Appellant.

AMENDED BRIEF OF APPELLANT

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Assignment of Error

1. Since substantial evidence does not support a finding that the defendant acted with the intent to inflict great bodily injury the trial court denied the defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it accepted the jury's verdict of guilt on the charge of first degree assault.

2. The trial court denied the defendant his due process rights under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, to present exculpatory evidence that he ran from the police because of the existence of an outstanding warrant and not as evidence of culpability for the offense charged.

3. The trial court's refusal to allow the defense to argue that Mr. Egeler was the perpetrator of the crime violated the defendant's right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

Issues Pertaining to Assignment of Error

1. Does a trial court deny a defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it accepts the jury's guilty verdict on a charge of first degree assault when substantial evidence does not support a finding that the defendant acted with the intent to inflict great bodily injury, which is an essential element of that offense?

2. Does a trial court deny a defendant the right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, to present exculpatory evidence if it refuses to allow that defendant to elicit evidence that he ran from the police because of the existence of an outstanding warrant and not as evidence of culpability for the offense charged?

3. Does a trial court's refusal to allow a defendant to argue that another person committed the crime for which the defendant is charged violate that defendant's right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when the evidence at trial supports the conclusion that another person committed the offense?

STATEMENT OF THE CASE

Factual History

At about 9:30 pm on July 24, 2013, Michelle Ray Ross was driving her silver 2006 Jetta with black wheels through the city of Bremerton after having returned from visiting her mother in Port Orchard. RP 78.[1] The defendant Aaron G. Cloud was riding in the front passenger seat and a person by the name of Brandon Egeler was in the back. RP 80-81, 101-102, 297. Ms Ross and the defendant had picked Mr. Egeler up earlier in the evening. RP 81-82. At the time Ms Ross and the defendant had been living together for a few weeks and had been acquainted with each other for many years. RP 75. According to Ms Ross, when they stopped to pick up Mr. Egeler, the defendant had asked if he was carrying a weapon and had Mr. Egeler lift up his shirt to show he didn't have a gun in his belt. RP 81-82. Ms Ross did not see a weapon but she could not see behind Mr. Egeler's back. RP 103. As far as she knew the defendant was unarmed and there was no weapon in her vehicle. RP 88-89. In addition, on that night both the defendant and Mr. Egeler were wearing their hair cut very close to their heads. RP 152, 201.

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[1]The record on appeal includes 8 continuously numbered volumes of verbatim reports of the trial held in this case between 10/9/13 to 10/22/13. They are referred to herein as "RP [page #]." The record on appeal also includes the verbatim reports of hearings held on 8/12/13, 9/6/13, 10/4/13, and 11/4/13 as well as the opening statements given on 10/15/13. These volumes are referred to herein as "RP [date] [page #]."

Ms Ross later explained that at one point while in Bremerton she stopped for a light in the right of two left turn lanes. RP 80-81. While waiting for the light to change a truck pulled up next to them on the right. *Id.* When it did the driver and the defendant looked at each other and exchanged some unpleasant words with the defendant first saying "what's up." RP 83-85. However, Ms Ross could not hear what was said beyond that. *Id.* Within a short space of time the light changed and she turned left. *Id.* The truck that had been beside her then made an illegal left turn and began pursuing her as she accelerated away. *Id.* As the truck approached on her right side she hit her brakes and the truck went by quickly. RP 85-86. As it passed she heard a popping sound and initially thought she had blown a tire. *Id.* Although she saw the defendant raise his arm she did not see a gun in his hand. RP 87-89. In fact she did not see a gun at any point. RP 102-103.

After the truck went by it stopped and turned around as if to pursue Ms Ross. RP 89-90. In response she turned around and went back in her original direction in an attempt to get away from the truck. *Id.* While making a few turns she did catch sight of the truck. RP 90-91. After a few minutes she came to a police officer who was blocking the road. *Id.* She then stopped even though the defendant was saying "Go, go, go." *Id.* In fact the defendant had an active warrant for his arrest at the time. RP 524-531. After she stopped her vehicle the defendant jumped out and ran off. RP 91-93. She

last saw him running around a corner. *Id.* A few minutes later a number of officers arrived and took her and Mr. Egeler into custody. RP 97-105, 195. When taken into custody, Mr. Egeler lied about his identity and gave his brother's name, although his true identity "later came out." RP 198.

According to a number of Bremerton Police Officers they responded to that area based upon a 911 call placed by a person by the name of Kyle Fortuna, who had claimed that a passenger in a Silver Jetta with black rims had shot at him and put a bullet hole in the lower portion of his driver's side door. RP 139, 212-213, 247-254. They then met with Mr. Fortuna, took a statement, saw the bullet hole and a number of them then started looking for the Silver Jetta. *Id.* The following gives the transcription of Mr. Fortuna's entire 911 call:

911 Operator: 911, what are you reporting?

Caller: Yeah, somebody just shot at me.

911 Operator: Okay, what's the address where this occurred?

Caller: I'm on Naval right now, and the person's driving a silver ...

911 Operator: Jetta, black rims....Hold on, hold on, you need to give me a cross street on Naval. What's the cross street?

Caller: I'm currently on Naval and 10th.

911 Operator: And 10th? Okay, and how long ago did this happen?

Caller: Just now.

911 Operator: Do you need an ambulance?

Caller: I don't believe so, but they just shot at me and I don't know where they went.

911 Operator: Okay. So it was a vehicle that shot at you, is that correct?

Caller: Yes.

911 Operator: Okay. Hold on just a second while I get this in, okay?

Caller: Yup.

911 Operator: Okay, give me a description of the vehicle that shot at you.

Caller: Uhhh. A silver, a silver lowered ah...ah...

911 Operator: Was it a Jetta, you said?

Caller: What's that?

911 Operator: A Jetta?

Caller: Like a Jetta, or, either a Jetta or a Passat.

911 Operator: Did it have black rims?

Caller: Yes.

911 Operator: Okay. How many people were inside the vehicle?

Caller: Probably three. It's a female driving and a guy with a shaved head in the passer seat.

911 Operator: Okay. Did you see the gun?

Caller: Yes, I saw the gun.

911 Operator: Can you tell me what type of gun it was?

Caller: Uh, a .22.

911 Operator: Okay. And I just want to confirm, you do not need an ambulance?

Caller: No.

911 Operator: Okay. Are you going to be waiting at Naval and 10th for law enforcement to contact you?

Caller: Ahh...I'll be....I'm on Naval right now, coming back towards AM/PM.

911 Operator: Are you walking?

Caller: No, I'm driving.

911 Operator: Oh, okay, so you're actually driving in a vehicle?

Caller: Yes.

911 Operator: What kind of vehicle are you in?

Caller: I'm in a Mazda (unintelligible) kind of low rider truck.

911 Operator: Where are you going to be waiting for contact?

Caller: I'll be at AM/PM.

911 Operator: You'll be at AM/PM. Okay.

Caller: Yep.

911 Operator: Can you give me direction of travel for the vehicle that shot at you?

Caller: Uh, it was circling around between Naval and 11th. It was circling around doing ..going around the block, um...

911 Operator: Hold on just a second for me, okay? You're doing a

good job of giving me this information. Hold on just a minute for me.

Caller: Yeah.

911 Operator: And you're at the AM/PM on 6th Street?

Caller: Yeah, yeah. Right now I am.

911 Operator: Okay. You're doing a good job. Hang on just a second here for me. Can you give me any other description about the female driver?

Caller: Uhh...I don't know the female driver...

911 Operator: Was she white? Black?

Caller: It was a white female.

911 Operator: White female. Can you tell me what she was wearing, or what color hair she had?

Caller: I..I just got a glance. I don't know.

911 Operator: That's okay. And how about the male passenger. You said he had a shaved head?

Caller: Shaved head...

911 Operator: And was he also white?

Caller: Yeah.

911 Operator: White male. Okay. Do you hear the officer there?

Caller: Well, they're speeding around, but....

911 Operator: They're trying to locate the vehicle.

Caller: Oh. Okay.

911 Operator: I'm just going to keep you on the phone here. What is your name sir?

Caller: Kyle Fortuna.

911 Operator: Kyle, how do you spell your last name?

Caller: F-o-r-t-u-n-a.

911 Operator: Okay, what's your home address?

Caller: 2768 Maple Street.

911 Operator: Maple. Do you know the people who did this to you?

Caller: No.

911 Operator: No. Okay.

Caller: But I've seen them...they should be on camera down there at the Burwell, ahh, car wash, down there on Montgomery.

911 Operator: Okay.

Caller: They should be on camera down there.

911 Operator: We'll let the officer know, okay?

Caller: Because I've seen them many times there today.

911 Operator: Kyle, what's your phone number?

Caller: 360-551-9897.

911 Operator: 9897? Are you the only one inside your vehicle?

Caller: Correct.

911 Operator: Okay. Can you tell me who shot at you? Was it the driver or was it the male passer.

Caller: Male passer.

911 Operator: Male passer? Okay. So what they said, they're gonna be driving around trying to locate this person, okay? So are you going to be waiting there then for contact until they contact you?

Caller: Yep.

911 Operator: And I just want to confirm here, you are going to be waiting in a Mazda low-rider truck?

Caller: Yeah.

911 Operator: Okay Kyle, we've got this out to law enforcement. They're checking the area, okay?

Caller: Uh, thank you.

911 Operator: Thank you sir, bye-bye.

CP 263-267.

According to the officer who stopped the Jetta, when the defendant got out of the passenger side of the vehicle the officer believed he heard a gunshot from that direction. RP 152-155. However he did not see a muzzle flash and so he did not shoot his firearm. *Id.* A number of officers later searched the area around the Jetta, searched the Jetta, and searched a storm drain by the Jetta and did not find any spent cartridges. RP 416-418, 422, 500. However, they did find a spent .308 cartridge on the street in the area in which Mr. Fortuna stated the event had occurred. RP 301-302. In addition, another officer found a loaded .308 pistol sitting by the curb in front

of a bank in an area in which the first officer had seen the defendant run. RP 167-168, 416. Later testing showed that the pistol was operational, although it kept jamming when it tried to feed a new cartridge out of the magazine into the chamber during firing. RP 326-328.

Eventually a few of the officers saw the defendant running through a field and through some blackberry bushes. RP 261-266, 283-285. They then took him into custody. *Id.* When they did the defendant made the following comment: "Gee, guys, it's just a DOC warrant period. All I have is a warrant." RP 558. According to other officers, once at the police station Ms Ross told them that she did not know the defendant had a firearm until he raised his arm up and shot out the window at the truck. RP 207-208. Ms Ross later denied ever making such a statement. RP 99-100. In addition, Mr. Fortuna later denied any memory of what happened that night or any memory of making any statements to the police. RP 51-61, 118-129.

Procedural History

By information filed August 9, 2013, the Kitsap County Prosecutor charged the defendant Aaron G. Cloud with one count of drive-by shooting under RCW 9A.36.045 and one count of illegal possession of a firearm in the first degree under RCW 9.41.010. CP 1-2. Two months later on October 9, 2013, the state amended this information to add a count of first degree assault with a firearm enhancement under RCW 9A.36.011(1)(a) and RCW

9.94A.570. CP 34-36. Although the state filed this amended information one week before trial, the defense did not raise any objections. RP 3-6.

On October 14, 2013, the court called this case for trial with the parties taking the entire day on pretrial motions and *voir dire*. RP 25-34. The state then called the first of its 16 different witnesses. RP 46-535. These witnesses included Ms Ross, Mr. Fortuna, and a number of officers who responded to the original 911 call or later investigated the case or tested evidence. *Id.* They testified to the facts contained in the preceding factual history. *See* Factual History, *supra*. Following the close of the state's case the defendant recalled one of the officers for a very brief time on the witnesses stand before resting its case. RP 557-559.

During Mr. Fortuna's testimony, the state proposed playing the entirety of his 911 call to the jury under ER 801(d)(1) arguing that it all constituted a statement of identification. RP 65-68. The defense responded by arguing that (1) the only portion of the 911 tape that was not inadmissible hearsay was Mr. Fortuna's description of the person who shot at him as a "white male with shaved head," and (2) that Mr. Fortuna's description of the vehicle did not qualify under rule the state cited. *Id.* After considering the arguments and listening to the entire 911 tape, the court allowed the state to play three redactions to the jury over the defendant's continued objection. RP 68-69. The following gives the transcript of those three redactions:

911 Operator: O.K., give me a description of the vehicle that shot at you.

Caller: Uhhh, a silver, a silver lowered, uhhhh....

911 Operator: Was it a silver Jetta you said?

Caller: Uhhh, what's that?

911 Operator: A Jetta?

Caller: Like a Jetta?

911 Operator: O.K.

Caller: Yeah, either a Jetta or Passat.

911 Operator: Did it have black rims?

Caller: Yes.

911 Operator: O.K.

. . .

911 Operator: Can you tell me who shot at you? Was it the driver, or was it the male passenger?

Caller: Male passenger.

911 Operator: Male passer? O.K.

. . .

911 Operator: Okay, and how about the male passenger? You said he had a shaved head?

Caller: Shaved head.....

911 Operator: And was he also white?

Caller: Yeah.

911 Operator: White male?

Caller: Yeah.

CP 259-260.

Finally, during cross-examination of Detective Crystal Gray, the state's last witness, the defense attempted to elicit the fact that at the time of the incident in question the defendant had an outstanding warrant for his arrest. RP 524-531. When the state objected the defense argued that this evidence was exculpatory because it provided an alternative explanation for the defendant's decision to flee from the officer who stopped the vehicle in which he was riding. *Id.* The court sustained the state's objection and prohibited the defense from presenting this evidence. *Id.* However, the court did allow the defense to elicit the fact that at the time of his arrest the defendant made a claim to the police that he believed there was a warrant outstanding for his arrest. RP 557-559.

After the close of its case the defendant moved for permission to argue the existence of another perpetrator for the offenses charged. RP 581-586. The defense took this step because the court had previously granted a pretrial motion precluding any such argument. RP 6-22. The court again denied the defendant's request and affirmed its decision to preclude the defense from arguing that Mr. Egeler was the shooter. RP 581-586. The court stated as follows on this issue:

> THE COURT: I'm going to allow Mr. Houser to argue based on what's been presented at trial regarding identity, specifically the testimony of Mr. Fortuna regarding identity, and the other evidence related to identity of those persons in the car. I'm not going to, Mr. Houser, allow you to argue at this point that – or make a statement indicating that Brandon Egeler must have been the shooter because I don't believe the evidence at this point, applying that evidence to Mak, that you can argue that he's the other shooter or he wasn't – I think you catch my drift on that.

RP 581-586.

After this argument the court instructed the jury without objection from either party. RP 569-575, 579; CP91-123. As part of this process the court also instructed the jury on the elements of first degree assault as charged as well as the elements of the lesser included offense of second degree assault. *Id.*

Following instruction the parties presented their arguments, after which the jury retired for deliberation. 590-666, 671. The jury later returned "guilty" verdicts on each count as well as a special verdict that the state had proven that the defendant was armed with a firearm at the time of assault. RP 671-675; 124-126. The court later sentenced the defendant within the standard range, after which the defendant filed timely notice of appeal. CP 232-243, 245.

ARGUMENT

I. SINCE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT A FINDING THAT THE DEFENDANT ACTED WITH THE INTENT TO INFLICT GREAT BODILY INJURY THE TRIAL COURT ERRED WHEN IT ACCEPTED THE JURY'S VERDICT OF GUILT ON THE FIRST DEGREE ASSAULT CHARGE.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: "[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law." *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. Id. In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

"Substantial evidence" in the context of a criminal case means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence is whether "after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In the case at bar the defendant argues that substantial evidence does not support his conviction for first degree assault because the evidence presented at trial does not support a conclusion that the defendant acted with the intent to cause great bodily injury. Specifically, the defendant argues that the evidence that he discharged a firearm at a pursuing vehicle, standing alone, is insufficient to support a conclusion that he acted with the requisite *mens rea* required to sustain a conviction for first degree assault. The following addresses this argument.

In RCW 9A.36.011(1) the Washington legislature defined the crime of first degree assault as follows:

> (1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

> (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or
>
> (b) Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance;

RCW 9A.36.011(1).

A person acts with intent when he or she acts "with the objective or purpose to accomplish a result constituting a crime." RCW 9A.08.010(1)(a). Evidence supporting the existence the *mens rea* element of any offense "is to be gathered from all of the circumstances of the case, including not only the manner and act of inflicting the wound, but also the nature of the prior relationship and any previous threats." *State v. Ferreira*, 69 Wn.App. 465, 468, 850 P.2d 541 (1993) (quoting *State v. Woo Won Choi*, 55 Wn.App. 895, 906, 781 P.2d 505 (1989), *review denied*, 114 Wn.2d 1002, 788 P.2d 1077 (1990)). In addition, specific intent cannot be presumed; rather, it should be inferred as a logical probability from all the facts and circumstances of a specific case. *State v. Salamanca*, 69 Wn.App. 817, 851 P.2d 1242, *review denied*, 122 Wn.2d 1020, 863 P.2d 1353 (1993).

In the case at bar the state charged the defendant by an amended information under the first alternative listed in subsection (1)(a) of the statute. Specifically, the amended information alleged the following in Count III:

> On or about July 24, 2013, in the County of Kitsap, State of Washington, the above-named Defendant did, with intent to inflict

> great bodily harm, assault another, to wit: KYLE ALAN FORTUNA, with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; contrary to the Revised Code of Washington 9A.36.011(1)(a).

CP 35.

Although the language of the information speaks in terms of all three alternative methods of committing the offense under subsection (1)(a) (firearm, deadly weapon or any force or means likely to produce great bodily harm or death), the evidence adduced at trial only supported a claim under the first alternative involving the use of a firearm. Indeed the "to convict" instruction in this case proposed by the state and given by the court only included a claim that the defendant committed the offense with a firearm. This instruction stated:

> To convict the defendant of the crime of assault in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about July 24, 2013, the defendant assaulted Kyle Fortuna;
>
> (2) That the assault was committed with a firearm;
>
> (3) That the defendant acted with intent to inflict great bodily harm; and
>
> (4) That this act occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 115.

As an examination of RCW 9A.36.011(1) and this jury instruction reveal, the "intent to inflict great bodily harm" and the act of intentionally assaulting another "with a firearm" are separate and distinct elements of the offense which the state bears the burden of proving beyond a reasonable doubt. Thus, proof of the latter element (intentionally assaulting with a firearm) does not *ipso facto* prove the former element (acting with the intent to inflict great bodily harm.) To hold otherwise would conflate the *mens rea* element (the intent to inflict great bodily harm) into the act of assaulting with a firearm. In other words, the fact that the defendant intentionally assaulted another with a firearm is insufficient alone to prove the added *mens rea* element of the intent to inflict great bodily harm. Rather, there must be evidence above and beyond the use of the firearm to constitute substantial evidence of the requisite intent. The following examines the decisions from three cases which illustrate this point. In each of these cases a defendant convicted of first degree assault with a firearm appealed arguing, *inter alia*, that substantial evidence did not support a finding that the defendant acted with the intent to inflict great bodily injury.

In *State v. Mitchell*, 65 Wn.2d 373, 397 P.2d 417 (1964), the state

convicted the defendant of first degree assault under a former statute in which the state had the burden of proving an intentional assault with a firearm coupled with the intent to kill. The defendant then appealed, arguing that there was no evidence, apart from the act of the shooting from which the jury could infer the requisite intent to kill. In addressing the argument, the court first noted that the existence of the *mens rea* element of the offense had to be determined from all of the evidence presented at trial. The court then reviewed those facts and found them sufficient to support the conviction. The court held:

> The specific intent to kill in first degree assault cases is to be gathered from all of the circumstances of the case, of which the infliction of the wound is but one. *State v. Davis*, 72 Wn. 261, 130 P. 95 (1913). In the instant case, the evidence indicates, together with other circumstances, that the defendant and the complaining witness had, shortly before the incident at Birdland [dance club], terminated a meretricious relationship following which the defendant had threatened the life of the complaining witness. This evidence, coupled with the manner and act of the shooting, sustains the jury's finding of intent.

State v. Mitchell, 65 Wn.2d at 374.

In *State v. Woo Won Choi*, supra, a defendant convicted of first degree assault with a firearm appealed his conviction, arguing that substantial evidence did not support a conclusion that he acted with the requisite intent to kill (again under the former definition of first degree assault). In this case the defendant had been to a card room and got into a dispute with a person by

the name of Lucena, who had accused the defendant of attempting to steal some of his chips. The defendant then left the club just prior to the complaining witness, who drove away with the defendant pursuing. Eventually the complaining witness stopped his vehicle and rolled down his window. At this point the defendant approached, pulled out a firearm and shot twice into the open window, nearly hitting the complaining witness who ducked when he saw the gun.

In addressing the defendant's claims, the court first reiterated the legal standard noted in *Mitchell* that evidence of the *mens rea* element was to be gleaned from all of the facts and circumstances of the case. The court stated:

> RCW 9A.36.010 requires that in order to establish first degree assault, the intent to kill must be shown. A person acts with intent when he acts with the objective or purpose to accomplish a result constituting a crime. RCW 9A.08.010(1)(a). Evidence of intent to kill is to be gathered from all of the circumstances of the case, including not only the manner and act of inflicting the wound, but also the nature of the prior relationship and any previous threats. *See State v. Mitchell*, 65 Wn.2d 373, 374, 397 P.2d 417 (1964). A person acts with knowledge when he is aware of or has information which would reasonably lead him to be aware of facts defining an offense. RCW 9A.08.010(1)(b).

State v. Woo Won Choi, 55 Wn. App. at 906.

After reviewing this legal standard the court rejected the defendant's argument, holding that the evidence did support a conclusion that the defendant acted with the requisite *mens rea*. The court held:

Viewing this evidence most favorably to the State, there was

> testimony regarding a prior altercation, the testimony of Lucena that Choi shot at him without provocation through an open window, and the physical evidence which revealed a shot at close range that would have hit Lucena's head if he had not ducked. From that evidence, the trier of fact could have found intent to kill beyond a reasonable doubt.

State v. Woo Won Choi, 55 Wn. App. at 906-07.

By contrast, the decision in *State v. Ferreira*, *supra*, illustrates a case in which the court held that the use of a firearm to assault another was alone insufficient to constitute substantial evidence of an intent to inflict great bodily injury. In this case the defendant, as a passenger in a vehicle with a number of other youth in it directed the driver to a house in which the occupants of the vehicle believed a specific person might be present. Their intent was to assault that person. Once at that location the car slowly drove by and one of the passengers pulled out a pistol and shot at least 13 times at the home. Although no one in the vehicle could see if anyone was present in the house, it appeared that there might have been persons present. In fact there were five persons in the house, including a child who was hit by one of the bullets. Based upon this conduct the state obtained convictions on five counts of first degree assault against the defendant as an accomplice to the shooter. Then defendant then appealed arguing insufficient evidence to prove the intent to inflict great bodily injury.

In addressing this argument the court first noted the standard applicable for determining the existence of substantial evidence of intent as

it relates to the *mens rea* element for first degree assault. The court then carefully reviewed the facts from the *Choi* case cited above. After reviewing the facts from *Choi*, the court reversed the defendant's convictions, holding as follows:

> Unlike *Choi,* the evidence here, when viewed most favorably to the State, is insufficient to establish the shooters' intent to inflict great bodily harm on any of the occupants in the house. As Mr. Ferreira contends, the trial court specifically rejected a finding that the shooters actually saw anyone inside the house. Instead, the court entered a finding that it was only "likely apparent" the house was occupied.
>
> > From where the shots were fired, *it [was] likely apparent that the house was occupied,* as the kitchen window was partially exposed and afforded a view completely through the room to the back door where people could be observed. The front room blinds were drawn shut, but light could be observed around and through the blinds from where the shots were fired. (Italics ours.)
>
> The trial court also rejected a finding that the shots were fired at "occupied areas" of the house. Instead, it found the shots were fired at the kitchen and living room, not the empty bedroom.
>
> Although the evidence does not support a finding that the shooters acted with intent to inflict great bodily harm, it does support a finding that they intended to create apprehension or fear to the likely occupants of the house and were therefore guilty of second degree assault. A person is guilty of second degree assault if, under circumstances not amounting to assault in the first degree, he assaults another with a deadly weapon.

State v. Ferreira, 69 Wn. App. at 469-470 (citations omitted).

An examination of the evidence in the case at bar reveals facts less supportive of the *mens rea* element for first degree assault than those facts the

courts found sufficient in *Mitchell* and *Choi*. First, in the case at bar there was no prior relationship or contact between the defendant and the driver of the truck prior to the discharge of the firearm. By contrast, in *Mitchell* and *Choi* there was some type of relationship or prior contact between the defendant and the victim before the discharge of the firearm. Second, in the case at bar there was no prior history of animosity between the defendant and the driver of the truck prior to the discharge of the firearm. By contrast, in *Mitchell* and *Choi* there was a history of animosity between the defendant and the victim prior to the discharge of the firearm. Third, in the case at bar there was no break in time between the initial contact and the discharge of the firearm. By contrast, in *Mitchell* and *Choi* there was a break in time between the initial contact and the discharge of the firearm. Fourth, in the case at bar the defendant did not follow or seek out the driver of the truck prior to the discharge of the firearm. Rather, the driver of the truck sought out the defendant. By contrast, in *Mitchell* and *Choi*, the defendants sought out the victims prior to discharging their firearms. Fifth, in the case at bar the defendant did not act aggressively toward the driver of the truck prior to discharging the firearm. Rather, the driver of the truck acted aggressively toward the defendant and the other occupants of his vehicle. By contract, in *Mitchell* and *Choi*, the defendants took aggressive action toward the victims prior to discharging their firearms.

An examination of the evidence in the case at bar also reveals facts even less supportive of the *mens rea* element for first degree assault than those facts the court found insufficient to support a first degree assault conviction in *Ferreira*. In *Ferreira* there was a confrontation prior in time providing a motive to assault. By contrast, in the case at bar there was no confrontation prior in time. In *Ferreira* the defendant and his accomplices sought out the victim. By contrast, in the case at bar the driver of the truck sought out the defendant. In *Ferreira* the defendant and his accomplices took an aggressive attitude toward the victims. By contrast, in the case at bar the driver of the truck took aggressive action toward the defendant and the other occupants of the vehicle in which the defendant was driving. In *Ferreira* the defendant's accomplice shot at least 14 times into the house in which he believed the intended victim might be present at a time when it appeared that persons were present. By contrast, in the case at bar the defendant shot once at a vehicle as it sped up and passed in an aggressive manner. Finally, in *Ferreira* a number of hours if not the better part of a day passed between the initial confrontation and defendant's discharge of the firearm, which was itself an action that he had previously planned. By contrast, in the case at bar the time between the initial contact and discharge of the firearm was probably less than a minute and the discharge of the firearm was described by the driver of the vehicle as an instant action taken without any prior deliberation.

As an examination of the facts in *Mitchell*, *Choi* and *Ferreira* reveals, there must be significant facts in addition to the discharge of a firearm to support a conclusion that the shooter acted with the *mens rea* necessary to elevate a second degree assault to a first degree assault. In *Mitchell* and *Choi*, the court found the requisite additional facts present and therefore sustained the convictions. In *Ferreira*, the court did not find the requisite additional facts present and therefore reversed the conviction. Since the facts from the case at bar are even less supportive of the requisite *mens rea* element than the facts in *Ferreira*, this court should reverse the defendant's conviction for first degree assault as did the court in *Ferreira*.

II. THE TRIAL COURT DENIED THE DEFENDANT HIS DUE PROCESS RIGHT TO PRESENT EXCULPATORY EVIDENCE THAT HE RAN FROM THE POLICE BECAUSE OF THE EXISTENCE OF AN OUTSTANDING WARRANT AND NOT AS EVIDENCE OF CULPABILITY FOR THE OFFENSE CHARGED.

While due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment does not guarantee every person a perfect trial, it does guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). As part of this right to a fair trial due process also guarantees that a defendant charged with a crime will be allowed to present relevant, exculpatory evidence in his or her defense. *State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983); *Chambers v. Mississippi*,

410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

For example, in *State v. Ellis,* 136 Wn.2d 498, 963 P.2d 843 (1998), a defendant charged with aggravated first degree murder sought and obtained discretionary review of a trial court order granting a state's motion to exclude his three experts on diminished capacity. In granting the motion to exclude, the trial court noted that the defense had failed to meet all of the criteria for the admissibility of diminished capacity evidence set in the Court of Appeals decision in *State v. Edmon*, 28 Wn.App. 98, 621 P.2d 1310 (1981).

On review, the state argued that the trial court had not erred because the defense experts had failed to meet the *Edmon* criteria. In its decision on the issue, the Supreme Court initially agreed with the state's analysis. However, the court nonetheless reversed the trial court, finding that regardless of the factors set out in *Edmon*, to maintain a diminished capacity defense, a defendant need only produce expert testimony demonstrating that the defendant suffers from a mental disorder, not amounting to insanity, and that the mental disorder impaired the defendant's ability to form the specific intent to commit the crime charged. The court then found that the state had failed to prove that the defendant's experts did not meet this standard. Thus, by granting the state's motion to exclude the defendant's experts on diminished capacity, the trial court had denied the defendant his due process right under Washington Constitution, Article 1, § 3, and United States

Constitution, Sixth and Fourteenth Amendments, to present relevant evidence supporting his defense.

In the case at bar, the state took great pains to present evidence of flight. These efforts included calling a number of police officers who described the defendant's extended flight from the vehicle once it was stopped to the point where he ran through blackberries and put blisters on his feet, to the point where he was finally cornered and gave up exhausted. During closing argument the state spent a great deal of time recounting the defendant's flight and arguing why it showed consciousness of guilt.

Generally, evidence of flight is admissible because it stands as an admission by conduct as it demonstrates a consciousness of guilt. It is relevant and probative because it creates "a reasonable and substantive inference that defendant's departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution." *State v. Nichols*, 5 Wn.App. 657, 660, 491 P.2d 677 (1971). Thus, evidence of flight, including "resistance to arrest, concealment, assumption of a false name, and related conduct"is admissible if one can reasonably infer from it a "consciousness of guilt" for the charged offense. *State v. Freeburg*, 105 Wn.App. 492, 497-498, 20 P.3d 984 (2001).

In the case at bar the defendant does not assign error to these efforts by the state to present and argue from this evidence because it was relevant

and admissible. However, what the defendant does assign error to is the court's refusal to allow the defense to present its best evidence to rebut the state's claims. This evidence was the fact that there was an outstanding DOC warrant for the defendant's arrest at the time he ran. Although the court did allow the defense to present evidence that upon arrest he claimed he ran because of an outstanding DOC warrant, the defendant's statement about the existence of a DOC warrant was obviously self-serving and probably not credible in the eyes of the jury, particularly given the lack of any evidence presented that there actually was an outstanding warrant. The evidence of the existence of the warrant was relevant and admissible for two reasons. First it rebutted the state's claim that the defendant ran out of a consciousness of guilt. Second, it supported the defendant's claim that there was an outstanding warrant. Thus, in the case at bar the trial court denied the defendant his right to present relevant, exculpatory evidence when it refused to allow the defense to elicit evidence of the extant warrant.

In the case at bar the admissible substantive evidence admitted at trial failed to exclude the back seat passenger in the vehicle as the person who pulled the firearm and shot at the truck. Indeed, the physical description of the shooter was vague enough to include both the defendant as well as back seat passenger. As a result, the evidence of flight in this case became a critical link pointing the finger at the defendant and away from the back seat

passenger. Had the evidence of the existence of the outstanding warrant not been excluded, there is a significant likelihood that the jury would have returned a verdict of acquittal. Thus, the trial court's error in excluding this evidence denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. As a result, this court should reverse the defendant's convictions and remand for a new trial.

III. THE TRIAL COURT'S REFUSAL TO ALLOW THE DEFENSE TO ARGUE THAT MR. EGELER WAS THE PERPETRATOR OF THE CRIME VIOLATED THE DEFENDANT'S RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.

As was mentioned in Argument II, a criminal defendant has a due process right under both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, to present all admissible evidence in his defense and argue the reasonable inferences therefrom. *State v. Swenson*, *supra*; *Bruton v. United States*; *see also State v. Rehak*, 67 Wn.App. 157, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, 844 P.2d 1018, *cert. denied*, 508 U.S. 953, 113 S.Ct. 2449, 124 L.Ed.2d 665 (1993). Under our court rules evidence is admissible if it is relevant (i.e., when it has "any tendency to make the existence of any fact ... of consequence ... more ... or less probable." ER 401.

Whether or not evidence that another person perpetrated the offense to which the defendant is charged is relevant and admissible depends upon the substance of the evidence and the reasonable inferences that can be drawn from it. *State v. Rehak*, 67 Wn.App. at 162 (citing *State v. Drummer*, 54 Wn.App. 751, 755, 775 P.2d 981 (1989)). In *State v. Mak,* 105 Wn.2d 692, 718 P.2d 407 (1986), the court puts the proposition as follows:

> Before such testimony can be received, there must be such proof of connection with the crime, such as a train of facts or circumstances as tend clearly to point out someone besides the accused as the guilty party.

State v. Mak, 105 Wn.2d at at 858 (quoting *State v. Downs*, 168 Wn. 664, 667, 13 P.2d 1 (1932)). Evidence of another party's motive, or motive coupled with threats is inadmissible unless evidence connecting the other person with the commission of the offense exists. *State v. Kwan*, 174 Wn. 528, 533, 25 P.2d 104 (1933).

For example, in *Rehak* the court held that a defendant charged with murder had failed to lay a foundation supporting her claim that her son had committed the offense because no evidence presented at trial placed him in the area where the crime was committed. Similarly in *Drummer* the court held that evidence that others had a motive to kill the decedent was inadmissible because the State had presented evidence that the defendant admitted to his friends he robbed and killed the victim and that the defendant

was in possession of items stolen from the victim whereas no evidence existed of anyone else near the scene of the crime.

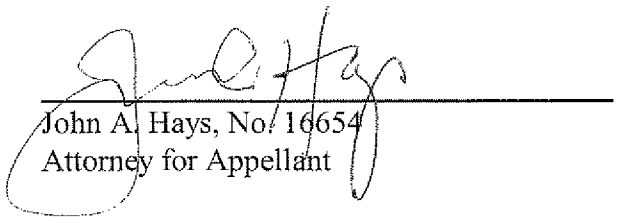
By contrast, in the case at bar the evidence presented at trial put both the defendant and Mr. Egeler in the vehicle from which the single shot was fired. In addition, the victim's description of the shooter equally fit both the defendant as well as Mr. Egeler. Finally, when the defendant did flee from the vehicle when it stopped and Mr. Egeler did not, Mr Egeler initially lied to the police about his identity when taken into custody. Even the discovery of the possible weapon along the path that the defendant fled in no way precludes Mr. Egeler from being the shooter. Thus, the trial court erred when it refused to allow the defense to argue that Mr. Egeler was the person who committed the offense and denied the defendant his constitutional right to present relevant, exculpatory evidence in his defense. As a result this court should reverse the defendant's conviction and remand for a new trial.

CONCLUSION

Substantial evidence does not support the defendant's conviction for first degree assault because insufficient evidence supports the conclusion that the defendant acted with the requisite *mens rea*. In addition, the trial court's decision to exclude relevant exculpatory evidence denied the defendant a fair trial. As a result this court should vacate the defendant's convictions and remand with instructions to dismiss the charge of first degree assault and grant the defendant a new trial on the remaining counts.

DATED this 5th day of September, 2014.

Respectfully submitted,



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APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

RCW 9A.36.011
Assault in the First Degree

(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

(a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or

(b) Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance; or

(c) Assaults another and inflicts great bodily harm.

(2) Assault in the first degree is a class A felony.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON, **Respondent,** **vs.** **AARON CLOUD,** **Appellant.**	**NO. 45579-0-II** **AFFIRMATION OF OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On this date, I personally e-filed and/or placed in the United States Mail the Amended Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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Dated this 5th day of September, 2014, at Longview, Washington.

Diane C. Hays

HAYS LAW OFFICE

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