

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON

Respondent/Cross-Appellant,

v.

ALFRED GALINDO JR.,

Appellant/Cross-Respondent.

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

The Honorable Judge Linda Tompkins

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Alfred Galindo received ineffective assistance of counsel when his attorney failed to request jury instructions on the lesser degree crime of second-degree assault. Alternatively, there was not sufficient evidence to support his conviction for first-degree assault because there was no evidence Mr. Galindo intended to inflict great bodily harm.

B. ASSIGNMENTS OF ERROR

1. The court erred by failing to give second-degree assault jury instructions.
2. Defense counsel was ineffective for failing to request second-degree assault jury instructions.
3. There was insufficient evidence of intent to inflict great bodily harm to support the first-degree assault conviction.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether defense counsel was ineffective for failing to request instructions on the inferior crime of second-degree assault.

- (a) Mr. Galindo was entitled to instructions on second-degree assault because the jury could have found that he committed an assault with a deadly weapon without intent to inflict great bodily harm.
- (b) Mr. Galindo was prejudiced by insufficient jury instructions as a result of defense counsel's deficient representation.
 - i. Counsel's performance was deficient.
 - ii. Counsel's deficient performance prejudiced the defendant.

Issue 2: Whether there was sufficient evidence that Mr. Galindo intended to inflict great bodily harm.

D. STATEMENT OF THE CASE

In the middle of the night on February 8, 2009, Alfred Galindo received messages from his girlfriend Kim Brown that she was being held against her will because he owed someone money. (2RP¹ 38, 39, 45, 59, 62, 74-75, 97; 1RP 219-20) He also received a phone call from the mother of one of Ms. Brown's friends, Suzanne Wheeler, telling Mr. Galindo that she had seen Ms. Brown and Ms. Brown needed his help. (2RP 38-39, 45)

Mr. Galindo drove around north Spokane trying to locate Ms. Brown and the small white car he thought she was held in. (2RP 83-84) While doing so, he saw a single white car in a closed Safeway parking lot on Francis and drove closer to try to see if Ms. Brown was in it. (2RP 85) As he approached, the car unexpectedly sped off and a chase ensued whereby Mr. Galindo followed the vehicle at high speeds and repeatedly rammed into the back side of it to try to get it to stop. (2RP 86-88, 103; 1RP 36-37, 56, 59, 60, 62, 163-64) Mr. Galindo also pointed a toy gun out the window while yelling at the driver to stop the vehicle. (*Id.*; 1RP 41, 165-66)

¹ "1RP" refers to the initial volume of the trial transcribed by Terry Sperry beginning August 31, 2009, along with sentencing on October 29, 2009. "2RP" refers to the second volume of the trial transcribed by Crystal Hicks for September 2 and 4, 2009.

Unfortunately, Ms. Brown was not in the vehicle, and Mr. Galindo later learned that the hostage situation was a mere ruse put on by his girlfriend and her friends. (2RP 59) Meanwhile, the car that Mr. Galindo chased was actually driven by Jonathen Scarpuzzi with passengers Daniel Chapin and Molly Talkington, who were simply out for the night and did not have any idea who Mr. Galindo was or why he was chasing them. (1RP 32-34, 56) They were spooked when Mr. Galindo first approached their vehicle and quickly drove away. (1RP 32-36, 163) They soon became afraid for their lives when Mr. Galindo appeared to pursue them (1RP 51-52, 61, 167), even though Mr. Galindo testified he was not trying to hurt anyone in the vehicle and was only trying to stop it to get to Ms. Brown (2RP 92-93, 103-04).

Following a jury trial, Mr. Galindo was found guilty of three counts of first-degree assault. (CP 40-42) He was sentenced to the low end of the standard range at 138 months for count one and 93 months for each of the remaining counts. (1RP 235-36, 246) The court decided to run the sentences concurrently (thereby creating an exceptional sentence downward) in light of the circumstances, the defendant's chemical dependency issues and the court's opinion that consecutive sentences would be unfair where Mr. Galindo had committed a single violent action

with his vehicle. (IRP 247-48) Both Mr. Galindo and the State timely appealed.

E. ARGUMENT

Issue 1: Whether defense counsel was ineffective for failing to request instructions on the inferior crime of second-degree assault.

Viewed in a light most favorable to the defendant, as is required for this issue, the evidence showed that Mr. Galindo rammed into the opposing vehicle in order to get the car to pull over and not with the intent to inflict great bodily harm. This evidence warranted instructions on the lesser degree crime of second-degree assault, and defense counsel was ineffective for failing to request the appropriate instructions.

- a. Mr. Galindo was entitled to instructions on second-degree assault because the jury could have found that he committed an assault with a deadly weapon without intent to inflict great bodily harm.

Pursuant to RCW 10.61.003, a defendant can be found guilty of a crime that is an inferior degree of the crime charged. A defendant is entitled to an instruction on this lesser degree crime if: “(1) the statutes for both the charged offense and the proposed inferior degree offense ‘proscribe but one offense’; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense.” *State v. Fernandez-Medina*, 141 Wn.2d 448,

454, 6 P.3d 1150 (2000) (quoting *State v. Peterson*, 133 Wash.2d 885, 889, 948 P.2d 381 (1997)).

The first two legal prongs are easily satisfied here. It is well settled that second-degree assault is an inferior degree of first-degree assault and that they both proscribe but one offense: assault. *Fernandez-Medina*, 141 Wn.2d at 455-56 (citing *State v. Foster*, 91 Wn.2d 466, 472, 589 P.2d 789, 794 (1979)). *Accord State v. Breitung*, 155 Wn. App. 606, 613-614, 230 P.3d 614 (2010).

Having satisfied the legal prongs, the next issue is whether the factual prong was also met so as to warrant the second-degree assault instruction. The question is not whether there was sufficient evidence to support the greater degree crime. Rather, “[a] requested jury instruction on a lesser included or inferior degree offense should be administered ‘if the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.’” *Fernandez-Medina*, 141 Wn.2d at 456 (quoting *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)). In other words, the instruction on the inferior crime should be given when evidence raises an inference that the lesser offense was committed to the exclusion of the charged offense. *Id.* at 455. In making this determination, the court must consider all evidence presented at trial by either party. *Id.* at 456. And the evidence must be viewed in a light

most favorable to the party requesting the instruction. *Fernandez-Medina*, 141 Wn.2d at 455-56 (evidence viewed in light most favorable to defendant who requested instruction below); *State v. Ward*, 125 Wn. App. 243, 248, 104 P.3d 670 (2004) (evidence viewed in light most favorable to defendant whose attorney failed to request the instruction below).

For purposes of this case, first-degree assault can be proven where, with the intent to inflict great bodily harm, a person assaults another with a deadly weapon such as a vehicle. RCW 9A.36.011(1)(a) (emphasis added); RCW 9A.04.110(6) (defining vehicle as deadly weapon based on manner of use). On the other hand, second-degree assault can be established where, even without intent to inflict great bodily harm, a person assaults another with a deadly weapon. RCW 9A.36.021(1)(c).² “Washington recognizes three common law definitions of assault: (1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an unlawful touching with criminal intent; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is incapable of inflicting that harm.” *State v. Stevens*, 158 Wn.2d 304, 311, 143 P.3d 817, 821 (2006) (citing *Clark v. Baines*, 150 Wn.2d 905, 909 n. 3, 84 P.3d 245 (2004)).

² “Any assault with a deadly weapon is at least a second degree assault.” *State v. Walther*, 114 Wn. App. 189, 192, 56 P.3d 1001 (2002). Thus, as will be further addressed below, it was unreasonable and inaccurate for defense counsel to recommend the instruction on fourth-degree assault since, if any assault occurred, it occurred with use of the vehicle.

Here, the evidence viewed, as required, in a light most favorable to Mr. Galindo, showed that he at most committed second-degree assault. Mr. Galindo admitted that he intentionally rammed his vehicle into the opposing vehicle. And the three occupants of that vehicle all testified that this caused them great apprehension and indeed fear for their lives. Thus, regardless of whether Mr. Galindo intended to inflict harm, he did create the apprehension that would meet the definition of assault. And he did so with intentional use of a vehicle, which, based on the manner of use, can constitute a deadly weapon for purposes of second-degree assault.

But, importantly, Mr. Galindo and several defense witnesses established that Mr. Galindo did not intend by his misguided actions to inflict great bodily harm on the vehicle occupants. He was simply trying to get the vehicle to pull over. As Mr. Galindo pointed out, he would have had prime opportunity to inflict great bodily harm, if that was his intention, while the opposing vehicle was parked. Or, he could have rammed the side of the vehicle to push it off the road if his intention was to cause great bodily harm. But this was not his intention. His intention by ramming the back side of the car was to get it to pull over so he could try to help Ms. Brown. Mr. Galindo had a right to have his theory submitted to the jury with proper instruction. *Fernandez-Medina*, 141 Wn.2d at 453-56. The evidence supported an instruction on the lesser

degree crime of second-degree assault, to wit, assault with a deadly weapon. It was error not to so instruct the jury.

b. Mr. Galindo was prejudiced by insufficient jury instructions as a result of defense counsel's deficient representation.

Every criminal defendant is constitutionally guaranteed the right to effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. I, §22; *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Defense counsel is ineffective where (i) counsel's performance was deficient and (ii) the deficiency prejudiced the defendant. *Thomas*, 109 Wn.2d at 225-26. To meet the first prong, counsel's representation must have fallen below an objective standard of reasonableness. *Id.* at 226. There is a strong presumption of reasonableness; if defense counsel's conduct can be fairly characterized as legitimate trial strategy or tactics, it does not constitute deficient performance. *Id.*; *Breitung*, 155 Wn. App. at 618 (internal citations omitted). The second prong—prejudice—requires the defendant to show a reasonable probability that the outcome would have been different absent counsel's deficient performance. *Id.*

i. Counsel's performance was deficient.

“The decision to not request an instruction on a lesser included offense is not ineffective assistance of counsel if it can be characterized as

part of a legitimate trial strategy to obtain an acquittal.” *Breitung*, 155 Wn. App. at 618 (quoting *State v. Hassan*, 151 Wn. App. 209, 218, 211 P.3d 441 (2009)). “But defense counsel can be ineffective where his tactical decision to pursue an all or nothing approach, by not requesting a lesser included instruction, is objectively unreasonable.” *Id.* “We consider three factors ‘to gauge whether a tactical decision not to request a lesser included offense instruction is sound or legitimate: (1) The difference in maximum penalties between the greater and lesser offenses; (2) whether the defense’s theory of the case is the same for both the greater and lesser offenses; and (3) the overall risk to the defendant, given the totality of the developments at trial.’” *Id.* at 619 (quoting *State v. Grier*, 150 Wn. App. 619, 640-41, 208 P.3d 1221 (2009), *review granted*, 167 Wn.2d 1017 (2010); and citing *State v. Pittman*, 134 Wn. App. 376, 387-88, 166 P.3d 720 (2006); *Ward*, 125 Wn. App. at 249-51).

The first criteria – disparity in penalties between first- and second-degree assault– demonstrates that counsel’s failure to request the lesser degree instructions was unreasonable. A conviction of second-degree assault would have exposed Mr. Galindo, based on five prior convictions and two other current offenses, to a standard sentencing range of 63 to 84 months. *See* RCW 9.94A.525(8) (offender score calculations); RCW 9.94A.510 (sentencing grid); RCW 9.94A.515 (table of seriousness

levels/crimes). On the other hand, the three first-degree assault convictions, if consecutively imposed,³ exposed Mr. Galindo to a standard range sentence of 324 to 430. Ultimately, Mr. Galindo was only sentenced to 138 months of confinement with his exceptional sentence downward, but this was still twice the sentence he should have received if convicted of three counts of second-degree assault and sentenced within the standard range. In *Breitung, supra*, there was only a five-month disparity in sentences, yet this, along with other differences in the possible sentences, was great enough to question the reasonableness of counsel’s “all or nothing” defense approach. *Breitung*, 155 Wn. App. at 618. Certainly in this case a five year rather than 11 year sentence warrants putting the second-degree assault option before the jury. Counsel was unreasonable for failing to do so and creating an unreasonable risk to the defendant.

The second and third criteria— effect of the defense theory in the case and risk to defendant— also show that counsel’s failure to request the inferior second-degree assault instruction in this case was unreasonable.

“Where a lesser included offense instruction would weaken the

³ The trial court exercised its discretion and imposed an exceptional sentence downward by running the three sentences concurrently at the low-end of the standard range for one of the counts of first-degree assault, for a total period of confinement of 138 months. *See In re Mulholland*, 161 Wn.2d 322, 166 P.3d 677 (2007) (interpreting the rule for multiple current serious violent offenses, which generally requires consecutive sentences (RCW 9.94A.589(1)(b)), and holding that the trial court still has discretion to impose concurrent, exceptional sentences).

defendant's claim of innocence, the failure to request a lesser included offense instruction is a reasonable strategy." *Breitung*, 155 Wn. App. at 616 (quoting *Hassan*, 151 Wn. App. at 220). But where the lesser degree instruction would not diminish the defense's theory and is consistent with the evidence, it is unreasonable to not make the request. *See id.* at 616-17; *Ward*, 125 Wn. App. at 249-50.

For example, in *State v. Ward, supra*, the defendant presented a self-defense theory to his charge of second-degree assault. 125 Wn. App. at 249-50. But the Court noted that such a defense would have been a complete defense to second-degree assault or the lesser included offense. *Id.* "If the jury did not believe [the defendant] acted unlawfully, he would have been acquitted of both the greater and lesser offenses." *Id.* at 249. Because the instruction on the lesser included would not have weakened the self-defense theory for either crime, the Court found the self-defense "all or nothing" approach "very risky" and unreasonable. *Id.* at 250. The Court reversed and remanded for a new trial due to counsel's deficient performance in failing to request the lesser included offense instruction. *Id.* at 251.

Similarly, defense counsel in *State v. Breitung* was unreasonable in not requesting the inferior degree instruction given the defense theory and the evidence presented in that case. There, the defense theory was a

general denial that the State had met all the elements of the charged second-degree assault. *Breitung*, 155 Wn. App. at 619. But the defendant admitted when testifying to at least fourth-degree assault. *Id.* The Court found that it was unreasonable for defense counsel to utilize the “all or nothing” approach. *Id.* “[W]here there is overwhelming evidence that the defendant is guilty of some offense, such strategy may be unreasonably risky.” *Id.* at 620 (citing *Grier*, 150 Wn. App. at 643). ““Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction.”” *Grier*, 150 Wn. App. at 643 (quoting *Keeble v. U.S.*, 412 U.S. 205, 212-13, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973)). The Court held that counsel’s failure to request the lesser included offense instructions was not a legitimate strategy under the circumstances and, thus, counsel’s performance was deficient. *Breitung*, 155 Wn. App. at 620.

Here, defense counsel presented two theories. First, counsel argued that Mr. Galindo acted lawfully in defense of another (i.e. that Mr. Galindo’s force was reasonable in his efforts to help Ms. Brown). And, second, counsel argued that the State did not establish all of the elements of first-degree assault beyond a reasonable doubt (i.e. Mr. Galindo did not intend to inflict great bodily harm).

As to the first defense theory, Mr. Galindo's case is on point with *State v. Ward, supra*. If the jury believed that Mr. Galindo had acted in lawful defense of another, it would have acquitted him of first-degree assault and the lesser degrees of that crime. Thus, instructing on the lesser degree would have cost Mr. Galindo nothing for purposes of this defense theory. There was no risk by instructing on second-degree assault.

As to the second defense theory, this case is on point with *Breitung, supra*. Mr. Galindo did admit that he intentionally rammed his vehicle into the opposing car, and the occupants of that vehicle testified about their great fear and apprehension as a result. In other words, like in *Breitung*, Mr. Galindo did admit to an assault. In fact, he admitted to an assault with a deadly weapon (i.e. a vehicle), which constitutes second-degree assault. Given these circumstances, it was unreasonable to expect the jury to ignore the fact that Mr. Galindo had used his vehicle intentionally as a deadly weapon and simply acquit him of the first-degree assault charges or convict him of fourth-degree assault with a *nondeadly* weapon. Even if Mr. Galindo did not intend to inflict great bodily harm, the jury would have been inclined to convict Mr. Galindo of some offense with a deadly weapon given the manner in which he was driving the vehicle.

Simply offering the jury the fourth-degree assault alternative was virtually the same as an all or nothing approach. Fourth-degree assault, a gross misdemeanor, does not involve a deadly weapon, was not consistent with the evidence presented by either party and would not hold the defendant accountable for his admitted actions from a jury's perspective. "A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another." RCW 9A.36.041(1) (emphasis added). "An instruction on fourth degree assault is proper when the evidence supports 'an inference that the assault was committed *only* with a *nondeadly weapon*.'" *Breitung*, 155 Wn. App. at 614 (quoting *State v. Winings*, 126 Wn. App. 75, 87, 107 P.3d 141 (2005)). The defense theory that Mr. Galindo could be convicted of fourth-degree assault was incorrect given the defendant's admission to assault with a deadly weapon. It was actually improper to even instruct on fourth-degree assault since it was contrary to the evidence presented by both parties. This unsupported defense theory did nothing for Mr. Galindo, and the second-degree assault instructions would have exposed him to no additional risk.

In sum, given the evidence in this case, the jury should have been instructed on second-degree assault. Failure to request the second-degree

assault instruction as the inferior degree crime was not a legitimate trial strategy. Counsel's performance was inadequate.

ii. Counsel's deficient performance prejudiced the defendant.

Having shown that the second-degree assault instructions should have been requested and given to the jury, the remaining issue is whether this deficiency prejudiced the defendant. In other words, there must be "a reasonable probability that, but for defense counsel's deficient performance, the trial results would have differed." *Breitung*, 155 Wn. App. at 617-18 (quoting *Grier*, 150 Wn. App. at 644).

Here, like in *Ward*, *Fernandez-Medina*, *Grier* and *Breitung*, *supra*, defense counsel's failure to request the lesser second-degree assault instructions prejudiced Mr. Galindo. "[T]he lack of a warranted lesser included instruction 'puts in an untenable position a jury that is convinced beyond a reasonable doubt that [the defendant] has committed a crime'; that is, 'the jury wants to hold the defendant culpable and to convict h[im] of some crime, but is given only one option, here, [first] degree [assault].'" *Breitung*, 155 Wn. App. at 618 (quoting *Grier*, 150 Wn. App. at 645).

The jury in this case rejected the "defense of another" theory, and Mr. Galindo admitted he intentionally rammed the opposing car with his vehicle, thus obliterating the fourth-degree assault option. Yet the jury was inclined to hold Mr. Galindo accountable for some degree of assault

with a deadly weapon. Given the lack of evidence showing intent to inflict great bodily harm, and the evidence that did support second-degree assault with a deadly weapon, Mr. Galindo was prejudiced by the missing instructions on second-degree assault. “The appropriate remedy is reversal and remand for a new trial on the assault counts.” *Breitung*, 155 Wn. App. at 618; *Fernandez-Medina*, 141 Wn.2d at 462.

Issue 2: Whether there was sufficient evidence that Mr. Galindo intended to inflict great bodily harm.

Mr. Galindo is entitled to a new trial given the inadequate instructions addressed above. Alternatively, his conviction should be reversed based on insufficient evidence to support the first-degree assault conviction because there was insufficient evidence that he intended to inflict great bodily harm.

“In reviewing the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Anderson*, 72 Wn. App. 453, 457-58, 864 P.2d 1001 (1994) (citing *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993)). “When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.*

A person is guilty of assault in the first degree if, with intent to inflict great bodily harm, he assaults another with a deadly weapon. RCW 9A.36.011(1)(a). The pertinent issue here is whether, when viewed in a light most favorable to the State, there was sufficient evidence that Mr. Galindo intended to inflict great bodily harm.

“The mens rea for first degree assault is the specific intent to inflict great bodily harm. Specific intent is defined as intent to produce a specific result, as opposed to intent to do the physical act that produces the result.” *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). “Specific intent cannot be presumed, but it can be inferred as a logical probability from all the facts and circumstances.” *State v. Pierre*, 108 Wn. App. 378, 386, 31 P.3d 1207 (2001) (citing *State v. Louther*, 22 Wn.2d 497, 502, 156 P.2d 672 (1945)). “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. Ferreira*, 69 Wn. App. 465, 468-69, 850 P.2d 541 (1993) (quoting *State v. Woo Won Choi*, 55 Wn. App. 895, 906, 781 P.2d 505 (1989), *review denied*, 114 Wn.2d 1002 (1990)). *See also Anderson*, 72 Wn. App. at 458. Finally, while the defendant need not intend to inflict great bodily harm on each specific victim, he must still

intend to inflict great bodily harm on some person that can then at least be transferred to the unintended victim(s). *Elmi*, 166 Wn.2d at 216-18.

Here, there was no evidence that Mr. Galindo intended to inflict great bodily harm on anyone. The State commented in closing argument that it was not required to prove any motive, which, “technically speaking,” might be true. However, the State was required to prove more than intentional ramming of a vehicle. It had to prove specific intent to inflict great bodily harm. This can be proven by inferences from the evidence, which often tie to motives, prior relationships and the manner of any wound imposed. But in this case, no inference could be made from any evidence presented that Mr. Galindo intended to cause anyone great bodily harm.

For demonstration purposes, intent has been inferred from the manner and act of inflicting the wound where a defendant repeatedly kicked a bleeding and unconscious store clerk in the head to the point of severe and permanent brain damage. *Pierre*, 108 Wn. App. at 383-87. And intent was inferred in *State v. Woo Won Choi*, 55 Wn. App. at 906-07, where there had been a prior altercation between the defendant and victim. *See also State v. Mitchell*, 65 Wn.2d 373, 374, 397 P.2d 417 (1964) (evidence of intent established based on defendant’s previous threats and tumultuous prior meretricious relationship). Similarly, intent

to inflict great bodily harm was inferred from the circumstances where an inmate assaulted an officer in his attempt to escape. *Anderson*, 72 Wn. App. at 457. *Accord*, *State v. Baker*, 136 Wn. App. 878, 151 P.3d 237, *review denied*, 162 Wn.2d 1010 (2007).

All of the aforementioned cases, however, had a common thread that is absent here. The intent of the defendants listed above could all be inferred from their prior relationships with the victims or some motive as to why the defendant proceeded with his actions in each case, either for purposes of escaping, a continuing conflict in some relationship or pursuing some other crime. Here, there is no such inference of specific intent. This case is more akin to *State v. Ferreira*, 69 Wn. App. 465. In *Ferreira*, the defendant or an accomplice shot from their vehicle at an occupied home, wounding a child inside, and the defendant was convicted of first-degree assault. *Id.* The Court found that the defendant did not necessarily know who was in which room being shot at. *Id.* at 469-70. Accordingly, because there was insufficient evidence of specific intent to inflict great bodily harm on anyone, the defendant was only liable as an accomplice for second-degree assault (assault with a deadly weapon). *Id.*

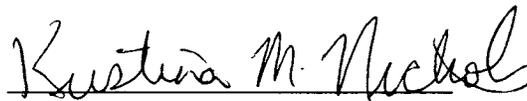
The State was required to prove each element of first-degree assault beyond a reasonable doubt. But there was no evidence that Mr. Galindo intended to inflict great bodily harm on anyone. There was no

prior relationship, motive or other circumstances surrounding the incident from which specific intent could be inferred. As such, the conviction for first-degree assault should be reversed for insufficient evidence.

F. CONCLUSION

Mr. Galindo received ineffective assistance when his attorney failed to request the lesser-degree offense instructions for second-degree assault. His conviction should be reversed and the matter remanded for a new trial. Alternatively, Mr. Galindo's first-degree assault conviction should be reversed because there is not sufficient evidence that he intended to inflict great bodily harm.

Respectfully submitted this 22 day of July, 2010.



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COURT OF APPEALS
DIVISION III
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OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent/)
Cross Appellant)
vs.) COA NO. 28632-1-III
)
ALFRED GALINDO JR.) PROOF OF SERVICE
Defendant/Appellant)
Cross Respondent)
_____)

I, Kristina M. Nichols, do hereby certify under penalty of perjury that on July 22, 2010,
I mailed by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the
Appellant's Opening Brief to:

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