

68114-1

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No. 68114-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT LEE TOMS aka JAMIL MU-TAZZ,

Appellant.

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

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APPELLANT'S OPENING BRIEF

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LINDSAY CALKINS  
Attorney for Appellant

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

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STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION ONE  
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TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR.....1

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR.....1

C. STATEMENT OF THE CASE.....2

D. ARGUMENT.....6

    THE STATE FAILED TO PROVE  
    BEYOND A REASONABLE DOUBT  
    EACH OF THE ASSAULTIVE ACTS.....6

E. CONCLUSION.....10

TABLE OF AUTHORITIES

**Washington Supreme Court Decisions**

State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105  
(1988).....6, 8, 9

State v. Lively, 130 Wn.2d 1, 921 P.2d 1035 (1996).....7

State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984).....6

State v. Stephens, 93 Wn.2d 186, 607 P.2d 304 (1980).....6

State v. Workman, 66 Wn. 292, 119 P. 751 (1911).....6

**Washington Court of Appeals Decisions**

State v. Loehner, 42 Wn. App. 408, 711 P.2d 377,  
rev. denied, 105 Wn.2d 1011 (1986).....7

State v. Mandanas, 163 Wn. App. 712, 262 P.3d 522 (2011).....7

**United States Supreme Court Decisions**

In re Winship, 397 U.S. 358, 90 S. Ct. 1068,  
25 L. Ed. 2d 368 (1970).....7

**Washington Statutes**

RCW 9A.36.031(1)(g).....7

A. ASSIGNMENT OF ERROR

The trial court committed reversible error by not giving a unanimity instruction as to the multiple acts that could have constituted Robert Lee Toms, aka Jamil Mu-Tazz's, assault conviction.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. In Washington, a jury must unanimously agree upon which act constituted the crime of conviction. When evidence is presented of multiple acts that could form the basis of conviction, either the prosecutor must elect which act for the jury to rely upon or the court must instruct the jury that they are to be unanimous as to which act was proved beyond a reasonable doubt. Here, the State presented evidence and then argued there were two intentional acts by Mr. Toms against Paul Ducre that constituted assault—a kick and a trip—but the prosecutor did not tell the jury which act to rely upon and the court did not give a unanimity instruction. Was this error?

2. When evidence of multiple acts is presented and no instruction is given or election made, the error is not harmless unless a rational trier fact could have found evidence of each act

beyond a reasonable doubt. In this case, there was not evidence that Ducre was intentionally tripped by Mr. Toms; rather, the evidence showed that the trip was likely accidental. Should this Court reverse Mr. Toms's assault conviction because a rational trier of fact could have had a reasonable doubt as to whether the tripping constituted intentional assault?

C. STATEMENT OF THE CASE<sup>1</sup>

On May 14, 2011, Khalil Safarian-Toussi and his friend, Jared Hooper, drove to a Seattle Sounders game in Hooper's car. 10/12/11 RP 121. They parked in the International District neighborhood of Seattle. Id. When they returned to the car from the soccer game, they saw legs hanging out of the back window. Id. at 122. Hooper ran toward the man, who ran into the bushes. Id. at 125. Eventually Hooper stopped his pursuit, and Hooper and Safarian-Toussi saw a police car. Id. at 127. They told the officer that Hooper's car had been broken into, and gave a description of an African-American man with dreadlocks. 10/12/11 RP 127.

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<sup>1</sup> The record consists of six individually-paginated volumes, referred to herein as 10/10/11 RP, 10/11/11 RP, 10/12/11 RP, 10/17/11 RP, 10/18/11 RP, and 12/2/11 RP.

On that evening, Seattle Police Officer Paul Ducre was in full uniform, with a handgun, handcuffs, and baton. 10/11/11 RP 28–29. He heard over the radio that a car prowler had been reported near 10th Avenue South and South King Street in Seattle. Id. at 30. The description of the suspect was a black male in his late 30s with dreadlocks. Id. at 30. Ducre drove to the area. Id. at 31.

Ducre exited his vehicle to search for the suspect. Id. at 34. He saw a black man with dreadlocks talking on a cell phone and holding a bag. 10/11/11 RP 35. Ducre approached the man, yelled police, and instructed him to show his hands. Id. at 40. The man began running west, and Ducre followed. Id. at 41. They ran near some trees, Ducre shoved the man from behind, and they both fell. Id. at 46. Ducre rolled over, and felt a kick in the left side of his lower back. Id. at 48. The man then got up and started running. 10/11/11 RP 50. Ducre gave chase, but lost sight of him. Id. at 51. Ducre then walked over to a concrete pillar next to some shrubs. Id. at 53. He testified:

I was kind of doing a side step shuffle,  
and at the last second I kind of turned  
my flashlight over to where this pillar was,

where there's some shrubs and I saw a leg sticking out, but I accidentally shined my light in that area and then I tripped over that leg.

Id. at 53. Later during his testimony, he said

When I turned my flashlight down towards that area, that's when I saw the leg sticking out from that area . . . after I tripped over that leg and I stood up I shined in the area after dropping my flashlight and saw that there was a person hiding in the shrubs next to the concrete pillar.

Q: Okay. And that person was lying on the ground?

A: On his side, yes, ma'am.

Q: On his side. Okay. Facing towards you or away?

A: I was facing towards I-5 so he would be facing away from me.

10/12/11 RP 18. After tripping, Ducre got up and ordered the person in the shrubs to get up and show his hands. 10/11/11 RP 53-54. As the man emerged, Ducre took him to the ground and punched him in the face. Id. at 55. Ducre then arrested him. Id.

Ducre was later joined by Seattle Police Officer Douglas Raguso. When Raguso arrived, and after a third police officer

joined them, the officers conducted a search incident to arrest and uncovered two pipes. 10/12/11 RP 72. Residue inside the pipes contained cocaine, though the officers did not find any packets of powder cocaine or rocks of crack. Id. at 87, 112, 117–18. Safarian-Toussi and Hooper were transported back to where the man was held, and they identified him as the car prowler. Id. at 130.

Robert Lee Toms, aka Jamil Mu-Tazz, was charged with vehicle prowling in the second degree, assault in the third degree, and violation of the Uniform Controlled Substances Act for possession of cocaine. CP 9–10. During closing, the prosecutor argued:

[Ducre] was assaulted by the defendant on two different times. One when he was kicked in the back, and then the second time when the defendant tripped him . . . an assault is [ ] intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done . . . Ducre didn't want to be kicked in his back . . . Ducre didn't want to be tripped there on the outskirts of the jungle. That was an assault.

10/17/11 RP 15. Mr. Toms was convicted on all three counts. CP 26–28.

D. ARGUMENT

THE STATE FAILED TO PROVE BEYOND  
A REASONABLE DOUBT EACH OF THE  
ASSAULTIVE ACTS.

In order to convict a defendant in Washington, a jury must decide unanimously that the criminal act charged in the information was committed. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980)). When the State presents evidence of several acts that could form the basis for a charge, the court must either instruct the jury that they must agree on which act constitutes the offense, or the prosecutor must tell the jury which act to rely on in reaching their verdict. Kitchen, 110 Wn.2d at 409 (citing State v. Petrich, 101 Wn.2d 566, 570, 572, 683 P.2d 173 (1984) and State v. Workman, 66 Wn. 292, 294–95, 119 P. 751 (1911)). When there is no election by the State or unanimity instruction by the court, a reviewing court considers the error under the constitutional harmless error standard. Kitchen, 110 Wn.2d at 411–12. By this standard, “the error is not harmless if a rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond

a reasonable doubt.” Id. at 411 (quoting State v. Loehner, 42 Wn. App. 408, 411, 711 P.2d 377 (Scholfield, J., concurring), rev. denied, 105 Wn.2d 1011 (1986)).

Here, Mr. Toms was charged with intentionally assaulting a police officer. See RCW 9A.36.031(1)(g); CP 50 (jury instruction on assault requiring intentional touching); State v. Mandanas, 163 Wn. App. 712, 718–19, 262 P.3d 522 (2011) (assault’s definition including intentional touching). Thus, it was the State’s burden to prove beyond a reasonable doubt that Toms had intended to touch Ducre when he allegedly assaulted him. See In re Winship, 397 U.S. 358, 363, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (State must prove every element beyond a reasonable doubt); State v. Lively, 130 Wn.2d 1, 11, 921 P.2d 1035 (1996).

The State presented two acts that could form the basis of the assault: the kick to Ducre’s back, Ducre’s tripping. 10/11/11 RP 48, 53; 10/17/11 RP 15. The court did not instruct the jury that they had to be unanimous as to which act constituted the assault. See CP 35–59 (court’s instructions to jury). And the

prosecutor did not elect which act upon which the jury should rely. To the contrary: he argued,

[Ducre] was assaulted by the defendant on two different times. One when he was kicked in the back, and then the second time when the defendant tripped him . . . an assault is [ ] intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done . . . Ducre didn't want to be kicked in his back . . . Ducre didn't want to be tripped there on the outskirts of the jungle. That was an assault.

10/17/11 RP 15.

This was error. It is presumed prejudicial. Kitchen, 110 Wn.2d at 411. The State may only overcome this presumption if no rational jury could have a reasonable doubt as to both an intentional kick and an intentional trip. See id. at 411–12. Here, the evidence presented about the trip did not portray an intentional act beyond a reasonable doubt—rather, it showed that a leg was sticking out from under bushes, that Toms was facing away from Ducre when his leg was sticking out, and that Ducre saw the leg and tripped over it. Ducre testified:

I was kind of doing a side step shuffle,  
and at the last second I kind of turned  
my flashlight over to where this pillar was,

where there's some shrubs and I saw a leg sticking out, but I accidentally shined my light in that area and then I tripped over that leg.

10/11/11 RP 53. Later during his testimony, he said

When I turned my flashlight down towards that area, that's when I saw the leg sticking out from that area . . . after I tripped over that leg and I stood up I shined in the area after dropping my flashlight and saw that there was a person hiding in the shrubs next to the concrete pillar.

Q: Okay. And that person was lying on the ground?

A: On his side, yes, ma'am.

Q: On his side. Okay. Facing towards you or away?

A: I was facing towards I-5 so he would be facing away from me.

10/12/11 RP 18.

Based on this evidence, a rational juror could have easily had a doubt as to whether Ducre's trip was an intentional assault. The State did not prove this act beyond a reasonable doubt, and Mr. Toms's conviction for third degree assault should be reversed. See Kitchen, 110 Wn.2d at 412.

E. CONCLUSION

For the foregoing reasons, Mr. Toms respectfully requests that this Court reverse his third degree assault conviction.

Dated this 6<sup>th</sup> day of July, 2012.

Respectfully submitted,



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LINDSAY CALKINS - No. 44127  
Washington Appellate Project - 91052  
Attorneys for Appellant

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DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 68114-1-I
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	)	
ROBERT TOMS,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6<sup>TH</sup> DAY OF JULY, 2012, 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:

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[X] ROBERT TOMS 916045 WASHINGTON CORRECTIONS CENTER PO BOX 900 SHELTON, WA 98584	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

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COURT OF APPEALS DIVISION ONE  
STATE OF WASHINGTON

**SIGNED** IN SEATTLE, WASHINGTON THIS 6<sup>TH</sup> DAY OF JULY, 2012.

X \_\_\_\_\_ 

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