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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON  
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No. 36390-9-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

ANTHONY ERNEST FAIN,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 06-1-03812-8  
The Honorable Beverly Grant, Judge

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OPENING BRIEF OF APPELLANT

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## **I. ASSIGNMENTS OF ERROR**

### **A. Assignments of Error**

1. The trial court erred when it denied Appellant's motions to dismiss count III because the State failed to present sufficient evidence to prove that the victim's wife was actually assaulted.

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

1. Did the trial court err in denying Appellant's motions to dismiss count III where the evidence did not establish that Appellant committed an assault against the victim's wife?  
(Assignment of Error 1)
2. Where the evidence showed that the victim's wife was not battered, and the evidence did not establish that Appellant was aware of the victim's wife's presence or that he intended to commit a battery upon the victim's wife, did the State fail to prove the essential element of assault against the victim's wife? (Assignment of Error 1)

## **II. STATEMENT OF THE CASE**

### **A. Procedural History**

The State charged Anthony Ernest Fain by Amended Information with: one count of attempted first degree murder (RCW

9A.32.030, 9A.28.020) while armed with a firearm (RCW 9.94A.310/.510) against victim Christopher Jiles (count I); one count of first degree assault (RCW 9A.36.011) while armed with a firearm (RCW 9.94A.310/.510) against victim Christopher Jiles (count II); one count of first degree assault (RCW 9A.36.011) while armed with a firearm (RCW 9.94A.310/.510) against victim Valeria Jiles (count III); and one count of first degree unlawful possession of a firearm (RCW 9.41.040) (count IV). (CP 3-5) Anthony pleaded guilty before trial to the crime of first degree unlawful possession of a firearm charged in count IV. (04/26/07 RP 10-12, 21, 22; CP 6-13)<sup>1</sup>

Anthony moved at the close of the State's case to dismiss count I and III for lack of evidence to prove the crimes. (05/07/07 RP 55-66) The trial court denied the motion. (05/07/07 RP 66) Anthony renewed his motion at the close of the defense case, before the jury instructions were given. (05/07/07 RP 144) The court again denied his motion. (05/07/07 RP 144)

The jury was unable to reach verdicts on count I and count III, but found Anthony guilty of count II, first degree assault against

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<sup>1</sup> Citations to the report of proceedings will be to the date of the proceeding followed by the page number.

Christopher Jiles. (CP 115-22; 05/10/07 RP 5-6, 10-11) The jury also found that Anthony was armed with a firearm when he committed the crime. (CP 118; 05/10/07 RP 5) The trial court ordered a mistrial on counts I and III. (05/10/07 RP 11-12)

As a result of a subsequent plea agreement, the State amended the Information to charge only first degree assault against Christopher Jiles (to conform to the jury's guilty verdict on the original count II), second degree assault against Valeria Jiles (RCW 9A.36.021) (a new count III), and first degree unlawful possession of a firearm (to conform to Anthony's earlier guilty plea to the original count IV). (CP 128-29, 130; 05/25/07 RP 4) The State agreed to dismiss the attempted first degree murder charge originally charged in count I. (CP 130; 05/25/07 RP 5) Anthony pleaded guilty to count III of this Second Amended Information. (05/25/07 RP 5-10; CP 131-38)

The trial court accepted the plea. (05/25/07 RP 11) The trial court then sentenced Anthony within his standard range on counts II, III and IV to a term of confinement totaling 318 months. (05/25/07 RP 24; CP 145, 147) This appeal timely follows. (CP 155)

**B. Substantive Facts**

Christopher and Valeria Jiles were in their car returning home from a shopping trip on the afternoon of August 11, 2006. (05/02/07 RP 296) As they approached their home, they saw two boys walking across their driveway. (05/02/07 RP 298) According to Christopher, he stopped his car, waited for the boys to pass, then turned into the driveway and parked by his garage. (05/02/07 RP 298-99) He testified that he said nothing to and made no gestures at the boys. (05/02/07 RP 300)

According to Christopher, he heard one of the boys say something to him as he got out of his car. (05/02/07 RP 300-01) He did not hear what was said, so he asked "what?" and moved closer to the boys. (05/02/07 RP 301-02) He also testified that he wanted to know why the two boys were in his driveway. (05/02/07 RP 303) Christopher testified that one of the boys, who he later identified as Anthony Fain, was "aggressive," and said "You don't want to mess with me. You don't know who I am." (05/02/07 RP 304)

Christopher testified that he was not looking to fight Anthony, and that he did not make any threats, did not clench his fists, and did not challenge Anthony to a fight. (05/02/07 RP 303, 304) But,

according to Christopher, Anthony pulled out a gun and, when Christopher instinctively tried to take it away, Anthony began shooting. (05/02/07 RP 305, 306) The first two shots went towards the ground, but then Anthony raised his arm and shot towards Christopher, hitting him in the lower chest. (05/02/07 RP 305, 306, 307) Christopher backed away, and heard two more shots fired. (05/02/07 RP 305, 306)

Valeria testified that she heard Anthony say to Christopher that he "need[s] to watch who you are driving up on." (05/03/07 RP 379) When she came around to Christopher's side of the car, she saw that Christopher had his hands in the air, and saw Anthony running away while shooting a gun. (05/03/07 RP 380) She was about eight or nine feet away and to the side of Christopher when the shooting started. (05/03/07 RP 383) She did not hear Christopher say anything to the boys, and Christopher did not appear upset before the incident. (05/03/07 RP 384)

James Roell's parents are the Jiles' neighbors, and James was visiting his parents on the day of the shooting. (05/03/07 RP 422, 423) James saw Christopher park his car, exit, and walk toward the two boys. (05/03/07 RP 425, 427) James noted that Christopher had his arms extended and hands open, and was

saying "what's wrong with you guys, man, what did I do?" (05/03/07 RP 427, 433) He heard the boys cussing at Christopher, and head Christopher respond "do you want some of me?" (05/03/07 RP 428) James then heard one of the boys, later identified as Bobby Hall, say "pop him now." (05/03/07 RP 428) He saw Anthony take a gun out of his pants and start firing at Christopher. (05/03/07 RP 429, 439) Christopher tried to dodge the bullets, then Anthony and Bobby ran away. (05/03/07 RP 429)

Jennifer Hyatt happened to be driving through a nearby intersection when she heard the gunshots. (05/03/07 RP 407, 409) She immediately turned to look, and saw a man walking with his arm extended at shoulder level, holding a gun in his hand, firing the gun towards the driveway. (05/03/07 RP 409, 411, 412) She then saw two men run away. (05/03/07 RP 411)

As part of a plea bargain, Bobby Hall testified for the State against Anthony. (05/07/07 RP 14) He testified that Christopher said something to them first, but that Anthony was arguing with Christopher because Christopher almost hit them with his car when he turned into the driveway. (05/07/07 RP 16, 17, 28) He did not hear Christopher make any threats, but Christopher did appear angry when he moved towards them. (05/07/07 RP 17, 30) He

saw Christopher try to grab Anthony, but did not see Christopher try to hit Anthony or threaten Anthony with a weapon. (05/07/07 RP 17-18) Anthony told Christopher that he would "pop you if you don't back up." (05/07/07 RP 18)

When Christopher did not back up, Bobby told Anthony to "pop him." (05/07/07 RP 18) He saw Christopher walk towards Anthony and try to grab the gun, then Anthony fired at him. (05/07/07 RP 19) After Anthony fired the gun, Christopher put his hands up and backed away, but Anthony continued to fire the gun. (05/07/07 RP 20) Bobby did not think that Anthony could have avoided a fight with Christopher, but he also did not feel that Anthony needed to shoot at Christopher. (05/07/07 RP 43, 49)

Christopher was taken to the hospital and treated for the gunshot wound. (05/01/07 RP 118; 05/03/07 RP 357, 359, 360-61) Anthony and Bobby were found nearby behind Anthony's girlfriend's home, and were taken into custody. (05/01/07 RP 132, 147-48, 170) Forensic tests showed that the single bullet recovered from Christopher's chest, a bullet found imbedded in the wall of a nearby utility structure, and the other bullets and casings recovered at the scene were all fired from the same gun recovered from Anthony's girlfriend shortly after the incident. (05/01/07 RP

172, 190-91; 05/02/07 RP 241, 245, 280; 05/03/07 RP 348, 453, 456, 458, 459, 461)

### III. ARGUMENT & AUTHORITIES

The State tried Anthony for first degree assault against Valeria under RCW 9A.36.011(1)(a), which states:

A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

(a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death[.]

(CP 4)

After the State rested its case and again at the close of the defense case, Anthony moved to dismiss this charge, arguing that the State failed to prove that Anthony intended to inflict great bodily harm on Valeria or that Anthony actually assaulted Valeria.<sup>2</sup> (05/07/07 RP 61-62; 05/07/07 RP 144) The State argued that it proved Anthony intended to cause great bodily harm to Christopher, and that under *State v. Wilson*, 125 Wn.2d 212, 883 P.2d 320 (1994), that intent is transferred to Valeria. *State v.*

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<sup>2</sup> A defendant generally waives his right to appeal the denial of a motion to dismiss made at the conclusion of the State's case in chief if he subsequently presents evidence on his own behalf, unless the defendant renews his motion at the close of all of the evidence. See *City of Seattle v. Ruffin*, 74 Wn.2d 16, 17, 442 P.2d 619 (1968). Anthony renewed his motion at the close of all the evidence and before the jury instructions were given (05/07/07 RP 144), so this error is not waived.

*Wilson* holds:

Assault in the first degree requires a specific intent; but it does not, under all circumstances, require that the specific intent match a specific victim. Consequently, once the intent to inflict great bodily harm is established, usually by proving that the defendant intended to inflict great bodily harm on a specific person, the mens rea is transferred under RCW 9A.36.011 to any unintended victim.

125 Wn.2d at 218.

However, while *Wilson's* holding may relieve the State of its burden of showing that Anthony intended to cause great bodily harm specifically to Valeria, it does not relieve the State of its burden of proving the remaining elements of first degree assault, namely the element of an actual assault on Valeria.

A challenge to the sufficiency of the evidence made at the close of the State's case admits the truth of the State's evidence and all reasonable inferences drawn therefrom. *State v. Robinson*, 92 Wn.2d 357, 359-60, 597 P.2d 892 (1979). The evidence must also be viewed in a light most favorable to the State. *Robinson*, 92 Wn.2d at 359-60. Nevertheless, due process still requires the State to prove all elements of the crime beyond a reasonable doubt. *State v. Aver*, 109 Wn.2d 303, 310, 745 P.2d 479 (1987).

Washington recognizes three forms of assault: (1) assault by

actual battery; (2) assault by attempting to inflict bodily injury on another while having apparent present ability to inflict such injury (attempted battery); and (3) assault by placing the victim in reasonable apprehension of bodily harm. *State v. Byrd*, 125 Wn.2d 707, 712-13, 887 P.2d 396 (1995); see also *Wilson*, 125 Wn.2d at 218.

In *Wilson*, the defendant fired three bullets through a tavern window, and two of the bullets actually hit unintended victims and resulted in convictions for first degree assault. The court was “persuaded that Wilson assaulted [the unintended victims] when [he] discharged bullets from a firearm into the [unintended victims].” *Wilson*, 125 Wn.2d at 218. Thus, under *Wilson*, if an unintended victim suffers an actual battery as a result of an intentional act by a defendant, then a defendant may be held accountable for his intentional act. This is reasonable because assault by actual battery requires only the general intent to commit the physical act constituting the assault. See *State v. Hall*, 104 Wn. App. 56, 62, 14 P.3d 884 (2000).

Here, however, there was no actual battery upon Valeria. She was not struck by a bullet nor directly battered by Anthony. Therefore, to establish the assault element of first degree assault,

the State was required to prove one of the other recognized forms of assault: (1) that Anthony intended to assault Valeria; or (2) that Anthony placed Valeria in reasonable apprehension of bodily harm. *Byrd*, 125 Wn.2d at 712-13; *Wilson*, 125 Wn.2d at 218.

The evidence presented at trial did not establish either of these types of assault. First, there is no evidence that Anthony intended to shoot Valeria. There is no evidence he even saw Valeria before or after he began shooting. Valeria testified she was about eight or nine feet away and to the side of Christopher when the shooting started. (05/03/07 RP 382, 383) James Roell testified that Anthony was "following" Christopher as he tried to get away from the bullets. (05/03/07 RP 439) It is clear that Anthony was focused on Christopher, and did not form the intent to shoot at Valeria. Therefore, the State did not prove that Anthony intended to assault Valeria.

Second, the evidence at trial established that Valeria was concerned for her husband's safety, but not her own. She testified that she never saw Anthony look or aim the gun at her. (05/03/07 RP 398) She does not recall any bullets coming near her. (05/03/07 RP 398) She was afraid and upset, but only because she "couldn't believe" what was happening to her husband.

(05/03/07 RP 386) The State simply did not show that Anthony's actions created in Valeria an apprehension of bodily harm.

The trial court therefore erred when it denied Anthony's motions to dismiss count III for lack of evidence establishing first degree assault against Valeria. Even though the jury was unable to unanimously agree on guilt or innocence on count III, Anthony was still prejudiced by the trial court's error because the charge of assault against Valeria remained after the mistrial. But this charge should never have gone to the jury, and Anthony should not have faced retrial on that count.

CrR 4.2(f) states that "[t]he court shall allow a defendant to withdraw his plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice." It is surely a manifest injustice to allow a guilty plea to stand when the State had no authority to press the charge in the first place. Therefore, Anthony's plea to the lesser crime of second degree assault against Valeria, which the State charged as count III in the Second Amended Information, is invalid.

The trial court should have dismissed count III, and the charge never should have been presented to the jury, never should have remained after the jury reached its verdicts on the remaining

counts, and never should have been included in the Second Amended Information filed after trial. Anthony's conviction on count III must be vacated.

#### IV. CONCLUSION

*Wilson* states that the "mens rea is transferred . . . to any unintended victim." 125 Wn.2d at 218. Valeria was not a victim. She suffered no battery upon her person, there was no attempt to inflict bodily injury upon her, and she was never in apprehension of bodily harm. The trial court therefore erred when it denied Anthony's motion to dismiss count III, and Anthony's guilty plea and subsequent conviction on that count should be vacated.

DATED: December 14, 2007



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#### CERTIFICATE OF MAILING

I certify that on 12/14/2007, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to:

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