

**FILED**

JUN 17, 2013

Court of Appeals  
Division III  
State of Washington

NO. 31259-3-III

COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION III

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**STATE OF WASHINGTON,**

Plaintiff/Respondent,

V.

**BONIFACIO ALCANTAR-MALDONADO,**

Defendant/Appellant.

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**APPELLANT'S BRIEF**

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## **ASSIGNMENTS OF ERROR**

1. The State failed to prove, beyond a reasonable doubt, each and every element of the offense of first degree assault as charged in Count II of the Amended Information. (CP 149)

2. The sentencing court's determination that a motor vehicle was used in connection with the crime is error.

## **ISSUES RELATING TO ASSIGNMENTS OF ERROR**

1. Did the State present sufficient evidence of Bonifacio Alcantar-Maldonado's "intent to inflict great bodily harm" on Eudis Mendoza?

2. When a firearm is used in an assault, but is not fired, has only the offense of second degree assault with a deadly weapon been committed?

3. Did the sentencing court err by determining that a motor vehicle was used in the commission of the offense?

## STATEMENT OF CASE

Eudis Mendoza met Twilight Krusow at a nightclub near the end of April 2012. Ms. Krusow and Mr. Alcantar-Maldonado were separated at the time. (Adams RP 22, l. 24 to RP 23, l. 8; RP 83, ll. 1-4)

Mr. Mendoza was at Ms. Krusow's duplex on the evening of May 8, 2012. They had been watching a movie. They then went into her bedroom. While in the bedroom they heard a loud knock/hit on the door. (Adams RP 24, ll. 6-17; RP 25, ll. 12-15; RP 89, ll. 2-12)

When Ms. Krusow answered the door she left the chain lock in place. She saw Mr. Alcantar-Maldonado outside. She refused to let him in. He kicked down the door. (Adams RP 89, ll. 21-25; RP 268, ll. 1-10)

Mr. Alcantar-Maldonado went directly to the bedroom. Ms. Krusow saw that he had a gun in his hand. Mr. Alcantar-Maldonado pointed the gun at Mr. Mendoza and told him to leave. (Adams RP 26, ll. 3-12; RP 90, ll. 14-15; RP 91, ll. 22-25)

As Mr. Mendoza left the bedroom he was hit in the face with the gun. Ms. Krusow tried to intervene and was either hit or knocked onto the bed. (Adams RP 27, ll. 4-13; ll. 21-24; RP 92, ll. 2-7; ll. 16-18)

When Mr. Mendoza got to the living room he attempted to pick up his cell phone and keys. Mr. Alcantar-Maldonado kicked him in the face. (Adams RP 28, ll. 6-9; RP 93, ll. 12-14; RP 270, ll. 11-19)

Mr. Mendoza claims he was hit with the gun as he was leaving. He was pushed into the edge of the door. His left eye closed up. (Adams RP 28, ll. 12-15; RP 29, ll. 15-23)

As Mr. Mendoza reached his car he was again hit by Mr. Alcantar-Maldonado. (Adams RP 30, ll. 11-15; RP 40, ll. 11-14; RP 94, l. 20 to RP 95, l. 1)

Mr. Mendoza's injuries included a cut on his cheek, a broken nose, fracture of his eye socket and other facial fractures. He was seen by Dr. Harn at Lourdes Medical Center. Sutures were needed for the cut. He was sent home with pain medications and antibiotics. Follow-up surgery was required. (Adams RP 33, l. 18 to RP 34, l. 13; RP 126, ll. 11-12; RP 129, ll. 17-20; RP 130, ll. 9-11; ll. 16-25; RP 131, ll. 2-8; RP 132, ll. 4-5)

Detective Parramore of the Pasco Police Department interviewed Mr. Alcantar-Maldonado at the Franklin County Jail after *Miranda*<sup>1</sup> warnings were given. (King RP 6, l. 24 to RP 7, l. 5; RP 8, ll. 10-16; ll. 19-21; Adams RP 177, ll. 8-14)

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966).

Mr. Alcantar-Maldonado advised Detective Parramore that he was “pissed off” since Ms. Krusow had some guy in the house and his daughter was present. (Adams RP 183, ll. 2-11)

Mr. Alcantar-Maldonado admitted that he had a gun. He admitted that he kicked in the front door. He admitted kicking Mr. Mendoza in the head while in the living room. (Adams RP 183, ll. 14-24; RP 185, ll. 6-8)

Mr. Alcantar-Maldonado denied using the gun as a weapon. He claims that he punched Mr. Mendoza in the head each time. He claimed that any blood on the gun had dripped from Mr. Mendoza’s face. (Adams RP 184, ll. 15-20; RP 188, ll. 14-18; RP 271, ll. 15-16; RP 291, ll. 20-23)

Mr. Alcantar-Maldonado’s gun was seized and placed in evidence. It was later tested at the Washington State Patrol Crime Lab. Buccal swabs were obtained from Mr. Mendoza. DNA analysis established that there was blood on the gun and it was Mr. Mendoza’s. (Adams RP 194, ll. 10-11; RP 195, ll. 3-6; RP 220, ll. 2-9; RP 229, ll. 17-18; RP 231, l. 17 to RP 232, l. 8)

An Information was filed on May 10, 2012 charging Mr. Alcantar-Maldonado with first degree assault. A firearm enhancement was included. (CP 162)

The jury trial was continued to September 12, 2012 pursuant to a continuance and waiver filed on June 19, 2012. (CP 151)

A CrR 3.5 hearing was conducted prior to trial. Findings of Fact and Conclusions of Law were entered on September 13, 2012. (CP 144)

An Amended Information was filed prior to trial. It added counts of first degree burglary and second degree assault. Both counts carried a firearm enhancement.

The jury only found Mr. Alcantar-Maldonado guilty of first degree assault. A special verdict was entered that he was armed with a firearm at the time. (CP 24; CP 25)

Judgment and Sentence was entered on October 16, 2012. The sentencing court determined that a motor vehicle had been used in connection with the offense. (CP 7)

Mr. Alcantar-Maldonado filed his Notice of Appeal on November 5, 2012. (CP 5)

### **SUMMARY OF ARGUMENT**

The evidence presented at trial only establishes the offense of second degree assault. The State failed to establish, beyond a reasonable doubt, that Mr. Alcantar-Maldonado intended to inflict “great bodily harm” on Mr. Mendoza.

When a firearm is used in an assault, but is not fired, it is only a deadly weapon and cannot be used to elevate second degree assault to first degree assault.

The facts do not support the sentencing court's determination that a motor vehicle was used in the commission of the offense.

## ARGUMENT

### I. SUFFICIENCY OF THE EVIDENCE

'... [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*.' *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed.2d 560 (1979).

*State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

The State failed to prove that the assault which occurred was with the intent to inflict "great bodily harm."

Great bodily harm means bodily injury that creates a probability of death, or that causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

WPIC 2.04.

Considering the evidence in a light most favorable to the State, the only testimony at trial applicable to “intent” consists of Mr. Mendoza’s testimony that the gun was placed to his head and he was told to leave or he would have his fucking brains blown out. (Adams RP 26, ll. 16-20)

The extent of the injuries, other than Dr. Harn’s testimony, consisted of Mr. Mendoza stating that two (2) plates had been put into his face to knit the bones. (Adams RP 34, ll. 14-19)

No testimony was presented that there was a “probability of death” from the injuries.

No testimony was presented that there was any “significant serious permanent disfigurement.” *See: State v. Atkinson*, 113 Wn. App. 661, 667-68, 54 P.3d 702 (2002), *review denied*, 149 Wn.2d 1013, 69 P.3d 874 (2004)

No testimony was presented that there was a “significant permanent loss or impairment of the function of any bodily part or organ.”

The State did establish “substantial bodily harm.” “Substantial bodily harm” is defined as

... bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, **or that causes a fracture of any bodily part.**

WPIC 2.03.01 (Emphasis supplied.)

Whether Mr. Mendoza's injuries were caused by the gun or Mr. Alcantar-Maldonado's fist is not the point. The issue is "intent to inflict great bodily harm."

It is apparent that Mr. Alcantar-Maldonado's intent was to have Mr. Mendoza leave the duplex. In doing so he threatened and assaulted him. However, the assault is only a second degree assault.

The jury was instructed on the lesser included offense of second degree assault by use of a deadly weapon. (Instruction 22; CP 53; Appendix "A")

Instruction 17 provided the following definition: "A firearm, whether loaded or unloaded, is a deadly weapon." (CP 48)

Mr. Alcantar-Maldonado contends that how the gun was actually used determines whether or not there was any "intent to inflict great bodily harm."

Existing case law indicates that an individual must actually fire a gun in order to be guilty of first degree assault with a firearm. *See: State v. Odom*, 83 Wn.2d 541, 520 P.2d 152, *cert. denied* 419 U.S. 1013, 95 S. Ct. 333, 42 L. Ed.2d 287 (1974) (actual firing of pistol); *State v. Flett*, 98 Wn. App. 799, 992 P.2d 1028 (2000) (gun fired into another car); *State v.*

*Mann*, 157 Wn. App. 428, 237 P.3d 966 (2010) (actual firing of a .380 cal. pistol).

As the Court noted in *State v. Adlington-Kelly*, 95 Wn.2d 917, 924, 631 P.2d 954 (1981): "... [T]he two degrees of assault are distinguished on the basis of *intent*."

The absence of significant medical testimony to support any of the alternative factors of "great bodily harm" precludes a finding other than "substantial bodily harm."

Similar cases where an individual has received a fracture when hit in the face are supportive of Mr. Alcantar-Maldonado's position. *See: State v. R.H.S.*, 94 Wn. App. 844, 846, 974 P.2d 1253 (1999) (serious eye injury requiring surgery after being punched in the face); *State v. Randoll*, 111 Wn. App. 578, 580, 45 P.3d 1137 (2002) (victim punched in head and knocked head-first onto the asphalt pavement causing a week-long coma with subsequent brain surgeries involving the removal of sections of the skull).

Moreover, as the Court recognized in *State v. Rodriguez*, 121 Wn. App. 180, 187, 87 P.3d 1201 (2004): "To convict Mr. Rodriguez of first degree assault, the jury had to find that he intended to inflict 'great bodily harm,' assaulted Mr. Van Dinter, **and inflicted 'great bodily harm.'**" (Emphasis supplied.)

The State failed to carry its burden of proof. The State neither established intent to inflict “great bodily harm,” nor actual infliction of “great bodily harm.”

## **II. USE OF MOTOR VEHICLE**

RCW 46.20.285 provides, in part:

The department shall revoke the license of any driver for the period of one calendar year unless otherwise provided in this section, upon receiving a record of the driver’s conviction of any of the following offenses, when the conviction has become final:

...

(4) Any felony in the commission of which a motor vehicle is used ....

The State was required to prove that a motor vehicle was used to facilitate the commission of first degree assault.

The relevant test is whether the felony had some reasonable relationship to the operation of a motor vehicle, or whether use of a motor vehicle contributed in some reasonable degree to the commission of the felony. *State v. B.E.K.*, 141 Wn. App. 742, 746, 172 P.3d 365 (2007) (citing *State v. Batten*, 140 Wn.2d 362, 365, 997 P.2d 350 (2000)).

*State v. Dupuis*, 168 Wn. App. 672, 675 (2012).

First degree assault, under the facts and circumstances of this case, had no reasonable relationship to the operation of a motor vehicle. The

operation of the motor vehicle did not contribute in any degree to the commission of first degree assault.

### CONCLUSION

The State's failure to prove, beyond a reasonable doubt, that Mr. Alcantar-Maldonado intended to inflict "great bodily harm" requires reversal of his conviction and entry of judgment and sentence as to second degree assault. *See: State v. A.M.*, 163 Wn. App. 414, 421, 260 P.3d 229 (2011).

The sentencing court did not have a basis for entry of a finding that a motor vehicle was used in the commission of an assault. The finding must be removed from the judgment and sentence.

DATED this 14th day of June, 2013.

Respectfully submitted,

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## **APPENDIX “A”**

### INSTRUCTION NO. 22

A person commits the crime of assault in the second degree when he or she assaults another with a deadly weapon.

**NO. 31259-3-III**

**COURT OF APPEALS**

**DIVISION III**

**STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	
	)	FRANKLIN COUNTY
Plaintiff,	)	NO. 12 1 50244 6
Respondent,	)	
	)	<b>CERTIFICATE OF SERVICE</b>
v.	)	
	)	
BONIFACIO ALCANTAR-MALDONADO,	)	
	)	
Defendant,	)	
Appellant.	)	
	)	

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I certify under penalty of perjury under the laws of the State of Washington that on this 15th day of June, 2013, I caused a true and correct copy of the *APPELLANT'S BRIEF* to be served on:

COURT OF APPEALS, DIVISION III  
Attn: Renee Townsley, Clerk  
500 N Cedar St  
Spokane, WA 99201

E-FILE

CERTIFICATE OF SERVICE

FRANKLIN COUNTY PROSECUTOR'S OFFICE  
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