

NO. 39128-7-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JOSEPH FRASQUILLO, JR.  
and  
DAVID A. FRASQUILLO

Appellants.

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APPELLANT'S BRIEF

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COURT OF APPEALS  
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## **A. ASSIGNMENTS OF ERROR**

1. The trial court erred in giving a jury instruction on transferred intent which relieved the jury of its obligation to find all of the elements of assault when the doctrine of transferred intent did not apply to the case at hand.

2. The trial court erred in denying the motion for dismissal of counts V, VI and VII, pertaining to alleged attempted assaults in the second degree involving Keith Knowlton, Linda Knowlton, and Jacob Knowlton respectively because the elements for those counts could not be proven.

3. There was insufficient evidence to support a finding of guilt on the charges of attempted assault in the second degree contained in counts II, IV, and VII of the amended information.

4. Mr. Joseph Frasquillo was denied his right to a fair trial by the trial court's refusal to grant his motion to sever the charge of unlawful possession of a firearm where the consolidation of the cases precluded him from calling his co-defendant to testify on his behalf.

5. Mr. Frasquillo was denied the right to a fair trial when the trial court gave a defective accomplice liability instruction.

6. The trial court erred in denying the motion to dismiss the counts of attempted assault in the first degree when the jury found guilt on the lesser charge of attempted assault in the second degree.

7. The trial court erred in entering multiple firearm enhancements when only one firearm was allegedly used and the firearm was an element of the offense.

**B. Issues Pertaining to the Assignments of Error**

1. Whether the jury instruction on transferred intent relieved the jury of its obligation to find all of the elements of assault and should not have been given to the jury. (Assignment of Error No. 1)

2. Whether the trial court erred in denying the motion to dismiss counts V, VI, and VII which alleged attempted assault against Keith Knowlton, Linda Knowlton, and Jacob Knowlton respectively when there was insufficient evidence of specific intent to commit an assault where Mr. Joseph Frasquillo did not know the alleged victims were present in the residence. (Assignment of Error No. 2)

3. Whether there was insufficient evidence to support a finding of guilt on the charges of assault in the second degree, and attempted assault in the second degree contained in counts II, IV, and VII of the amended information. (Assignment of Error No. 3)

4. Whether Mr. Joseph Frasquillo was denied the right to a fair trial when the trial court denied his motion to sever the charge of unlawful possession of a firearm when the consolidation of the defendants as to that count impeded his ability to present a defense. (Assignment of Error No. 4)

5. Whether the accomplice liability instruction was constitutionally deficient because it relieved the state of its burden of proving each element of the crimes charged when the instruction improperly informed the jury they need only find Mr. Joseph Frasquillo knowingly aided an assault. (Assignment of Error No.5)

6. Whether the trial court violated Mr. Joseph Frasquillo's double jeopardy rights by refusing to dismiss the counts involving assault in the first degree when the jury chose to convict Mr. Joseph Frasquillo of the lesser charge of assault in the second degree. (Assignment of Error No. 6)

7. Whether the trial court violated Mr. Joseph Frasquillo's double jeopardy rights by ordering three firearm enhancements. (Assignment of Error No. 7)

### **C. Statement of the Case**

#### **1. Procedural History**

Mr. Frasquillo was charged by way of an amended information of the following: Count I assault in the first degree against Ms. Luzik as an accomplice with a firearm enhancement; Count II: assault in the second degree against Ms. Luzik as an accomplice with a firearm enhancement; Count III: assault in the first degree against Mr. Matthew Knowlton as an accomplice with a firearm enhancement; Count IV: assault in the second degree against Mr. Matthew Knowlton as an accomplice with a firearm

enhancement; Count V: attempted assault in the second degree against Mr. Keith Knowlton as an accomplice with a firearm enhancement; Count VI: attempted assault in the second degree against Ms. Linda Knowlton as an accomplice with a firearm enhancement; Count VII: attempted assault in the second degree against Mr. Jacob Knowlton as an accomplice with a firearm enhancement; Count VIII: Unlawful Possession of a firearm in the first degree occurring on or about June 24, 2008.

CP 33-43

The trial court joined the cases involving Mr. Joseph Frasquillo and Mr. David Frasquillo over the objection of defense counsel. 11/4/08 RP 4-7<sup>1</sup>. Specifically, defense counsel objected to consolidation of the cases in regards to the count involving unlawful possession of a firearm. 11/04/08 RP 4-7; 11/12/08 RP 3-4. Defense counsel sought to sever that count from the consolidated trial. *Id.* The request was denied. 11/12/08 RP 4. The request to sever was raised again prior to trial when counsel for Mr. Frasquillo renewed his objection to consolidation of the charge alleging Mr. Joseph Frasquillo unlawfully possessed a firearm. RP 5 Defense was allowed to renew the objection to consolidation, specifically in regards to the charge of unlawful possession of a firearm. RP 10

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Designation of Reports of proceedings occurring before and after the trial include the date of the hearing. Reports of the trial proceedings are not dated.

Counsel for both defendants requested the Court sever the count of unlawful possession of a firearm as charged against Joseph Frasquillo. RP 4-17. The motion was denied. RP 17 The objection was renewed at the time the State sought to amend the information pertaining to Joseph Frasquillo. RP 1234

Defense Counsel presented motions to dismiss all counts at the conclusion of the State's case and again just prior to the discussions regarding the jury instructions which occurred prior to the presentation of closing arguments. RP 1783, 1942-1951 Those motions were denied. *Id.* The motions were based on a claim that insufficient evidence had been presented to warrant the jury's consideration of the charges. *Id.*

The jury was unable to reach an unanimous decision on Count I: assault in the first degree, Count III: assault in the first degree, Count V: attempted assault in the second degree, and Count VI: attempted assault in the second degree. RP 2151-2152 Mr. Frasquillo was found guilty of the crime of assault in the second degree as alleged in Count II of the information, assault in the second degree as alleged in Count IV of the information, attempted assault in the second degree as alleged in Count VII, and unlawful possession of a firearm as alleged in Count VIII. RP 2151-2152 The jury found that Mr. Joseph Frasquillo was armed with a firearm as to Count II, Count IV, and Count VII. RP 2153-2153 Judge

Laurie, who took the verdict with agreement of the parties, declared a mistrial on counts V and VI due to the jury instructions. RP 2150

Mr. Joseph Frasquillo was sentenced to a total of 132 months of confinement. CP 397-707. At the time of sentencing defense counsel objected to the imposition of multiple firearm enhancements and sought a dismissal with prejudice of counts I and III which alleged assault in the first degree. 3/27/09 RP 3-4. The jury convicted Mr. Frasquillo on the lesser charge of assault in the second degree. CP 397-407 The motion for dismissal with prejudice was denied, but the trial court did dismiss counts I, III, V, and VI without prejudice. CP 393-394. This appeal follows. CP 409.

## **2. Statement of Facts**

Mr. Frasquillo lived with his parents and his brothers Darren and David at the time of the alleged incident. RP 1475, 1561-1562. On the evening of June 23, 2008 several events over the course of the evening into the early hours of June 24, 2008. During that evening several individuals hung out together including Ms. Devin, Mr. Treacher, Mr. Moore, Mr. Williams among others described below.

Several individuals sent multiple text messages and phone calls that evening. RP 458, 475, 663. Mr. Williams created an antagonistic situation by contacting Ms. Luzik at her place of employment on June 23, 2008. RP 927 He went inside the business where she worked, saw

Ms. Luzik, shook his head, pointed finger at her and then left. *Id.* He left a threatening note on her car as well. *Id.* He was angry at Ms. Luzik for treating Andrew Treacher poorly. RP 928 Andrew had been Ms. Luzik's former boyfriend. *Id.* Ms. Luzik though Mr. Williams threatened her at the request of her former boyfriend. Andrew. RP 541-542, 660. Ms. Luzik's current boyfriend was Matthew Knowlton and she stayed with him on occasion. RP 540.

Mr. Williams testified regarding his observations of the group including Zachary Gibbs-Churchley, Joseph Frasquillo, David Frasquillo, and Ms. Aaronessa Devin. Some members of that group decided to meet at the Silverdale Taco Bell for a fist fight, which was the product of the conflict surrounding Ms. Luzik. RP 545, 667-668, 931-932 The fight did not occur. RP 671. Text messaging and phone calls continued to occur throughout the evening between Ms. Luzik and other members of the group. The Frasquillo brothers were not involved in either the text messages or the calls and were not familiar with most of the group. RP 454, 475, 671, 828.

Ms. Devin testified regarding her participation in the events of June 23-34, 2008. She testified that she went to the Frasquillo home with Zach, Andrew, and some others. RP 678, 841. Ms. Devin reported that she observed Joesph Frasquillo holding two shotguns in the home. RP 683. Andrew Treacher testified at trial as well. He got off shift at Taco

Bell, changed clothes and joined Zach and Troy Moore in Aaronessa's car. RP 833 He recalled driving by the Knowlton residence with Aaronessa. RP 835. Aaronessa was driving. RP 834-835 He did not recall seeing any lights on at the residence and thought the house was unoccupied. RP 836 After driving by the residence, they met up with a group at the Silverdale Taco Bell. From there Mr. Treacher testified they went to the Frasquillo residence with the others in the car. RP 839 He testified that while at the residence he saw both Joseph and David handle shotguns. RP 840 Mr. Treacher left the residence with Troy and Aaronessa. RP 846. The group drove back to the Jack in the Box parking lot in East Bremerton. RP 683, 847-850.

The group moved on to the parking lot of the Payless shoe store. RP 961. Ms. Devin had concerns about the evening and went to purchase fuel for her car at the Chevron station for the purpose of creating an alibi. RP 781. Ms. Devin saw what she assumed was the Frasquillo brothers. RP 782 She recalled seeing Zach leave in his van with two individuals and returned alone. RP 785

Mr. Williams was present at the Payless Shoes' parking lot on June 23, 2008. He testified that he saw a van leave with Zachary, Joseph, and David. RP 962 He did not see any guns in the van, or that night at all. RP 962, 973 Mr. Williams was later arrested and charged with harassment as a result of his actions on the evening of June 23, 2008.

RP 965 Mr. Williams entered into a pretrial diversion agreement for that charge. *Id.* The agreement contained a provision requiring Mr. Williams to testify in accordance with his prior statement. RP 967, 976 In fact Mr. Williams is required under his agreement to testify in conformity with the statement he previously made and will be convicted if he did not do so. RP 997

Mr. Treacher testified that Zach left with the Frasquillo brothers. RP 846 They all met up again at the Payless Shoe store parking lot. RP 847 Mr. Treacher walked up to Zach's minivan and saw the Frasquillo brothers handling firearms. RP 849. He was aware that Dustin spoke to Zach as well. *Id.* He recalled that Zach's van left was gone from the area from five to ten minutes. RP 853 When Zach returned to the parking lot, the Frasquillo brothers were not with him. Mr. Treacher did not see the brothers leave. RP 853 When Mr. Treacher was initially contacted by law enforcement he indicated that he had never seen any guns. RP 874 During the course of the evening Mr. Treacher made a point to be on video at the Jack in the Box. RP 900 Mr. Treacher also testified that Zach told him: "I just took out a couple windows," RP 916

Mr. Troy Moore, who suffers from attention deficit disorder and has poor long term memory, also testified at trial. RP 1009. Mr. Moore testified that a group consisting of Andrew, Zach, Arronessa, Joseph Frasquillo, David Frasquillo, and him all went to David Frasquillo's house

on June 23, 2009. RP 1016. He also testified to seeing Zach get into a car with David and Joseph. RP 1018. He saw one of the Frasquillo brothers carry a long black plastic case. *Id.* He was not certain which brother was carrying the case. *Id.* From the Frasquillo's residence, a group met at Jack in the Box and moved to the Payless Shoe store parking lot. RP 1019. When he got to the Payless parking lot he saw Zach in his vehicle, a minivan, and the Frasquillo brothers were in the minivan with him. RP 102-1021. He got out of his vehicle and walked over to Zach's minivan. RP 1021. He did not see any firearms in the van, but he saw a black case. RP 1022. Mr. Moore left the parking lot to get gas. He assumed the van left the parking lot, but he was not certain because he had left to go to the gas station. RP 1024. He saw the minivan again ten to fifteen minutes later. *Id.* No one testified of hearing Joseph or David Frasquillo state that he was aware or supported a plan to commit any type of assault. RP 683, 844, 849.

Ms. Weir, Mr. Teneyck, and Mr. Anderson, who were roommates on June 23, 2008 RP 1614, 1627, 1639. Ms. Weir testified that Joseph and David Frasquillo came to their residence on the evening of June 23, 2008. *Id.* Ms. Weir stayed up the latest of the group and recalled that Joseph and David were at her residence when she went to bed between 4:00 a.m. and 5:00 a.m. RP 1641 Ms. Weir indicated that the statement taken by law enforcement did not accurately reflect what she had told the

officers. RP 1643 Ms. Weir did not specifically recall if David or Joseph left her residence at any time in prior to her going to bed, but believed it was a strong possibility that David left to pick up some food. RP 1640 She did not recall seeing David and Joseph leaving together. RP 1645 She would have remembered if that had happened. *Id.* Both Joseph and David told Detective Trogdon they had been at Ms. Weir's residence all night and denied participating in a drive-by shooting. RP 1355

Mr. Johnson testified that he saw Matthew Knowlton, Andrew, Dustin, Aaronessa, Alethia Acosta and two guys he didn't know at the Silverdale Taco Bell around 1:30 a.m. RP 1437-1438 He did not see any guns. RP 1442 Ms. Acosta testified as well. She verified that she was with Mr. Johnson that night, went to the Silverdale Taco Bell and saw two people that she did not know. RP 1465-1468 She did not see any guns that night. RP 1468

Jon Anderson confirmed some of Ms. Weir's statements. Mr. Anderson was present at a distance of less than one foot when Ms. Weir was questioned by law enforcement. RP 1695. Specifically he recalled that Ms. Wier told law enforcement that she went to bed around 4:00 or 5:00 o'clock in the morning, and both Joseph and David Frasquillo were at her residence when she went to bed. RP 1699 Mr. Anderson also testified that he did not hear Ms. Wier report that Joseph and David left her residence before 2:00 a.m. *Id.*

On the evening of June 23, 2008 Ms. Shaelyn Luzik spent the evening at the Knowlton residence and spent the evening watching a movie with Matthew and his brother Jacob following her work shift. RP 551. That evening they noticed cars that they thought were owned by Ms. Devin and other members of the group driving slowly by the home. RP 551, 478-82. A call to 911 was placed. *Id.* Thereafter Ms. Luzik, Matthew and Jacob resumed watching the movie and went to bed thereafter. RP 551. Around 3:00 a.m. Shaelyn and Matthew were awakened by the sound of broken glass in their bedroom. RP 489-491, 552-553. Neither of them heard gunshots. RP 489, 553. They believed that a rock had been thrown through the window and were not aware at that time firearms were involved. *Id.* Shaelyn had some superficial scratches that she treated with bandaids but otherwise neither of them were hurt. RP 554, 574.

Jacob Knowlton slept in a bedroom downstairs in a back bedroom. RP 451 He recalled hearing a bang like someone hit a wall. RP 460. He was not fully awakened until Matthew burst into his room. *Id.* Both Linda Knowlton and Keith Knowlton were present in the home and were sleeping in an upstairs bedroom. RP 416, 429. Ms. Knowlton heard what she assumed was a knocking noise and Mr. Knowlton was awakened by his wife. *Id.* Neither heard any noise similar to a gunshot. *Id.*

Deputy Moszkowicz was called to the Knowlton residence at 3:12 a.m. on June 24, 2008. Rp 768, 771 He was the first officer at the scene. Deputy Moszkowicz spoke with Matthew Knowlton. RP 775 Mr. Knowlton was under the impression that the window of the residence had been hit by rocks. RP 775-776 Neither Matthew Knowlton or Sherlayn Luzik reported any injuries. RP 776. Two windows of two rooms were damaged. RP 775-777. One room was unoccupied. RP 1199. The other room was used by Matthew and Shaelyn. *Id.* No shotgun pellets went inside the bedroom where Matthew and Shaelyn slept. RP 1180

Detective Doremus reviewed the scene at the Knowlton residence. RP 1168-1205. He could not tell if the shot had been made from someone standing or from a vehicle. RP 1202. He looked for, but did not find, any foot marks in the grass around the Knowlton residence. RP 1203 Additionally, he could not determine where the shot originated from. RP 1200

Detective Trogdon reviewed the scene at the Knowlton residence. RP 1325 Detective Trogdon acknowledged that there was no possible way to determine the manufacturer of the birdshot used at the Knowlton residence. RP 1333 He also acknowledged that it was impossible to determine if one or two shooters were involved. RP 1340 Finally, he acknowledged that it was impossible to determine if the shotguns taken

from David Frasquillo were used at the shooting at the Knowlton residence. RP 1341

Jim Harris testified at trial as well. RP 1709-1778. Mr. Harris is a private investigator. RP 1778. He conducted an investigation regarding the alleged incident. RP 1710. Using the description of events including places and time provided by State's witness RP 1710-1717 He constructed a possible time line for the jury. RP 1730-1739. He also testified in regards to the tattoos on Joseph and David Frasquillo. RP 719-1723 According to Mr. Harris, David Frasquillo does not have tattoos on either his neck or back, no tattoos involving either a smiley face or the word "hi" on his hand. RP 1720 Joseph did not have tattoos on his neck, involving a smiley face or the word "hi" either RP 1722 Mr. Harris' assessment was that the tattoos were professional in nature, with the exception of the tattoos on David Frasquillo's hands. RP 1723, 1754-1755 Mr. Harris also conducted measurements at the Knowlton home. RP 1717-1718, 1723-1724. Mr. Harris testified that in order to shoot at the lower windows of the Knowlton home from a distance of 30 feet, the shooter would need to be in the center of the driveway of the residence across the street from the Knowlton residence. RP 1724 Additionally, he testified that to be at a distance of 40 feet, the shooter would be in the garage of the residence across the street. *Id.*

Marcus Carter testified in detail regarding firearms. RP 1513-1560 He indicated that the lack of a loud noise in conjunction with the firing of a gun outside the Knowlton residence could be consistent with a low powered round. RP 1531 He also testified that the lack of pellets inside the residence was indicative of a low powered round as well. RP 1534 Mr. Carter also indicated that red and white wadding was the most common color for 12 gauge shotgun rounds. RP 1547

### **C. Argument**

#### **1. The trial court violated Mr. Frasquillo's**

**Constitutional right to due process of law by allowing a jury instruction on the doctrine of transferred intent.**

When reviewing a challenge to jury instructions, the applicable standard of review is whether the trial court abused its discretion by giving the jury instruction. See. *Connor v. Skagit Corp.*, 30 Wn.App. 725, 731, 638 P.2d 115 (1981), *aff'd* 99 Wn.2d 709, 664 P.2d 1208 (1983). Jury instructions are proper if they 1) permit each party to argue his theory of the case; 2) are not misleading and 3) properly inform the trier of fact of the applicable law. *Brown v. Spokane Cy. Fire Prot. Dist. 1*, 100 Wn.2d 188, 194, 668 P.2d 571 (1983). Reversal is required when prejudice is shown. An error is prejudicial if it affects, or presumptively effects the outcome of the trial. *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983)

In the case at hand, the trial court presented the jury with an instruction on the doctrine of transferred intent. CP 135. That instruction was presented to the jury over the objection of defense counsel. RP 1827. The inclusion of this instruction was misleading and did not properly inform the trier of fact of the applicable law in this case. Thus, the instruction was improper. The doctrine of transferred intent was not applicable to the case at hand.

In the case at hand Mr. Keith Knowlton and Ms. Linda Knowlton, nor Jacob Knowlton were not in range of any bullets. No one was aware until after the fact that someone shot at the house. Keith, Linda, and Jacob were not in a place where they could have been harmed by the bullets. No particles flew in their direction and the shot was a low powered round. RP 1534. Furthermore, no one was injured.

In support of its argument against dismissal the state cited the case of *State v. Elmi*, 138 Wn.App 306, 156 P.3d 281 (2007) as cited by the State. RP 1944 That case was reviewed by the Washington State Supreme Court: *State v. Elmi*, 166 Wash.2d 209, 207 P.3d 439 (2009) The facts of that case are distinguishable to the facts of the case at hand. In that case the defendant was charged with four counts of assault in the first degree with a deadly weapon. *Id.* The court held in that case the defendant's intent toward the targeted victim (his wife) transferred to the children who also occupied the living room into which the defendant fired

gunshots. Both the intended victim (the wife) and the children were present in the room in which gunshots were fired. *State v. Elmi*, 166 Wash.2d at 211-212. None of the individuals were harmed in that case but the children were heard screaming and crying in the recorded 911 call. *State v. Elmi*, 166 Wash.2d at 212. In that case the children were put in apprehension of harm because the children were sitting in the living room watching television at the time bullets pierced the living room window, curtains and television screen. *State v. Elmi*, 166 Wash.2d at 218-219.

In the case at hand the shots were not fired into a room where either Keith, Linda or Jacob were located. There was no testimony suggesting their rooms were damaged. The fact that the three individuals were not in the room the shots were fired into. Additionally, in this case no pellets went into any occupied room which is another factual difference to the *Elmi, supra*, case. Finally, the evidence presented suggested that Keith, Linda or Jacob were upset at the time of the incident. They were sleeping, or in Linda's situation, she was awake due to reasons other than the shooting. None of the individuals thought shots had been fired until after the incident. These important facts distinguish this case from *State v. Elmi, supra*. The doctrine of transferred intent does not apply in this case.

There are three common law definitions of assault. (1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily

injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm. Because the Knowltons were unharmed, the State must prove either the second or third definitions of assault: that Mr. Frasquillo attempted, with unlawful force, to injure them or attempted to create apprehension of fear and bodily injury.

The application of the doctrine of transferred intent to these facts results in an overly broad result. Use of the transferred intent doctrine to hold a defendant accountable for inchoate crimes like attempted assault criminalizes unintended and unaccomplished potential consequences of his/her actions. The application of the doctrine in cases where no unintended person was injured makes a defendant's potential liability limitless. See *Ford v. State*, 330 Md.682, 712, 625 A.2d 984 (Ct.App. 1993); *Ramsey v. State*, 56 P.3d 675, 681-82 (Alaska Ct.App.2002)

Under a theory of transferred intent, the State must show Keith, Linda, and Jacob Knowlton were in fact fearful of the shots and apprehended the harm. *State v. Nicholson*, 119 Wash.App. 855, 862, 84 P.3d 877 (2003) *overruled on other grounds by State v. Smith*, 159 Wash.2d 778, 154 P.3d 873; *State v. Bland*, 71 Wash.App. 345, 356, 860 P.2d 1046 (1993). In the case at hand neither Keith, Linda, or Jacob were in the room in which shots were alleged fired. Linda and Keith were on the top floor of the home. RP 420. Additionally in the case at hand the

testimony presented regarding the shots indicated that the upper floor of the home could not have been harmed by the shots. RP 1531-1534.

In this case, where no one was injured, the appropriate charge would have been drive-by shooting rather than assault in the first or second degree. In ruling on a motion to dismiss presented immediately prior to closing arguments, the Court cited the case of *State v. Ferreira*, 69 Wn.App. 465, 850 P.2d 541 (1993) in support of its denial of the motion. RP 1949. In *Ferreira* case the Court found that shots were fired into the kitchen and living room of a house at it was "likely apparent" the house was occupied. *State v. Ferreira*, 69 Wn.App 469. One person was hit by a bullet and at least twelve other bullets were fired into the home. *State v. Ferreira*, 69 Wn.App at 467. Five individuals were in the home at the time of the shooting. *State v. Ferreira*, 69 Wn.App at 571. The Court found that the convictions for assault in the second degree were warranted because the defendants intended to create apprehension or fear to the occupants of the house. *State v. Ferreira*, 69 Wn.App at 469-470. The facts of the *Ferreira* case are distinguishable from the case at hand. In the *Ferreira* case, someone was actually struck by a bullet and a large number of bullets were fired. In the present case no one was injured, only two bullets were fired, and the alleged victims charged in counts V (Keith), VI (Linda) and VII (Jacob) were not in potential danger from the bullets. Nor did the incident create apprehension since they were

not aware that a gun had been fired. The facts of this case indicate that the doctrine of transferred intent did not apply. The Court's decision to include the instruction was in error. It is clear that the inclusion of the instruction was prejudicial to Mr. Frasquillo because he was convicted for attempting to assault Jacob Knowlton even though he was not in the room where the shots were fired into or was aware of what was going on until after the incident occurred.

**2. The trial court erred in denying defense motion to dismiss Counts V, VI, and VII which alleged attempted assault against Keith Knowlton, Linda Knowlton, and Jacob Knowlton respectively when there was insufficient evidence of specific intent to commit and assault where Mr. Joseph Frasquillo did not know the alleged victims were present in the residence.**

Defense counsel sought a dismissal of Counts V, VI, and VII based on the absence of the element of intent. RP 1392-1430. The motion was denied. RP 1430-1433. The motion was renewed after all evidence had been presented. RP 1783. The motion was denied again. RP 1799.

In order to convict Mr. Frasquillo of attempted assault in the second degree as alleged in counts V, VI and VII of the information, the state was required to prove that Mr. Frasquillo specifically intended to

assault Keith, Linda or Jacob Knowlton as alleged in the information. *RCW 9A.36.021; State v. Wilson*, 125 Wn.2d 212, 218, 883 P.2d 320 (1994). In this case it was impossible to meet that burden and motion to dismiss should have been granted. There was not any evidence presented at trial indicating that Mr. Frasquillo had any issue with Keith, Linda, or Jacob Knowlton. Nor was an evidence presented indicating that Mr. Frasquillo knew that those individuals were home at the time. As argued previously in this brief, the doctrine of transferred intent does not apply. There was not sufficient evidence to indicate that either Keith, Jacob, or Linda Knowlton were in fear or apprehension of bodily harm. There was insufficient evidence of an assault toward those individuals. Consequently, the motion to dismiss counts V, VI and VII was denied in error. For the reasons argued previously in the brief, the doctrine of transferred intent did not apply. Consequently, the State could not prove the assaults alleged in Courts V, VI and VII. The trial court's refusal to dismiss the counts was an abuse of discretion. The trial court's decision to deny the repeated motion to dismiss was in error. There was no basis in law for the jury to consider those counts since intent could not be established and the doctrine of transferred intent did not apply.

**3. Mr. Frasquillo was convicted of the crimes of assault in the second degree and attempted assault in the second degree based on insufficient evidence to establish guilt beyond a reasonable doubt.**

Evidence is sufficient to support a conviction if when the evidence is viewed in the light most favorable to the prosecution, any rational trial of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992)

The crime of Assault in the second degree is defined as follows:

RCW 9A.36.021. Assault in the second degree

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

- (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or
- (b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or
- (c) Assaults another with a deadly weapon; or
- (d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or
- (e) With intent to commit a felony, assaults another; or
- (f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or

(g) Assaults another by strangulation.

The definition of accomplice liability is found in RCW 9A.08.020.

That statute states as follows:

(2) A person is legally accountable for the conduct of another person when:

(a) Acting with the kind of culpability that is sufficient for the commission of the crime, he causes an innocent or irresponsible person to engage in such conduct; or

(b) He is made accountable for the conduct of such other person by this title or by the law defining the crime; or

(c) He is an accomplice of such other person in the commission of the crime.

(3) A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he

(i) solicits, commands, encourages, or requests such other person to commit it; or

(ii) aids or agrees to aid such other person in planning or committing it.

The crime of criminal contempt contains two elements: intent to commit specific crime, and substantial step toward commission of that crime.

*RCWA 9A.28.020(1)*

In the case at hand insufficient evidence was presented to warrant a conviction for assault in the second degree either as an accomplice or as attempted assault. No evidence was presented placing Mr. Frasquillo at the Knowlton residence. The forensic evidence at the

scene did not suggest that the firearms found either in the trunk of Mr. Frasquillo's car or in the Frasquillo residence were used to shoot the windows at the Knowlton residence. RP 1341. It was also impossible to determine if one or two shooters were involved. RP 1340. It was also impossible to determine where the shot came from RP 1200.

The statements provided by the witnesses were inconsistent. Mr. Harris testified in detail regarding a time line of events of June 23- June 24. By his testimony it was impossible for the events described by the witnesses fit the time line described by those witnesses.

Ms. Devin testified that she observed tattoos on the individuals she described as the Frasquillo brothers. Her description of the tattoos were inconsistent with the description of the tattoos given by Mr. Harris. It is impossible for the events described by the State's witnesses to have occurred within the time frame presented at trial. Additionally, the testimony from the group at the parking lot was inconsistent on the subject of whether Mr. Frasquillo had a firearm in his possession.

Mr. Williams did not see any guns on the night in question. RP 962, 973.

Mr. Moore did not see any guns either. RP 1022. There was no evidence suggesting that Mr. Frasquillo entered into a plan to participate in a drive by shooting that night. Consequently, there is not sufficient evidence to prove that Mr. Frasquillo aided in the assault as an accomplice.

Furthermore, Mr. Frasquillo presented an alibi defense. Mr. Harris confirmed the consistency of Ms. Weir's statements. Mr. Harris also testified that Ms. Weir reported that she went to bed between 4:00 a.m. and 5:00 a.m., and that Joseph and David did not leave her house at any time between 1:30 and 2:00 a.m. RP 1720. Mr. Harris showed the police report generated in this matter to Ms. Wier and she was upset by the contents of the report. RP1744.

Additionally, Mr. Knowlton did not hear the shot, Ms. Knowlton thought the noise was someone knocking on the door and Matthew Knowlton thought a rock had been thrown through a window. In regards to Matthew and Shaelyn's room, no pellets went beyond the front window of that room. There was no evidence connecting the shotgun shell remnants found at the Knowlton residence to Mr. Frasquillo. The numbers found on the wadding are random. The ammunition found in the trunk of Mr. Frasquillo's vehicle did not match the numbers on the wadding found at the Knowlton residence. As Detective Trogdon testified, it was impossible to determine from the evidence found at the Knowlton residence whether the shotguns found in Mr. Frasquillo's trunk were the ones used to shoot at the Knowlton residence. RP 1341.

Even when the evidence is viewed in the light most favorable to the prosecutor, there is insufficient evidence to base an assault conviction upon. There was no evidence that Mr. Frasquillo had an issue with

anyone in the Knowlton residence. There was no evidence presented even placing Mr. Frasquillo at the Knowlton residence. Mr. Gibbs-Churchley admitted to shooting the windows at the Knowlton residence himself. RP 916. Mr. Gibbs-Churchley did not indicate that anyone else shot at the windows of the residence.

**4. Mr. Joseph Frasquillo was denied his right to a fair trial by the trial court's refusal to grant his motion to sever the charge of unlawful possession of a firearm where the consolidation of the cases precluded him from calling his co-defendant to testify on his behalf.**

The consolidation of the trial effectively impeded Mr. Frasquillo's ability to present a defense, specifically on the charge of unlawful possession of a firearm. In the case at hand only one defendant, Joseph Frasquillo, faced the charge of unlawful possession of a firearm. CP 33-43 Defense counsel for Joseph Frasquillo argued that the joinder of the defendants impaired Mr. Joseph Frasquillo's ability to present a defense. RP 4-7. Specifically, Mr. Joseph Frasquillo could not call his brother to testify regarding the unlawful possession of a firearm charge. *Id.* As indicated by David Frasquillo's counsel, David was a witness but would not be testifying for his brother in the joined trial. RP 8. Defense counsel for David Frasquillo moved to sever the count of unlawful possession of a

firearm based on a concern of potential prejudice to Mr. David Frasquillo once the jury heard of Joseph Frasquillo's prior criminal charge. RP 7-8.

Prior to trial counsel for Mr. Frasquillo renewed his objection to consolidation of the trial involving Mr. Joseph Frasquillo with the trial for Mr. David Frasquillo. RP 5. The issue of consolidation of the cases was resolved by Judge Roof prior to trial and defense counsel renewed the objection during the presentation of motions in limine. RP 4. Under CrR4.4(a)(2) : "If a defendant's pretrial motion for severance was overruled he may renew the motion on the same ground before or at the close of all the evidence. Severance is waived by failure to renew the motion." CrR4.4(a)(2). CrR 4.3(a)(1) authorizes joinder of both counts because they are of the same or similar character. A trial court's decision to consolidate cases, or refuse to sever cases if properly joined, is reviewed under an abuse of discretion standard. *State v. Harris*, 36 Wash.App. 746, 677 P.2d 202 (1984) See, e.g., *State v. Thompson*, 88 Wash.2d 518, 564 P.2d 315 (1977); *State v. Weddel*, 29 Wash.App. 461, 629 P.2d 912 (1981). Joinder must not be utilized in such a way as to prejudice a defendant. *State v. Smith*, 74 Wash.2d 744, 446 P.2d 571 (1968).

In this case a Charles Daly 12 gauge shotgun was found in a locked case in the trunk of Joseph Frasquillo's vehicle. RP 1078-1079. David Frasquillo told Detective Birkenfeld the gun in the back of the

vehicle belonged to him. RP 1084. When confronted with the firearms in the truck of the car Joseph told Detective Trogdon that the gun in the trunk belonged to his brother. RP 1349. David Frasquillo admitted that the firearms were his. RP 1355. The effect of the denial of the motion to sever was to preclude Mr. Joseph Frasquillo from calling his brother to the stand to confirm the firearms were not in Joseph's possession. The trial court erred in denying the motion to sever the count of unlawful possession of a firearm.

**5. Whether the accomplice liability instruction was constitutionally deficient because it relieved the state of its burden of proving each element of the crimes charged when the instruction improperly informed the jury they need only find Mr. Joseph Frasquillo knowingly added an assault.**

The state's theory of the case was that Mr. Frasquillo was a principal or an accomplice to the crimes of assault in either the first or second degree as to the Knowlton family and to Shaelyn Luzik. The jury instruction presented in this case (Number 24) is as follows:

A person is an accomplice in the commission of Assault in the First Degree or Assault in the Second Degree if, with knowledge that it will promote or facilitate the commission or an assault, he either:

(1) solicits, commands, encourages, or request another person to commit an assault; or

(2) aids or agrees to aid another person in planning or committing an assault. CP 344

The jury instruction on accomplice liability was defective here and relieved the state of its burden of proving each element of the crime beyond a reasonable doubt. The due process clause protects against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he is charged. *Sarausad v. Porter*, 479 F3d 671, 683 (9<sup>th</sup> Cir.) citing *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970). For accomplice liability to attach, the defendant must not merely aid in any crime, but must knowingly aid in the commission of the specific crime charged. *State v. Roberts*, 142 Wn.2d 471, 509-513, 14 P.3d 713(2000); *State v. Cronin*, 142 Wn.2d 568, 578-80, 14 P.3d 752 (2000). A faulty jury instruction which relieves the State of its burden of proving the defendant knew he was assisting the crime charged is presumed to be prejudicial error. *State v. Brown*, 147 Wn.2d 330, 58 P.3d 889 (2002). This issue is one of a constitutional magnitude that may be raised for the first time on appeal. *State v. Byrd*, 125 Wn.2d 707, 713-714, 887 P.2d 1229 (1995). An instruction that relieves the State of that burden is reversible error. *State v. Castle*, 86 Wash.App. 48, 51, 935 P.2d 656 (1997). Jury instructions that fail to define the State's burden of proof or shifts the State's burden qualify as manifest constitutional errors. *State v. Scott*, 110 Wash.2d 682, 866 n. 5, 757 P.2d 492 (1988). Errors of

constitutional magnitude may be raised for the first time on review. RAP 2.5.

In this case the jury instruction allowed the jury to convict Joseph Frasquillo of first or second degree assault if the jury found that he knew his conduct would promote the commission of an assault. CP 344 . That jury instruction was in error as it does not inform the jury that in order to find guilt, Mr. Frasquillo must have had knowledge of the particular crime charged. The instruction refers to an assault in a generic sense without specifically identifying the type of assault that the jury must find that Mr. Frasquillo assisted with. In order to obtain a conviction for assault under an accomplice liability theory, the state must prove that Mr. Frasquillo aided in the commission of a specific crime. Jury instruction number 24 was not a proper jury instruction because the document relieved the State of proving that Mr. Frasquillo possessed knowledge that he was aiding in the specific crime of assault in the second degree. This was a significant error that denied Mr. Frasquillo the right to a fair trial. As previously discussed in this brief the evidence linking Mr. Frasquillo to the shooting at the Knowlton residence was minimal at best. The evidence presented failed to establish that Mr. Frasquillo knew of or participated in a plan to commit an assault in the second degree. Despite the lack of evidence, the jury convicted Mr. Frasquillo of being an accomplice to an assault. It is unlikely that the jury would have reached the same result if they had been correctly advised of their fact finding role.

**6. Mr. Joseph Frasquillo's double jeopardy rights were violated when the trial court denied the motion to dismiss the counts involving assault in the first degree with prejudice when the jury chose to convict Mr. Joseph Frasquillo of assault in the second degree.**

The State presented argument regarding the jury instructions during closing argument. RP 1932-1933, 1995. Initially the State set forth assault in the second degree as a lesser charge and suggested to the jury if they felt the State had not met its burden in regards to assault in the first degree, the jury should then consider assault in the second degree.

RP 1932-1933. Later in closing argument, the State outlined a procedure for the jury when considering the charges of assault as follows:

“State's charged two counts of assault in the first degree against the two victims in the bedroom. Take into consideration those counts first. If you don't find those, you go to the next counts for those same victims, and that's assault in the second degree. Then we have three counts of attempted assault in the second degree for all other individuals in the house.” RP 1995

The jury instructions themselves also instructed the jury to first consider the charges of assault in the first degree and if either the jury found Mr. Frasquillo not guilty, or they could not reach a unanimous verdict the jury was to turn to the charge of assault in the second degree. CP356-358. Multiple convictions for the same offense are prohibited by the double jeopardy clause. *Brown v. Ohio*, 432 U.S. 161, 165 97 S.Ct. 2221,

53 L.2d 187 (1977); *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), *overruled on other grounds*, *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). Under the Fifth Amendment to the United States Constitution:

Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.

Under Article 1, Section 9 of the Washington State Constitution:

No person shall....be twice put in jeopardy for the same offense.

The Washington State Constitution double jeopardy clause prohibits the Courts from imposing more than one punishment for the same offense. *Brown v. Ohio*, 432 U.S. at 166. The court may not enter multiple convictions for the same criminal offense on double jeopardy grounds. *State v. Freeman*, 153 Wn.2d 765, 770-771, 109 P.3d 753 (2005); *State v. Vladovic*, 99 Wn.2d 413, 422, 662 P.2d 853 (1983).

In the case at hand the jury considered the evidence presented and determined that a verdict could not be reached on assault in the first degree. The jury then considered the charge of assault in the second degree as advised by the prosecutor and the jury instructions themselves. The jury found Mr. Frasquillo guilty of the lesser charge. Both charges of assaults were based on the same event, the shooting at the Knowlton residence. Since the jury was able to reach a decision on the charge of assault in the second degree, the state should be precluded from re-trying

Mr. Frasquillo on the charge of assault in the first degree. To do otherwise would be exposing Mr. Frasquillo to multiple punishment for the same offense. If the court allows a re-trial of this matter, the State should be precluded from proceeding on a charge of assault in the first degree.

**7. The trial court violated Mr. Frasquillo's right against double jeopardy by imposing multiple firearm enhancements when a firearm was an element of the offense.**

Mr. Frasquillo requests the court find the firearm sentence enhancement imposed violate double jeopardy because the offenses he was convicted for include a firearm as the element of the offense. Although in the case of *State v. Kelly*, 146 Wn.App. 370, 189 P.3d 853 (2008) the court held that a firearm enhancement does not necessarily violate double jeopardy, the case has been accepted for review by the Washington State Supreme Court. *State v. Kelly*, 165 Wn.2d 1027, 203 P.3d 379 (2009). Mr. Frasquillo wishes to preserve review of this issue until this issue is decided by the Washington State Supreme Court.

**D. Conclusions**

For the reasons cited above, Mr. Frasquillo respectfully requests the court to reverse the conviction entered in this matter.

Respectfully submitted this 15<sup>th</sup> day of December, 2009.

A handwritten signature in black ink, appearing to read 'MBA', written over a horizontal line.

MICHELLE BACON ADAMS  
WSBA No. 25200  
Attorney for Appellant

NO. 39128-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH FRASQUILLO, JR.,  
DAVID A. FRASQUILLO,

Appellants.

CERTIFICATION OF MAILING

I, JEANNE L. HOSKINSON, declare under penalty of perjury under the laws of the State of Washington that the following statements are true and based on my personal knowledge, and that I am competent to testify to the same.

That on this day I had the Brief of Appellant Joseph Frasquillo, Jr. in the above-captioned case faxed, hand-delivered or mailed as follows:

**Copy Hand Delivered To:**

Mr. Randall Sutton  
Kitsap County Prosecuting Attorney's Office  
614 Division Street, MS-35  
Port Orchard, WA 98366

**Copy Mailed To:**

Joseph Frasquillo, Jr. / DOC #329592  
c/o Washington State Penitentiary  
1313 North 13th Avenue  
Walla Walla, WA 99362

DATED this 15th day of December, 2009, at Port Orchard, Washington.

  
JEANNE L. HOSKINSON  
Legal Assistant

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I, JEANNE L. HOSKINSON, declare under penalty of perjury under the laws of the State of Washington that the following statements are true and based on my personal knowledge, and that I am competent to testify to the same.

That on this day I had the Brief of Appellant Joseph Frasquillo, Jr. in the above-captioned case faxed, hand-delivered or mailed as follows:

**Original Brief Hand-Delivered To:**

Clerk of Court  
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402

DATED this 15th day of December, 2009, at Port Orchard, Washington.



MICHELLE BACON ADAMS

BY \_\_\_\_\_  
STATE OF WASHINGTON  
DEPUTY

09 DEC 15 PM 4:53

COURT OF APPEALS  
DIVISION II