

Original

No. 34958-2-II

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

COURT OF APPEALS
DIVISION II
07 FEB -6 PM 2:12
STATE OF WASHINGTON
BY
IDENTITY

STATE OF WASHINGTON,
Respondent,

v.

ROBERT RICHARD RUDNER, JR.,
Appellant.

APPELLANT'S BRIEF

Carol A. Elewski, WSBA # 33647
Attorney for Appellant
P.O. Box 4459
Tumwater, WA 98501
(360) 570-8339

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

A. ASSIGNMENTS OF ERROR 1

 1. Assignments of Error 1

 i. The superior court erred in giving the two counts of assault in the first degree to the jury when the evidence was insufficient to convict on those counts as a matter of law. 1

 ii. The superior court erred in failing to give unanimity instructions regarding the two counts of assault in the first degree 1

 2. Issues Pertaining to Assignment of Error . 1

 i. When assault in the first degree requires, *inter alia*, the intent to inflict great bodily harm, did the State fail to prove the two charged first degree assaults when the defendant and an accomplice, both methamphetamine addicts stealing property to finance their habits, decided on the spur of the moment to burglarize an apartment belonging to people they did not know, brought along a .9 millimeter semiautomatic firearm and ammunition, and committed the following assaults:

 a. With regard to one victim, there were three separate assaults: the defendant briefly pointed the gun at her head at the start of the crime; the other intruder fought off the victim after the victim jumped her, striking and injuring her with her ring-covered hands;

and the defendant pointed the gun at her boyfriend, possibly pulling the trigger but not firing a bullet.

b. With regard to the other victim, there were two assaults: the defendant pointed the gun at the victim's head, possibly pulling the trigger, and swung the gun at him, striking him in the head. . 2

ii. When the State offered evidence of three assaults against one victim and two assaults against the other, failing to elect which assaults it relied upon for the first degree assault charges and the court did not give a unanimity instruction, is the presumption of prejudice insurmountable because a rational juror could have had a reasonable doubt as to whether at least one of the assaults against each victim amounted to assault in the first degree?
. 3

B. STATEMENT OF THE CASE 4

1. Statement of Relevant Facts on Appeal . . . 4

i. Introduction 4

ii. The evidence of the first degree assaults 5

iii. The State's argument to the jury and the court's jury instructions . . . 12

2. Statement of Procedure 14

C. ARGUMENT 17

Point I: When the State Failed to Prove that Mr.

Rudner or his Accomplice Intended to Cause Great Bodily Injury in the Assaults Against Kimberly Riley and Brian Faranda, it Failed to Prove the Charged Crimes and This Court Should Reverse the Convictions	17
A. The State Failed to Prove Assault in the First Degree Against Kimberly Riley	19
B. The State Failed to Prove Assault in the First Degree Against Brian Faranda .	24
Point II: When the State Introduced Evidence of Three Assaults Against Riley and Two Assaults Against Faranda as Proof of its Charges of First Degree Assault, the Court Failed to Protect Mr. Rudner's Right to Be Convicted by a Unanimous Jury By Failing to Provide a Unanimity Instruction	29
A. The presumption of prejudice cannot be overcome as to the assault in the first degree against Brian Faranda	32
B. The presumption of prejudice cannot be overcome as to the assault in the first degree against Kimberly Riley . . .	35
D. CONCLUSION	38
CERTIFICATE OF SERVICE	39

TABLE OF AUTHORITIES

Table of Cases

State v. Camarillo, 115 Wn.2d 60, 794 P.2d 850 (1990)
 18, 30

State v. Coleman, No. 77706-3, 2007 Wash. LEXIS 61 (Wa.
S. Ct. Jan. 25, 2007) 3, 30, 31, 36

State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998)
 22

State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988)
 30, 31

State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992)
 2, 17

State v. Wilson, 125 Wn.2d 212, 883 P.2d 320 (1994)
 19, 21

Statutes

RCW 69.50.4013 15

RCW 9.41.040 15

RCW 9.94A.310 14

RCW 9.94A.370 14

RCW 9.94A.510 14

RCW 9.94A.530 14

RCW 9A.36.011 14, 18, 19, 20, 23, 25

RCW 9A.36.021 25

RCW 9A.52.020 15

RCW 9A.56.190	15
RCW 9A.56.200	15
RCW 9A.56.310	15

A. ASSIGNMENTS OF ERROR

1. Assignments of Error

i. The superior court erred in giving the two counts of assault in the first degree to the jury when the evidence was insufficient to convict on those counts as a matter of law.

ii. The superior court erred in failing to give unanimity instructions regarding the two counts of assault in the first degree.

2. Issues Pertaining to Assignment of Error

i. When assault in the first degree requires, *inter alia*, the intent to inflict great bodily harm, did the State fail to prove the two charged first degree assaults when the defendant and an accomplice, both methamphetamine addicts stealing property to finance their habits, decided on the spur of the moment to burglarize an apartment belonging to people they did not know, brought along a .9 millimeter semiautomatic firearm and ammunition, and committed the following assaults:

a. With regard to one victim, there were three separate assaults: the defendant briefly pointed the gun at her head at the start of the crime; the other intruder fought off the victim after the victim jumped her, striking and injuring her with her ring-covered hands; and the defendant pointed the gun at her boyfriend, possibly pulling the trigger but not firing a bullet.

b. With regard to the other victim, there were two assaults: the defendant pointed the gun at the victim's head, possibly pulling the trigger, and swung the gun at him, striking him in the head.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would 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) (citation omitted).

ii. When the State offered evidence of three assaults against one victim and two assaults against the other, failing to elect which assaults it relied upon for the first degree assault charges and the court did not give a unanimity instruction, is the presumption of prejudice insurmountable because a rational juror could have had a reasonable doubt as to whether at least one of the assaults against each victim amounted to assault in the first degree?

A conviction attained in a multiple incidents case where no election was made and no unanimity instruction given will be upheld only if the error is harmless beyond a reasonable doubt. The presumption of error is overcome only if no rational juror could have a reasonable doubt as to any of the incidents alleged. *State v. Coleman*, No. 77706-3, 2007 Wash. LEXIS 61, *4 (Wa. S. Ct. Jan. 25, 2007) (citation omitted).

B. STATEMENT OF THE CASE

1. Statement of Relevant Facts on Appeal

i. Introduction.

The Appellant, Robert Richard Rudner, a methamphetamine addict at the time of a series of crimes resulting in the instant case, was convicted of eight criminal counts and sentenced to 47 years and eight months in prison. On appeal, he challenges only the assaults in the first degree.

Mr. Rudner submits that while the evidence shows he and his accomplice used a gun in the commission of some of the assault incidents in this case, it does not show that they used it with the intent to inflict great bodily harm. Instead, the evidence shows they used the gun merely to assist them in the completion of a burglary/robbery. For these reasons, they did not have the requisite intent for assault in the first degree and this Court should reverse Mr. Rudner's convictions.

In addition, when several acts could have provided the basis for each first degree assault, Mr. Rudner

submits that the court erred in failing to give a unanimity instruction.

ii. The evidence of the first degree assaults.

At the time of the assaults that are the subject of this appeal, Mr. Rudner and his friend, Autumn Arnestad, were methamphetamine addicts supporting their habits through, *inter alia*, armed but non-violent crimes. Arnestad and Mr. Rudner were constant companions during the two months they knew each other prior to the charged assaults. Verbatim Report of Proceeding (RP) at 655-56, 679-693, 700-01.

On the night of August 6, 2004, a mutual acquaintance and fellow drug user, Desmond Berry, or "Tank," suggested the instant burglary to Mr. Rudner and Arnestad. He made the suggestion "like 10 minutes" before they did it. No planning was involved. Berry told Arnestad and Rudner that they could get keys to a car in the victims' apartment. Around four a.m., the three entered the apartment; Arnestad going in first armed with a .9 millimeter firearm. Berry left the apartment shortly thereafter. RP at 665-67, 671, 826.

The apartment was shared by Brian Faranda and his girlfriend, Kimberly Riley. The two had been asleep on the couch in the living room at the time of the entry. Other than the blue glow of a television screen after a DVD or video had ended, the room was dark. Once inside, Arnestad handed the gun to Mr. Rudner. Mr. Rudner pointed it toward Faranda's and Riley's heads. The two demanded car keys. As Faranda and Riley remained at gunpoint on the couch, Arnestad searched the apartment for the keys and other valuables. She appeared to be in charge of the operation. RP at 579, 584-91, 723, 810, 835.

Arnestad searched the apartment for about five minutes. Then she told Faranda to kneel on the floor with his hands behind his head, directly across from Mr. Rudner. They were separated by the couch, but Mr. Rudner had the gun pointed directly at Faranda's head. (Faranda testified that it was two feet from his head, Riley that it was just inches.) Mr. Rudner made no verbal threats to either victim. RP at 591-95, 600, 819, 845, 876. While Faranda was on his knees,

Arnestad rifled through the pockets of his pajamas. She directed Mr. Rudner to keep an eye on the two victims. She searched through everything possible in the apartment, "shouting orders, like she was in charge." RP at 844-46.

Faranda could see the gun in the corner of his eye, but he kept his attention focused on his girlfriend, who remained on the couch. After about a minute, Faranda heard a click come from the gun, which he believed to be either an accidental trigger pull or the de-cocking of the gun, done to drop the hammer without firing the weapon. He was fairly certain of the meaning of the sound, as he used to own pistols. He believed the weapon would have been cocked as a means of intimidation. RP at 587-98, 600-01.

Arnestad testified that she also heard a click. When she looked to the source of the noise, she saw the clip on the carpet and thought the sound was made by the clip falling out of the gun Rudner was holding. RP at 731-32, 734-39. Later, however, she testified that she could not be certain when she saw the clip on

the floor, before or after the altercation with Arnestad. RP at 742.

When Riley heard the click, she thought the trigger had been pulled and either there were no bullets or the gun misfired. When the State asked if she saw the trigger being pulled, she answered in the negative:

Q: Did you see the trigger being pulled?

A: I did not see. You know, I heard. I was looking at it. I didn't know where the click had come from. I don't know much about guns. My assumption was, at that point in time I assumed the click was coming from him pulling the trigger.

RP at 853. Seconds later, she changed her testimony, saying that she saw Mr. Rudner pull the trigger.

A: He pulled the trigger.

Q: How do you know he pulled the trigger?

A: Because I was looking at him.

Q: Did you see that?

A: Yes, I did.

RP at 853. Thinking they were going to die, she decided to fight. She stood up, jumped onto Arnestad and started to attack her, striking at her and pulling out her hair. RP at 847, 855.

During the fight, Riley was in a state of shock. She described it as being "blacked out in myself" and did not remember things very clearly. RP at 856. She thought Arnestad hit her in the eye with an "item." However, she did not see anything in Arnestad's hand before she jumped on her. After Arnestad hit her, Riley ran over to Faranda and Rudner. As she ran, Arnestad grabbed Riley's necklace from her neck, scratching her neck. RP at 855-57; 873-74.

Arnestad's blow to Riley's eye required stitches. RP at 865. However, Arnestad did not remember any particular punch; she stated she "was just throwing." She only used her hands, but she was wearing a lot of rings which likely caused the injury. RP at 726, 730-31. After Riley stopped trying to fight Arnestad, Arnestad did not pursue her. RP at 740, 858.

At about the same time Riley attacked Arnestad, Faranda stood up. He stood facing Riley for an amount of time that would have allowed Mr. Rudner to put a round of ammunition in the gun. However, Rudner did not chamber any ammunition. After a moment, Faranda

grabbed the gun. Rudner grabbed it back. As Faranda came around the couch, he and Mr. Rudner were "wrestling around" and Rudner was "swinging away" with the pistol. Faranda got hit in the face with the gun, across his nose and forehead. He believes he also was bit. RP at 595-97, 602-03, 634-36, 814.

Faranda subdued Mr. Rudner in about five or ten minutes. He was able to pin Rudner to the couch, at which point he told him if he threw the pistol down he would let him leave the apartment. When Mr. Rudner complied, Faranda threw him onto the floor and held him down. RP at 603-06, 636-37, 641-42.

Riley picked up the gun and struck Mr. Rudner several times with it. She was shouting, "kill 'em, kill 'em [sic]." RP at 792. However, she threw the gun down when Faranda told her to do so. As this was going on, Arnestad grabbed Riley's purse and a bag containing some of the victims' property and fled off the balcony. RP at 740-41. Riley went outside calling for help and the police arrived shortly. RP at 636-37, 641-42, 644, 725. Riley's ten year old daughter and

her daughter's friend were also sleeping in the apartment that night, unaware of what was going on. After the intruders were subdued, Riley woke them and took them to a neighbor's. RP at 826, 859-60.

Faranda suffered a broken nose, some superficial wounds to his head, and additional wounds to his eye and forehead requiring eight stitches. RP at 611. Riley suffered a black and blue eye which required stitches and scratches on her neck. She also had a migraine headache. RP at 822-23, 865.

Arnestad had stolen the gun used in this incident. Prior to the instant crime, she had been playing with the gun, loading and unloading it many times. She carried the gun into the apartment, although she did not know whether it was loaded at the time. She lamented her failure to check the gun beforehand, saying it was "stupid not to check" because she would not have taken a loaded gun into a residence. RP at 793, 769. She explained, "Because we weren't going there to kill anybody. . . . We were going to get some keys. I can't believe it. Just stupid." RP at 793.

The gun used in the burglary was a fully-operable Beretta .9 millimeter semi-automatic pistol. The gun contained no bullets, nor were spent shells located in the apartment. RP at 532, 556-57, 559. A nine-millimeter Beretta gun clip containing eight rounds was recovered from the floor where Mr. Rudner had been lying when the police arrived. On Rudner's person, the police officer recovered an empty gun clip that appeared to be for a .40 caliber gun. In addition, police found eight or nine .9 millimeter bullets contained within a brown cotton glove on Mr. Rudner. RP at 518-20, 547-48, 902-03.

iii. The State's argument to the jury and the court's jury instructions.

Regarding the charged assaults, the State argued first that the evidence established second degree assault against Faranda, and next that it also established first degree assault. It stated that the only real difference between first and second degree assaults was the intent of the assailant. RP at 1018-19. It argued that there were two assaults against Faranda: one when Arnestad made him get on his knees

and Mr. Rudner pointed the gun at his head; the other when Mr. Rudner hit Faranda with the gun during Faranda's attempt to get the gun and subdue Mr. Rudner. RP at 1021-22.

Having laid the groundwork for establishing the second degree assaults, the State next argued that Mr. Rudner actually committed assault in the first degree because he entered the apartment "with the intent of using the weapon, inflicting great bodily harm." RP at 1023. It argued that Arnestad brought the gun into the apartment to shoot to kill, that the gun must have been loaded, and that Mr. Rudner intentionally pulled the trigger. RP at 1023-28.

Next the State argued that Mr. Rudner committed first degree assault against Riley. It maintained that Riley was assaulted three times. The first assault was when Mr. Rudner directly pointed the gun at her. The next was the harm inflicted by Arnestad's blow. Finally, it argued that Mr. Rudner could be held liable for assault in the first degree against Riley by his intent when he held Faranda at gunpoint. It argued

that that assault was on Riley as well as Faranda. RP at 1028-29.

The court did not instruct the jury as to its need to be unanimous as to which acts constituted the two charged assaults. Nor did it instruct the jury that an assault on Brian Faranda could be an assault on Kimberly Riley. See Clerk's Papers (CP) 49-97 (Court's Instructions to the Jury). Instead, the "to-convict" instruction for assault in the first degree against Riley specified that Mr. Rudner or his accomplice must have assaulted Riley. CP 65 (Instruction No. 15). The State did not object to these instructions.

2. Statement of Procedure

In counts I through VI of a 10-count second amended information filed December 7, 2005, the State charged Mr. Rudner with two counts of assault in the first degree while armed with a firearm in violation of RCW 9A.36.011(1)(a) and invoking the provisions of RCW 9.94A.310/9.94A.510 and adding additional time to the presumptive sentence as provided in RCW 9.94A.370/9.94A.530; one count of burglary in the first degree

while armed with a firearm in violation of RCW 9A.52.020(1) and invoking the same sentence enhancement provisions; one count of robbery in the first degree while armed with a firearm in violation of RCW 9A.56.190 and 9A.56.200(1)(a)(i), also invoking the same sentence enhancement provisions; one count of unlawful possession of a firearm in the first degree in violation of RCW 9.41.040(1)(a); and one count of possession of a stolen firearm in violation of RCW 9.56.140(1) and RCW 9A.56.310(1); all occurring on August 6, 2004. In addition, Counts VII and VIII of the information charged residential burglary and theft of a firearm occurring on August 1, 2004. Finally, the information charged in Counts IX and X residential burglary in violation of RCW 9A.52.025 and unlawful possession of a controlled substance, methamphetamine, in violation of RCW 69.50.4013, both also occurring on August 1, 2004. CP 5-9.

Mr. Rudner exercised his right to a jury trial, the Honorable Vicki L. Hogan presiding. After the evidence was submitted, the State dismissed Counts VII

and VIII. CP 10-11. Mr. Rudner was convicted on all other counts and special verdicts regarding use of a firearm were entered with regard to Counts I-IV (the two first degree assaults, first degree burglary and first degree robbery).

At sentencing, Mr. Rudner stipulated to his prior record and offender score. CP 13-15. At the same time sentence was imposed in this case, a concurrent sentence was imposed in another matter. RP at 1090. In this case, the court imposed 240 months on the first assault charge, with a 60 month consecutive sentence for the firearm. On the second assault, it imposed a consecutive 93 months plus a 60 month consecutive sentence for the firearm. Concurrent to these sentences, the court imposed 166 months for the first degree burglary, with a consecutive 60 month enhancement. For the robbery first degree it imposed 129 months concurrent plus an additional 60 months consecutive for the firearm enhancement. For the unlawful possession of a firearm it imposed 87 months and for the stolen firearm, 72 months, both concurrent.

Finally, it imposed 63 months for the residential burglary and 24 months for the unlawful possession of a controlled substance. Mr. Rudner's total sentence is 573 months, or 47.75 years. CP 16-30.

This appeal followed. CP 31-46.

C. ARGUMENT

Point I: When the State Failed to Prove that Mr. Rudner or his Accomplice Intended to Cause Great Bodily Injury in the Assaults Against Kimberly Riley and Brian Faranda, it Failed to Prove the Charged Crimes and This Court Should Reverse the Convictions

The evidence at trial was insufficient as a matter of law to prove assault in the first degree against Kimberley Riley and Brian Faranda. Evidence supports a conviction if, when viewed in the light most favorable to the prosecution, a rational trier of fact 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) (citation omitted). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* Credibility determinations are for the trier of fact and are not subject to review.

State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The State failed to prove the assault in the first degree against Riley and Faranda when it failed to demonstrate either that the perpetrators intended to inflict great bodily harm and/or that the assaults were committed by a force or means likely to produce great bodily harm. See RCW 9A.36.011. To prove assault in the first degree, the State had to prove Mr. Rudner or his accomplice committing the following:

- (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 or 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.

RCW 9A.36.011 (excerpt). In this case, none of the several assaults against Riley and Faranda rise to the level of assault in the first degree.¹

A. The State Failed to Prove Assault in the First Degree Against Kimberly Riley.

In this case, the jury might have considered any of three assaults the first degree assault against Riley. The first assault was when Mr. Rudner pointed the firearm at Ms. Riley as she and Faranda sat together on the couch at the beginning of the incident. The next was based on the State's argument that Mr. Rudner vicariously assaulted Riley when he pointed the firearm at Faranda's head while Faranda knelt near him. See RP at 1029. The third was the blows by Arnestad that injured Riley as Riley tried to fight the intruder. None of these assaults constitutes first degree assault.

¹ Three definitions of assault are recognized under Washington law:

(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]. *State v. Wilson*, 125 Wn.2d 212, 218, 883 P.2d 320 (1994) (citations omitted); see CP 60 (Jury Instruction No. 10).

With regard to the first incident, Mr. Rudner pointing the weapon at Riley as Arnestad searched the apartment, it should be plain that this action was not done with the intent to inflict great bodily harm. To the contrary, assaulting someone by pointing a weapon at them and not firing it demonstrates, if anything, the absence of intent to inflict harm. For this reason, it cannot be deemed a first degree assault. See RCW 9A.36.011.

Next, Mr. Rudner pointing the gun at Faranda's head, even if he pulled the trigger, cannot be deemed a first degree assault on Riley. As an initial matter, the State failed to prove he intended to inflict great bodily harm in this incident. See Point I(B), below. Thus, as it was not a first degree assault against Faranda, it could not have been a first degree assault against Riley. In addition, whatever crime occurred against Faranda in this incident cannot be transferred wholesale to Riley.

Under the first degree assault statute, intent toward an intended victim suffices for intent toward

any unintended victims. *State v. Wilson*, 125 Wn.2d 212, 218, 883 P.2d 320 (1994). However, a discrete assault against one person cannot be transferred to another, uninjured person. To allow this type of wholesale transfer of an assault, rather than just the intent, would lead to absurd results. Under this reasoning, a person in a barroom fight against one other person would be guilty of as many assaults as there are patrons in the bar. Our courts have never expanded the doctrine of intent in this way.

Indeed, the only time an unintended victim can be the victim of a first degree assault is when that person is actually injured. See *Wilson*, 125 Wn.2d 212. In *Wilson*, for example, the defendant was guilty of first degree assault when he fired a gun into a bar, apparently aiming at two specific people. The intended targets were uninjured, but two bystanders were hit. Although the defendant did not intend to hit the two others, his intent as to some of the individuals was sufficient to convict him of first degree as to the injured victims.

Here, in contrast, by all accounts, the weapon was aimed point-blank at Faranda's head. Not only was Riley not injured in this assault, but there was no possibility that she could have been, even if Mr. Rudner had pulled the trigger and the gun had been loaded (two circumstances Mr. Rudner disputes). Mr. Rudner may have committed an assault against Faranda, but in no sense did that discrete assault involve Riley. Under these circumstances, this incident cannot be deemed a first degree assault on Riley.

Moreover, the to-convict jury instruction specifically required an assault on Kimberly Riley. CP 65 (Jury Instruction No. 15). There was no instruction that an assault on Faranda could be deemed an assault on Riley. Under the doctrine of law of the case, a jury instruction to which the State does not object becomes law of the case which the State is required to prove. *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998) (citations omitted). Thus, the State was required to prove first degree assault on Riley by evidence of an assault on her, not on Faranda. For

these reasons also, the State failed to meet its burden of proof.

Finally, the blows inflicted on Riley by Arnestad's be-ringed hand also cannot be deemed first degree assault because Arnestad neither had the requisite intent nor used the necessary force. See RCW 9A.36.011. First, she clearly did not intend to inflict great bodily harm. All the evidence shows that while Arnestad struck Riley a hard blow, it was only because Riley attacked her. Of course, Riley had every right to do so and Arnestad had no similar right to fight back. Nevertheless, when the undisputed evidence shows Arnestad merely "defended" herself, Arnestad clearly did not act with the intent to inflict great bodily harm. She just wanted to stop the attack. Indeed, when Riley moved away from her, Arnestad did not pursue her, choosing instead to flee.

Moreover, when Arnestad did not use anything in the fight other than her hands, the assault was not committed either with a firearm or by a force or means likely to produce great bodily harm or death. Although

she was wearing rings, there was no evidence that she "armed" herself with the rings in an attempt to muster deadly force. Similarly, there was no evidence that Arnestad was unusually strong or a particularly skilled fighter. Under these circumstances, Arnestad's hand can in no way be deemed deadly force. Because this assault fails to meet two of the prongs of the first degree assault statute, it also was insufficient to prove first degree assault against Kimberly Riley.

For all of these reasons, the State failed to prove Mr. Rudner committed assault in the first degree against Kimberly Riley and this Court should reverse this conviction.

B. The State Failed to Prove Assault in the First Degree Against Brian Faranda

The evidence at trial was also insufficient as a matter of law to prove assault in the first degree against Brian Faranda. The jury could have considered either of two assaults the first degree assault of Faranda. The first was when Mr. Rudner pointed the pistol at Faranda as Faranda knelt near him. The second was when Mr. Rudner swung the pistol at Faranda

as Faranda tried to subdue him. Regarding neither assault did the State prove that Mr. Rudner intended to inflict great bodily harm.

First, pointing the gun at Faranda did not demonstrate the intent to inflict great bodily harm. It is axiomatic that more than the mere presence of an operable, loaded firearm is required to prove the crime of assault in the first degree. Otherwise, there would be no distinction between assault committed with a firearm in the first and second degrees. When an assault is committed with a firearm, the key distinction between assault one and assault two is the requisite *mens rea*. Cf. RCW 9A.36.011 and RCW 9A.36.021.

But the evidence also showed that Mr. Rudner pulled the trigger on the gun when it was pointed at Faranda's head. While this was a matter of some dispute at trial, credibility determinations are not for this Court. Thus, the issue is whether pulling the trigger on a gun that does not contain a chambered

bullet necessarily demonstrates intent to inflict great bodily injury.

Given the circumstances of this case, the trigger pull failed to prove the requisite intent. Mr. Rudner and Arnestad were methamphetamine addicts simply looking to score property to sell for drugs. They entered Riley's apartment ten minutes after the idea was suggested to them. They had no grudge against Riley or Faranda; indeed, they had never met them before.

Arnestad testified that she would never have brought a loaded gun into the apartment. (In this case, she forgot to check to see whether it was loaded). Thus, Mr. Rudner, Arnestad's constant companion for the prior two months, likely believed that the gun was not loaded. That he did not believe the gun was loaded is revealed most clearly through his actions following the "click." Those actions demonstrate both that he did not believe the weapon was loaded and that he had no intention of injuring Faranda.

First, had Mr. Rudner believed the weapon was loaded and he desired to injure Faranda, he would have thought the first trigger pull was some kind of mistake. He would have pulled the trigger numerous times in an attempt to fire a bullet. But no one heard more than a single click. Thus, Mr. Rudner either did not believe the weapon was loaded or he did not want to hurt Faranda.

Next, had he thought the "click" meant the weapon was unloaded and he desired to injure Faranda, he could have loaded the gun. It is undisputed that Mr. Rudner possessed the proper ammunition for the gun and that he had time after the "click" and before Faranda jumped him to load the gun. Yet he did not do so. Thus, his actions demonstrate that he did not intend to injure Faranda. For these reasons, Mr. Rudner both did not believe the gun was loaded when he pulled the trigger and he did not want to hurt Faranda. Under such circumstances, the State failed to prove he intended to inflict great bodily injury in this assault.

Next, there was no evidence of intent to inflict great bodily harm during the fight with Brian Faranda. As in the fight between Riley and Arnestad, the fight between Mr. Rudner and Faranda was largely "defensive" on Mr. Rudner's part. Faranda was trying to take the weapon and Rudner was trying to keep him from doing so. Again, Mr. Rudner's actions were not justified, but it does not follow that he intended to cause great bodily harm. While Rudner swung at Faranda with the gun in his hand, the evidence does not support intent to inflict great bodily harm but, rather, intent to hang onto the gun. Rudner did not pick up the gun in an attempt to increase the injury to Faranda, but merely swung defensively with what was in his hand at the time.

In sum, this case illustrates the dangers attendant upon a burglary committed with a firearm - chief among which is the heightened risk to innocent victims. It is because of situations such as this one that our statutes increase the penalties for crimes committed with guns. But it does not follow that the

gun was used in this case with the intent to inflict great bodily harm. To the contrary, while Rudner and Arnestad used the gun against Faranda and Riley, they did not do so to seriously injure them. Instead, they used the gun to enable them to complete the burglary/robbery. Accordingly, they did not have the requisite intent for assault in the first degree and this Court should reverse Mr. Rudner's convictions.

Point II: When the State Introduced Evidence of Three Assaults Against Riley and Two Assaults Against Faranda as Proof of its Charges of First Degree Assault, the Court Failed to Protect Mr. Rudner's Right to Be Convicted by a Unanimous Jury By Failing to Provide a Unanimity Instruction

When the State introduced evidence of multiple assaults and rational jurors could have had reasonable doubts as to whether at least one of the assaults on each victim was assault in the first degree, the superior court committed constitutional error in failing to provide a unanimity instruction and this Court should reverse. See Const. art. 1, § 22 (amend. 10); U.S. Const. amend. 6. To protect a defendant's State constitutional right to a unanimous verdict and federal constitutional right to a jury trial in cases

where multiple incidents could prove the crime charged, either the State must elect which act is relied upon for a conviction or the court must instruct the *State v. Coleman*, No. 77706-3, 2007 Wash. LEXIS 61, *4 (Wa. S. Ct. Jan. 25, 2007), citing *State v. Camarillo*, 115 Wn.2d 60, 63-64, 794 P.2d 850 (1990). "[T]he 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." *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988) (internal quotation marks omitted).

In this case, the State did not elect which assaults it relied on and the court did not provide a unanimity instruction. Under these circumstances, "omission of the unanimity instruction is presumed to result in prejudice." *Coleman*, 2007 Wash. LEXIS 61, *4. "The presumption of error is overcome only if no rational juror could have a reasonable doubt as to any of the incidents alleged." *Id.* at *5, citing *State v. Kitchen*, 110 Wn.2d at 411-12 (1988).

While *Kitchen* and *Coleman* address the situation where there is conflicting testimony such that a rational juror could reasonably doubt whether one or more incidents actually occurred, their rationale applies to any multiple incidents case where one or more incidents is susceptible to reasonable doubt of the charged crime. See *Kitchen*, 110 Wn.2d at 411. The problem with a multiple incidents case is not simply that different jurors might have relied on different incidents as the charged crime. The greater problem is that some jurors might have found reasonable doubt as to one incident, while other jurors relied on that very incident as proof of the crime. See *Coleman*, 2007 Wash. LEXIS 61, *5. It is in that scenario that a defendant is prejudiced. It is only when all the alleged incidents equally prove the crime that a defendant is not prejudiced.

In this case, although there was contradictory testimony as to only one assault, not all the assaults were equally probative of the offense. Thus, a rational juror could have had reasonable doubt as to

whether some of the incidents proved assault in the first degree. Under these circumstances, the *Kitchen* and *Coleman* presumption of prejudice cannot be overcome and this Court should reverse the convictions.

A. The presumption of prejudice cannot be overcome as to the assault in the first degree against Brian Faranda.

As previously discussed, the State provided evidence of two different assaults against Faranda: 1) Mr. Rudner pointing the gun at his head and possibly pulling the trigger and 2) Mr. Rudner swinging at and injuring Faranda with the gun in his hand. RP at 1021-22. The State opened its discussion of the assault charges by arguing that the only difference between first degree assault and second degree assault was in the state of mind of the attacker. RP at 1018-19. Then it argued that assault in the first degree against Faranda was proven by the fact that Rudner and Arnestad entered the apartment with a loaded gun which they intended to use. RP at 1023-24. Clearly, this circumstance applies to all the assaults committed in the apartment, making all the assaults potentially first degree assaults. While the State emphasized the

pointing-the-gun assault as the first degree assault, it did not elect this assault as the only one that could prove the first degree charge.

The presumption of prejudice caused by the failure to elect and lack of a unanimity instruction cannot be overcome here because some jurors could have had reasonable doubt as to whether Mr. Rudner pulled the trigger. Mr. Rudner maintains that neither assault rises to the level of first degree assault. See Point I(B), above. However, setting aside that argument for a moment, the most contradictory evidence at trial was with regard to whether he pulled the trigger in the first assault. If Mr. Rudner pulled the trigger, the State's burden of proving intent would be easier to meet. On the other hand, if Mr. Rudner had merely pointed the gun at Faranda, he was not guilty of first degree assault. Thus, a central controversy at trial was whether he pulled the trigger.

Three witnesses heard a "click" come from the gun. These witness, however, gave contradictory testimony as to what caused the click. Brian Faranda, the one with

the greatest at stake, thought the click was either an *accidental* trigger pull or the de-cocking of the gun, done to drop the hammer without firing the weapon. He was fairly certain of the meaning of the sound, as he used to own pistols. RP at 587-98, 600-01. On the other hand, Arnestad thought the click was an ill-fitting clip dropping from the gun. RP at 731-32, 734-39. This testimony was supported by the fact that two clips were found on the scene, but none in the gun. Thus, if jury members credited either Faranda or Arnestad, they would not have found the requisite intent.

Kim Riley was the one who told the jury she saw an actual trigger pull. But her own testimony was internally inconsistent. After initially stating that she "did not see" the trigger being pulled, she just heard it, seconds later she testified that she not only heard the click, but she saw Mr. Rudner pull the trigger. RP at 853.

Kim Riley's inconsistent testimony about the trigger pull, combined with the other witnesses'

conflicting testimony about the nature of the "click" could raise reasonable doubt in the mind of a rational juror as to whether this assault was a first degree assault. Thus, Mr. Rudner could have been convicted because some jurors thought he pulled the trigger, evidencing his intent to cause great bodily harm, while others found reasonable doubt as to that incident, relying instead on his swinging the gun at Faranda as the first degree assault. Accordingly, Mr. Rudner was prejudiced by the State's failure to elect and the court's failure to give a unanimity instruction and this Court should reverse his conviction.

B. The presumption of prejudice cannot be overcome as to the assault in the first degree against Kimberly Riley.

As previously discussed, the State provided evidence of three different assaults against Riley: 1) Mr. Rudner pointed the gun at her head, 2) Arnestad struck her with her hand, and 3) Mr. Rudner pointed the gun at Faranda, thereby assaulting Riley. In addition, since the State argued that pointing the gun at Faranda was the same as assaulting Riley, the jury could easily have understood that striking Faranda with the gun

could also have been an assault on Riley. While it specifically offered only the gun-pointing incident for the first degree assault charge, it did not elect this offense to prove the crime. See *Coleman*, 2007 Wash. LEXIS 61 (reversing court of appeals decision which had held omitted unanimity instruction not prejudicial because State did not emphasize disputed incident).

Instead, its arguments with regard to Faranda applied equally to Riley: It argued that the only difference between first degree assault and second degree assault was in the state of mind of the attacker and that the requisite state of mind was proven when Arnestad and Riley entered the apartment with a loaded gun. Thus, the jury could have considered any and all of the assaults offered to prove the second degree charge as evidence of the first degree assault.

Moreover, because the State argued that the assault on Faranda was vicariously an assault on Riley, Mr. Rudner's arguments regarding the contradictory evidence as to whether the trigger was pulled apply with equal force here. See Point II (A). Thus, a

rational juror might have had a reasonable doubt as to whether at least that offense occurred.

In addition, a juror could have reasonable doubt as to whether each of the other assaults was a first degree assault against Riley. See Point I(A), above. Regarding the assault in which Mr. Rudner pointed the gun at Riley at the beginning of the crime, a rational juror could clearly have reasonable doubt as to whether this incident was a first degree assault. Similarly, a rational juror could have had reasonable doubt as to whether Arnestad's blow to Riley's eye constituted first degree assault. Finally, the same doubts apply to the State's vicarious liability theory. Thus, some of the jurors might have relied on one of these incidents to prove the crime, while others found reasonable doubt as to that very incident, relying on yet another to prove the crime.

When it cannot be determined whether the verdict was unanimous and not all of the assaults support the charge, Mr. Rudner was prejudiced and his conviction should be reversed.

D. CONCLUSION

For all of these reasons, Robert Richard Rudner, Jr., respectfully requests this Court to reverse his two convictions for assault in the first degree.

Dated this 5th day of February, 2007.

Respectfully submitted,



Carol Elewski, WSBA # 33647
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on this 5th day of February, 2007,
I served the original and one copy of the attached
brief by U.S. mail, postage prepaid, to:

Mr. David Ponzoha
Clerk/Administrator
The Court of Appeals
Of the State of Washington
950 Broadway, Suite 300
Tacoma, WA 98402-4454;

and one copy of the attached brief to:

Ms. Kathleen Proctor
Pierce County Deputy Prosecuting Attorney
930 Tacoma Avenue South
Tacoma, Washington 98402-2102
Respondent's Attorney; and

Mr. Robert Rudner, Jr.
DOC No. 739434, A-407L
Washington State Reformatory
P.O. Box 777
Monroe, WA 98271

COURT OF APPEALS
DIVISION II
OFFICE OF THE CLERK
FEB -6 PM 2:12
STATE OF WASHINGTON
BY DEPUTY



Carol Elewski