Supreme Court No. 93249-2
COA No. 72911-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSE JAIME ROSALES-CONTRERAS,

Petitioner.

PETITION FOR REVIEW

MAUREEN M. CYR
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Washington Cases

United States Supreme Court Cases

Other Jurisdictions

Statutes

A. IDENTITY OF PETITIONER/DECISION BELOW

Jose Jaime Rosales-Contreras requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Rosales-Contreras, No. 72911-0-I, filed April 18, 2016. A copy of the opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Mr. Rosales-Contreras was convicted of first degree assault after he struck his wife only one time in the face with his fist and she lost an eye as a result. The Court of Appeals held the evidence was sufficient to prove beyond a reasonable doubt Mr. Rosales-Contreras specifically intended to inflict "great bodily harm." "Great bodily harm" is the gravest kind of injury contemplated by the Legislature and encompasses the most serious kind of injury short of death. Generally, the evidence is sufficient to prove a person acted with a specific intent to cause great bodily harm only where the person assaulted another with a weapon or instrument *likely to produce great bodily harm*, such as a firearm or a knife. Even where a single blow by a hand or foot results in great bodily harm, this is generally insufficient to prove the defendant acted with the *specific intent* to inflict such an injury. Should this Court grant review, reverse the Court of Appeals, and hold that

under the circumstances of this case, the evidence was insufficient to prove Mr. Rosales-Contreras acted with the specific intent to inflict great bodily harm? RAP 13.4(b)(1), (2), (4).

2. Did Mr. Rosales-Contreras receive ineffective assistance of counsel in violation of the Sixth Amendment where his attorney did not request a jury instruction on a lesser-included offense?

C. STATEMENT OF THE CASE

Mr. Rosales-Contreras was married to Maria Dimas. 9/11/14RP 21. The couple lived together with her two sons from a previous relationship and the couple's two younger sons. 9/11/14RP 21.

One day, Mr. Rosales-Contreras came home from work to find the oldest son, Emilio, had not finished his chores. Mr. Rosales-Contreras entered the kitchen and began yelling at Emilio. 9/16/14RP 102-03. When Ms. Dimas heard Mr. Rosales-Contreras yelling at Emilio, she rushed into the kitchen. 9/11/14RP 57-58. Mr. Rosales-Contreras was standing close to Emilio, facing him, and looked very angry. 9/11/14RP 59.

In an effort to protect Emilio, Ms. Dimas stood between him and Mr. Rosales-Contreras. 9/11/14RP 62. She faced Mr. Rosales-Contreras. 9/11/14RP 63. He told her to get out of the way but she

would not. 9/11/14RP 63. He said, "Move or I'm going to hit you." 9/11/14RP 63. She saw him lift his arm and saw his fist come toward her. 9/11/14RP 64. She then saw a flash of light. 9/11/14RP 64. She felt something drip from her eye and felt severe pain. 9/11/14RP 65. She went to the bathroom and saw that her left eye was bleeding; she could not open it. 9/11/14RP 66.

Emilio said that after that single strike, Mr. Rosales-Contreras "backed up a little bit," then "walked [Ms. Dimas] to the bathroom." 9/16/14RP 108.

The second son, Jacob, also witnessed the event. He saw his mother step in front of Emilio and saw Mr. Rosales-Contreras grab her on the shoulders. Mr. Rosales-Contreras "raised his hand, his right hand," and struck Ms. Dimas a single time. 9/16/14RP 75-76. After that, "things just kind of settled down a little" and Ms. Dimas and Mr. Rosales-Contreras left the room. 9/16/14RP 77. A short while later, Mr. Rosales-Contreras asked Jacob to get a slice of onion to put on his mother's eye. 9/16/14RP 90.

Hours later, when the pain in her eye did not improve, Ms. Dimas went to an urgent care center for treatment. 9/11/14RP 68.

Ultimately, she lost vision in her eye. 9/11/14RP 84. It was removed and replaced with a "glass" eye. 9/11/14RP 86; 9/15/14RP 151.

The State charged Mr. Rosales-Contreras with one count of first degree assault, alleging that, "with intent to inflict great bodily harm, [he] did assault another and inflict great bodily harm upon Marie Rosales." CP 5. At trial, defense counsel did not request a jury instruction on a lesser-included offense. The jury found Mr. Rosales-Contreras guilty of first degree assault as charged. CP 68.

The Court of Appeals affirmed, holding the evidence was sufficient to prove beyond a reasonable doubt Mr. Rosales-Contreras acted with a specific intent to inflict bodily harm. The court reasoned, "[t]he force required to inflict the injury Dimas suffered is indicative of the magnitude of harm Rosales-Contreras intended." Slip Op. at 7. In other words, the court concluded that because the injury required "severe force," Mr. Rosales-Contreras must have specifically intended to inflict such an injury.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The Court of Appeals' opinion is erroneous because a court cannot conclude a person acted with a specific intent to inflict bodily harm simply from the fact that such harm resulted.

To prove the charged crime of first degree assault, the State was required to prove *both* that Mr. Rosales-Contreras assaulted Ms. Dimas "with intent to inflict great bodily harm," *and* that the assault actually "resulted in the infliction of great bodily harm." CP 55; RCW 9A.36.011(1)(c). Constitutional due process required the State to prove this specific intent beyond a reasonable doubt.[1] See Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3.

First degree assault requires proof of a *specific intent* to inflict great bodily harm.[2] State v. Wilson, 125 Wn.2d 212, 218, 883 P.2d

---

[1] In reviewing the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

[2] "A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime." CP 53; RCW 9A.08.010(1)(a).

320 (1994). Thus, to prove the crime, the State must prove more than that the defendant intentionally assaulted another, and that the assault resulted in great bodily harm. The State must also prove the defendant acted with the *objective or purpose* of inflicting great bodily harm. Wilson, 125 Wn.2d 218; see also State v. Louther, 22 Wn.2d 497, 502, 156 P.2d 672 (1945) ("An assault in the first degree is a crime which consists of an act combined with a specific intent, hence the intent is just as much an element of the crime as is the act of assault.").

"[W]here specific intent is an element of a crime, the specific intent must be proved as an independent fact and cannot be presumed from the commission of the unlawful act." Louther, 22 Wn.2d at 502. In other words, to prove the defendant had a specific intent to inflict great bodily harm, the State must prove more than that his actions produced that result.

The Court of Appeals' opinion contravenes this principle. The court's reasoning is circular and does not hold the State to its burden to prove specific intent to cause great bodily harm as a separate element. The court concluded that because the injury that Ms. Dimas suffered required "severe force" to inflict, Mr. Rosales-Contreras must have acted with a specific intent to cause that degree of harm. Slip Op. at 7.

This is no different from presuming Mr. Rosales-Contreras must have intended to inflict great bodily harm simply from the fact that such a result occurred. The court's opinion is contrary to Louther's declaration that "specific intent must be proved as an independent fact and cannot be presumed from the commission of the unlawful act." Louther, 22 Wn.2d at 502. For this reason, this Court should grant review and reverse. RAP 13.4(b)(1), (4).

"Great bodily harm" is the gravest kind of injury contemplated by the Legislature and "encompasses the most serious injuries short of death." State v. Stubbs, 170 Wn.2d 117, 128, 240 P.3d 143 (2010). "Great bodily harm" means "bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ." CP 54; RCW 9A.04.110(4)(c). There is no injury more serious than "great bodily harm." Stubbs, 170 Wn.2d at 128.

To prove the charged crime of first degree assault, the State was required to prove not only that Ms. Dimas suffered "great bodily harm," but also that Mr. Rosales-Contreras *specifically intended* to inflict such harm. RCW 9A.36.011(1)(c); Wilson, 125 Wn.2d at 218;

Louther, 22 Wn.2d at 502. The evidence is insufficient to prove this element beyond a reasonable doubt.

Because first degree assault requires proof of a specific intent to inflict "great bodily harm," the crime typically involves use of a firearm or other deadly weapon such as a knife. State v. Pierre, 108 Wn. App. 378, 383, 31 P.3d 1207 (2001). Although the absence of such a weapon does not prelude the State from charging first degree assault, the evidence must show beyond a reasonable doubt that the actual force or means used was "*likely to produce* great bodily harm." Id. (emphasis added). A single blow to the face with a fist is not "likely to produce great bodily harm." Therefore, when an assault is committed by a single blow with a fist, the State must present additional evidence—beyond the infliction of a grave injury itself—to prove the accused acted with a specific intent to inflict great bodily harm.

Apparently no published Washington case addresses whether an assault committed by a single blow with a fist can rise to the level of first degree assault. In those cases where the defendant did not use a firearm or other deadly weapon, courts have generally upheld first degree assault convictions only where the defendant inflicted repeated,

ongoing, brutal and forceful blows against an unresisting victim. In Pierre, for instance, Pierre and his friends ran toward a car in which the victim was sitting, opened the car door, punched the victim as he tried to crawl out of the car, pulled him out by his feet, causing his head to hit the concrete, and then kicked and stomped his head repeatedly as he lay defenseless on the ground. Pierre, 108 Wn. App. at 380-81. Under these circumstances, the jury could infer Pierre acted with an intent to cause great bodily harm, as "it is difficult to avoid an inference that Pierre could have possibly intended anything other than . . . great bodily harm when he continued to kick at [the victim's] head" "as though it was a ball," causing permanent brain damage. Id. at 386-87.

Similarly, in State v. Alcantar-Maldonado, 184 Wn. App. 215, 225-26, 340 P.3d 859 (2014), the defendant told the victim he would "blow his 'fucking brains out,'" then struck him in the face with his gun three times, hit and kicked him in the face, and pushed him into a door and through a doorway, causing multiple facial bone fractures. According to witnesses, the noise of the defendant striking the victim sounded like "bones breaking," or "a watermelon thrown to the ground." Id. at 226. The victim had two plates surgically implanted in his face in order to fuse the bones together. Id. Under these

circumstances, the evidence was sufficient to prove an intent to inflict great bodily harm. Id.

Compared to those cases, the circumstances in this case are far less convincing. They are, at best, equivocal. Instead of engaging in a repeated, ongoing, brutal attack, Mr. Rosales-Contreras struck Ms. Dimas only one time. The assault was then complete and things "settled down." 9/16/14RP 77. Once Mr. Rosales-Contreras saw that Ms. Dimas was injured, he attempted to assist her. He "walked her to the bathroom," then asked his son to get a slice of onion to put on her eye. 9/16/14RP 90, 108. These actions do not demonstrate an intent to inflict a lethal or grave injury.

The injury that Ms. Dimas suffered was unusual and improbable. It is unlikely that a person would lose an eye as a result of being hit in the face one time with a fist. Thus, the jury could not infer, simply from the fact that Ms. Dimas lost her eye, that Mr. Rosales-Contreras specifically intended to cause such an injury. See Pierre, 108 Wn. App. at 383. No other circumstances unequivocally demonstrate Mr. Rosales-Contreras specifically intended to cause Ms. Dimas to suffer great bodily harm.

Courts in other jurisdictions generally agree that when an assault is committed with a hand or fist and not a deadly weapon, the evidence is usually insufficient to prove an intent to kill or cause great bodily harm because death or great bodily harm do not ordinarily result from such an assault. See People v. Spring, 153 Cal App. 3d 1199, 1205, 200 Cal. Rptr. 849 (1984) ("Normally, hitting a person with the hands or feet does not constitute murder in any degree" because death or great bodily harm are not a "reasonable or probable consequence" of such a beating"); McAndrews v. People, 71 Colo. 542, 544, 208 P. 486 (1922) (if "death should ensue from an attack made with the hands and feet only, on a person of mature years, and in full health and strength, the law would not imply malice, because, ordinarily, death would not be caused by the use of such means"); People v. Crenshaw, 298 Ill. 412, 417, 131 N.E. 576 (1921) ("The striking of a blow with the fist on the side of the face or head is not likely to be attended with dangerous or fatal consequences, and no inference of an intent to kill is warranted"); State v. Lang, 309 N.C. 512, 525, 308 S.E.2d 317 (1983) ("ordinarily if death ensues from an attack made with hands and feet only, on a person of mature years and full health and strength, the law would not imply malice required to make the homicide second-degree murder" because

"ordinarily, death would not be caused by use of such means"); Commonwealth v. Thomas, 527 Pa. 511, 514, 594 A.2d 300 (1991) ("a single blow, without a weapon is, ordinarily, not sufficient to establish malice"); Commonwealth v. Dorazio, 365 Pa. 291, 299, 74 A.2d 125 (1950) ("Ordinarily where an assault is made with bare fists only, without a deadly weapon, and death results, there would only be manslaughter" because the evidence would be insufficient to prove an intent to inflict great bodily harm).

Consistent with Washington case law, in determining whether the evidence is sufficient to prove an intent to inflict great bodily harm where an assault is committed with the fists alone, courts consider whether the defendant inflicted "repeated and continued blows to vital and delicate parts of the body of a defenseless, unresisting victim." Dorazio, 365 Pa. at 301. The evidence may be sufficient if the assault was "brutal, prolonged, persistent, [and] ferocious," carried out by a "larger, more powerful" assailant. Thomas, 527 Pa. at 516.

Thus, in the following cases, courts concluded the evidence was sufficient to prove an intent to cause death or great bodily harm because the defendant inflicted repeated, brutal blows upon an unresisting victim. State v. Gardner, 522 S.W.2d 323, 323 (Mo. Ct.

App. 1975) (evidence sufficient to prove intent to cause death or great bodily harm, where defendant struck victim with fists, knocking him to ground, then kicked him in groin and pounded his head against the pavement); State v. Himmelmann, 399 S.W.2d 58, 59-60 (Mo. 1966) (evidence sufficient to prove intent to inflict great bodily harm, where defendant struck victim with fist in head, then struck him repeatedly on head and face, causing serious bruises, lacerations, fractures and a concussion); Commonwealth v. Buzard, 365 Pa. 511, 514-15, 517, 76 A.2d 394 (1950) (evidence sufficient where defendant pursued victim, forced him to ground, held him between his legs, and struck him repeatedly on his head and face with his hands and feet); Dorazio, 365 Pa. at 293-94, 301-02 (evidence sufficient where defendant engaged in "brutal, persistent attack on helpless, non-resisting victim" by punching victim who lay on ground repeatedly about the head and body and victim died as result of skull fracture).

By contrast, courts held in the following cases that the evidence was *in*sufficient to prove an intent to cause great bodily harm because the defendant inflicted only a single, isolated blow with a fist, even where the victim suffered actual death or great bodily harm as a result. Spring, 153 Cal App. 3d at 1203, 1205-06 (evidence insufficient to

prove malice where defendant punched victim single time above his left eye and victim died later from hematoma caused by punch); People v. Mighell, 254 Ill. 53, 54, 59, 98 N.E. 236 (1912) (evidence insufficient to prove malice were defendant struck victim twice with his hand, causing victim to fall and fracture skull); Nunn v. State, 601 N.E.2d 334, 339 (Ind. 1992) (evidence insufficient where defendant struck victim single time in head and neck area with his hand, and victim fell and died later from severed artery in neck); State v. Johnson, 318 Mo. 596, 602, 605 (1927) (evidence insufficient where defendant slapped wife several times on face and head, and struck her with fist, causing bruises, bleeding, and black and swollen eyes); Thomas, 527 Pa. at 513, 516-17 (evidence insufficient to prove malice where defendant struck victim single time in face with his fist, and victim fell and suffered fatal brain hemorrhage); Fluornoy v. State, 124 Tex. Crim. 395, 396, 63 S.W.2d 558 (1933) (evidence insufficient where defendant struck victim single time with fist, knocking him down, causing him to strike head on concrete curb and suffer fatal skull fracture).

The Court of Appeals summarily dismissed these out-of-state cases, stating they "involved crimes requiring a different specific intent than the one here: either malice or intent to kill." Slip Op. at 6. But

regardless of the nature of the specific intent at issue, the basic principle is the same. When a person is assaulted with a single blow by a hand or foot and not a weapon or instrument likely to produce death or great bodily harm, it is unlikely that the person will actually suffer death or great bodily harm. If the person *does* suffer death or great bodily harm as a result of that single blow, the resulting injury is not enough by itself to prove the offender acted with a specific intent to cause such harm. This principle is consistent with Washington law.

As stated, "great bodily harm" is the gravest kind of injury contemplated by the Legislature and "encompasses the most serious injuries short of death." Stubbs, 170 Wn.2d at 128. Thus, to prove the charged crime, the State was required to prove Mr. Rosales-Contreras specifically intended to inflict an injury on Ms. Dimas that was just short of death. The State could not rely on the serious nature of the injury alone to prove specific intent. Wilson, 125 Wn.2d at 218; Louther, 22 Wn.2d at 502. Because the surrounding circumstances of the offense do not demonstrate Mr. Rosales-Contreras specifically intended to cause Ms. Dimas to suffer an injury just short of death, the Court of Appeals' opinion is erroneous. This Court should grant review and reverse.

2. Mr. Rosales-Contreras received ineffective assistance of counsel because his attorney did not propose a jury instruction on a lesser-included offense.

An accused in a criminal case is entitled to receive effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); U.S. Const. amend. VI. To demonstrate ineffective assistance of counsel, the defendant must show (1) his attorney's performance was "deficient" in that it fell below an objective standard of reasonableness; and (2) he was prejudiced by his attorney's actions or omissions, by demonstrating there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 687-88, 694.

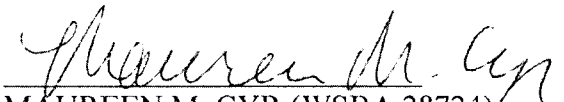
An accused may receive ineffective assistance of counsel if his attorney unreasonably fails to request a jury instruction on a lesser-included offense when warranted by the facts. Crace v. Herzog, 798 F.3d 840 (9th Cir. 2015). Here, Mr. Rosales-Contreras was entitled to a jury instruction on a lesser-included offense. But his attorney failed to request one. Because there is a reasonable probability the result would have been different had his attorney requested such an

instruction, Mr. Rosales-Contreras received ineffective assistance of counsel.

E. CONCLUSION

This Court should grant review because the Court of Appeals erroneously held the evidence was sufficient to prove Mr. Rosales-Contreras acted with a specific intent to inflict great bodily harm. The Court of Appeals' holding that the evidence was sufficient simply because Ms. Dimas actually suffered great bodily harm from a single blow to the face with a fist is contrary to Washington case law and presents an issue of substantial public interest warranting review. RAP 13.4(b)(1), (2), (4). In addition, Mr. Rosales-Contreras received ineffective assistance of counsel because his attorney failed to request a jury instruction for a lesser-included offense.

Respectfully submitted this 13th day of May, 2016.



MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JOSE JAIME ROSALES-CONTRERAS, Appellant.	)	No. 72911-0-I DIVISION ONE UNPUBLISHED OPINION FILED: April 18, 2016

APPELWICK, J. — Rosales-Contreras appeals his conviction for first degree assault. He argues that the State failed to prove that he intended to inflict great bodily harm. In a statement of additional grounds, Rosales-Contreras contends that he received ineffective assistance of counsel and asserts that the trial court abused its discretion by denying his challenge to remove a juror for cause. We affirm.

FACTS

Jose Rosales-Contreras and Maria Dimas were married in 2003. Shortly after they were married, the two began arguing frequently. They argued most often about finances and disciplining the children.

Dimas had two sons from a previous relationship, Emilio and Jacob. And, Rosales-Contreras and Dimas had two sons together, Andrew and Giovanni.

Rosales-Contreras treated Emilio and Jacob differently than Andrew and Giovanni. Emilio and Jacob both had long lists of chores that they were expected to complete before Rosales-Contreras came home each night.

On April 2, 2008, Rosales-Contreras came home to find that thirteen year old Emilio had not finished his chores. He was furious, yelling at Emilio in the kitchen. He was just inches away from Emilio. From the bedroom Dimas heard Rosales-Contreras yelling, and she went into the kitchen to protect her son. She inserted herself in between Rosales-Contreras and Emilio. Rosales-Contreras told Dimas to move, but she refused, telling him, " 'I'm not moving. You're not going to hit my son.' " Rosales-Contreras again told Dimas, " 'Move or I'm going to hit you.' " Dimas stood her ground, and told Rosales-Contreras, " 'You're not going to hurt my son. You're not going to touch my son.' "

Dimas then saw Rosales-Contreras lift up his arm, and his fist came at her. Dimas saw a flash of bright light. She felt something dripping from her eye. Dimas was in unbearable pain, and she was afraid.

The next thing Dimas remembered, she was in the bathroom. She could tell that her eye was bleeding, and she could not open up her eyelid because it hurt too much. After lying in bed in pain for several hours, Dimas realized she had to see a doctor about her eye. She asked Rosales-Contreras to take her to the hospital, but he was too afraid that he would be arrested. So, Dimas drove herself to the urgent care that was 10 minutes away from her home.

Dimas had surgery, but she ultimately lost her vision in that eye. Her eye had shrunk, and she had to have a plastic sphere implanted to maintain the shape of her eye.

Dimas did not immediately report what Rosales-Contreras had done to her. Rosales-Contreras left the family and went to Mexico in December 2008. Once she knew that Rosales-Contreras was not coming back, Dimas filed for dissolution and sought a protection order against him. In March 2009, she went to the Federal Way Police Department to reveal what Rosales-Contreras had done to her.

Rosales-Contreras was first charged with assault in the second degree – domestic violence on March 24, 2009. But, he did not appear at arraignment. The State amended the information on February 3, 2011 to charge Rosales-Contreras with assault in the first degree – domestic violence, with an aggravating factor for committing the crime within the sight or sound of a minor child. Rosales-Contreras was apprehended in January 2014.

The case proceeded to trial, and the jury convicted Rosales-Contreras as charged. He appeals.

DISCUSSION

Rosales-Contreras argues that the sufficiency of the evidence does not support his conviction, because the State did not prove that he intended to inflict great bodily harm. In a statement of additional grounds, Rosales-Contreras asserts that he received ineffective assistance of counsel, because his trial attorney did not present an involuntary intoxication defense, request a lesser included offense instruction, argue that ER 404(b) evidence should be excluded,

or obtain evidence to support his theory of the case. And, he argues that the trial court abused its discretion by denying his challenge to remove a juror for cause.

I. Intent to Inflict Great Bodily Harm

Rosales-Contreras argues that the State did not prove beyond a reasonable doubt that he acted with specific intent to inflict great bodily harm on Dimas. He contends that because he struck Dimas only a single time with his fist, and her severe injury was unexpected, the evidence was insufficient to support his conviction.

When faced with a challenge to the sufficiency of the evidence, this court asks whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Sweany, 174 Wn.2d 909, 914, 281 P.3d 305 (2012). In doing so, we view the evidence in the light most favorable to the State. Id. All reasonable inferences are drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Credibility determinations are for the trier of fact, and we do not review them on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

A person commits assault in the first degree when he or she "with intent to inflict great bodily harm . . . assaults another and inflicts great bodily harm." RCW 9A.36.011. Great bodily harm is defined as "bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ." RCW 9A.04.110. The fact of great bodily harm standing

alone is not sufficient to prove assault in the first degree. See State v. Wilson, 125 Wn.2d 212, 218, 883 P.2d 320 (1994) (noting that assault in the first degree requires a specific intent to inflict great bodily harm). The State must also prove intent, which is established when a person acts with the objective or purpose to accomplish a result which constitutes a crime. RCW 9A.36.011; RCW 9A.08.010.

Generally, intent to commit a crime may be inferred when the defendant's conduct and the surrounding circumstances indicate such an intent as a matter of logical probability. State v. Vasquez, 178 Wn.2d 1, 8, 309 P.3d 318 (2013). The same is true with the intent to inflict great bodily harm—all of the details of the case may indicate intent, including the manner and act of inflicting the wound, and also the nature of the relationship and any prior threats. State v. Ferreira, 69 Wn. App. 465, 468-69, 850 P.2d 541 (1993).

Rosales-Contreras argues that the evidence here did not establish intent, because he struck Dimas only once. He points to two Washington cases where the evidence indicated intent to inflict great bodily harm. See State v. Pierre, 108 Wn. App. 378, 385-86, 31 P.3d 1207 (2001) (defendant was part of a group that kicked and stomped on the victim's head relentlessly, causing permanent brain damage); State v. Alcantar-Maldonado, 184 Wn. App. 215, 220, 340 P.3d 859 (2014) (defendant hit the victim in the face with a gun, pushed him into a door, kicked him, and struck him in the face). Rosales-Contreras suggests that these cases—and cases from other jurisdictions—demonstrate that when a defendant did not use a weapon to effect the assault, intent was established by repeated blows against an unresisting victim. The inference from the argument is that a

single blow is necessarily insufficient proof of intent to inflict great bodily harm. We disagree.

Neither Alcantar-Maldanado nor Pierre announced a bright line rule requiring the defendant to strike multiple blows. Instead, the court in both cases analyzed the specific facts of the case to conclude that there was sufficient evidence of intent. Alcantar-Maldonado, 184 Wn. App. at 225-26; Pierre, 108 Wn. App. at 385-86. And, most of the out-of-state cases that Rosales-Contreras cites involved crimes requiring a different specific intent than the one here: either malice or intent to kill. See, e.g., People v. Spring, 153 Cal. App. 3d 1199, 1204, 200 Cal. Rptr. 849 (1984) (malice); McAndrews v. People, 71 Colo. 542, 548-49, 208 P. 486 (1922) (malice); People v. Mighell, 254 Ill. 53, 59, 98 N.E. 236 (1912) (intent to kill); Nunn v. State, 601 N.E.2d 334, 339 (1992) (intent to kill); State v. Lang, 309 N.C. 512, 524-25, 308 S.E.2d 317 (1983) (malice); Commonwealth v. Thomas, 527 Pa. 511, 513, 594 A.2d 300 (1991) (malice). Thus, they offer little guidance as to what evidence is sufficient to prove intent to inflict great bodily harm. The remaining cases he relies upon recognize that whether intent to inflict great bodily harm is established depends on the facts of each case. See, e.g., State v. Gardner, 522 S.W.2d 323, 324 (Mo. Ct. App. 1975) (looking at the facts of the case); Flournoy v. State, 124 Tex. Crim. 395, 396, 63 S.W.2d 558 (1933) (looking at the facts of the case). Instead of supporting an argument that a single blow is insufficient to show intent, these cases demonstrate that intent is a fact specific inquiry.

And, the facts of this case allow a jury to conclude that Rosales-Contreras possessed the requisite intent when he struck Dimas. Jacob, who witnessed the

altercation, testified that he saw Rosales-Contreras raise his right hand and strike Dimas in the head. In the moments leading up to the punch, Rosales-Contreras was furious. He was yelling, his face was tensed up, his eyebrows were furrowed, and his arms were crossed. He told Dimas to get out of the way when she stepped between him and Emilio. When Dimas refused to move, Rosales-Contreras again told her to get out of the way. He specifically threatened her, " 'Move or I'm going to hit you.' " When Dimas stood her ground, Rosales-Contreras followed through with this threat, punching her in the eye. The blow was intentional.

The force required to inflict the injury Dimas suffered is indicative of the magnitude of harm Rosales-Contreras intended. All Dimas can remember of the punch was seeing a bright flash of light, feeling something dripping from her eye, and being in unbearable pain. She has a gap in her memory between the time of the punch and looking at herself in the bathroom mirror—she cannot recall how she got from the kitchen to the bathroom. Dimas eventually lost her vision in that eye. Dr. Daniel Selove, an expert witness in forensic pathology, testified that moderate to severe force was required to inflict Dimas's injury. In differentiating between moderate and severe force, he explained that moderate force would not cause loss of consciousness, whereas severe force would be akin to a "knock-out punch." The fact that Dimas had no memory of what happened between the flash of light and standing in the bathroom suggests that she momentarily lost consciousness. Viewing this evidence in the light most favorable to the State, a rational trier of fact could have found that Rosales-Contreras intended to inflict great bodily harm on Dimas.

We hold that sufficient evidence supports Rosales-Contreras's conviction for first degree assault.

II. Ineffective Assistance of Counsel

In a statement of additional grounds, Rosales-Contreras argues that his trial attorney provided ineffective assistance on multiple occasions. He claims that his attorney failed to obtain phone and Facebook (social media website) records that would support his theory that Dimas fabricated this assault to get revenge on Rosales-Contreras for having a new girlfriend. And, he claims that his attorney failed to have ER 404(b) evidence pertaining to an incident on December 6, 2006 excluded. Rosales-Contreras further asserts that his attorney refused to argue an involuntary intoxication defense. And, he argues that his attorney failed to seek a lesser included offense instruction.

To demonstrate ineffective assistance of counsel, a defendant must first show that counsel's representation was deficient, in that it fell below an objective standard of reasonableness. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). We presume that counsel's representation was effective. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). The defendant has the burden to show deficient representation based on the record. McFarland, 127 Wn.2d at 335. A defendant must also show that counsel's deficient performance prejudiced the defendant, in that there is a reasonable probability that the outcome of the proceeding would have been different but for counsel's errors. Id. at 334-35.

When counsel's actions can be characterized as legitimate trial strategy or tactics, performance is not deficient. State v. Kyllo, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). Whether to present a certain defense or request a lesser included offense instruction are tactical decisions made by counsel. See State v. Grier, 171 Wn.2d 17, 39, 246 P.3d 1260 (2011); In re Pers. Restraint of Woods, 154 Wn.2d 400, 420-21, 114 P.3d 607 (2005). Therefore, whether to present the involuntary intoxication defense or request a lesser included instruction were both tactical decisions. There is no evidence in the record that Rosales-Contreras went to the dentist and received sedatives on the day of the assault, as he claims would support an involuntary intoxication defense. Nor are there any facts surrounding Rosales-Contreras's conversations with his attorney to suggest that she refused to follow his wishes in defending the case or requesting a lesser included offense instruction. Without this evidence in the record, Rosales-Contreras has failed to meet his burden of showing deficient representation.

Rosales-Contreras also argues that his trial attorney's performance was deficient because she failed to have ER 404(b) evidence relating to an incident on December 6, 2006 excluded. The only ER 404(b) evidence that the trial court allowed was an incident during the spring of 2006. The trial court specifically excluded ER 404(b) evidence about the December 6, 2006 incident. Therefore, Rosales-Contreras has failed to show that his attorney's performance was deficient in this regard. We conclude that Rosales-Contreras did not receive ineffective assistance of counsel on these bases.

Lastly, Rosales-Contreras asserts that his trial attorney should have obtained evidence of Dimas's phone records and Facebook communications to support his theory of the case. He argues that this evidence would have shown that Dimas fabricated the assault because he refused to leave his girlfriend and reconcile with Dimas. Rosales-Contreras contends that his attorney should have sent a subpoena duces tecum to the phone company and Facebook instead of Dimas herself. He also notes that the subpoena duces tecum counsel did send failed to inform Dimas of her right to object.

Rosales-Contreras's trial counsel asked the State to assist in obtaining Dimas's phone records. The State agreed, but its efforts were ultimately unsuccessful. Consequently, Rosales-Contreras's attorney served a subpoena duces tecum on Dimas on August 25, 2014. It instructed Dimas to produce all Facebook or other recorded communications with Rubi Cardenas[1] and all copies of her phone records between April 2, 2008 and December 31, 2009. Dimas did not comply. Then, Rosales-Contreras's attorney moved to dismiss the case pursuant to CrR 8.3, arguing that the State committed misconduct by failing to obtain Dimas's phone records. The trial court denied this motion, because defense counsel should have known some time earlier that she needed to obtain the records herself. And, the court recognized that the subpoena duces tecum did not comply with court rules, because it failed to inform Dimas of her rights.

Trial counsel has a duty to investigate the case. State v. Jones, 183 Wn.2d 327, 339, 352 P.3d 776 (2015). Rosales-Contreras's attorney did not investigate

[1] Cardenas was Rosales-Contreras's new girlfriend.

the phone and Facebook records when it became clear that the State could not obtain them, even though the State suggested several other avenues counsel could pursue. She also failed to follow court rules by not notifying Dimas of her right to object to the subpoena duces tecum. See CR 45. Because the subpoena duces tecum did not advise Dimas that she could object, the court refused to enforce it. Thus, these errors likely constituted deficient performance.

However, Rosales-Contreras has not shown that his attorney's deficient performance was prejudicial. The record does not contain the phone and Facebook records in question. Without knowing what, if anything, these records would have established, it is impossible to conclude that the records would have changed the outcome of the case.

Additionally, Rosales-Contreras's attorney was still able to present this theory of the case. Dimas testified that she found out that Rosales-Contreras had a new girlfriend in February 2009. She said that she spoke to this woman on the phone when she called Rosales-Contreras about the divorce papers. During her closing argument, defense counsel relied heavily on this event, stating,

> [T]he seminal event that really triggered [Dimas reporting the assault] was when [Rosales-Contreras's] girlfriend picked up the phone when she called down to Mexico about the divorce. Before then they had left -- [Rosales-Contreras] and her had separated for long periods of time, for months at a time, and he would always come back. This time, though, she found out that he had a new girlfriend. That was the seminal event that got her to march down to that police station and report that a crime had been committed.

And, counsel supported this theory by attacking Dimas's credibility, arguing that Dimas said whatever she needed to say to make Rosales-Contreras seem like a

monster. She confronted Dimas with her previous statements to the police and the defense, in which she did not include the same details about which she testified. And, she attempted to show that Jacob and Emilio were biased witnesses, whose stories had changed because they were trying to help their mother.

Dimas, however, explained that when she discovered that Rosales-Contreras had a new girlfriend, she was relieved, not jealous. She felt safer knowing that her family would no longer be Rosales-Contreras's focus. She testified that she decided to report the assault in March 2009, because she wanted to begin moving on with her life and start healing. Thus, the jury heard both sides of this argument. And, the jury found Rosales-Contreras guilty, indicating that it believed Dimas.

Therefore, while counsel likely erred by failing to investigate potentially relevant evidence, this error was not prejudicial. We hold that she did not provide ineffective assistance of counsel.

III. Challenge for Cause

In his statement of additional grounds, Rosales-Contreras also asserts that the trial court erred by denying his challenge to remove juror 45 for cause.

During voir dire, juror 45 indicated that he would lean toward believing that Rosales-Contreras was guilty due to the violence involved, but he would wait until all the facts were presented to make a decision. Rosales-Contreras then asked that juror 45 be removed for cause. The court reminded the juror that Rosales-Contreras was not guilty at that point and would remain not guilty until the State

proved beyond a reasonable doubt that he is guilty. The court asked if the juror could accept this instruction, and the juror replied, "Yes." And, the court asked, "Can you be fair and impartial, wait for the end of the case before you make a decision in that regard?" Juror 45 replied, "Absolutely." As a result, the trial court denied Rosales-Contreras's request to remove the juror for cause. Rosales-Contreras later used a peremptory challenge to excuse juror 45.

This court reviews a trial court's denial of a challenge for cause for manifest abuse of discretion. State v. Noltie, 116 Wn.2d 831, 838, 809 P.2d 190 (1991). A juror's equivocal answers alone do not require the juror to be removed when challenged for cause. Id. at 839. Instead, the relevant question is whether a juror with preconceived ideas can set them aside. Id. The trial court is in the best position to observe a juror's demeanor and determine their ability to be fair and impartial. Id.

Here, while juror 45 at first expressed that he would have difficulty presuming that Rosales-Contreras was innocent, he later stated that he would absolutely be fair and impartial. Because the trial court was in the best position to judge whether juror 45 could be impartial, we defer to the trial court's judgment on this issue. Moreover, Rosales-Contreras exercised a peremptory challenge to remove this juror, which cured any error. See State v. Latham, 100 Wn.2d 59, 64, 667 P.2d 56 (1983) (noting that use of a peremptory challenge to remove a juror who should have been removed for cause cures the error). Rosales-Contreras has not demonstrated prejudice through the forced use of a peremptory challenge. See id. (where the juror is excused through a peremptory challenge, the defendant

must show the use of the peremptory challenge was prejudicial). We hold that the trial court did not err in denying the request to remove juror 45 for cause.

We affirm.

WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 72911-0-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Ian Ith, DPA
[PAOAppellateUnitMail@kingcounty.gov]
[ian.ith@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: May 13, 2016