No. 31188-1-III
(consolidated with 31187-2-III)

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

ARMANDO LOPEZ,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR YAKIMA COUNTY

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# REPLY BRIEF OF APPELLANT

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## A. ARGUMENT IN REPLY[1]

### 1. Instructions 16-22 omitted an essential element of the crime of first degree assault.

"[S]pecific intent either to create apprehension of bodily harm or to cause bodily harm **is an essential element**" of assault. *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995) (emphasis added.). The Court reiterated its holding a year later saying "[a]s we settled in *Byrd*, specific intent represents an 'essential element' and its omission results in manifest error." *State v. Eastmond*, 129 Wn.2d 497, 502, 919 P.2d 577 (1996). Instructions 16 through 22 do not include any mention of this element of the offense.

"A 'to convict' instruction must contain all of the elements of the crime because it serves as a 'yardstick' by which the jury measures the evidence to determine guilt or innocence." *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). Therefore, "an instruction purporting to list all of the elements of a crime must in fact do so." *Id*. (citing *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953)).

Here, the to-convict instruction do not include the specific-intent element discussed in *Eastmond* and *Byrd*. In response, the State first

[1] Mr. Lopez offers arguments in reply regarding several issues raised in his initial brief. Those issues and arguments not addressed in this brief are fully developed in his initial brief and do not require argument.

contends the instructions do include all the essential elements of the assault. Brief of Respondent at 7. Yet in the very same paragraph concedes the specific intent element was not contained in the to convict instructions but in "other instructions." *Id*. *State v. Sibert* makes clear, however, this court may not look to instruction to find the missing elements. A reviewing court may not to look to other jury instructions to supply a missing element from a "to convict" jury instruction. 168 Wn.2d 306, 311, 230 P.3d 142 (2010) (citing *Smith*, 131 Wn.2d at 262-63).

Finally, the State contends Mr. Lopez invited the error because a codefendant proposed a similar instruction. Brief of Respondent at 3-4. "The invited-error doctrine as applied to jury instructions precludes a defendant from arguing that an instruction *he* proposed was erroneous. *State v. Schaler*, 169 Wn.2d 274, 292, 236 P.3d 858 (2010) (emphasis added). As the State readily acknowledges in its brief, Mr. Lopez did not propose the instructions he challenges now. Brief of Respondent at 3-4. Because Mr. Lopez did not propose the erroneous instruction, he did not invite the error. *Schaler*, 169 Wn.2d at 292.

The to-convict instructions do not include each essential element of the offenses. As set forth in Mr. Lopez's initial brief that error requires reversal of his convictions.

2. **The State did not prove each essential element of the crimes beyond a reasonable doubt.**

As set forth above, where there is not an actual battery the specific intent to either cause fear or cause injury in a specific person is an essential element of an assault. *Eastmond*, 129 Wn.2d at 502 (citing *Byrd*, 125 Wn.2d at 713-14). *Eastmond* observed

> These two forms of assault . . . require inapposite elements of fear: although the State need not prove fear in fact to support a conviction for assault by attempt to cause injury, fear is a necessary element of assault by attempt to cause fear.

129 Wn.2d at 503-04.

In his initial brief, Mr. Lopez makes a straightforward argument: The State did not prove Mr. Lopez or an accomplice had the intent to cause great bodily injury to a specific person. The State did not prove Mr. Lopez or an accomplice had a specific intent to cause injury or fear to a specific person. The State never established that Mr. Lopez or an accomplice knew who was inside the building.

Moreover, Mr. Lopez notes that even if the law did not generally require the State to prove a specific intent tied to a specific

individual, the to-convict instruction in this case do. This is so because each of the seven instructions separately identified one of the seven alleged victims and required the jury find Mr. Lopez or an accomplice intended to assault the named person. CP 61-67. "In criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the 'to convict' instruction." *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). Thus, the to-convict instructions required the State to prove a specific intent tied to a specific person. The State's brief simply brushes that requirement aside. Brief of Respondent at 33.

In *State v. Elmi*, the Court recognized that under the first degree assault statute the specific intent to cause great bodily injury to a specific person could transfer to other unintended victims. 166 Wn.2d 209, 218, 207 P.3d 439 (2009). Critically, the Court recognized that transfer can only occur where the State can first establish a specific intent to harm a specific person. *Id*. Here, again the State did not offer any proof of that threshold fact.

Ignoring this threshold requirement, the State maintains *Elmi* nonetheless permits the conviction even where the State cannot prove Mr. Lopez or an accomplice intended to assault any specific person

inside the home. Brief of Respondent at 41-43. As is clear, that is simply not the rule *Elmi* announced.

The State did not prove Mr. Lopez or an accomplice assaulted any of the named victims.

**3. Instruction 15 misstated the law and relieved the State of its burden of proving each element of the assault**.

The State contends *Elmi* upheld the use of transferred intent instruction such as Instrcution 15 in this case. Brief of Respondent at 40. Again, the State misreads *Elmi*.

The Supreme Court expressly declined to address whether it was appropriate to give such an instruction where the unintended victim did not suffer injury. The Court said:

> Because RCW 9A.36.011 encompasses transferred intent, the Court of Appeals did not need to analyze this matter under the doctrine of transferred intent. As such, we do not need to reach the doctrine of transferred intent either and proceed, instead, under RCW 9A.36.011.

*Elmi*, 166 Wn.2d at 218. Indeed, the dissent chastised the majority's failure to address the instruction, "I respectfully cannot see how this court can grant Elmi's 'petition for review on the issue of transferred intent' and refuse to discuss application of the doctrine under the

statute." *Elmi*, 166 Wn.2d at 220 (Madsen, J., dissenting, joined by Sanders and Fairhurst, JJ).

Critical to the holding in *Elmi* is that the actor first had the specific intent to assault a particular person. 166 Wn.2d at 618-19. *Elmi* did not conclude that a person commits first degree assault simply by firing a gun into a building which happens to be occupied. That would be an extraordinary expansion of the crime of assault. Instead, *Elmi* is grounded in the common-sense idea that before intent may be transferred there must be an intended victim.

Instruction 15 goes far beyond the holding of *Elmi*. The instruction's included terms "mistake, inadvertence, or indifference" are terms that define recklessness or negligence and suggest those lower mental states as substitutes for intent. That is especially prejudicial in a case such as this where the State never endeavored to prove who the intended victim was. In doing so, Instruction 15 relieved the State of its burden of proving the requisite specific intent.

**4. The trial court erred in refusing to suppress statements obtained in violation of Mr. Lopez's constitutional rights.**

As in this Court recent decision in *State v. DeLeon*, 185 Wn. App. 171, 341 P.3d 315 (2014), Mr. Lopez's statements obtained under

the guise of a jail booking interview, but later used as evidence at trial, were involuntary. Defense counsel specifically argued the interrogation was "coercive." RP 146-47. Defense counsel specifically pointed to the ploy of telling inmates "if you don't answer this question its going to be very unsafe for you here, and then prosecute them ad asking the Court to enhance the sentence . . . based on that information that was given after . . . they invoke their rights. RP 147. Indeed, the booking officer assured Mr. Lopez the questions "were just to make sure [he was] housed safely" in the jail. RP 132.

On appeal, Mr. Lopez has continued this argument specifically arguing this ploy renders any statement involuntary. Nonetheless, the State devotes several pages of its brief to the contention that this argument was not raise below. It is not at all clear, what the State believes is missing when it repeats throughout is brief that no argument regarding coercion has been raised. *See e.g.* Brief of Respondent at 23-24. The State's response becomes even more confusing when, several pages later, it expressly acknowledges Mr. Lopez's argument regarding voluntariness. Brief of Respondent at 28-29.

Mr. Lopez statements were involuntary and obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Nothing in *Deleon* or Mr. Lopez's argument would prevent the jail from routinely question new inmates regarding gang affiliation and make housing decisions based upon that information. Indeed, they should for purpose of ensuring institutional safety. *See, State v. Denney*, 152 Wn. App. 665, 218 P.3d 633 (2009). But it does not follow that having told an inmate the information will only be used for that purpose that the jail could then immediately pass the information to the State for use in pending prosecutions. If it were so, the booking interview becomes a mere pretext for criminal investigation.

B. CONCLUSION

For the reasons set forth above and in Mr. Lopez's initial briefing, this Court should reverse Mr. Lopez's convictions and sentence.

Respectfully submitted this 1st day of September, 2015.

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| Appellant. | ) | |

## DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 2ND DAY OF SEPTEMBER, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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