31050-7-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

BENITO GOMEZ, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF WALLA WALLA COUNTY

APPELLANT'S BRIEF

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2. The trial court erred in finding Mr. Gomez guilty of first degree assault of Mr. DeJesus, Ms. Glasby, Mr. Cloyd, and Mr. Cuevas, where the evidence was insufficient.

3. The trial court erred in imposing four community custody conditions that are not authorized by statute.

4. The judgment and sentence erroneously indicates the date of the crimes of conviction as May 17, 2012.

B. ISSUES

1. Prior to trial, the trial court informed the parties it would not allow people to enter the courtroom after court was in session. The trial court did not consider the five factors set forth in *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). Did the trial court violate Mr. Gomez's constitutional public trial right?

2. Mr. DeJesus, Ms. Glasby, and Mr. Cloyd ran inside a nearby apartment building when they heard gunshots. They ran up an interior staircase to an apartment on the

second floor. The evidence did not show they were within proximity of the bullets, or that they were placed in actual fear of bodily injury. Mr. Cuevas was asleep at the time a bullet entered his apartment. The evidence did not show his proximity to the bullet. Under these facts, was the evidence sufficient to support a finding that Mr. Gomez committed attempted assault or assault by apprehension of harm of Mr. DeJesus, Ms. Glasby, Mr. Cloyd, and Mr. Cuevas, as required to find him guilty of first degree assault of each of these four individuals?

3. The trial court imposed community custody conditions prohibiting Mr. Gomez from the following: (1) appearing at any court proceeding, unless he is a party, defendant in a criminal action, or subpoenaed as a witness; (2) possessing a beeper, pager, cellular phone or any other cordless or otherwise wireless communication device; (3) possessing graffiti; and (4) being with anyone who is using or possessing any illegal intoxicants, narcotics, or drugs. Were these conditions authorized by RCW 9.94A.703(3)(f) which authorizes the court to "order an offender to comply with any crime-related prohibitions"?

4. The judgment and sentence erroneously indicates the date of the crimes of conviction as May 17, 2012. The date of the crimes was May 17, 2011. Should this error in the judgment and sentence be corrected?

C. STATEMENT OF THE CASE

Miguel Saucedo and Joseph DeJesus are members of the Florence 13 gang. (RP 432-433, 456). According to Mr. DeJesus, their rival gang is the 18th Street gang. (RP 433). On May 17, 2011, Mr. Saucedo and Mr. DeJesus were upstairs in the apartment building where they lived, when a fellow gang member, Julio Martinez, told them some 18th Street gang members were coming down a nearby alley, towards their location. (RP 432-436, 446, 455-457).

Mr. Saucedo and Mr. DeJesus went out into the alley, and along with Mr. Martinez, walked up to four 18th Street gang members. (RP 436, 458-459). Mr. Saucedo and Mr. DeJesus did not recognize any of these gang members, and they both stated that the fourth gang member had a blue bandanna covering his face. (RP 436, 445, 447-449, 459, 464-466, 472). The fourth gang member pulled out a gun and started shooting at them, and all three of them ran. (RP 459-460). Mr. Saucedo and Mr. DeJesus ran into the apartment building. (RP 436-438, 460-461).

After realizing Mr. Martinez was not there, they went back out into the alley and found him lying on the ground. (RP 438, 441-442, 461-463).

Officers responded to the scene. (RP 162-163). City of Walla Walla Police Officer Jeremy Pellicer went into the alley and found Mr. Martinez on the ground, on his back, and a large pool of blood. (RP 164, 166). Mr. Martinez was taken to the hospital. (RP 167). He died as a result of two gunshot wounds to the head. (RP 327).

Officer Pellicer found two bullet holes in the apartment building, one "just outside the entryway walking into the apartment building[,]" and one "in the doorway area of the first apartment . . . inside the entryway . . . ." (RP 167-168, 172-173, 185, 187). Roberto Cuevas and Patricia Nelson were both asleep in the first apartment at the time the shots were fired. (RP 232-236). Mr. Cuevas woke up when he heard sirens. (RP 233). He found a bullet that had gone through his apartment door. (RP 233). Ms. Nelson woke up and heard a bullet come through the apartment door, and saw that a piece of clothing, her hoodie, stopped the bullet. (RP 236-237).

Jessica Glasby also lived in the apartment building. (RP 414). She was standing outside of the building when she saw some people come up the alley, and then heard shots being fired. (RP 415-416, 419). She ran into the apartment building. (RP 415-416). David Cloyd was standing

outside with Ms. Glasby when the shots were fired. (RP 415, 420-421). He also ran into the apartment building. (RP 421-424). Shots were fired into the apartment building after Ms. Glasby and Mr. Cloyd ran inside. (RP 418, 425-428).

The State charged Mr. Gomez with one count of first degree murder of Mr. Martinez. (CP 145-146). The State also charged Mr. Gomez with six counts of first degree assault: of Mr. Saucedo; Mr. DeJesus; Ms. Glasby; Mr. Cloyd; Mr. Cuevas; and Ms. Nelson. (CP 145-147).

The State alleged a firearm enhancement for each of the seven counts. (CP 145-147). The date of the alleged crimes was May 17, 2011. (CP 146-147).

Prior to trial, the trial court addressed the security measures in place for the trial. (RP 148-158). The trial court issued the following ruling regarding closure of the courtroom:

> We continue to have rules of procedure where people have to be on time for proceedings here. We do not allow people to come into the courtroom after the court is in session for not only security reasons but as well as the distraction that that causes when people come in. As you all know who have been here and tried cases, when a jury is impaneled in a case such as this, it doesn't make any difference what type of case it might be, but when people come into the courtroom after the matter is in session, they stop listening to the attorneys or to the witness who is testifying and they immediately direct their attention to the

> person that is coming in the door. And even though that person may be very innocent in coming in late, that distracts from the proceeding. And you run the potential that whatever is being said or addressed by the testimony, by the questions, by the Court's instructions is not going to be heard by the jury or members of that jury. And again, that then leads to problems and distractions and the orderly processing of that case.

(RP 153-154).

At trial, witnesses testified that there were three apartments in the apartment building. (RP 263-264, 415-416, 424, 464-465). The door to the first apartment was straight back from the apartment entrance, and the doors to the second and third apartments were to the right of the apartment entrance. (RP 263-264, 415-416, 424, 464-465). The door to the third apartment was the second door on the right. (RP 415-416, 424, 464-465). The door to the third apartment opened to a staircase, which led to the third apartment, located on the second floor. (RP 415-416, 424, 464-465). Mr. DeJesus, Mr. Saucedo, and Ms. Glasby lived in the third apartment. (RP 414, 432, 455).

Michael Mercado, who was affiliated with the 18th Street gang, testified that he was one of the four men that approached Mr. Martinez, Mr. Saucedo and Mr. DeJesus in the alley on the day in question. (RP 475-478, 493). He testified that they were going to fight their rival gang. (RP 476). Mr. Mercado told the court that the three men with him

were Andres Solis, Alberto Ramirez, and Mr. Gomez. (RP 475-478, 481). Mr. Mercado identified Mr. Gomez as the shooter. (RP 480, 482). According to Mr. Mercado, Mr. Gomez shot Mr. Martinez, then shot back at the apartment building. (RP 482).

Mr. Ramirez told the court that he heard a shot, then saw that Mr. Gomez had a gun and that he was pointing at the Florence 13 gang members. (RP 199). Mr. Solis testified he did not see who shot the gun, and that he did not think anyone had a gun when they went into the alley to fight. (RP 548, 550, 554).

Ms. Glasby testified that she thinks the shooter might have been bigger than Mr. Gomez. (RP 418-419). Mr. Cloyd told the court that the shooter did not match the physical description of Mr. Gomez. (RP 429-431).

Mr. Cuevas testified that he knew nothing about the incident in question until he heard sirens. (RP 234). Ms. Nelson testified that she and Mr. Cuevas were asleep, and she heard "a lot of racket" followed by four "boom" sounds. (RP 236). Ms. Nelson told the court that Mr. Cuevas then jumped out of bed, and she jumped up behind him. (RP 236). She testified that "when I was jumping, that is when the bullet came in that room, because I heard it right there." (RP 236). She stated "the hoodie stopped the bullet or the bullet would have continued and got me in the

forehead because I was halfway off the bed." (RP 236). Ms. Nelson testified that the bed is lined up with the front door. (RP 236). She told the court the police arrived, with sirens going, a couple of minutes after the shots. (RP 238).

City of Walla Walla Police Sergeant Matthew Wood stated that he found a bullet on a pile of clothes inside the first apartment. (RP 253-255, 262-263). He told the court he also found a bullet in the door frame of the second apartment. (RP 257-259).

Ms. Glasby testified that after she heard shots being fired, she ran into the apartment building, and up the set of stairs that leads to her apartment. (RP 415-416). She told the court that she thinks everyone else followed her up the stairs. (RP 415-416, 418). She stated that Mr. Cloyd was right behind her. (RP 416). When asked if any bullets went by her, Ms. Glasby testified: "Yeah. When we were going up the stairs, we could hear the wood splinter at the bottom of the stairs." (RP 418).

Mr. Cloyd told the court he ran into the apartment building when he heard shots being fired. (RP 422-425). He testified:

> There were shots fired into the front hallway of the house where I had just got about - - I don't know probably 3 or 4 strides, steps up the stairs. I would say just the beginning of the stairs. I just shooed everyone past and I was the last to go up. And I remember gunshots and it was really loud. It seemed like it was right next to me, but it wasn't. So it

> echoed in there. And I believe - - I don't know where. I know there was shots fired, so yeah. We were all scared.

(RP 425-426).

The State asked Mr. Cloyd a follow-up question:

> [The State:] . . . Now, you mentioned that as you were running up the stairs, you are hearing loud noises. Did you see any bullets or feel any bullets go by you, or before you even ran up the stairs, where exactly would those gunshots have went off?
> [Mr. Cloyd:] It was like they were out off of the porch standing in the corner of the house probably. It seemed they were coming from outside the house. He wasn't - - The person wasn't in the house and it sounded like they were hitting the walls and stuff, right by the base of stairs.

(RP 427-428).

Mr. Cloyd further testified that he had just reached the top of the stairs when the gunshots went off. (RP 428). He told the court he had reached the second floor, and that the staircase was approximately 15 or 20 stairs long. (RP 428).

Mr. DeJesus testified he ran when he heard gunshots. (RP 437, 446). He told the court that he made it up the stairs into the apartment, and that "Jessica and I think his name was David" were already there. (RP 437). Mr. DeJesus testified that Mr. Saucedo was behind him on the stairs, and that he shut the door. (RP 437-438, 447).

Mr. Saucedo told the court that he ran when he heard the first gunshot. (RP 460). He testified that after he jumped onto the porch of the

apartment building, the shooter shot two shots, and the bullets came "[r]ight in my face." (RP 460-461). He stated that of the three people in his group (himself, Mr. DeJesus, and Mr. Martinez), Mr. DeJesus was the first person to get inside the apartment building. (RP 460). Mr. Saucedo testified he went inside after Mr. DeJesus. (RP 461).

The trial court instructed the jury on the lesser-included offense of second degree murder, of Mr. Martinez. (CP 187-189; RP 595-597). The trial court instructed the jury that in order to convict Mr. Gomez of first degree assault of each of the alleged victims, the following elements must be proved, beyond a reasonable doubt: "(1) [t]hat on or about the 17th day of May, 2011, the defendant assaulted [the named victim]; (2) [t]hat the assault was committed with a firearm; (3) [t]hat the defendant acted with intent to inflict great bodily harm; and [4] [t]hat this act occurred in the County of Walla Walla, State of Washington." (CP 192-197). The trial court also instructed the jury with a definition of assault, and the doctrine of transferred intent. (CP 191198; RP 597-598, 602-603).

The jury found Mr. Gomez guilty of the lesser-included offense of second degree murder, of Mr. Martinez. (CP 206; RP 666). The jury also found Mr. Gomez guilty of six counts of first degree assault, as charged. (CP 207-212; RP 666-667). The jury returned a special verdict on each of

the seven counts, finding that Mr. Gomez was armed with a firearm at the time of the commission of each crime. (CP 213-219; RP 667-669).

The trial court sentenced Mr. Gomez to a term of confinement of 1,378 months. (CP 241; RP 692-693). The trial court also imposed community custody for a term of 252 months, "or for the period of earned early release awarded pursuant to RCW 9.94A.728, whichever is longer [.]" (CP 241-242; RP 693-694). The trial court imposed the following community custody conditions, among others:

> 13. You are not to appear at any court proceeding unless you are a party, defendant in a criminal action, or subpoenaed as a witness.
> 14. You are not to possess a beeper, pager, cellular phone or any other cordless or otherwise wireless communication device.
> 15. You are not to possess graffiti in any form.
> . . .
> 17. . . . You are not to be with anyone who is using or possessing any illegal intoxicants, narcotics, or drugs.

(CP 245-246; RP 694).

The judgment and sentence lists the date of the crimes of conviction as May 17, 2012. (CP 237-238).

Mr. Gomez appealed. (CP 258-272).

D. ARGUMENT

1. THE TRIAL COURT VIOLATED MR. GOMEZ'S CONSTITUTIONAL PUBLIC TRIAL RIGHT BY PROHIBITING THE PUBLIC FROM ENTERING THE COURTROOM ONCE COURT WAS IN SESSION, WITHOUT CONSIDERING THE FACTORS SET FORTH IN *BONE-CLUB*.

Whether a defendant's constitutional public trial right has been violated is reviewed *de novo*. *State v. Wise*, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012) (*citing State v. Easterling*, 157 Wn.2d 167, 173-74, 137 P.3d 825 (2006)). A defendant may raise the issue for the first time on appeal. *Id*.

Both the federal and Washington State constitutions provide that a defendant has a right to a public trial. *Id.* (*citing* Wash. Const. art. I, § 22; U.S. Const. amend VI). This right to a public trial is not absolute. *Id*. (*citing State v. Bone-Club*, 128 Wn.2d at 259). "In *Bone-Club*, this court enumerated five criteria that a trial court must consider on the record in order to close trial proceedings to the public." *Id.* at 10 (*citing Bone-Club*, 128 Wn.2d at 258-59). The five criteria are as follows:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.

3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59.

"A trial court is required to consider the *Bone-Club* factors *before* closing a trial proceeding that should be public." *Wise*, 176 Wn.2d at 12 (emphasis in original); *see also State v. Paumier*, 176 Wn.2d 29, 35, 288 P.3d 1126 (2012).

"[U]nless the trial court considers the *Bone-Club* factors on the record before closing a trial to the public, the wrongful deprivation of the public trial right is a structural error presumed to be prejudicial." *Id*. at 14; *see also Paumier*, 176 Wn.2d at 35-37. A defendant is not required to prove prejudice when his constitutional public trial right is violated. *Paumier*, 176 Wn.2d at 37 (*citing Wise*, 176 Wn.2d at 14). The violation of the constitutional right to a public trial is not subject to harmless error analysis. *State v. Strode*, 167 Wn.2d 222, 231, 217 P.3d 316 (2009) (*quoting Easterling*, 157 Wn.2d at 181). The remedy for a violation of the constitutional public trial right is a new trial. *Wise*, 176 Wn.2d at 15, 19; *see also Paumier*, 176 Wn.2d at 35-37.

The trial court closed the courtroom by prohibiting the public from entering the courtroom after court was in session. (RP 153-154); *see also State v. Sublett*, 176 Wn.2d 58, 71, 292 P.3d 715 (2012) (stating that closure "occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave.") (*quoting State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011)). Although the record contains no other discussion of the courtroom closure, "[o]n appeal, a defendant claiming a violation to the public trial right is not required to prove that the trial court's order has been carried out." *State v. Brightman*, 155 Wn.2d 506, 517, 122 P.3d 150 (2005) (*citing In re Personal Restraint of Orange*, 152 Wn.2d 795, 813-14, 100 P.3d 291 (2004)). "[O]nce the plain language of the trial court's ruling imposes a closure, the burden is on the State to overcome the strong presumption that the courtroom was closed. *Id*. at 516. The State cannot overcome the presumption that a closure occurred here.

The trial court did not consider the *Bone-Club* factors before closing the trial to the public. *See Bone-Club*, 128 Wn.2d at 258-59. Therefore, Mr. Gomez's constitutional right to a public trial was violated. *See Wise*, 176 Wn.2d at 14; *Paumier*, 176 Wn.2d at 35-37. This is a structural error, and the remedy is a new trial. *See Wise*, 176 Wn.2d at 14-15, 19; *see also Paumier*, 176 Wn.2d at 35-37.

2. THE TRIAL COURT ERRED IN FINDING MR. GOMEZ GUILTY OF FIRST DEGREE ASSAULT OF MR. DEJESUS, MS. GLASBY, MR. CLOYD, AND MR. CUEVAS, WHERE THE EVIDENCE WAS INSUFFICIENT.

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (*citing State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id*. (*citing State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Furthermore, "[a] claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id*. (*citing State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980)).

In order to find Mr. Gomez guilty of first degree assault, for each count charged, the jury had to find that he assaulted the alleged victim, with a firearm, with the intent to inflict great bodily harm. (CP 193-196);

see also RCW 9A.36.011(1)(a) (defining first degree assault). The jury was instructed on the three common law definitions of assault: actual battery, attempted battery, and putting another in apprehension of harm. (CP 191; RP 597-598); *see also State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009) (setting forth these three common law definitions of assault).

The jury was also instructed on the doctrine of transferred intent. (CP 198; RP 602-603). Under this doctrine, which is embodied in RCW 9A.36.011, "once the intent to inflict great bodily harm is established, usually by proving that the defendant intended to inflict great bodily harm on a specific person, the mens rea is transferred under RCW 9A.36.011 to any unintended victim." *Elmi*, 166 Wn.2d at 218. Specifically, "RCW 9A.36.011 provides that once the mens rea is established, any unintended victim is assaulted if they fall within the terms and conditions of the statute." *Id*. (*citing State v. Wilson*, 125 Wn.2d 212, 219, 883 P.2d 320 (1994)). The terms and conditions of the first degree assault statute include both this *mens rea* intent element, and "an actus reus element of any of the three common law forms of assault, *i.e.*, '(1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm.'"

State v. Abuan, 161 Wn. App. 135, 157, 257 P.3d 1 (2011) (*quoting Elmi,* 166 Wn.2d at 215).

Because there was no actual battery of the alleged assault victims, only the attempted battery and putting another in apprehension of harm definitions of assault are at issue here. For the first degree assaults of Mr. DeJesus, Ms. Glasby, Mr. Cloyd, and Mr. Cuevas, there was insufficient evidence of the *actus reus* of assault.

Attempted battery is "an act, with unlawful force, done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented." (CP 191; RP 597); *see also State v. Hall*, 104 Wn. App. 56, 62, 14 P.3d 884 (2000); *State v. Jimerson*, 27 Wn. App. 415, 418, 618 P.2d 1027 (1980).

"An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury." (CP 191; RP 598); *see also State v. Kier*, 164 Wn.2d 798, 806, 194 P.3d 212 (2008). This form of assault requires proof of actual fear by the alleged victim. *See State v. Eastmond*, 129 Wn.2d 497, 503-04,

919 P.2d 577 (1996), *overruled on other grounds by State v. Brown*, 147 Wn.2d 330, 340, 58 P.3d 889 (2002).

There was insufficient evidence that Mr. Gomez assaulted Mr. DeJesus. First, there was insufficient evidence of an attempted assault of Mr. DeJesus. He testified that when he heard gunshots, he ran, and made it up the stairs into the third apartment. (RP 437, 446). Mr. DeJesus did not testify that bullets were being shot into the apartment as he was running. (RP 432-450). His proximity to the bullets was unclear. (RP 432-450). There were no bullets found in the doorframe of or inside the third apartment. (RP 253-255, 257-259, 262-263). Because there was no testimony that Mr. DeJesus could have been hit with a bullet, there was insufficient evidence of "the apparent present ability to inflict bodily injury if not prevented[,]" as required for an attempted assault. (CP 191; RP 597); *see also Hall*, 104 Wn. App. at 62; *Jimerson*, 27 Wn. App. at 418. Second, there was insufficient evidence of assault by apprehension of harm, because Mr. DeJesus did not testify that he was placed in actual fear of bodily injury. *See Eastmond*, 129 Wn.2d at 503-04, *overruled on other grounds by Brown*, 147 Wn.2d at 340.

There was also insufficient evidence that Mr. Gomez assaulted Ms. Glasby. First, there was insufficient evidence of an attempted assault of Ms. Glasby. She testified that when she heard gunshots, she ran into the

apartment building and up the stairs into the third apartment. (RP 415-416). Although Ms. Glasby testified that she "could hear the wood splinter at the bottom of the stairs[ ]" as she went up, she stated that Mr. Cloyd was right behind her. (RP 416, 418). Mr. Cloyd stated he was the last person to go up the stairs. (RP 426). He testified he had reached the top of the stairs when the gunshots went off. (RP 428). He testified he had reached the second floor, approximately 15 or 20 stairs above. (RP 428). Given this testimony, Ms. Glasby was already upstairs on the second floor when bullets entered the apartment building. She was not within proximity of the bullets. There were no bullets found in the doorframe of or inside the third apartment. (RP 253-255, 257-259, 262-263). Because there was no testimony that Ms. Glasby could have been hit with a bullet, there was insufficient evidence of "the apparent present ability to inflict bodily injury if not prevented[,]" as required for an attempted assault. (CP 191; RP 597); *see also Hall*, 104 Wn. App. at 62; *Jimerson*, 27 Wn. App. at 418. Second, there was insufficient evidence of assault by apprehension of harm, because Ms. Glasby did not testify that she was placed in actual fear of bodily injury. *See Eastmond*, 129 Wn.2d at 503-04, *overruled on other grounds by Brown*, 147 Wn.2d at 340.

Next, there was insufficient evidence that Mr. Gomez assaulted Mr. Cloyd. First, there was insufficient evidence of an attempted assault of Mr. Cloyd. Mr. Cloyd testified he had reached the top of the stairs when the gunshots went off. (RP 428). He testified he had reached the second floor, approximately 15 or 20 stairs above. (RP 428). When asked about the location of the gunshots, Mr. Cloyd testified "it sounded like they were hitting the walls and stuff, right by the base of the stairs." (RP 428). But his testimony shows he was already upstairs on the second floor when bullets entered the apartment building; he was not within proximity of the bullets. (RP 428). Mr. Cloyd testified "[i]t seemed like it was right next to me, *but it wasn't.*" (RP 426) (emphasis added). There were no bullets found in the doorframe of or inside the third apartment. (RP 253-255, 257-259, 262-263). Because there was no testimony that Mr. Cloyd could have been hit with a bullet, there was insufficient evidence of "the apparent present ability to inflict bodily injury if not prevented[,]" as required for an attempted assault. (CP 191; RP 597); *see also Hall*, 104 Wn. App. at 62; *Jimerson*, 27 Wn. App. at 418. Second, there was insufficient evidence of assault by apprehension of harm of Mr. Cloyd. Although he testified, "[w]e were all scared," he did not testify that he was placed in actual fear of bodily injury. (RP 426); s*ee also Kier*,

164 Wn.2d at 806. To the contrary, according to his testimony, he was aware that the bullets were not next to him. (RP 426).

Finally, there was insufficient evidence that Mr. Gomez assaulted Mr. Cuevas. Mr. Cuevas was asleep at the time the shots were fired. (RP 232-236). According to Mr. Cuevas, he woke up when he heard sirens. (RP 233). He testified he knew nothing about the incident until he heard sirens. (RP 234). Mr. Cuevas did not testify that he was placed in actual fear of bodily injury. (RP 230-234); s*ee also Eastmond*, 129 Wn.2d at 503-04, *overruled on other grounds by Brown*, 147 Wn.2d at 340; *State v. Bland*, 71 Wn. App. 345, 860 P.2d 1046 (1993) (holding there was insufficient evidence of assault by apprehension of harm, where the alleged victim was asleep at the time a bullet entered a window of his home), *overruled on other grounds by State v. Smith*, 159 Wn.2d 778, 786-87, 154 P.3d 873 (2007). Therefore, there was insufficient evidence of assault by apprehension of harm. There was also insufficient evidence of attempted assault of Mr. Cuevas. Based on his testimony and the testimony of Ms. Nelson, his proximity to the bullet that entered the first apartment is unclear. (RP 230-239). Because there was no testimony that Mr. Cuevas could have been hit with the bullet, there was insufficient evidence of "the apparent present ability to inflict bodily injury if not prevented[,]" as required for an attempted assault. (CP 191;

RP 597); *see also Hall*, 104 Wn. App. at 62; *Jimerson*, 27 Wn. App. at 418.

A rational trier of fact could not have found Mr. Gomez guilty, beyond a reasonable doubt, of first degree assault of Mr. DeJesus, Ms. Glasby, Mr. Cloyd, and Mr. Cuevas. *See Salinas*, 119 Wn.2d at 201 (*citing Green*, 94 Wn.2d at 220-22). Therefore, these convictions must be reversed and the charges dismissed with prejudice. *See State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005) (stating "'[r]etrial following reversal for insufficient evidence is 'unequivocally prohibited' and dismissal is the remedy.'") (*quoting State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998)).

3. THE TRIAL COURT IMPOSED FOUR UNAUTHORIZED COMMUNITY CUSTODY CONDITIONS UNRELATED TO THE CHARGED CRIMES.

The trial court imposed the following community custody conditions, among others:

> 13. You are not to appear at any court proceeding unless you are a party, defendant in a criminal action, or subpoenaed as a witness.
> 14. You are not to possess a beeper, pager, cellular phone or any other cordless or otherwise wireless communication device.
> 15. You are not to possess graffiti in any form.
> . . .

> 17. . . . You are not to be with anyone who is using or possessing any illegal intoxicants, narcotics, or drugs.

(CP 245-246; RP 694).

Although Mr. Gomez did not object to the imposition of these conditions, sentencing errors may be raised for the first time on appeal. *See State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (stating that "'[i]n the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.'") (*quoting State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)).

"As part of any term of community custody, the court may order an offender to . . . [c]omply with any crime-related prohibitions." RCW 9.94A.703(3)(f). Whether a community custody condition is crime-related is reviewed for an abuse of discretion. *State v. Zimmer*, 146 Wn. App. 405, 413, 190 P.3d 121 (2008) (*citing State v. Autrey*, 136 Wn. App. 460, 466-67, 150 P.3d 580 (2006)). A "[c]rime-related prohibition" is defined, in relevant part, as "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10); *see also State v. O'Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

The community custody condition prohibiting Mr. Gomez from appearing at any court proceeding, unless he is a party, defendant in a

criminal action, or subpoenaed as a witness is not related to the crimes of conviction. Furthermore, this condition interferes with Mr. Gomez's right, as a member of the public, under article I, § 10 of the Washington Constitution, to open and accessible court proceedings. *State v. Beskurt*, -- Wn.2d --, 293 P.3d 1159, 1161 (2013) (stating this constitutional right).

The community custody condition prohibiting Mr. Gomez from possessing a beeper, pager, cellular phone, or any other cordless or otherwise wireless communication device is not related to the crimes of conviction. *See Zimmer*, 146 Wn. App. at 413-414 (holding that the trial court abused its discretion in imposing a community custody condition prohibiting the defendant from possessing a cellular phone and handheld electronic data devices, because the prohibition was not crime-related). There was no evidence in the record that Mr. Gomez used any type of wireless communication device in relation to the crimes of conviction.

Finally, the community custody conditions prohibiting Mr. Gomez from possessing graffiti and prohibiting Mr. Gomez from being with anyone who is using or possessing any illegal intoxicants, narcotics, or drugs are not related to the crimes of conviction. There is no evidence in the record that graffiti, illegal intoxicants, narcotics, or drugs were used in relation to the crimes of conviction.

The four challenged community custody conditions discussed above are not "[c]rime-related prohibition[s]." RCW 9.94A.030(10); *see also O'Cain*, 144 Wn. App. at 775. Accordingly, this court should remand this case with an order that the trial court strike these four community custody conditions. *See O'Cain*, 144 Wn. App. at 775 (stating the remedy for an erroneous community custody condition was to strike it on remand).

4. THE JUDGMENT AND SENTENCE CONTAINS AN ERROR THAT SHOULD BE CORRECTED.

The judgment and sentence indicates that the date of the crimes of conviction was May 17, 2012. (CP 237-238). However, the date of the crimes of conviction was May 17, 2011. (CP 146-147, 189, 192-197, 206-212; RP 162-163). This court should remand this case for correction of the judgment and sentence to indicate the date of the crimes of conviction as May 17, 2011. *See, e.g., State v. Naillieux*, 158 Wn. App. 630, 646, 241 P.2d 1280 (2010) (remand appropriate to correct scrivener's error in judgment and sentence, erroneously stating the defendant stipulated to an exceptional sentence); *State v. Healy*, 157 Wn. App. 502, 516, 237 P.3d 360 (2010) (remand appropriate to correct scrivener's error in judgment and sentence, incorrectly stating the terms of confinement imposed).

E. CONCLUSION

The evidence was insufficient to support Mr. Gomez's convictions for first degree assault of Mr. DeJesus, Ms. Glasby, Mr. Cloyd, and Mr. Cuevas. Mr. Gomez's convictions on these charges must be reversed and the charges dismissed with prejudice.

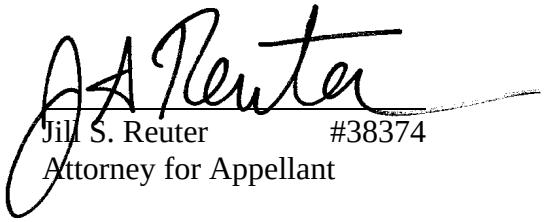
The remaining charges should be reversed and remanded for a new trial, because the trial court violated Mr. Gomez's constitutional public trial right by prohibiting the public from entering the courtroom once court was in session, without considering the factors set forth in *State v. Bone-Club*, 128 Wn.2d at 258-59.

This court should also order the trial court to strike the community custody conditions prohibiting Mr. Gomez from: (1) appearing at any court proceeding, unless he is a party, defendant in a criminal action, or subpoenaed as a witness; (2) possessing a beeper, pager, cellular phone or any other cordless or otherwise wireless communication device; (3) possessing graffiti; and (4) being with anyone who is using or possessing any illegal intoxicants, narcotics, or drugs.

Finally, the case should be remanded for correction of the judgment and sentence to indicate the date of the crimes of conviction as May 17, 2011.

Dated this 8th day of April, 2013.

JANET GEMBERLING, P.S.



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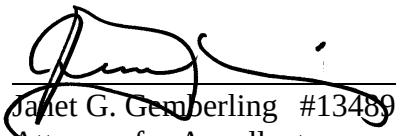
Attorney for Appellant



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Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 31050-7-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
BENITO GOMEZ,	)	
	)	
Appellant.	)	

I certify under penalty of perjury under the laws of the State of Washington that on April 8, 2013, I served a copy of Appellant's Brief in this matter by email to the attorney for the respondent, receipt confirmed, pursuant to the parties' agreement:

Teresa Jeanne Chen
tchen@wapa-sep.wa.gov

I certify under penalty of perjury under the laws of the State of Washington that on April 8, 2013, I mailed a copy of Appellant's Brief in this matter to:

Benito Gomez
Washington State Penitentiary
1313 N. 13th Avenue
Walla Walla, WA 99362

Signed at Spokane, Washington on April 8, 2013.

Janet G. Gemberling
Attorney at Law