

NO. 71956-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

LARRY D. DALEY, JR.,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE WILLIAM DOWNING

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The State adduced evidence that defendant Larry Daley, Jr., from a distance of ten feet, fired a handgun at a group of three to five men who fled and were not identified. Could a reasonable fact finder have convicted Daley of one count of first-degree assault, for shooting at “John Doe?”

2. Immediately after Daley shot at the group of men, three nearby Seattle Police Department detectives attempted to apprehend him. Daley shot at two of the detectives, who were standing close together in a parking lot, and then at the third detective as he approached Daley’s location on Yale Avenue. Could a reasonable fact finder have convicted Daley of three additional counts of first-degree assault?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged defendant Larry Daley, Jr., with four counts of Assault in the First Degree, while armed with a firearm.¹ CP 12-14. In Count One, the State alleged that Daley, with intent to inflict great bodily harm, did assault “John Doe” with a firearm (a nine-millimeter pistol) and force and means likely to produce great bodily harm or death. CP 12. For

¹ RCW 9A.36.011(1)(a); RCW 9.94A.533(3). The State also charged Daley with two counts of Unlawful Possession of a Firearm in the First Degree, but those charges are not at issue in this appeal. CP 14; RCW 9.41.040(1).

Counts Two through Four, the State alleged that Daley, with intent to inflict great bodily harm, did assault three Seattle Police Department detectives with the same firearm. CP 13.

At a bench trial, the superior court found Daley guilty of all four counts of first-degree assault. CP 17-23. The court imposed a standard range sentence. CP 26, 28.

2. SUBSTANTIVE FACTS.

At about 1:50 a.m. on November 25, 2012, Seattle Police Department Gang Unit detectives Benjamin Hughey, Jonathan Huber, and Thomas Janes responded to a request for assistance at the Citrus nightclub on Fairview Avenue. 2RP 17-18, 26, 35-36; 6RP 41-43, 48-51, 126-27, 131-32.² Fights had broken out during the evening and a large crowd was gathering as the club staff attempted to close for the night. 4RP 52, 58, 116-17; 6RP 49, 132.

The detectives decided to provide a “visual deterrent” to prevent further violence. 2RP 29. They arrived together in a single car and parked in a small triangular parking lot, at the loading dock of the Fred Hutchinson Cancer Research Center, located directly opposite the

² The verbatim report of proceedings is cited as follows: 1RP – Mar. 19, 2014; 2RP – Mar. 20, 2014; 3RP – Mar. 24, 2014; 4RP – Mar. 25, 2014; 5RP – Mar. 26, 2014; 6RP – Mar. 27, 2014; 7RP – Mar. 31, 2014; 8RP – Apr. 1, 2014; 9RP – Apr. 25, 2014; 10RP – May 16, 2014.

nightclub on the far side of Fairview Avenue.³ 2RP 39, 42; 6RP 50-51, 55, 83, 85, 131-34. They parked facing the nightclub. 2RP 42; 6RP 51, 85, 133-34. To their right, Yale Avenue rose uphill from Fairview Avenue at an angle, separated from the parking lot by a retaining wall and a line of rhododendron bushes. 2RP 37-39; 6RP 85; Exhibit 1.

³ The layout of the shooting scene is helpful to understanding the events of this case. To that end, the State has designated Exhibit 1—a Google maps overview of the shooting scene, containing notations that were made by police witnesses at trial. 2RP 37-39; Exhibit 1 (attached at Appendix A). While the events of the shooting are discussed fully in the facts section of this brief, the State hopes that this footnote will provide a useful reference for this Court's review.

Near the center of Exhibit 1 is the triangular parking lot of the Fred Hutchinson Cancer Research Center loading dock. 2RP 41-42; 6RP 55, 83, 133-34. A black rectangle hand-drawn in the parking lot represents the officers' vehicle, parked near the apex of the triangle, and facing directly toward the Citrus nightclub on the opposite side of Fairview Avenue, which runs perpendicular to the officers' location/orientation. 2RP 41-42, 65.

In the center of Fairview Avenue is a black "X" that indicates the approximate location where Daley fired shots at a group of three to five men, whose position is indicated by three small black circles nearby. 2RP 64-65.

The red circle next to that "X" is the location where Daley then turned and pointed his weapon at the detectives, before running along Fairview Avenue and turning up Yale Avenue. 2RP 76, 78-79.

Yale Avenue then travels uphill from Fairview Avenue, above the parking lot where the officers were parked. 2RP 38-39. Yale Avenue is separated from the parking lot not only by its elevation, but also by a retaining wall and a line of rhododendron bushes. 2RP 39. A green "X" located near the rhododendron bushes marks the spot where Daley, running along Yale Avenue, fired shots through those bushes at detectives Janes and Huber, who were standing next to their vehicle in the parking lot below. 6RP 77. Janes's and Huber's locations are marked with two black circles. 6RP 77.

Finally, farther up Yale Avenue, flush with the Fred Hutchinson building, is a red circle that marks the spot where Daley was subsequently detained after being hit by the officers' fire and hiding under the rhododendron bushes. 2RP 85. It is also the spot from which he fired a final shot at Detective Hughey, who had traveled up a ramp from the parking lot to Yale Avenue in order to pursue Daley. 2RP 110-12.

For additional reference, the State also attaches diagrams prepared by Seattle Police Department Crime Scene Investigations Unit detectives, depicting many of the same details described above. Exhibit 12 (attached at Appendix B); Exhibit 14 (attached at Appendix C); see also 3RP 86-105 (testimony of CSI Detective Lisa Haakenstad).

The detectives could see and hear a boisterous crowd of about 100 people in the Citrus parking lot. 2RP 44-45; 6RP 54-56, 133. As they scanned the crowd, their attention was drawn to a group of three to five men, dressed like club patrons, walking along Fairview Avenue. 2RP 50-52; 6RP 58-60, 137-38. The group was following a man dressed in a white hooded sweatshirt. 2RP 51; 6RP 58-59, 138. That man was the defendant, Larry Daley, Jr. 2RP 50-52; 6RP 59-61, 138-39.

Daley and the group of men appeared to be having a heated argument. 2RP 50-56; 6RP 60, 139. Daley stepped into the street and began to cross Fairview Avenue, toward the detectives. 2RP 54; 6RP 60, 138-39. The group followed him into the street. 2RP 54-55. They exchanged gestures and yelling. 6RP 60, 139.

Daley turned suddenly back toward his pursuers. 2RP 56. He reached toward his waistband with his right hand and drew out his arm, elbow raised, in a motion that the detectives immediately recognized as drawing a firearm. 2RP 56-57; 6RP 60, 63, 139-40. Daley extended his hand and leveled a nine-millimeter semiautomatic pistol directly at the group of men. 2RP 56-57, 59-61, 91-94; 3RP 122; 6RP 71. He was only about ten feet from the men, at this point. 2RP 56. The group was clustered together, standing approximately an arm's length apart. 2RP 58.

Daley then fired multiple shots directly at the group of men, with the crowd of club patrons—“hundreds of people”—also in his line of fire, beyond. 2RP 56-57, 59-61; 6RP 63-66, 140. The men scattered and were never identified. 2RP 58-59. The crowd erupted into chaos—yelling and screaming, and drivers “peeling out” in their cars to get away. 6RP 140-41.

The detectives leapt out of the vehicle. 2RP 60; 6RP 66, 141. Janes shouted “Stop, Police!” multiple times while Hughey raced forward to intercept Daley. 2RP 67; 6RP 66-67. Daley looked over at the detectives, but instead of stopping, turned back and fired additional shots at the fleeing men and the crowd. 6RP 67-69. He then sprinted toward the detectives. 2RP 67.

As the distance between Daley and Hughey closed to approximately 15 feet, Daley raised his gun and pointed it directly at Hughey. 2RP 68, 70-71. Hughey believed in that moment that Daley was about to shoot him and kill him. 2RP 72. He thought to himself, “I’m going to go home tonight and I’m not going to die here.” 2RP 72. He raised his own service weapon and sighted Daley, waiting until the backdrop was clear of innocent bystanders, and fired twice as Daley veered past him onto Yale Avenue—running above and behind the detectives’ position. 2RP 74-79; 6RP 141-42; Exhibit 1.

As he gained the high ground on Yale Avenue, Daley entered a “superior ambush position,” presenting a deadly threat to the detectives. 2RP 82-83. Hughey ran over to the retaining wall and spotted Daley through the rhododendrons. 2RP 79. Daley was still holding his handgun. 2RP 79. Not knowing if Daley was going to turn and shoot at him, or other people in the area, and knowing that Daley had ignored clear commands by a police officer to stop, Hughey fired additional shots at Daley as he continued to run up Yale Avenue. 2RP 79-80.

Meanwhile, Huber and Janes had circled their vehicle to get a better angle on Daley. 6RP 76, 85-86, 143. As Daley crossed their line of sight on the opposite side of the rhododendrons, Huber saw Daley turn and look at him, and point his gun in his and Janes’s direction. 6RP 143-44, 164-64. He immediately felt that his life was in danger and fired several shots at Daley. 6RP 144.

In that same moment, as Huber fired at Daley after seeing him point his gun at him from Yale Avenue, Janes saw two amber muzzle flashes coming back toward his and Huber’s position. 6RP 76-78, 83, 114. The shots came from Yale Avenue, between the rhododendron bushes that lined the street. 6RP 76-77, 86, 115; Exhibit 1. Janes actually felt and heard the bullets pass by his head—a distinctive pop and whiz, caused by the projectiles breaking the sound barrier. 6RP 78-79. Standing

“right next to [Huber]” at the time—“right beside each other”—Janes thought that either he or Huber was going to die. 6RP 80-81. He yelled for Huber to take cover. 6RP 81.

Meanwhile, Hughey had run to the back of the parking lot to access a ramp leading up Yale Avenue. 2RP 83. He could see Huber firing, but, because of the stress and adrenaline, did not hear his shots. 2RP 84. When he reached the ramp, he sprinted up to Yale Avenue and, for a frightening moment, saw nothing. 2RP 85.

Then, he heard rustling in the nearby rhododendrons. 2RP 85. He dropped to one knee and illuminated the rhododendron bushes with his weapon-mounted flashlight. 2RP 85. He saw Daley under the bushes, wearing the same white hooded sweatshirt. 2RP 85-86, 95-96; Exhibit 1. Daley called out, “I’m shot, I’m dying.” 2RP 89. Hughey yelled at him to keep his hands up, then called out to Huber and Janes that he had the suspect. 2RP 89.

Huber ran up to provide Hughey with cover, as Hughey ordered Daley out of the bushes. 2RP 89; 6RP 147-48. Daley no longer had a gun in his hand, and Hughey found no weapon while patting him down. 2RP 90-92. He demanded to know where Daley’s gun was and Daley nodded back toward the bushes, saying something to the effect of, “It’s over there.” 2RP 90-92.

Hughey looked under the rhododendron bush with his flashlight and saw Daley's nine-millimeter semiautomatic pistol, lying on the ground. 2RP 91-92. The gun was right where Daley would have been hiding in the bushes. 6RP 148-50. The slide was locked rearward, as if the weapon had run out of ammunition.⁴ 2RP 92-93.

Forensic investigators processed the shooting scene and recovered several spent nine-millimeter shell casings from Fairview Avenue. 4RP 156-58. Three of the casings matched Daley's pistol. 2RP 91-94; 3RP 121-22, 153; 4RP 157; 5RP 62-63, 72-73. Investigators also recovered two spent casings from under the rhododendron bush where Daley was arrested, which also matched his pistol. 4RP 172-74, 182-83; 5RP 70-71, 80; Exhibit 14 (Appendix C).

Detectives Hughey and Janes later viewed security footage of the incident, recorded from cameras on the Fred Hutchinson campus. 2RP 95, 98; 6RP 87-90; Exhibit 2. The footage was played at trial. 2RP 98-112; 3RP 5-11, 28-30. It shows Daley running across Fairview Avenue and up Yale Avenue, as Hughey fires at him. 2RP 100-02, 106; Exhibit 2,

⁴ Around this time, Janes observed two other men in the area, peeking out from around a car. 2RP 89; 6RP 91. However, they were not involved in the shooting. 6RP 92. The detectives were certain that Daley was the man that shot at the group on Fairview Avenue and then at them from Yale Avenue. 2RP 86, 95; 6RP 72-73, 94-95.

Camera 072 at 1:56:48 a.m.-1:57:07 a.m.⁵ At 1:57:11 a.m., Daley can be seen passing between two vehicles parked along Yale Avenue, affording him a shot at the detectives in the parking lot below. 2RP 106-07, 109-110; Exhibit 2, Camera 072 at 1:57:11 a.m.; see also Appendix D (Screen Shot of Daley's Location). Another camera angle, at that time, shows a muzzle flash from Daley's location. 3RP 10, 28-30; Exhibit 2, Camera 081 at 1:57:11 a.m.;⁶ see also Appendix E (Screen Shot of Muzzle Flash). Janes and Huber were in the path of that muzzle flash. 3RP 29-30.

The video next shows Daley run and crouch in the bushes along the side of the research center. 2RP 107, 110; Exhibit 2, Camera 072 at 1:57:12 a.m-1:57:21 a.m. Then, at 1:57:22 a.m., as the camera pans eastward to track another individual, the camera captures Daley firing a

⁵ There are multiple video files on Exhibit 2 (a DVD). Camera 072 is "CAM-072PTZSouthwestThomasRoof_2012-11-25_01h45min00s072ms.asf." See 2RP 100.

⁶ Camera 81 is "CAM-081FairviewParkingLot_2012-11-25_01h45min11s922ms.asf." This camera is not specifically identified in the transcript, however, it is apparent from the record that this is the angle discussed by Hughey and played in court at 3RP 5-11, 28-30. The camera angle played there shows the triangle parking lot, which takes up the entire frame. 3RP 5. It shows the rhododendrons lining Yale Avenue, and the stairwell that leads up to Yale Avenue, which is partially blocked by the building's overhang. 3RP 5. It also shows a dumpster. 3RP 9. It depicts the detectives arriving in their vehicle after 1:53:22 a.m. 3RP 6. Daley enters the frame wearing a white hooded sweatshirt at 1:57:05 a.m. 3RP 8. It depicts Hughey tracking Daley with his flashlight, swinging in a clockwise direction as Daley runs past on Yale Avenue. 3RP 8-9. Then it shows the muzzle flash from Yale Avenue at 1:57:11 a.m. 3RP 10, 28-30. Huber and Janes were in the path of the muzzle flash, but are concealed in the video by the overhang and the "trash can" (dumpster). 3RP 29-30. This description matches the events clearly depicted by Camera 81, at just after 1:53:22 a.m., when the detectives arrive and park; and between 1:57:05 and 1:57:11 a.m., when Daley enters the frame on the left side and runs up Yale Avenue, Hughey tracks him with his weapon flashlight, and Daley fires at Janes and Huber through the rhododendron bushes near the top of the frame. See Exhibit 2, Camera 81 at 1:53:25 a.m.-1:53:42 a.m., 1:57:05 a.m.-1:57:11 a.m.

final shot from the bushes at Hughey—in the top right corner of the frame. 2RP 111-12; Exhibit 2, Camera 072 at 1:57:22 a.m.; see also Appendix F (Screen Shot of Final Muzzle Flash – Shot Fired at Hughey).

Although Hughey did not perceive this final shot in the heat of the moment, he realized while watching the security video that “somebody really did try to kill me.” 2RP 111-12.

C. ARGUMENT

1. THE EVIDENCE WAS SUFFICIENT FOR A REASONABLE FACT TRIER TO FIND THAT DALEY ASSAULTED “JOHN DOE” BY SHOOTING AT HIM.

a. Additional Facts.

In closing argument, the State argued that Daley fired his pistol at one or more of the men with whom he was arguing, and that, at that time, there were over 100 people in the crowd beyond. 7RP 48, 52. “John Doe” was one of the men that Daley was arguing with outside of the club. 7RP 52. The court clarified that the State was asking to find that John Doe was a stand-in for a single, unidentified victim among the many people outside of the club that night:

Prosecutor: The State is going to ask Your Honor to find the defendant guilty of several counts, specifically assault in the first degree for John Doe, which is the individual that Mr. Daley was shooting at as he was aiming toward [the] Citrus Club

Court: As far as John Doe is concerned, it's your view that the—of the 100 people, one of them was John Doe or we'll treat as being John Doe, or that it would be legally problematic to allege or to find 100 John Does, but a single one is—

Prosecutor: That is correct, You Honor.

7RP 48. The prosecutor added that the principle of transferred intent could apply to the court's finding that John Doe had been assaulted. 7RP 50.

The trial court found that more than a hundred club patrons were present outside of Citrus when Daley had a verbal altercation with a group of men and fired a handgun in the direction of the crowd, including the group of men.⁷ CP 18, 21; 7RP 48. The court also explained that, in doing so, Daley assaulted at least one of them, and that John Doe represented one such victim:

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.

CP 21. The court thus concluded that Daley was guilty of the crime of first-degree assault as charged in Count One. CP 22.

⁷ While the trial court simply referred in its findings to "the crowd," it is apparent from the trial court's discussion with the prosecutor during closing argument that the trial court used this term to include everyone in front of the nightclub, including the men involved in the argument with Daley. CP 18, 21; 7RP 48, 52.

b. Standard Of Review.

Evidence is sufficient to support a criminal conviction if, after viewing the evidence in the light most favorable to the State, a rational fact trier could have found the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State’s evidence, as well as all reasonable inferences from the evidence, which must be drawn in favor of the State and against the defendant. Id. An appellate court defers to the trier of fact on all “issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004), abrogated in part on other grounds by Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

c. Sufficient Evidence Proved That Daley Committed First-Degree Assault When He Shot A Handgun At “John Doe” On Fairview Avenue, As Charged In Count One.

Daley asserts that the State failed to adduce sufficient proof of the identity of an intended victim, necessary to sustain his conviction for first-degree assault against “John Doe.”⁸ He declares that “[t]he requisite

⁸ Daley also assigns error to several of the trial court’s findings of fact, claiming that they are unsupported by “substantial evidence.” Br. of App’t at 1-2. Because the ultimate question in this appeal is simply whether the evidence was sufficient for a reasonable fact finder to find that the elements of the crime were proven beyond a reasonable doubt—not

quantum of specificity to identify an intended victim is an issue of first impression in this jurisdiction.” Br. of App’t at 12. Daley fundamentally misapprehends the elements of first-degree assault.

The State was not actually required to prove the identity of an intended victim. Instead, the State needed only to prove that Daley had the intent to inflict great bodily harm and that, acting with that intent, he assaulted another with a firearm. Because the evidence at trial—that Daley argued with a group of men and then fired multiple shots at them with a handgun, in the direction of a crowd of over 100 people—amply proved these elements, Daley’s conviction should be affirmed.

A person commits first-degree assault when he, “with intent to inflict great bodily harm . . . [a]ssaults another with a firearm[.]” RCW 9A.36.011(1)(a). This crime has four elements: that the defendant, with (1) intent to inflict great bodily harm, (2) assaulted (3) another (4) with a firearm. State v. Elmi, 166 Wn.2d 209, 214-15, 207 P.3d 439 (2009). The name of a victim is not an element of assault. State v. Plano, 67 Wn. App. 674, 679-80, 838 P.2d 1145 (1992).

whether any specific findings were supported by “substantial evidence,” a standard alien to a sufficiency challenge—the State discusses the evidence more broadly than Daley attempts to frame it. Regardless, all of the trial court’s findings are sufficiently supported, as should be made apparent herein.

Daley’s challenge to the sufficiency of the evidence proving the identity of an intended victim confuses the relationship between the intent and victim elements of the crime. The State reviews both elements below.

First-degree assault is a specific intent crime, meaning that the State must prove that the defendant actually intended to inflict great bodily harm. Elmi, 166 Wn.2d at 215. But the specific intent to inflict great bodily harm need not be directed toward any specific victim. Elmi, 166 Wn.2d at 215-18; State v. Wilson, 125 Wn.2d 212, 218, 883 P.2d 320 (1994). Instead, “once the intent to inflict great bodily harm is established, *usually*”—therefore, not always—“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; see Wilson, 125 Wn.2d at 218. In other words, the identity of an intended victim is not, in and of itself, an element of first-degree assault.⁹ In a typical assault case, where the victim is known, the State would of course seek to prove the specific identity of the intended victim—but not to satisfy an independent element of the crime. Instead, as the Washington Supreme Court has observed, such proof

⁹ Thus, while Daley quotes a Florida case for the proposition that the requisite intent must be directed toward a specific victim, this simply is not the law in Washington. Br. of App’t at 14 (quoting State v. Conroy, 118 So.3d 305, 312 n.10 (Fla. 2013)).

serves as evidence of the defendant's intent.¹⁰ See Elmi, 166 Wn.2d at 218; Wilson, 125 Wn.2d at 218. But proof of a defendant's intent to inflict great bodily harm is not limited to evidence of a specific intended victim.

“Evidence of intent . . . is to be gathered from all of the circumstances of the case, including not only the manner and act of [the assault], but also the nature of the prior relationship and any previous threats.” Wilson, 125 Wn.2d at 217 (internal quotation marks omitted). Specific intent “can be inferred as a logical probability from all the facts and circumstances.” Id.

Daley does not argue (nor could he seriously contend) that the evidence was insufficient to prove that he intended to inflict great bodily harm when he fired multiple shots from a semiautomatic handgun at a group of men he had been arguing with, who were standing a mere ten feet away, with a crowd of over 100 people beyond.¹¹ Nor does he argue that

¹⁰ Logically, it may also serve to prove the actual victim element of the crime, i.e., that the defendant assaulted “another.” See RCW 9A.36.011(1)(a). But as noted, Daley does not claim that the State failed to prove that a person was actually assaulted by his actions—he instead claims, essentially, that the State failed to prove who he was aiming at.

¹¹ “A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime.” RCW 9A.08.010(1)(a). “Great bodily harm” is defined as “bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ.” RCW 9A.04.110(4)(c). By shooting at the group of men, Daley easily could have killed any

shooting a handgun in these circumstances was insufficient to constitute an assault.¹² Thus, the sole remaining question is whether the evidence was sufficient for a reasonable fact finder to find that Daley assaulted *another*.

In answering this question, a decision of the California Court of Appeals with remarkably similar facts is instructive.¹³ In People v. Griggs, 216 Cal. App. 3d 734, 265 Cal. Rptr. 53 (Cal. Ct. App. 1989) (opinion published in part), an officer was assigned to patrol a parking lot during a concert. 216 Cal. App. 3d at 737. When the concert ended, the crowd gathered to leave, with many people running about and others attempting to drive through the congestion. Id. The officer then saw the defendant pull out a revolver and fire at least two shots into the crowd. Id. The audience scattered and fled, and no victims were identified. Id. at 743.

one of them. 2RP 61-63. The crowd of club patrons in the parking lot were also in Daley's line of fire. 2RP 66; 6RP 64.

¹² The term "assault" in Washington retains its common law definitions. Wilson, 125 Wn.2d at 217-18. The three recognized definitions are: "(1) an attempt, with unlawful force, to inflict bodily injury upon another [attempted battery]; (2) an unlawful touching with criminal intent [actual battery]; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting that harm [common law assault]." Id. at 218 (insertions original). Although the State in this case could not prove that any person was struck by Daley's gunfire, Daley committed attempted battery by firing the handgun at the men and the crowd; the fact that the men and the crowd scattered also proved an apprehension of harm.

¹³ Daley argues that Edmund v. State, 398 Md. 562, 921 A.2d 264 (Md. 2007) illustrates the level of specificity necessary to prove the identity of an assault victim. Br. of App't at 12-13. But Edmund entailed an assault on a single person, not a crowd shooting such as in the case at bar. 398 Md. at 564-67. Edmund is inapposite.

The defendant was charged with assault with a deadly weapon. 216 Cal. App. 3d at 736; see Cal. Penal Code § 245(a)(2) (West). In California, this crime requires the prosecution to prove “that a person was assaulted and that the assault was committed by the use of a deadly weapon or instrument or by means of force likely to produce great bodily injury.”¹⁴ 216 Cal. App. 3d at 739-40.

The defendant moved at trial to dismiss, arguing that the name of the victim was a material element of the crime and that the prosecution had failed to offer any proof of this element. 216 Cal. App. 3d at 738. The trial court denied the motion and the defendant was convicted as charged. Id. at 738-39.

On appeal, the defendant renewed his claim that the identity of the victim was a necessary element of the offense, and also asserted that the lack of a named victim made it impossible for him to defend himself. 216 Cal. App. 3d at 739. Analyzing the penal code and California case law, the court concluded that the victim’s specific identity was immaterial to proving the crime:

To understand what constitutes the “person of another” for our purposes, we focus on the actions of the defendant. The victim’s fear, lack of fear, injury, or lack of injury are not elements which

¹⁴ Unlike in Washington, assault with a deadly weapon in California is a general intent crime—but this means only that the crime requires the intent to commit a battery, not the intent to cause any specific level of injury. Griggs, 216 Cal. App. 3d at 740; see also People v. Parks, 4 Cal. 3d 955, 959, 485 P.2d 257, 95 Cal. Rptr. 193 (Cal. 1971).

need to be proved or disproved. *All that is necessary is that there is a victim; the characteristics of the victim are not critical elements of the offense.* The law is seeking to punish the reckless disregard of human life, and what needs to be shown is that a human life was threatened in the manner proscribed [W]e conclude the naming of the particular victim is not an element of assault with a deadly weapon[.]

Id. at 742 (emphasis added). Thus, because “the defendant was clearly aware of the crowd assembled in the direction in which he fired the gun[.] . . . [a]ny one of a number of [the] intended victims [could] satisfy the component of the ‘person of another.’” Id.

Having concluded that the specific identity of a victim was not a material element of the offense, the Griggs court next considered and rejected the defendant’s due process argument—that the lack of an identified victim denied him the ability to mount an effective defense. While Daley does not assert that he was denied the ability to mount an effective defense,¹⁵ the Griggs court’s analysis is once again instructive on the issue of victim specificity:

[D]efendant shot into a crowd of people. By pure chance, no one was injured. The crowd dispersed and left the scene of the crime, presumably to escape the dangerous situation. Law enforcement’s concern during this dangerous time was to check for injured people and apprehend those causing the danger. The victims fled the scene and were unknown to law enforcement. This was not due to any lack of diligence on the police officers’ part. Due process is not offended in this type of unusual situation where a particular victim is not identified. Public policy would be offended to allow

¹⁵ Daley’s defense was essentially one of mistaken identity. 7RP 77, 89.

a defendant to fire a gun in the direction of a human being under these circumstances and not be punished for an assault with a deadly weapon.

216 Cal. App. 3d at 743.

Because the name of a victim is also not an element of assault in Washington, and because the evidence established that Daley fired directly at a group of three to five men from a distance of ten feet, who scattered in obvious apprehension of harm, the evidence was sufficient to prove that Daley assaulted “another.” See RCW 9A.36.011(1)(a). Neither a general notion of due process nor the requirement of sufficient proof was violated by the instant prosecution. Because “[a]n indiscriminate would-be killer is just as culpable as one who targets a specific person,”¹⁶ Daley’s claim should be rejected.

Daley makes two more claims related to his conviction on Count One that must be addressed here: that double jeopardy protections mandate the dismissal of this case and that his right to a unanimous verdict required an identified victim. Both claims are unavailing.

Double jeopardy claims are reviewed *de novo*. State v. Kelley, 168 Wn.2d 72, 76, 226 P.3d 773 (2010). “The United States Constitution provides that a person may not be subject ‘for the same offense to be twice put in jeopardy of life or limb.’” State v. Chouap, 170 Wn. App. 114, 122,

¹⁶ People v. Stone, 92 Cal. Rptr. 3d 362, 369, 46 Cal. 4th 131, 140, 205 P.3d 272 (Cal. 2009).

285 P.3d 138 (2012) (quoting U.S. Const. amend. V). The Washington Constitution similarly provides that a person may not be put in jeopardy twice for the same offense. Chouap, 170 Wn. App. at 122 (citing Wash. Const. art. I, § 9). Daley does not argue that he has been put in jeopardy twice for the same offense. Instead, he argues that at some time in the future he may. This claim is hypothetical and not ripe for review. See State v. Sanchez, 177 Wn.2d 835, 848, 306 P.3d 935 (2013) (claim of hypothetical violation not ripe for review); Lewis Cnty. v. State, 178 Wn. App. 431, 440, 315 P.3d 550 (2013) (“If a claim is speculative and hypothetical, it is not ripe.”).

A prospective double jeopardy claim similar to Daley’s was also dismissed as “fanciful” in Edmund, the Maryland case upon which Daley principally relies. 398 Md. at 577. There, the court held that there was no credible scenario in which the lack of a named victim would subject the defendant to double punishment:

Nor will Mr. Edmund be subject to double punishment. The purported concern is that Mr. Edmund will, at some time in the future, be prosecuted for having assaulted, on January 20, 2005, outside 28 Enchanted Hills, in Baltimore County, a black male, five feet eight inches in height, and then weighing 240 pounds, with a beard and mustache, and that the State will contend that that assaultee is not the John Doe of this cause. The concern is fanciful. Even if the State were to initiate such a prosecution,

Mr. Edmund, in support of a defense of *autrefois convict*, could use the entire record of this cause.

Id.

Likewise, in the instant case, there is no credible scenario in which Daley, at some point in the future, will be prosecuted for a shooting occurring at 1:57 a.m. on November 25, 2012, on Fairview Avenue in front of the Citrus nightclub in Seattle, involving a group of men that followed him into the street and a crowd of patrons standing in the parking lot, and the State will argue that the victim is someone other than the John Doe of this cause. In the remotest likelihood that such an event occur, Daley may raise his double jeopardy claim at that time.¹⁷

The final issue relating to Count One is Daley's claim that his right to a unanimous verdict required the State to identify a specific victim. Br. of App't at 15-16. This claim fails because Daley's case was tried by bench trial and concerns about jury unanimity are therefore irrelevant.

1RP 10; see State v. Morley, 134 Wn.2d 588, 614-15, 952 P.2d 167 (1998)

(holding that military court martial was valid prior conviction in

¹⁷ Like the defendant in Edmund, Daley would be able to avail himself of the entire record in this case in order to support a double jeopardy claim. The prosecutor in this case explained that John Doe was one of the individuals that Daley was arguing with when he fired in the direction of the crowd at the Citrus nightclub. 7RP 48, 52. In its findings of fact and conclusions of law, the trial court clarified that, "The name 'John Doe' is used in a representative sense to stand for simply one of these unidentified individuals [in the area outside of Citrus]." CP 21. This leaves no doubt as to what incident Daley was prosecuted for in this case, nor who was considered among the potential victims of Daley's crime—all of the men on Fairview Avenue and the entire crowd outside of Citrus are included.

Washington, notwithstanding military's lack of unanimity requirement, because court martial was tried by single military judge); see also People v. Davis, 72 N.Y.2d 32, 39, 530 N.Y.S.2d 529, 526 N.E.2d 20 (N.Y. Ct. App. 1988) (“[B]ecause this was a bench trial there was no possibility that the verdict would not be unanimous[.]”).

For all of these reasons, Daley's conviction on Count One for first-degree assault, against victim “John Doe,” should be affirmed.

2. SUFFICIENT EVIDENCE PROVED THAT DALEY ASSAULTED THREE POLICE DETECTIVES BY SHOOTING AT THEM, AS CHARGED IN COUNTS TWO THROUGH FOUR.

a. Standard Of Review.

The standard of review applicable to a challenge on appeal to the sufficiency of the evidence is described above.

b. Additional Facts.

In closing argument, the State argued that Daley committed first-degree assault as charged in Counts Two and Three when he fired through the rhododendron bushes while running along Yale Avenue, at detectives Huber and Janes, who were standing close together by their patrol vehicle. 7RP 48, 57-58.

For Count Four, the State argued that Daley committed first degree-assault against Hughey by firing a final shot at him, when he

scaled the ramp to apprehend Daley on Yale Avenue. 7RP 46-48, 58-59, 63-64.

The trial court, having heard all of the testimony and having reviewed all of the exhibits admitted into evidence, entered the following findings of fact:

[. . .]

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

[. . .]

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 and in actual possession of an operable 9 mm Star semi-automatic handgun and used it in the commission of the crimes described herein.

[. . .]

CP 20-22.

Based on these findings, the trial court found Daley guilty of assault in the first-degree, as charged in Counts Two through Four. CP

22-23.

c. Sufficient Evidence Proved That Daley Committed First-Degree Assault When He Shot A Handgun At Detectives Janes And Huber, As Charged In Counts Two And Three; And When He Shot At Detective Hughey, As Charged In Count Four.

The evidence proved that Daley committed first-degree assault when he shot at Janes and Huber, as charged in Counts Two and Three.

When Janes went around his car in order to look for access to Yale

Avenue, he ended up right next to Huber. 6RP 76, 81, 85-86, 114. They were “right beside each other.” 6RP 81.

As Huber then fired at Daley, Janes saw two amber flashes coming back toward them, from between the rhododendron bushes on Yale Avenue. 6RP 76-78, 86, 114-15; Exhibit 1. He heard and felt a whizzing and popping sound as the projectiles broke the sound barrier, passing “pretty close” to his head. 6RP 78-79. He thought that, “[E]ither one of my partners was going to die or I was going to die.” 6RP 81. It would have been “very easy” for him or Huber to have been killed. 6RP 81. Huber, himself, saw Daley point the gun at him as he ran uphill on Yale Avenue, but did not perceive Daley shooting at him. 6RP 143-44.

Taken as true and the light most favorable to the State, this testimony provides more than sufficient evidence for a reasonable fact finder to find that Daley assaulted both Janes and Huber by shooting at them with his pistol. Janes obviously knew that he was being shot at by Daley.¹⁸ As for Huber, who was standing right next to Janes at the time, it is irrelevant that Huber did not perceive the shots,¹⁹ because the evidence

¹⁸ Even if Huber was the intended target, Janes was assaulted because he apprehended the harm and the first-degree assault statute, by its plain language, “encompasses transferred intent.” Elmi, 166 Wn.2d at 218 (citing RCW 9A.36.011); see also Wilson, 125 Wn.2d at 218.

¹⁹ Other testimony in the record explained that stress and adrenaline can interfere with hearing and perception, providing a reasonable explanation for this discrepancy. 2RP 68, 84.

supports the reasonable conclusion that Daley shot at Huber, thereby committing the common law assault of attempted battery. Daley's convictions on Counts Two and Three should be affirmed.

The security footage also corroborates the detectives' account, by showing at least one muzzle flash at 1:57:11 a.m., from the elevated area of Yale Avenue, through the rhododendron bushes. 3RP 10, 28-30; Exhibit 2, Camera 081 at 1:57:11 a.m.; Appendix E. Another camera angle shows Daley at that exact time, in that approximate location. 2RP 106-07, 109-10; Exhibit 2, Camera 072 at 1:57:11 a.m.; Appendix D.

Daley insists that the trial court "misrepresented the security videotape" and that the footage is "inconclusive," because it shows other people near the shooting scene and "arguably" shows fewer muzzle flashes than were recounted by the officers. Br. of App't at 1, 19. For multiple reasons, this argument is unavailing.

Initially, the State notes that Daley has failed to designate the security tape and that this usually would preclude review. See Olmsted v. Mulder, 72 Wn. App. 169, 183, 863 P.2d 1355 (1993) (failure to designate relevant portions of the record precludes review). Daley has also failed to cite any specific portions of the security footage or in-court proceedings to support his argument that the security footage contradicts the testimony at trial. Thus, his arguments regarding the tape should not be considered.

See State v. Nelson, 131 Wn. App. 108, 117, 125 P.3d 1008 (2006) (lack of adequate citations to the record precludes review); see also Thomas, 150 Wn.2d at 868-69. Moreover, Daley actually cites the wrong exhibit,²⁰ which he has also failed to designate.

Furthermore, Daley's argument regarding the security tape fails because he asserts only that the tape is "inconclusive" and "arguably" contradicts the officers' testimony—an untenable position in a sufficiency challenge, in which the State's evidence must be taken as true and construed in the light most favorable to the State. See Salinas, 119 Wn.2d at 201. He also asks this Court to re-weigh the credibility of the officers' testimony, likewise inappropriate in a sufficiency challenge on appeal. See Thomas, 150 Wn.2d at 874-75; see also State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) ("Credibility determinations are for the trier of fact and cannot be reviewed on appeal."). Daley had his chance to advance this position during closing argument at trial; on appeal, under the correct standard of review, his claim should be rejected.²¹

²⁰ Daley cites Exhibit 4 when claiming unspecified inconsistencies between the security tape and the testimony. Br. of App't at 19 (citing Exhibit 4). Exhibit 4 is actually an audio CD of police radio transmissions, not a security video. Compare 2RP 95-98 (identifying the security footage as Exhibit 2) with 3RP 30-31 (identifying Exhibit 4 as an audio recording of police radio transmissions); see also Supp. CP __ (Sub No. 75, Exhibit List at 2).

²¹ Ultimately, because the security footage actually corroborates the detectives' account, as the trial judge reasonably concluded, the State has designated it for this appeal and has attached video stills, showing the relevant moments discussed at trial. See Appendix D; Appendix E; Appendix F.

Finally, the evidence was sufficient to support a finding that Daley assaulted Hughey, as charged in Count Four. As Daley sprinted uphill on Yale Avenue, Hughey raced to the ramp in order to close the distance between them and to deny Daley the high ground. 2RP 79-83. When he reached Yale Avenue, he heard rustling in the rhododendrons. 2RP 85. He yelled, "Police, show your hands!" and used his flashlight to illuminate Daley under the bushes. 2RP 85. He asked Daley where his gun was, and Daley said something to the effect of, "It's over there," and indicated back under the bush. 2RP 90-92. Daley's nine-millimeter pistol and two spent casings, matching the pistol, were found under the bush, right where Daley was located. 2RP 91-94; 4RP 172-74, 182-83; 5RP 70-71, 80; 6RP 148-50; Exhibit 14 (Appendix C).

Later, when watching the security footage, Hughey saw that Daley had fired one last shot from under that rhododendron bush, at 1:57:22 a.m., right at the time that Hughey was running up the ramp to detain Daley. 2RP 111-12; Exhibit 2, Camera 072 at 1:57:22 a.m.; Appendix F. While he did not perceive the shot in the heat of the moment, he realized when he saw the footage that "somebody really did try to kill me."²² 2RP 111-12.

²² Daley implies that Hughey's usage of the phrase, "*somebody* really did try to kill me," means that the identity of the shooter is unknown. Br. of App't at 20 (emphasis original).

The above evidence, taken as true and in the light most favorable to the State, is sufficient for a reasonable fact finder to conclude that Daley shot at Hughey as he ran up the ramp to Yale Avenue, and that Daley did so with the intent to inflict great bodily harm. Daley's conviction for first-degree assault as charged in Count Four should be affirmed.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Daley's convictions.

DATED this 24th day of April, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

JACOB R. BROWN, WSBA #44052
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Daley's characterization of this figure of speech is unconvincing. In fact, Hughey identified Daley as the shooter with "100%" certainty. 2RP 86, 95.

INDEX OF APPENDICES

- Appendix A** Exhibit 1 – Google “Maps” Overview of Shooting Scene
- Appendix B** Exhibit 12 – Seattle Police CSI Diagram – Fairview Avenue and Yale Avenue
- Appendix C** Exhibit 14 – Seattle Police CSI Diagram – Arrest Location
- Appendix D** Screen Shot of Exhibit 2, Security Camera # 72 – 1:57:11 a.m. – Daley’s Location at Time of Shot Fired at Huber and Janes
- Appendix E** Screen Shot of Exhibit 2, Security Camera # 81 – 1:57:11 a.m. – Daley’s Muzzle Flash – Shot Fired at Huber and Janes
- Appendix F** Screen Shot of Exhibit 2, Security Camera # 72 – 1:57:22 a.m. – Daley’s Final Muzzle Flash – Shot Fired at Hughey

APPENDIX A

Exhibit 1

Overview of Shooting Scene

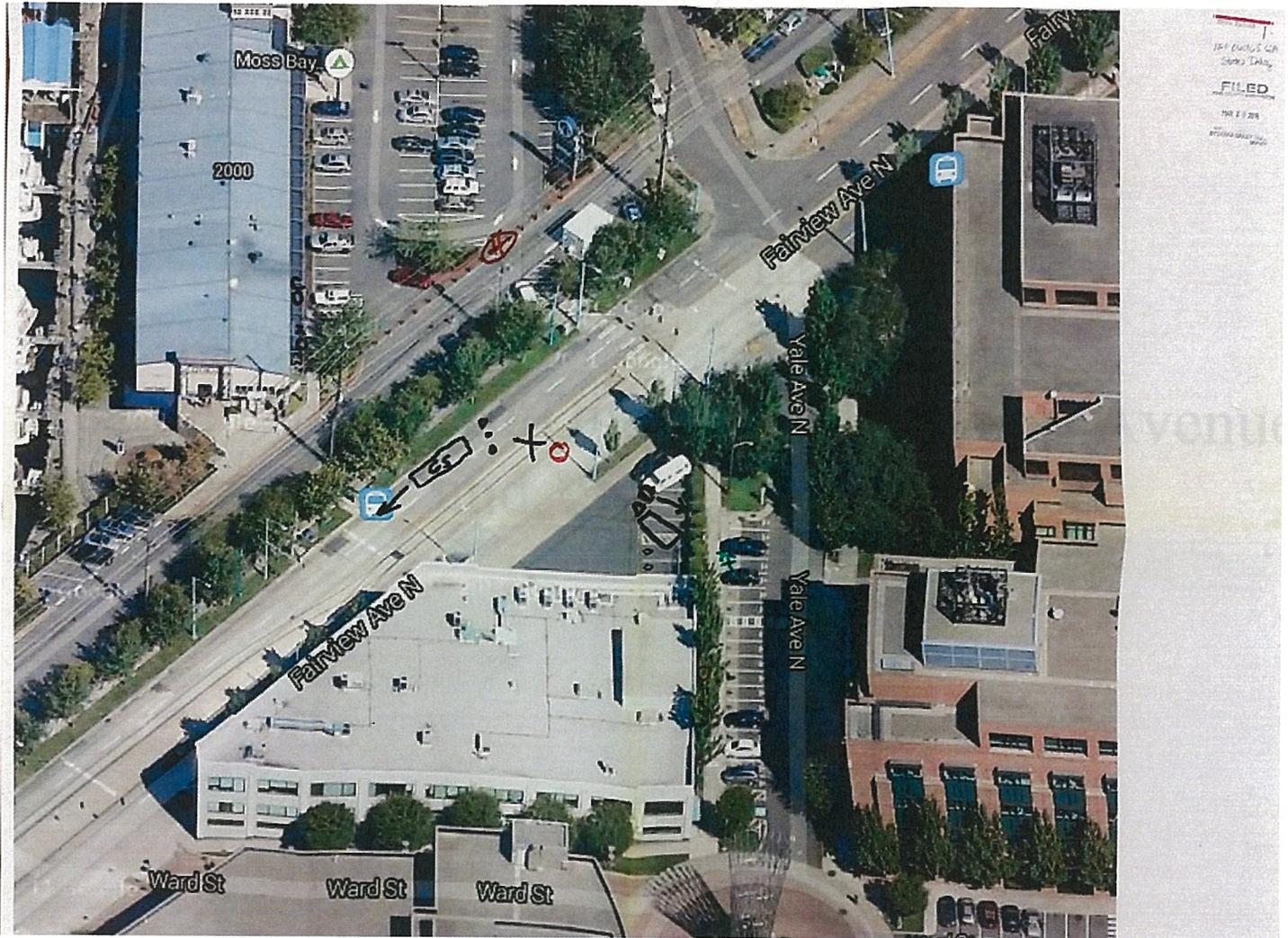
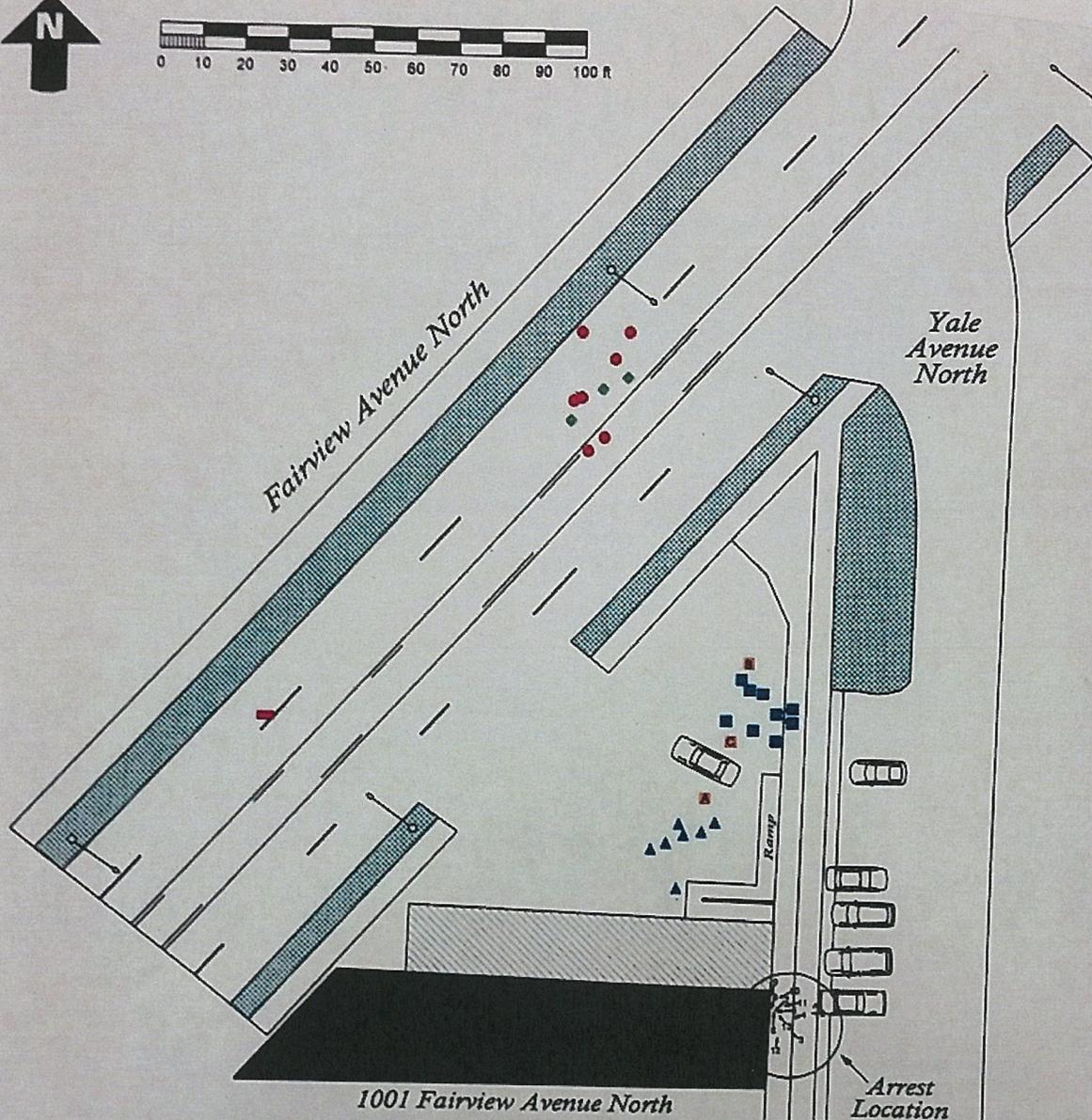
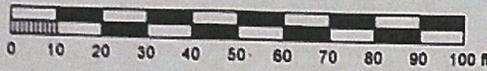


Exhibit 1 is actually a poster-sized exhibit. The State provides this image of Exhibit 1 for ease of reference.

Fairview Avenue North & Yale Avenue North

State Exhibit **12**



Legend

- ▲ = Fired Cartridge Cases - Detective Huber
- = Fired Cartridge Cases - Detective Hughey
- = Fired Cartridge Cases - 9mm
- ◆ = Fired Cartridge Cases - 45 cal
- = Fired Cartridge Case - 40 cal
- A = Approximate Position - Detective Huber
- B = Approximate Position - Detective Hughey
- C = Approximate Position - Detective Janes

CSI Seattle Police Department
 Crime Scene Investigations Unit
 SPQ Case: 11-003796 CS# File: 11-301
 Officer Involved Shooting
 Drawn By: Det. L. Hoshenated #0203 Date: 11/25/11
 Approved By: Det. B. Thomas #1121 Date: 11/25/11
 Drawing Title: Scene Diagram

567-B-1 6128

12

12-1-06016-5 SEA
State v Daley

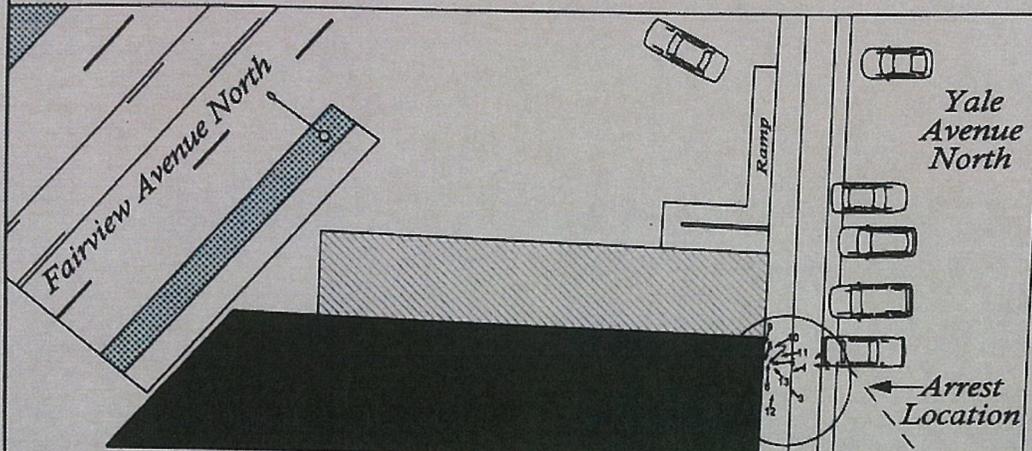
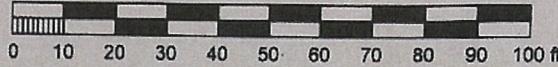
APPENDIX C

Exhibit 14

Seattle Police CSI Diagram – Arrest Location

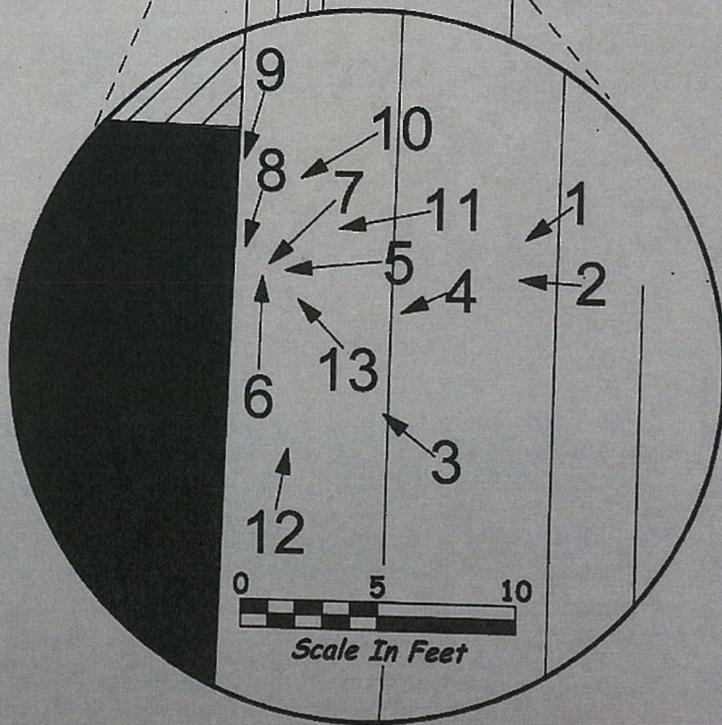
Fairview Avenue North & Yale Avenue North (Arrest Location)

State Exhibit 14



Legend

1. Lighter / Cell Phone
2. Clothing
3. Clothing
4. Lotion / Red Cord
5. Bottle / Cell Phone Bill
6. Fired Cartridge Case
7. Pistol
8. Clothing
9. Clothing
10. Key / Fob
11. Backpack / T-shirt
12. Clothing
13. Fired Cartridge Case



CSI Seattle Police Department
 Crime Scene Investigations Unit
 SPD Case: 12-403798 CBI File: 12-101
 Officer Involved Shooting
 Drawn By: Det. L. Washland 86025 Date: 11/25/12
 Approved By: Sgt. B. Starnoff 86128 Date: 11/27/12
 Drawing Title: Scene Diagram

567-3 - 615

State Exhibit

14

12-1-06016-5 SEA

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APPENDIX D

Screen Shot of Exhibit 2, Security Camera # 72
at 1:57:11 a.m.

Daley's Location at Time of Shot Fired at
Huber and Janes





In this version of the same screen shot depicted on the previous page, the State has added a red circle showing Daley's position and his line of sight, toward the detectives Janes and Huber, near their patrol car in the parking lot.

APPENDIX E

Screen Shot of Exhibit 2, Security Camera # 81
at 1:57:11 a.m.

Daley's Muzzle Flash of Shot Fired at Huber
and Janes





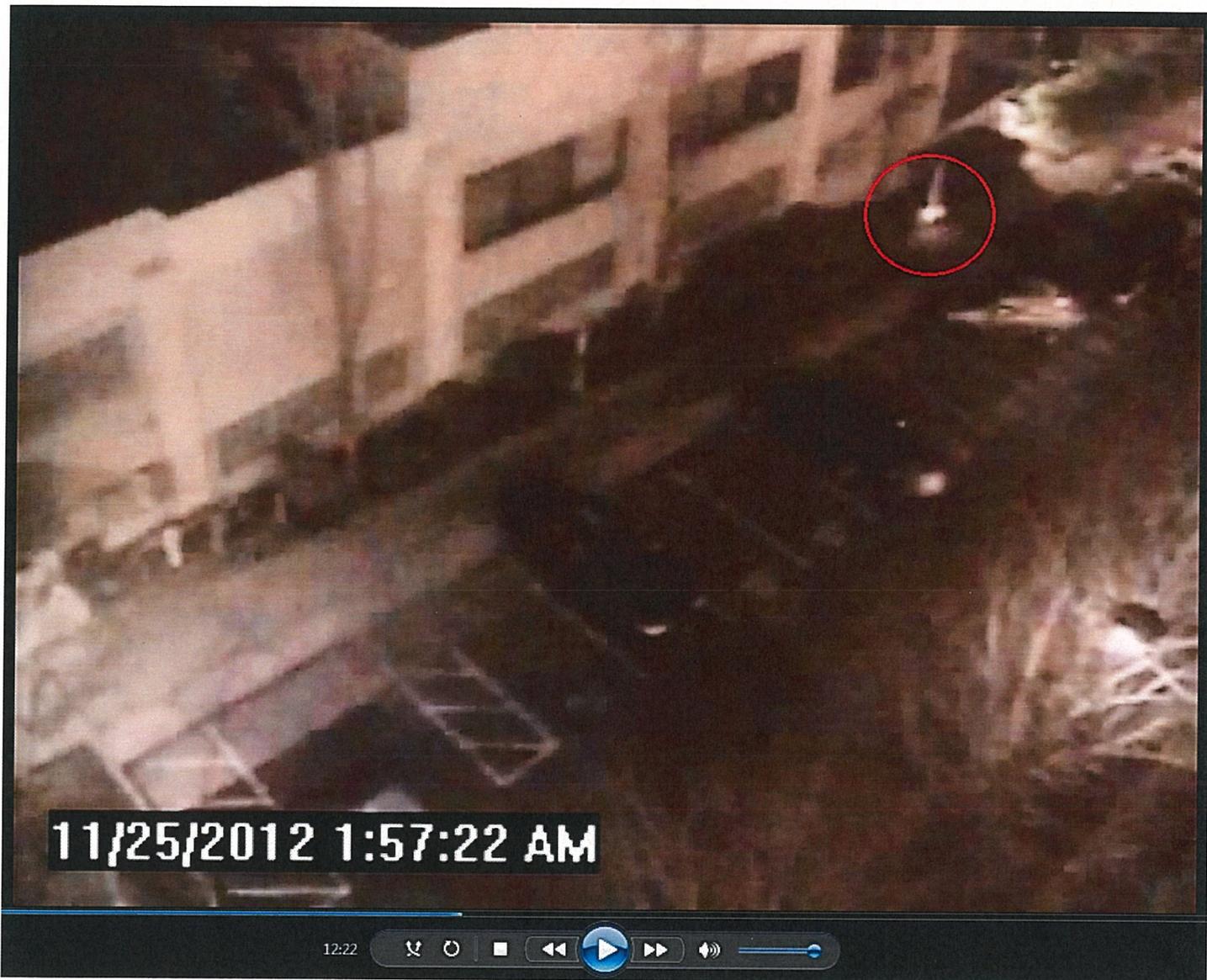
In this version of the same screen shot depicted on the previous page, the State has added a red circle, identifying the muzzle flash of Daley's shot at detectives Huber and Janes, through the rhododendron bushes lining Yale Avenue.

APPENDIX F

Screen Shot of Exhibit 2, Security Camera # 72
at 1:57:22 a.m.

Daley's Final Muzzle Flash of Shot Fired at
Hughey





In this version of the same screen shot depicted on the previous page, the State has added a red circle identifying the muzzle flash of Daley's final shot, fired at Hughey.

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Sarah Hrobsky and Susan Wilk, the attorney for the appellant, at Washington Appellate Project, 1511 3rd Ave, Suite 701, Seattle, WA, 98101, containing a copy of the Brief of Respondent, in State v. Larry Dawson Daley, Jr., Cause No. 71956-4, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 27th day of April, 2015.

W Brame

Name

Done in Seattle, Washington

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2015 APR 24 PM 3:40