

NO. 37090-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS
DIVISION II
08 JUN -6 PM 1:16
STATE OF WASHINGTON
BY DEPUTY

STATE OF WASHINGTON, Respondent,

v.

DOMINICK MALDONADO, Appellant.

APPELLANT'S BRIEF

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FILED 6/5/08

TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR.....	1
II.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	1
III.	STATEMENT OF THE CASE.....	2
IV.	ARGUMENT	9
	ISSUE 1: THERE WAS NOT SUFFICIENT EVIDENCE TO PROVE INTENT TO INFLICT GREAT BODILY HARM WHERE THERE WAS NO EVIDENCE MALDONADO TARGETED ANYONE NEAR THE VICTIMS, MUCH LESS THE VICTIMS THEMSELVES, AND THE ONLY EVIDENCE WITH REGARD TO VICTIMS TORRES, TOOMEY, DAVIS AND STILES WAS THAT MALDONADO WAS INDISCRIMINATELY SHOOTING AND THEY WERE INJURED	9
V.	CONCLUSION.....	18

TABLE OF AUTHORITIES

TABLE OF CASES

Washington Cases

<i>State v. Aver</i> , 109 Wn.2d 303, 310, 745 P.2d 479 (1987).....	9
<i>State v. Ferreira</i> , 69 Wn. App. 465, 470, 850 P.2d 541 (1993).....	12
<i>State v. Green</i> , 94 Wn.2d 216, 221, 616 P.2d 628 (1980)	9
<i>State v. Louther</i> , 22 Wn.2d 497, 502, 156 P.2d 672 (1945).....	10
<i>State v. Salamanca</i> , 69 Wn. App 817, 826, 851 P.2d 1242 (1993)	10
<i>State v. Shelton</i> , 71 Wn.2d 838, 431 P.2d 201 (1967).....	10
<i>State v. Wilson</i> , 125 Wn.2d 212, 883 P.2d 320 (1994).....	10
<i>State v. Woo Won Choi</i> , 55 Wn. App. 895, 906, 781 P.2d 505 (1989).....	10

STATUTES

RCW 9A.08.010(1)(a).....	10
RCW 9A.36.011	9, 10

I. ASSIGNMENTS OF ERROR

1. The trial court erred by convicting Maldonado of first degree assault of Daniel Torres without sufficient evidence to prove intent to inflict great bodily harm beyond a reasonable doubt.
2. The trial court erred by convicting Maldonado of first degree assault of James Toomey without sufficient evidence to prove intent to inflict great bodily harm beyond a reasonable doubt.
3. The trial court erred by convicting Maldonado of first degree assault of Roberta Davis without sufficient evidence to prove intent to inflict great bodily harm beyond a reasonable doubt.
4. The trial court erred by convicting Maldonado of first degree assault of Frank Stiles without sufficient evidence to prove intent to inflict great bodily harm beyond a reasonable doubt.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether there was sufficient evidence to prove intent to inflict great bodily harm where there is no evidence Maldonado targeted anyone near the victims, much less the victims themselves, and the only evidence with regard to victims Torres, Toomey, Davis and

Stiles was that Maldonado was indiscriminately shooting and they were injured.

III. STATEMENT OF THE CASE

It is undisputed that on November 20, 2005, Dominick Maldonado entered Tacoma Mall with a rifle and a handgun. RP3 53, 80, 98-99. Maldonado's friends were shocked that he had taken this action, describing him as a leader and father-figure in their group. RP6 570-71, 585. In the weeks leading up to that fateful day, Maldonado had been acting strangely, not "like his normal self." RP6 599. The journal Maldonado kept during that time shows depression, paranoia, and suicidal thoughts. RP11 1189. Maldonado wrote on his bedroom white-board, "Today I will be heard." RP6 579.

Maldonado was very upset over abuse he had suffered as a youth at the hands of a Lakewood police officer at a camp, as well as a later incident when he was beaten and left alone naked and bleeding. RP8 924-25. Maldonado's journal had repeated entries stating, "Help me," and, "I need help." RP8 910.

The chain of events leading to the shooting began the night before, when Maldonado was hit by a car. RP8 939. This seems to have been a "last straw" for Maldonado, who concluded that, "Everything happens to

me, and that was it.” RP8 939. He decided he was going to leave town. RP10 1108. He told his girlfriend, Tiffany Robison, he needed help and broke up with her to avoid “pulling her down with me.” RP8 936, RP10 1108. He went home, tried to pack, and had a shower. RP10 1108-9.

Early in the morning, Maldonado called Tiffany Robison and told her that “he’s either going to a good place or a bad place, and he wanted to talk things over.” RP6 593. She said no. RP6 593.

Maldonado did not remember making the decision to go to the mall, he blacked out and found himself in his car in the mall parking lot. RP10 1109. He sent text messages to friends with the same message: “Today is the day the world will feel my anger. Today is the day the world will feel my pain. Today is the day I will be heard.” RP6 567-8, 578. He also called 911 to warn him he was about to go in. RP8 835. He said he wanted to be caught and stopped. RP8 929.

Maldonado entered the mall, took out his guns, and began shooting indiscriminately. RP3 110, 136, 175, RP4 252, 331.

Some of the first shots went toward the T-Mobile kiosk. RP3 73, 77. Frank Latimer was shot in the leg while standing at the T-Mobile kiosk. RP4 239, 241. Andrea Hutchinson, sitting nearby, was hit with shrapnel from the kiosk. RP4 208, 217. Daniel Torres and James

Toomey, T-Mobile employees, had taken shelter behind the kiosk and were fortunately uninjured by the bullets hitting the kiosk. RP3 77-78.

Ruth Jackson was hit by shrapnel in her leg and stomach. RP4 252, 255. Amit Ben Yehuda was also hit by a ricochet bullet—he never saw Maldonado. RP10 1056.

Brendan McKown heard gunfire on his way out of Kits Cameras. RP4 338. He drew his handgun and saw Maldonado walking by with his rifle held down, not shooting. RP4 342. He called to Maldonado for him to drop his weapon. RP4 345. Maldonado turned and fired at McKown, hitting him in the stomach. RP4 346. Maldonado turned and walked away. RP4 347.

After the exchange with McKown, Maldonado walked into the Sam Goody store and ordered Jon Black, Katherine Riggans, and Joseph Hudson, who were still inside to lock up and barricade the store. RP7 699, 702.

Once the store was secure, Maldonado allowed the other three to make calls to loved ones and began talking with them. RP6 639. Maldonado told them he only wanted was to confront a police officer who had abused him as a child at a youth camp. RP6 634-35.

When Maldonado spoke with the police negotiator, his only demand was to have the three police officers who had been in charge of

the youth camp where he had been abused come to apologize to him. RP8 836, 879.

Maldonado told them he had not meant to hurt anyone inside the mall, but wanted to make a lot of noise so that he could get everyone's attention. RP6 637. He said he had not aimed the guns, but only shot to make noise. RP6 637. Maldonado did acknowledge shooting McKown—saying that he panicked when he saw McKown pointing a gun at him. RP6 637.

It later turned out that a 14-year-old, Phi-Ho Phan, was hiding inside the store. RP7 671, 679. Maldonado talked with a police negotiator by phone and agreed to release Phan, which he did without incident 20-30 minutes after he was discovered. RP7 687-88, RP8 855. Maldonado also agreed that police could evacuate McKown from the neighboring store. RP8 841.

Initially seeming emotionless and distant, while talking with Hudson, Maldonado began to cry when he thought about the people who were injured. RP6 641. From that point on, his demeanor completely changed. RP6 641. He turned his weapons over to Hudson and Black and called 911 to tell the police he wanted to surrender. RP6 642. Maldonado was remorseful, telling Hudson, Riggans and Black that he was sorry for

involving them and that he did not mean to hurt anyone. RP6 642.

Maldonado was “frightened, scared, broken, weak.” RP6 645.

Dr. William Sack testified that Maldonado suffered from a “dissociative fugue state” at the time of the shooting. RP10 1088. Dr. Sack believed that this had been caused by the traumatic events in Maldonado’s youth. RP10 1102. In Dr. Sack’s opinion, a person suffering from this condition is not thinking rationally and cannot form intent. RP10 1112.

The State’s expert, Dr. Greg Gagliardi of Western State Hospital, testified that although Maldonado was suffering from bipolar spectrum disorder, he was capable of forming intent. RP11 1212-13, 1260.

Following jury trial, Maldonado was convicted of the following:

	<u>Victim</u>	<u>Conviction</u>	<u>Special Verdict: Firearm</u>
I	Frank Latimer	First Degree Assault	Yes
II	Andrea Hutchinson	First Degree Assault	Yes
III	Daniel Torres	First Degree Assault	Yes
IV	James Toomey	First Degree Assault	Yes
V	Roberta Davis	First Degree Assault	Yes
VI	Brandon McKown	Attempted Second Degree Murder	Yes

VII	Frank Stiles	First Degree Assault	Yes
VIII	Amit Ben Yehuda	Second Degree Assault	Yes
IX	Joseph Hudson	First Degree Kidnapping	Yes
X	Katherine Riggans	First Degree Kidnapping	Yes
XI	John Black	First Degree Kidnapping	Yes
XII	Phi-Ho Phan	First Degree Kidnapping	Yes
XIII	(Rifle)	Unlawful Possession of a Firearm in the First Degree	
XIV	(Handgun)	Unlawful Possession of a Firearm in the First Degree	
XV	Ruth Jackson	Second Degree Assault	Yes

See RP 10/2/07 7-12.

The parties agreed on the offender score and standard range calculations. RP 11/2/07 4. The defense asked the court for an exceptional sentence downward because the standard range sentence in this case was clearly excessive. RP 11/2/07 19. The court declined and sentenced Maldonado to the top of the standard range on all counts, resulting in the following sentence:

<u>Count</u>	<u>Range</u>	<u>Enhance.</u>	<u>Total Range</u>	<u>Sentence</u>
I	93-123 months	60 months	153-183 months	180 months

II	93-123 months	60 months	153-183 months	180 months
III	93-123 months	60 months	153-183 months	180 months
IV	93-123 months	60 months	153-183 months	180 months
V	93-123 months	60 months	153-183 months	180 months
VI	162-237 months	60 months	222-297 months	287 months
VII	93-123 months	60 months	153-183 months	180 months
VIII	63-84 months	36 months	99-120 months	120 months
IX	51-68 months	60 months	111-128 months	128 months
X	51-68 months	60 months	111-128 months	128 months
XI	51-68 months	60 months	111-128 months	128 months
XII	51-68 months	60 months	111-128 months	128 months
XIII	87-116 months		87-116 months	102 months
XIV	87-116 months		87-116 months	102 months
XV	63-84 months	36 months	99-120 months	120 months

CP 205, 208. In addition, the court ordered that Counts I, II, III, IV, V, VI, VII, IX, X, XI and XII were to run consecutively.¹ CP 208. The firearm enhancements were also consecutive to each other and to the

¹ This was required by RCW 9.94A.589(1)(b) for all serious violent offenses.

underlying sentence. CP 208. Thus, Maldonado's total sentence was 1961 months (more than 163 years). CP 209.

IV. ARGUMENT

ISSUE 1: THERE WAS NOT SUFFICIENT EVIDENCE TO PROVE INTENT TO INFLICT GREAT BODILY HARM WHERE THERE WAS NO EVIDENCE MALDONADO TARGETED ANYONE NEAR THE VICTIMS, MUCH LESS THE VICTIMS THEMSELVES, AND THE ONLY EVIDENCE WITH REGARD TO VICTIMS TORRES, TOOMEY, DAVIS AND STILES WAS THAT MALDONADO WAS INDISCRIMINATELY SHOOTING AND THEY WERE INJURED.

There was not sufficient evidence of intent to inflict great bodily harm, an essential element of first degree assault, to support Maldonado's convictions for Torres, Toomey, Davis and Styles. Due process requires the State to prove all elements of a crime beyond a reasonable doubt. *State v. Aver*, 109 Wn.2d 303, 310, 745 P.2d 479 (1987). Evidence is insufficient to support a conviction when, viewed in the light most favorable to the prosecution, it would not permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Maldonado was convicted of six counts of first degree assault. In order to convict Maldonado of first degree assault, the jury had to find beyond a reasonable doubt that he had the intent to inflict great bodily harm. RCW 9A.36.011 states:

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;

See also CP 101, 105.

A person acts with intent when he acts with the objective or purpose to accomplish a result constituting a crime. RCW 9A.08.010(1)(a). “Evidence of intent . . . is to be gathered from all of the circumstances of the case, including not only the manner and act of inflicting the wound, but also the nature of the prior relationship and any previous threats.” *State v. Woo Won Choi*, 55 Wn. App. 895, 906, 781 P.2d 505 (1989), *review denied*, 114 Wn.2d 1002 (1990). *See also State v. Shelton*, 71 Wn.2d 838, 431 P.2d 201 (1967). Specific intent cannot be presumed, but it can be inferred as a logical probability from all the facts and circumstances. *State v. Louthier*, 22 Wn.2d 497, 502, 156 P.2d 672 (1945); *State v. Salamanca*, 69 Wn. App 817, 826, 851 P.2d 1242, *review denied*, 122 Wn.2d 1020, 863 P.2d 1353 (1993). Although the intent need not be specific to the victim, the defendant must have had “the intent to inflict great bodily harm upon some person at the time he engaged in the assaultive conduct.” CP 105, *see also State v. Wilson*, 125 Wn.2d 212, 883 P.2d 320 (1994).

In this case, only two of the first degree assault victims, Latimer and Hutchinson, testified that Maldonado was taking aim at them, or indeed at anyone. All of the other witnesses who saw Maldonado testified that he was firing indiscriminately, without taking aim at anyone or anything. Only Latimer, Davis, McKown and Styles were directly hit by bullets. Torres was not hit at all and Toomey was only grazed by debris.

Count III: Daniel Torres

There was not sufficient evidence to prove Maldonado had the intent to inflict great bodily harm to support his conviction in count three, involving Daniel Torres. Torres was working at the T-Mobile Kiosk with James Toomey. RP3 94. Torres saw Maldonado pull out his rifle and begin shooting. RP3 98-99. When the shooting began, he and Toomey took shelter behind the kiosk. RP3 76. It appeared to Torres that Maldonado was shooting indiscriminately and was not targeting anyone in particular. RP3 109-110.

Torres was not shot. He was not even harmed by debris. Instead, the prosecution argued that he was assaulted when bullets hit the T-Mobile kiosk. There is simply no evidence of the intent to inflict great bodily harm in this case. Torres himself testified that Maldonado was shooting indiscriminately. This is consistent with almost every other witness'

testimony. See RP3 136, 175, RP4 252, 331.² This is also consistent with Maldonado's consistent claim that he did not intend to harm anyone. RP6 637, RP8 948. There is no evidence that Maldonado knew Torres and Toomey were behind the counter.

While there is no doubt that shooting inside an occupied public building is reckless, it is not sufficient evidence, in and of itself, of intent to cause great bodily harm. In *State v. Ferreira*, 69 Wn. App. 465, 470, 850 P.2d 541 (1993), the court reversed convictions for first degree assault when the defendant fired several shots into a house because there was no proof the defendant knew the house was occupied at the time. The court found that the trial court's finding that it was "likely apparent" that the house was occupied was insufficient to support a finding of intent to inflict great bodily harm. *Ferreira*, at 470. In other words, merely shooting recklessly into the house, without more, is insufficient evidence of first degree assault.

Similarly here, there is no evidence that Maldonado was aiming at anyone when the shots went into the kiosk counter. There is no evidence

² To one witness, it looked like he was firing "aimlessly," not aiming at anyone in particular. RP3 136. Another witness testified that Maldonado was "spraying" bullets, with no particular target. RP3 175. Jackson testified that Maldonado was only looking in the direction he was firing some of the time. RP4 252. Another witness also said that Maldonado was just "spraying" bullets, with his gun level. RP4 331.

he knew anyone was behind it. Thus, there is insufficient evidence to support a conviction for first degree assault on Torres and the conviction must be reversed.

Count IV: James Toomey

James Toomey was working at the T-Mobile Kiosk. RP3 62, 68. He saw Maldonado walk by, then he turned to help some customers. RP3 70. He heard three to four gunshots and saw people running away. RP3 72. His co-worker, Torres, pulled him to the ground behind the kiosk. RP3 75-76. Toomey poked his head above the counter once to see what was going on and then the kiosk was hit. RP3 77. Toomey was “grazed” by debris, but not shot. RP3 77-78. He did not testify to any medical treatment for injury. He never saw Maldonado firing at them. RP3 88. When he looked up, he saw Maldonado’s back to them. RP3 86. The bullets that hit the kiosk could have been ricochet. RP3 88.

As with Torres, there is no evidence in Toomey’s case that Maldonado had the intent to inflict great bodily harm. Toomey testified that he never saw Maldonado fire at him and that the kiosk could have been hit indirectly by a ricochet. Thus, there is not sufficient evidence of Maldonado’s intent to inflict great bodily harm and this conviction must be reversed.

Count V: Roberta Davis

Roberta Davis was shopping with her husband when she heard the shots. RP4 290, 292. As she ran for the door, she felt something hit her leg—a bullet hit her. RP4 293, 295. She never saw the shooter. RP4 294.

Just as with Toomey and Torres, the only evidence in Davis' case was that Maldonado was shooting indiscriminately in the mall. There is no evidence in Davis' case that Maldonado ever even saw her. Given that the jury returned second degree assault verdicts for the other two indirect shooting victims (Yehuda and Jackson), it is mystifying that they returned a different verdict on the same evidence with Davis. It is even clearer in count V that there is insufficient evidence of intent to inflict great bodily harm and this conviction must also be reversed.

Count VII: Frank Stiles

Frank Stiles and his wife were shopping at the mall. RP4 268. He heard gunshots and was hit by a bullet in his arm. RP4 272. He never saw the shooter at all. RP4 279. Neither did his wife. RP4 288.

Again, as with Davis, Toomey and Torres there is no evidence that Maldonado ever saw Stiles, much less targeted him. Because the only evidence is that Maldonado was shooting indiscriminately in the mall, not targeting anyone in particular when Stiles was hit, there is insufficient

evidence of intent to inflict great bodily harm to support count VII and this conviction must be reversed.

V. CONCLUSION

There was not sufficient evidence of intent to inflict great bodily harm to support convictions for first degree assault in counts III, IV, V and VI. The only evidence to support these convictions was that Maldonado was recklessly, but indiscriminately, firing his guns and that this resulted in two people being hit by ricochet shrapnel and two being frightened when the counter they were hiding behind was hit by wild bullets. This is not sufficient evidence in and of itself to prove intent to inflict great bodily harm. Therefore, these four first degree assault convictions must be reversed.

DATED: June 5, 2008

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CERTIFICATE OF SERVICE

I certify that on June 5, 2008, I caused a true and correct copy of this Appellant's Brief to be served on the following via prepaid first class mail:

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