71956-4

716564

No. 71956-4-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

LARRY D. DALEY, JR.,

Appellant.

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

BRIEF OF APPELLANT

SARAH M. HROBSKY
Attorney for Appellant

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Constitution

Washington Constitution

United States Supreme Court Decisions

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

Statutes

Other Authorities

A. ASSIGNMENTS OF ERROR

1. Insufficient evidence was presented to establish beyond a reasonable doubt the specific intent to assault an identified victim, an essential element of assault in the first degree, as charged in Count 1.

2. Insufficient evidence was presented to establish beyond a reasonable doubt Mr. Daley assaulted Detective Huber, Detective Janes, and Detective Hughey, as charged in Counts 2, 3, and 4.

3. In the absence of substantial evidence in the record, the court erred in entering Finding of Fact 7, to the extent it misinterpreted the security videotape.[1]

4. In the absence of substantial evidence in the record, the court erred in entering Finding of Fact 8, to the extent it misinterpreted the security videotape.

5. In the absence of substantial evidence in the record, the court erred in entering Finding of Fact 11.

6. In the absence of substantial evidence in the record, the court erred in entering Finding of Fact 12.

7. To the extent it could be considered a Finding of Fact and in the absence of substantial evidence in the record, the court erred in entering Conclusion of Law 2.

---

[1] A copy of the Findings of Fact and Conclusions of Law is attached as Appendix A.

8. To the extent it could be considered a Finding of Fact and in the absence of substantial evidence in the record, the court erred in entering Conclusion of Law 3.

9. To the extent it could be considered a Finding of Fact and in the absence of substantial evidence in the record, the court erred in entering Conclusion of Law 4.

10. To the extent it could be considered a Finding of Fact and in the absence of substantial evidence in the record, the court erred in entering Conclusion of Law 5.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The constitutional right to due process requires the State to prove beyond a reasonable doubt every essential element of the crime charged. An essential element of the crime of assault in the first degree is the specific intent to assault an identified victim. Where the evidence indicated Mr. Daley fired a gun in the direction of a crowd and the State identified the alleged victim of that shooting only as a generic "John Doe," was Mr. Daley's right to due process violated when he was convicted of assault in the first degree against John Doe? (Assignments of Error 1, 5, 7)

2. Where the evidence did not establish beyond a reasonable doubt that Mr. Daley was the individual who fired shots in the direction of the three detectives, was Mr. Daley's right to due process further violated

when he was convicted of assault in the first degree against the three detectives? (Assignments of Error 2, 3, 4, 6, 8, 9, 10)

C. STATEMENT OF THE CASE

On November 25, 2012, security for Citrus, a nightclub near the intersection of Fairview Avenue North and Yale Avenue North, Seattle, requested a police presence to help maintain order at closing time around 2 a.m. 3/25/14 RP 58; 3/27/14 RP 49, 132. Detective Benjamin Hughey, Detective Thomas Janes, and Detective Jonathan Huber responded and parked their unmarked patrol car in a parking lot for Fred Hutchinson Cancer Research Center across Fairview Avenue North facing the club entrance. 3/20/14 RP 32, 35, 39, 43; 3/27/14 RP 45, 49-51, 54, 132-33. When they arrived, a crowd of least 100 people was milling around in front of the club, another 50 to 75 people were in the club parking lot, and more people were coming out of the club. 3/20/14 RP 44; 3/27/14 RP 55-56, 135, 155.

Shortly after they arrived, the detectives noticed a man in a white hooded sweatshirt, later identified as Larry D. Daley, Jr., in a verbal altercation with a group of three to five other men. 3/20/14 RP 50-52; 3/27/14 RP 58, 138, 160. The group of men followed Mr. Daley as he started to cross Fairview Avenue North and walk toward Yale Avenue North and the lot where the officers were parked. 3/20/14 RP 52, 54;

3/24/14 RP 38-39; 3/27/14 RP 139, 158-59. Detective Janes heard a person, possibly Mr. Daley, yell, "What's up now, nigga?" 3/27/14 RP 60, 62, 105. Mr. Daley then stopped in the middle of the street, turned away from the patrol car to face the group, and made a distinctive motion as if drawing a gun from his waistband. 3/20/14 RP 56; 3/24/14 RP 40; 3/27/14 RP 61, 63, 139-40, 159. The detectives then saw Mr. Daley point a gun in the direction of the men who were following him and toward the club parking lot, they heard gunshots, and they saw several muzzle flashes from the gun. 3/20/14 RP 56-57, 63; 3/24/14 RP 40; 3/27/14 RP 61, 63, 140, 159.

Immediately, the detectives got out of their patrol car and pulled their guns. 3/20/14 RP 67; 3/27/14 RP 65, 141. Detective Janes ordered Mr. Daley to stop but he did not comply. 3/27/14 RP 66. Rather, Mr. Daley shot several additional rounds in the direction of the group following him and the crowd outside the club. 3/27/14 RP 110. While Mr. Daley was shooting in the direction of the group following him, Detective Hughey started to shoot at Mr. Daley. 3/27/14 RP 112-13. Mr. Daley then turned back toward the parking lot and ran directly toward the patrol car, still holding the gun in his hand. 3/20/14 RP 60, 70; 3/27/14 RP 109-10, 142, 161-62. As Mr. Daley ran past the patrol car and onto Yale Avenue North, Detective Huber started to shoot at him 3/20/14 RP 70; 3/27/14 RP

76, 144-45. According to Detective Janes, Mr. Daley was merely holding the gun and not pointing at anyone as he and two unidentified individuals ran in the detectives' direction. 3/27/14 RP 68, 163. On the other hand, Detective Huber testified that Mr. Daley held the gun pointed in his general direction whereas Detective Hughey testified that Mr. Daley raised the gun and pointed it directly at him. 3/20/14 RP 70; 3/27/14 RP 143-44, 165.

Mr. Daley ran along Yale Avenue North pursued by the detectives. Detective Hughey briefly lost sight of him and when he regained sight, Mr. Daley and a group of unidentified people were running away behind a building. 3/20/14 RP 78-79. Detective Hughey again fired at Mr. Daley and continued to chase him but again briefly lost sight. 3/20/14 RP 81, 83. Detective Hughey then heard a rustling noise and located Mr. Daley hiding under a bush. 3/20/14 RP 85.

At the same time, Detective Janes and Detective Huber were also chasing Mr. Daley. 3/27/14 RP 75. According to Detective Janes, while he and Detective Huber were very close to each other, he saw two muzzle flashes from Mr. Daley's direction and he felt and heard bullets whiz past his head. 3/27/14 RP 76, 78, 81. Very shortly thereafter, he heard Detective Hughey call out that he located Mr. Daley. 3/27/14 RP 91, 114. He then noticed a man in a white tee shirt "peeking" around a building and

two men, later identified as Montique Chambers and Charles Smith, crouching under a car. The three men were detained but they were not charged with involvement in the incident. 3/27/14 RP 94-95.

Mr. Daley was handcuffed and he indicated that his gun was under the bush. 3/20/14 RP 89-91. He suffered two gunshot wounds in his back. 3/19/14 RP 31. The detectives recovered the gun with an empty magazine. 3/20/14 RP 93; 3/27/14 RP 148. Two bullet casings and keys to a car registered to a friend of Mr. Daley were also found under the bush. 3/25/14 RP 176, 180-81, 182, 199. The car was impounded and searched, and a revolver with Mr. Daley's thumb print was found underneath the driver's seat. 3/24/14 RP 125, 127-28, 159; 3/25/14 RP 194, 197. Immediately after Mr. Daley was handcuffed, the detectives heard additional gunshots from outside the club. 3/20/14 RP 103; 3/27/14 RP 92, 116-18, 148, 168.

It was later determined that Detective Hughey fired nine bullets and Detective Huber fired seven bullets. 3/24/14 RP 98-101, 103; Ex. 12, 13, 15. Ten bullet casings were recovered from the middle of Fairview Avenue North; three casings matched the two casings found under the bush, all of which were fired from the gun found under the bush, four casings were of the same caliber but not necessarily fired from the same

gun, and three casings were of a different caliber. 3/26/14 RP 72-75; Ex. 15, 56, 57.

Darren Lenz, head of security for Citrus, described the incident differently. While escorting an unruly patron outside the club, he heard a gunshot and he saw a man running across Fairview Avenue North in the direction of the parked patrol car. 3/25/14 RP 52-53, 60, 62. The running man was followed by "other individuals," including one man with braided hair wearing a white tee shirt. 3/25/14 RP 63; Ex. 50 at 3. The man in the tee shirt then turned back towards the club and deliberately fired a gun in the direction of the club parking lot. 3/25/14 RP 63, 65-68, 70-71; Ex. 50 at 3-4. A second man wearing a plaid shirt came up to the man in the tee shirt and he fired eight or nine shots in the direction of the club parking lot. 3/25/14 RP 74-75; Ex. 50 at 4. The two men then ran across the street in the direction of the parked patrol car. 3/25/14 RP 75; Ex. 50 at 4-5.

Robert McCord, a Citrus employee, testified that a "big brawl" erupted inside the club and several smaller fights broke out in the club parking lot. 3/25/14 RP 116, 122-23. While the parking lot fights were going on, he observed a man run across Fairview Avenue North followed by three to six people. 3/25/14 RP 126-27. He heard one round of shots as the people were running across the street and followed very shortly thereafter by a second round of shots from across the street. 3/25/14 RP

129-30. At trial he testified that he did not see the shooter of the first round of shots, but in a pre-trial interview, he stated that the first man shot towards the club while backing up in the middle of the street and then turned and continued to run across the street. 3/25/14 RP 144-45. He did not provide a description of the shooter.

David Hallmon was at Citrus to with his cousin and his cousin's friends. 3/25/14 RP 4. After last call, he went to the parking lot and waited for his cousin and friends to leave the club. 3/25/14 RP 10-11. While waiting, he heard a "couple of shots," which sounded as if they were fired in front of the club. 3/25/14 RP 13. He crouched between two cars and three to five minutes later, he heard another series of about eight shots that sounded like multiple guns and he was struck in his left arm by a bullet. 3/25/14 RP 13, 15, 18, 21, 28. He did not see anyone with a gun. 3/25/14 RP 23. He was taken to a hospital where several bullet fragments were removed but he did not know whether the fragments were tested. 3/25/14 RP 23-24, 39.

Montique Chambers, Charles Smith, Salud DiVito, and Lee Bentley arrived together at Citrus and parked on Fairview Avenue North across from the club. 3/26/14 RP 4-5, 7, 17; 3/31/14 RP 6. They left shortly before closing time and as they were walking to their car, Mr. Chambers and Mr. Smith heard gunshots from behind. 3/26/14 RP 9, 17-

18; 3/31/14 RP 10-12. Mr. Chambers ran towards the car and heard a second volley of gunshots from in front of him that were louder and seemed closer. 3/26/14 RP 18. He dropped to the ground near the car and heard a third volley of shots, again from behind in the direction of the club. 3/26/14 RP 18-19, 21. Mr. Smith tried to get into the car when the windows broke from gunfire, so he ran towards the research center. 3/31/14 RP 12, 18. It was later determined that the officers shot and shattered four windows on the car. 3/26/14 RP 34; Ex. 23. When the shooting stopped, Mr. Chambers heard a person cry out, "I'm hit, I'm hit." 3/26/14 RP 21. Mr. Chambers and Mr. Smith were arrested and subsequently released. 3/26/14 RP 21, 38; 3/31/14 RP 15.

Arnulfo Aserios, a security officer for Fred Hutchinson Cancer Research Center, gave yet another description of the incident. He observed "hundreds" of people in the club parking lot across Fairview Avenue North and he noticed three men start to cross the street from Citrus towards the research center. 3/27/14 RP 5, 12, 17. In the middle of the street, the men stopped, turned back toward the club, drew guns, shot three or four times in the direction of the club, and then ran towards the research center. 3/27/14 RP 17-18. According to Mr. Aserios, two of the men were wearing dark hooded sweatshirts and the third man, whom he identified as Mr. Daley, was wearing a light hooded sweatshirt. 3/27/14 RP 18, 22.

Mr. Daley was charged with four counts of assault in the first degree, Count 1 against a generic "John Doe," Count 2 against Detective Huber, Count 3 against Detective James, and Count 4 against Detective Hughey, each count alleged to have been committed while Mr. Daley was armed with a firearm. CP 12-13. In addition, Mr. Daley was charged with two counts of unlawful possession of a firearm. CP 14. He waived his right to a jury trial. CP 10-11. Judge William Downing heard testimony from the witnesses and viewed footage from several security videotapes from the research center. Ex. 2. Mr. Daley was convicted as charged. CP 17-23.

D. ARGUMENT

A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989); U.S. Const. amend. VI, XIV; Const. art. I, § 3. The State bears the burden of producing sufficient evidence to prove beyond a reasonable doubt every essential element of a crime charged. *Winship*, 397 U.S. at 364; *State v. Deer*, 175 Wn.2d 725, 731, 287 P.3d 539 (2012). Evidence is sufficient to support a conviction only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential

elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); *accord State v. Rose*, 175 Wn.2d 10, 14, 282 P.3d 1087 (2012).

RCW 9A.36.011(1)(a) provides:

> (1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:
> (a) Assaults another with a firearm nor any deadly weapon or by any force or means likely to produce great bodily harm or death; or
> (b) Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance; or
> (c) Assaults another and inflicts great bodily harm.

Washington courts recognize three common law definitions of "assault," which is not defined by statute: "(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. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). No actual battery was committed here, so only attempted battery and apprehension of harm are at issue.[2]

[2] Mr. Daley was not charged with assault against Mr. Hallmon.

1. Insufficient evidence was presented to support Mr. Daley's conviction for assault in the first degree against a generic "John Doe," as charged in Count 1.

a. The assault in the first degree statute requires specific intent to assault an identified victim.

Assault in the first degree is a specific intent offense that requires proof beyond a reasonable doubt that the defendant had the specific intent to assault an identified victim. *Elmi*, 166 Wn.2d at 218; *State v. Thomas*, 123 Wn. App. 771, 779, 98 P.3d 1258 (2004). The requisite quantum of specificity to identify an intended victim is an issue of first impression in this jurisdiction. Other jurisdictions that have considered this issue require, as a minimum, a description of the intended victim. For example, in *Edmund v. State*, the defendant challenged the sufficiency of the charging document that alleged he committed first degree assault, in violation of Maryland Code (2002) Criminal Law Article (CL) § 3-202,[3] against a victim who was described in detail, but who was not identified by name.

---

[3] CL § 3-202 provides in relevant part:

(a) *Prohibited.*—...

(2) A person may not commit an assault with a firearm, including:

(i) a handgun....

CL § 3-201(b) defines assault as "the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings," to wit: " (1) an attempt to commit a battery or (2) an intentional placing of another in apprehension of receiving an immediate battery." *Edmund*, 921 A.2d at 269.

398 Md. 562, 921 A.2d 264, 267 (2007). The charging document included a description of the victim.

> Physical description is a black male, approximately five feet eight inches tall, 240 pounds, with a beard and mustache, wearing a black puffy jacket, brown hooded sweatshirt and red skull cap.

Id. The defendant confessed to shooting the victim with whom he had on-going problems but whose name he did not know. *Id.* at 266. On the day of the incident, the victim engaged the defendant in a verbal confrontation, pointed his finger in the defendant's face, and followed the defendant, cursing and waving his finger, as the defendant walked to his apartment. *Id.* The defendant's brother was inside the apartment where the defendant retrieved a handgun, and the two went outside to confront the victim. *Id.* Outside, the victim challenged the defendant to a fight, the defendant drew his handgun, and he then shot at the victim at close range. *Id.* 266-67. The defendant's brother witnessed the incident and provided the physical description of the victim. *Id.* at 266. The Maryland appellate court upheld the conviction on the grounds the charging document contained sufficient detail to provide notice of the criminal conduct charged, especially since the defendant confessed to shooting the victim. *Id.* at 272. *See also Akins v. United States*, 679 A.2d 1017, 1021 (D.C. 1996), *superseded on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158

L.Ed.2d 177 (2004) (affirming defendant's conviction for assault during a robbery against unnamed victim when the assault was memorialized on film by a co-defendant from such close range that "the fear in the victim's eyes is clearly visible" and the victim could heard repeatedly asking why he was being assaulted); *State v. Conroy*, 118 So.3d 305, 312 n.10 (Fla. 2013) ("Because ... aggravated assault,[4] ... [is] a specific intent crime, the requisite intent must be directed toward a specific victim....").

b. The constitutional prohibition against double jeopardy and the right to a unanimous verdict require identification of an intended victim.

In addition to the statutory requirement of an identified, intended victim, the constitutional prohibition against double jeopardy also requires identification of a specific victim. The double jeopardy clauses of the Fifth Amendment to the United States Constitution and of Article I, section 9 of the Washington Constitution protect a defendant from successive prosecutions for the same offense. *United States v. Dixon*, 509 U.S. 688, 696, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993); *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). Where the victim of an assault is not identified, however, and there are multiple potential victims of the same

---

[4] F.S.A. § 784.021(1) provides:

(1) An "aggravated assault" is an assault:
(a) With a deadly weapon without intent to kill; or
(b) With an intent to commit a felony.

"Aggravated battery" is a separate offense, F.S.A. § 784.045.

assault, some identifying facts are necessary to protect the defendant from successive prosecutions for the same incident. For example, in *State v. Crank*, following the defendants' confession to killing an unknown person, they were charged and convicted of the murder of "John Doe." 105 Utah 332, 142 P.2d 178, 180 (1943). On appeal, they challenged the sufficiency of the information, on the grounds that it failed to name or describe the victim. *Id.* The court ruled the information was sufficient, but noted:

> There must, however, be some facts then supplied to identify the victim, to enable the defendant to prepare his defense, and to identify the crime, for the protection of the defendant, in case defendant is acquitted, or placed in jeopardy and again charged with the same offense.

Id. See also Edmund, 921 A.2d at 272-73 (because the victim was described in detail, the defendant's concern about double jeopardy was unfounded).

The constitutional right to a unanimous verdict similarly demands an identified, intended victim. The right to a jury trial includes the right to a unanimous finding of all elements of the offense. *State v. Coleman*, 159 Wn.2d 509, 515, 150 P.3d 1126 (2007); *In re Detention of Keeney*, 141 Wn. App. 318, 327, 169 P.3d 852 (2007); Const. Art. I, § 21. Again, where the victim of an assault is not identified, and there are multiple potential victims of the same assault, some identifying facts are necessary

to guarantee a unanimous verdict as to every element of the offense. For example, in *State v. Stephens*, the defendant was charged with one count of assault against two victims based on a single shot in the victims' direction. 93 Wn.2d 186, 188, 607 P.2d 304 (1980). At trial, however, the jury was instructed in the disjunctive to determine whether the defendant assaulted either one victim or the other victim. *Id.* at 189. On appeal, the Court reversed the conviction and noted the instruction "in effect, split the action into two separate crimes ... while the information charged only one." *Id.* at 190. Here, the trial court found, "When [Mr. Daley] fired his handgun at the crowd of unidentified people, the defendant, with the intent to inflict great bodily harm, did assault more than one of them with a firearm. The name "John Doe" is used in a representative sense to stand for simply one of these unidentified individuals." CP 21 (Finding of Fact 11). As in *Stephens*, however, Mr. Daley was charged with a single count of assault. Had his case been presented to a jury, in the absence of identification of an individual victim, there would be no way to determine whether the jury unanimously agreed on every element of the offense of assault.

c. The theory of transferred intent is inapplicable to the present case.

The trial court introduced the theory of transferred intent. 3/19/14 RP 80-81. The specific intent to commit assault in the first degree against an identified, intended victim may be transferred to include any unintended victims as well. For example, in *Elmi*, the defendant was convicted of attempted murder and assault in the first degree against his intended victim, as well as against three unintended victims, when he fired into a house with the specific intent to harm his estranged wife and, unbeknownst to the defendant, three children also were present inside the house. 166 Wn.2d at 212-13. On appeal, the Court upheld the assault convictions against the unintended victims and ruled that the defendant's specific intent to assault the intended victim, his estranged wife, transferred to each of the three children. *Id.* at 219. The Court reasoned, "[O]nce 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." *Id.* at 218 (quoting *State v. Wilson*, 125 Wn.2d 212, 218, 883 P.2d 320 (1994)).

Here, the State did not charge Mr. Daley with assault against an unintended victim, but, rather, charged him with assault against a generic

"John Doe." CP 12-14. In closing argument, the State speculated that Mr. Daley caused Mr. Hallmon's injury. 3/31/14 RP 50, 53-54. However, the State did not charge Mr. Daley with assault against Mr. Hallmon, either as an intended or an unintended victim. Moreover, the State's speculation was pure conjecture, unsupported by ballistic or any other evidence. Therefore, the theory of transferred intent does not pertain to the present case.

2. Insufficient evidence was presented to support Mr. Daley's convictions for assault in the first degree against Detective Janes, Detective Huber, and Detective Hughey.

No one saw Mr. Daley fire his gun after he ran across Fairview Avenue North and there was insufficient corroborating or circumstantial evidence to prove beyond a reasonable doubt Mr. Daley was the individual who shot at the detectives.

The court found that Detective Janes and Detective Huber were assaulted by "a shot or shots" fired by Mr. Daley from Yale Avenue North. CP 20, 21 (Findings of Fact 7, 12). Detective Janes testified that he saw two muzzle flashes from Yale Avenue where Mr. Daley was running, and he felt and heard a bullet whiz past his head. 3/27/14 RP 76-78. On the other hand, Detective Huber was standing close to Detective Janes at the time and he did not see a muzzle flash or feel a bullet pass by him.

Significantly, neither detective testified that Mr. Daley shot at them. Moreover, no bullets or casings were found at or near the location where Detective Janes stated he saw the muzzle flash and no bullets were located in the area. The trial court found the security videotape corroborated Detective Janes's testimony because one tape shows a muzzle flash and another tape shows Mr. Daley at the location of the muzzle flash. CP 20 (Finding of Fact 7). The tape is inconclusive, however, because it also shows numerous other individuals in the same location at the same time. Ex. 4. In addition, the videotape arguably shows a single muzzle flash only, and does not corroborate Detective Janes's testimony of two flashes. Ex. 4.

The court found that Detective Hughey was assaulted by "at least" one shot fired by Mr. Daley from under the bush where he was arrested. CP 20, 21 (Findings of Fact 8, 12). Again, the court relied on the security videotape to bolster its finding that Mr. Daley shot "at least" one time at Detective Hughey, even though the video shows other individuals in the same location at the same time. CP 20 (Finding of Fact 6); Ex. 4. In fact, when Detective Hughey was chasing Mr. Daley, he saw "numerous other people" running on Yale Avenue North in front and behind Mr. Daley. 3/20/14 RP 79. Moreover, Detective Hughey candidly acknowledged that he was unaware of being fired upon until he viewed the security

videotape. 3/20/14 RP 82. After viewing the security videotape, he thought "*somebody* really did try to kill me." 3/20/14 RP 112 (emphasis added). He did not, however, testify that Mr. Daley was the shooter.

The evidence does not support the trial court's finding that Mr. Daley was the individual who shot at the detectives.

3. The remedy is reversal of the four convictions for assault in the first degree.

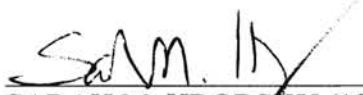
Mr. Daley's conviction for assault in the first degree against a generic "John Doe" was based on insufficient evidence to identify an intended victim. His convictions for assault in the first degree against the three detectives were based on insufficient evidence he was the individual who shot at the detectives. A conviction based on insufficient evidence cannot stand. *State v. Veliz*, 176 Wn. App. 849, 865, 298 P.3d 75 (2013). To retry Mr. Daley for the same conduct would violate the prohibition against double jeopardy. *Burks v. United States*, 437 U.S. 1, 18, 98 S. Ct. 2141, 57 L.Ed.2d 1 (1979); *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). Accordingly, Mr. Daley's convictions for assault in the first degree must be reversed and the charges dismissed with prejudice.

E. CONCLUSION

Mr. Daley's conviction for assault against a generic "John Doe" was based on insufficient evidence to identify the alleged victim, an essential element of assault in the first degree. His convictions for assault against the three detectives were based on insufficient evidence Mr. Daley was the individual who shot at them. For the forgoing reasons, Mr. Daley requests this Court reverse his four convictions for assault in the first degree.

DATED this 21st day of January 2015.

Respectfully submitted,



SARAH M. HROBSKY (12352)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, v. LARRY D. DALEY, Jr. Defendant.	No. 12-1-06016-5 SEA FINDINGS OF FACT AND CONCLUSIONS OF LAW

This criminal case came on for a bench trial on March 19-31, 2014 before the undersigned Judge of the above-entitled Court. The plaintiff State of Washington was represented by Deputy Prosecuting Attorneys Stephen Herschkowitz and Dan Carew and the defendant Larry Daley was represented by Leanne Lucas. The Court heard the testimony of 17 witnesses and has reviewed all exhibits admitted into evidence. The Court also heard closing arguments of counsel. Having considered the foregoing, together with the legal authorities cited by the parties, the Court now makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Although it has since been closed, in late 2012 there was a nightclub named the Citrus Lounge doing business at 1001 Fairview Avenue N. in Seattle, Washington. Despite the presumed screening efforts of club personnel, it was not unusual for there to be a dangerous mix of excessive alcohol, weapons and hostility in and around the club at closing time. Such was the case in the early morning hours of Sunday November 25, 2012 when Seattle Police Department Gang Unit detectives arrived to serve as a "visible deterrent" and to keep an eye on the crowd of departing patrons.

2. More than a hundred such patrons were spread around the front of the club and its parking lot as Detectives Jonathan Huber, Thomas Janes and Benjamin Hughey pulled their unmarked (but distinctively police-configured) Ford Crown Victoria onto Fred Hutchinson Cancer Research Center property directly across Fairview Avenue. The detectives had a more than fair view across the well-lighted street and, for instance, easily spotted an individual known to have an outstanding arrest warrant. Through their windshield and open windows, they watched and listened as events quickly unfolded.

3. An individual in a white hooded sweatshirt, later identified as the defendant Larry Daley, soon caught their attention. As he was crossing Fairview Avenue in front of them, he was engaged in a disagreement with others behind him. He was in a visibly agitated state. As the officers watched, this individual pulled out a handgun which he leveled at the crowd and fired off several rounds in their direction.

The detectives could hear the report and see the muzzle flash. Later, it would be determined that three shell casings recovered in this spot had been fired from the semi-automatic 9 mm handgun that would be found in the nearby bushes where the defendant was soon arrested. Of course, discovery of the casings, the defendant and the gun were still minutes away and the lab work weeks away as the officers had to take quick action.

4. Det. Hughey, the front seat passenger, was first to get out of the police vehicle and Det. Janes, seated behind him, followed. It was Det. Janes who yelled to the defendant "Police! Stop!" as Det. Hughey drew his service weapon. As the defendant looked their way, his gun was briefly pointed at the officers. He did not fire it and he did not stop but, instead, bolted toward the intersection of Fairview and Yale Avenues and ran southbound on Yale.

5. Having just seen the defendant shoot into a crowd and run off with the gun still in his hand, Detectives Hughey and Huber determined that potentially deadly force was necessary to protect themselves and the public. Det. Hughey fired several shots at the defendant as he rounded the corner and headed up Yale Avenue and Det. Huber, from a location further south, fired several more after the defendant was on Yale Avenue.

6. Supplementing the testimony of the detectives is that of several forensic experts and civilian witnesses, of whom Mr. Aserios, Mr. Chambers and Mr. Smith had particular value. Finally, Fred Hutchinson security videotapes, recorded from various locations, provide a firm basis upon which the events may be reconstructed.

7. As the defendant was proceeding southbound and uphill on Yale Avenue, the detectives were taking different routes to get up to his location in order to continue their pursuit. Det. Hughey led the way by going up a concrete ramp while Dets. Janes and Huber took the route of the loading dock. At a time of 1:57:11 a.m. on the loading dock security videotape, a muzzle flash can be seen from the Yale Avenue location from which Det. Janes testifies a shot or shots were fired in the direction of him and Det. Huber who was engaged in firing at the fleeing suspect. Another camera angle shows that at this precise time, the defendant was in that very location. Det. Janes does not simply say he saw the shots fired but, compellingly and convincingly, he testifies that he could feel and hear the bullets pass closely by him. Whoever was the intended target, Det. Janes was certainly caused to experience a reasonable fear and apprehension of imminent bodily injury. While maintaining their professionalism throughout the course of their being assaulted, the same is true for Detectives Huber and Hughey.

8. Having been shot in the lower back, the defendant scampered underneath a rhododendron alongside a Cancer Research Center building. From this location, he can be seen on the videotape to get off at least one final round as Det. Hughey was closing in on his location. The muzzle flash of this shot can be observed at 1:57:22 a.m. on the security videotape. As he was pulled from the shrubbery, he was asked where his gun was and he indicated its location. From that spot under the rhododendron, officers recovered the 9 millimeter Star semi-automatic pistol and two

expended cartridge casings. There were no unfired rounds in the magazine or gun. From that same location, the police also retrieved the keys to a Cadillac.

9. The defendant has not asserted a claim of self-defense and so whether he was unaware the men pursuing him were police officers is not material. In addition, since he was the first aggressor in the violent affray, a claim of self-defense would not be available to him.

10. In the Citrus parking lot, police found the Cadillac car that matched the keys recovered with the defendant and the gun. When the car was later searched pursuant to a warrant, a loaded Smith and Wesson .357 revolver was found under the driver's seat. It was later determined that the defendant's thumbprint was matched to a latent print on the handle of that gun. A bill of sale in the car's glove compartment contained his name – crossed out – as involved in the recent purchase of the car.

11. When he fired his handgun at the crowd of unidentified people, the defendant, with the intent to inflict great bodily harm, did assault more than one of them with a firearm. The name "John Doe" is used in a representative sense to stand for simply one of these unidentified individuals.

12. When he fired his handgun from Yale Avenue at Thomas Janes and Jonathan Huber, the defendant, acting with the intent to inflict great bodily harm, did assault them with a firearm and when he fired his handgun from the rhododendron arrest site at Benjamin Hughey, the defendant, acting with the intent to inflict great bodily harm, did assault him.

13. On November 25, 2012, the defendant was knowingly in actual possession of an operable 9 mm Star semi-automatic handgun and used it in commission of the crimes described herein.

14. On November 25, 2012, the defendant was knowingly in constructive possession of the operable Smith and Wesson .357 revolver under the seat of the Cadillac.

15. By stipulation of the parties, the defendant had, prior to November 25, 2012, been convicted of a "serious offense" and given notice of his ineligibility to possess a firearm.

Having made the foregoing findings of fact, the Court now makes and enters the following:

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter of this action.

2. Beyond a reasonable doubt, the defendant is guilty of the crime of assault in the first degree as charged in Count 1 of the Amended Information.

3. Beyond a reasonable doubt, the defendant is guilty of the crime of assault in the first degree as charged in Count 2 of the Amended Information.

4. Beyond a reasonable doubt, the defendant is guilty of the crime of assault in the first degree as charged in Count 3 of the Amended Information.

5. Beyond a reasonable doubt, the defendant is guilty of the crime of assault in the first degree as charged in Count 4 of the Amended Information.

6. As to each of Counts 1, 2, 3 and 4, beyond a reasonable doubt, the defendant was armed with a firearm at the time of the commission of the crime.

7. Beyond a reasonable doubt, the defendant is guilty of the crime of unlawful possession of a firearm in the first degree as charged in Count 5 of the Amended Information.

8. Beyond a reasonable doubt, the defendant is guilty of the crime of unlawful possession of a firearm in the first degree as charged in Count 6 of the Amended Information.

9. It was suggested that the Court give consideration to the multiplicity and/or duplicity of charges all based on limited acts occurring in a brief span of time. In particular, it may be noted that Counts 2 and 3 are based on the same action, one that was directed at two victims. While this is not a factor in the guilt determination, it could be a subject meriting further discussion in regard to sentencing.

10. Judgment shall be entered consistent with these findings of fact and conclusions of law.

Dated this 1st day of April 2014.

Honorable William L. Downing

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. LARRY DALEY, JR., Appellant.	)))))))))	NO. 71956-4-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF JANUARY, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] LARRY DALEY, JR. 342612 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 21ST DAY OF JANUARY, 2015.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710