

No. 66538-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ROY STETHEN PORTER,

Appellant.

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

The Honorable Michael C. Hayden

BRIEF OF APPELLANT

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COURT OF APPEALS
STATE OF WASHINGTON

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ASSIGNMENT OF ERROR

There was insufficient evidence presented to support the jury's verdict that Mr. Porter was guilty of first degree assault.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Due process requires the State prove every element of the charged offense beyond a reasonable doubt. The intent to commit a crime inside a residence is an essential element of residential burglary. First degree assault with a firearm or deadly weapon requires the State to prove the assault was done with the intent to inflict great bodily harm. Where the evidence established Mr. Porter fired the shot but failed to prove he did so with the requisite intent to inflict great bodily harm, is he entitled to reversal of his conviction with instructions to dismiss?

C. STATEMENT OF THE CASE

Darryl Peterson is the live-in partner of Chloe Porter, Roy Porter's mother. 11/18/2010RP 8-9. The relationship between Mr. Porter and Mr. Peterson was poor at best, resulting in Mr. Peterson barring Mr. Porter from the house he and Ms. Porter shared. 11/18/2010RP 10-11.

On February 10, 2010, Mr. Porter had spent the day with his mother and they returned to Ms. Porter's house. 11/18/2010RP 63.

Mr. Peterson was furious and immediately demanded Mr. Porter leave the house, an order Mr. Porter angrily refused.

11/18/2010RP 15. Words were exchanged between the two and Mr. Peterson moved into his bedroom to call the police.

11/18/2010RP 16-17. Ms. Porter urged Mr. Porter to leave the house and he began to leave. 11/18/2010RP 24. According to Mr. Peterson, prior to leaving, Mr. Porter moved towards him, pulled out a firearm and fired a single shot in the general direction of Mr. Peterson. 11/18/2010RP 16, 25. The bullet lodged in a nearby closet door. 11/18/2010RP 25-26. Mr. Porter left the house. 11/18/2010RP 26.

Mr. Porter was subsequently convicted of first degree assault with a deadly weapon enhancement and unlawful possession of a firearm in the second degree. CP 57-59.

D. ARGUMENT

THE EVIDENCE FAILED TO ESTABLISH BEYOND
A REASONABLE DOUBT THAT MR PORTER
INTENDED TO INFLICT GREAT BODILY HARM

1. The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt. The State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is “[w]hether, 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). A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

2. The State failed to prove Mr. Porter intended to inflict great bodily harm. Mr. Porter was convicted of assaulting Mr. Peterson with a firearm with the intent to inflict great bodily harm. He submits his conviction for first degree assault must be reversed as the evidence established he fired the shot but failed to establish he did so with the requisite intent to inflict great bodily harm on Mr. Peterson.

To prove first degree assault, the State must prove beyond a reasonable doubt that the defendant, "with intent to inflict great bodily harm: (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death." RCW 9A.36.011(1). "Great bodily harm" is defined as "bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(4)(c); *State v. Saenz*, 156 Wn.App. 866, 875, 234 P.3d 336 (2010).

The jury ascertains "intent" by determining whether a person acts with the "objective or purpose to accomplish a result which constitutes a crime." RCW 9A.08.010(1)(a). The jury also looks to "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” to determine intent. *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).

The evidence established that Mr. Porter shot the gun in the general direction of Mr. Peterson, but did not establish Mr. Porter intended to hit Mr. Mr. Peterson with the gunshot. At best, the evidence established Mr. Porter may have been reckless in venting his frustration at Mr. Peterson by shooting *near* him.

Reckless endangerment occurs when a person recklessly engages in conduct that creates a substantial risk of death or serious physical injury to another. RCW 9A.36.050(1). Clearly Mr. Porter was reckless in the manner he used the firearm and his conduct created a situation where his actions may have resulted in serious injury to Mr. Peterson had he shot *at* Mr. Peterson. But, the evidence simply did not establish Mr. Porter shot at Mr. Peterson with the intent to inflict great bodily injury on him. As such, the jury’s verdict cannot be sustained.

3. Mr. Porter is entitled to reversal of his first degree assault conviction with instructions to dismiss. Since there was insufficient evidence to support the first degree assault conviction, this Court must reverse the conviction with instructions to dismiss. To do otherwise would violate double jeopardy. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution “forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.”), quoting *Burks v. United States*, 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

E. CONCLUSION

For the reasons stated, Mr. Porter requests this Court reverse his first degree assault conviction with instructions to dismiss.

DATED this 31st day of August 2011.

Respectfully submitted,



THOMAS M. KUMMEROW (WSBA 21518)
tom@washapp.org
Washington Appellate Project – 91052
Attorneys for Appellant

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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 66538-3-I
v.)	
)	
ROY PORTER,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF AUGUST, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF AUGUST, 2011.

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Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710