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DIVISION II
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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

DOMINICK MALDONADO, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Linda CJ Lee

No. 05-1-05774-4

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should this court sustain the jury's verdicts as to four counts of assault in the first degree when the challenged convictions are supported by sufficient evidence?

B. STATEMENT OF THE CASE.

1. Procedure

On November 21, 2005, the State filed an information and declaration for probable cause charging appellant Dominick Maldonado, hereinafter "defendant", with eight counts of assault in the first degree, each with firearm sentence enhancement (counts I-VIII), four counts of kidnapping in the first degree, each with firearm sentence enhancement alleged (counts IX-XII), and, two counts of unlawful possession of a firearm in the first degree (counts XIII and XIV). CP 1-9.

On December 8, 2006, the State filed an amended information. Count VI was amended from assault in the first degree to attempted murder in the first degree murder with firearm sentence enhancement. A single count of assault in the first degree with firearm sentence enhancement was added as Count XV. CP 241-251. The matter was pre assigned to Department 19, Judge Linda Lee. CP 240.

On July 30, 2007, a hearing was held regarding pretrial motions including CrR 3.5. (7/30/2007 RP 4-140, 7/31/2007 RP 3-11). After

hearing testimony the court ruled defendant's statements admissible. The court entered written findings of fact and conclusions of law. CP 53-59.

On August 14, 2007, trial in this matter commenced. RP 1-16. On October 2, 2007, the jury convicted as charged including firearm sentence enhancements in counts I (assault 1 Latimer), II (assault 1 Hutchison), III (assault 1 Torres), IV (assault 1 Toomey), V (assault 1 Davis), VII (assault 1 Stiles), IX (kidnap 1 Hudson), X (kidnap 1 Riggins), XI (kidnap 1 Black), and XII (kidnap 1 Phan). The jury convicted as charged in counts XIII (unlawful possession of a firearm in the first degree) and XIV (unlawful possession of a firearm in the first degree). With regarding to count VI (attempted murder 1 McKown) the jury convicted of the lesser offense of attempted murder in the second degree with firearm sentence enhancement. With regard to counts VII (assault 1 BenYehuda) and XV (assault 1 Jackson) the jury convicted of the lesser offense of assault in the second degree each with a firearm sentence enhancement.

On November 2, 2007, defendant was sentenced. The court imposed consecutive standard range sentences for the serious violent convictions of attempted murder in the second degree, six counts of assault in the first degree, and four counts of kidnapping in the first degree. The thirteen firearm sentence enhancements ran consecutive to each other and the base sentences on the serious violent felonies. In all, defendant received a sentence of just over 163 years. CP 200-215.

Defendant filed a timely notice of appeal from entry of this judgment. CP 216-234. On appeal defendant challenges only his convictions in counts III (victim Daniel Torres), IV (victim James Toomey), V (victim Roberta Davis) and VII (victim Francis Stiles).

2. Facts

On November 20, 2005, shortly before noon, 911 dispatch received a call from defendant's phone. Defendant told the dispatcher he was about to shoot people. When asked who and where he was, defendant replied "follow the screams." RP 859- 861, 872. Nearly simultaneously, several of defendant friends received a text message from defendant that read "Today is the day the world will know my anger. Today is the day the world will feel my pain. Today is the day I will be heard." RP 567, 578, 594-595, 737.

Defendant entered the Tacoma Mall Shopping Center near the Sears store. Exhibits 59A and 60 A; CP 252-265 (Diagram of relevant portion of the mall). RP 56-58, 62-64, 930. Defendant was armed with a 9mm high capacity handgun and a 7.62 x 39 assault style rifle. RP 794. Defendant carried several loaded ammunition magazines for each weapon and extra ammunition for each weapon. In all, defendant had approximately 400 rounds of ammunition for both guns. RP 794, 814-820. Three of the magazines for the assault rifle were taped together for quick tactical reloading. RP 764-769. Defendant carried the guns and

ammunition in a satchel, a guitar case, and under a under a long trench coat he was wearing. RP 927-931.

Defendant twice walked past the T-Mobile kiosk located in the mall concourse between the Sears and JC Penney stores. James Toomey was a sales person working out of the T-Mobile kiosk. RP 62-63. He asked defendant if he would like to buy a phone. Defendant shook his head no. Toomey saw defendant a second time and again asked about a phone. Defendant shook his head. Toomey turned away and heard loud bangs. RP 69-71. Toomey became disoriented. RP 71-75.

Billy Mitchell was at the mall with his wife and young son to get pictures taken with Santa. RP 168. Mitchell and his son were sitting on seats located between the Sears and Penney stores and in close proximity to the T-Mobile kiosk. RP 170. Mitchell saw the defendant drop a coat, raise a rifle, and fire shots from a chest level position down the mall away from Mitchell and in the general direction of the Macy's store. RP 173-177.

Daniel Torres worked in the kiosk with Toomey. RP 94. Torres saw defendant near the kiosk and watched as defendant shrugged off the trench coat and displayed a rifle. RP 98-99. Torres observed defendant point the rifle in the direction of Macy's and fire down the mall concourse. RP 100. Torres noted that there were many people in front of defendant when he began to fire. RP 107. Torres recognized the danger and dropped to the floor. RP 101.

Once on the ground Torres and Toomey heard defendant fire several shots. Toomey and Torres rose up to see if they could locate defendant. RP 77, 102. Torres saw that defendant had passed the kiosk. Torres saw defendant turn back toward the kiosk and fire into the kiosk, hitting the kiosk three times. RP 102. Toomey was hit in the face by debris as shots volleyed into the kiosk. RP 78.

Frank Latimer and Andrea Hutchison were in the mall to upgrade their cell phone service. Latimer and Hutchison stopped at the T-Mobile kiosk and were speaking with one of the salespeople. RP 205, 237. Both heard very loud bangs. RP 208, 238-239. Latimer saw defendant turn toward him holding a rifle. Defendant pointed the rifle and began to shoot at Latimer. RP 238-239. Latimer was hit in the upper leg. The bullet entered near his hip and exited near his groin. RP 241-242. Hutchison saw defendant turn toward them and fire in a purposeful sweeping motion. RP 212-213, 222, 226, 231, 234-235. Hutchison saw Latimer fall. Hutchison went to aid Latimer and realized she too had been hit by gunfire. RP 215. Hutchison would later find that her leg had been riddled by shrapnel as opposed to a whole bullet. RP 217. Hutchison and Latimer worked their way into a nearby store. RP 214.

Ron Colston was at the mall in the Build-A-Bear store located near the T-Mobile kiosk. RP 327. Colston heard shooting from the mall concourse. RP 328. Colston looked to the mall and saw defendant level a rifle and fire down the mall concourse toward the Macy's store. RP 329.

Francis Stiles and his wife were in the mall shopping. RP 268. Stiles stopped at a kiosk near the Sam Goody in the main concourse of the mall near the T-Mobile kiosk. RP 271. Stiles heard loud noises he immediately recognized as gunshots. RP 272. Stiles immediately tried to drop to the floor. Before he could get to the floor Stiles was hit by a bullet that passed through his shoulder. RP 273. Stiles believed he was hit by the second or third shot that he heard. RP 272. Stiles did not see the person who shot him. RP 279.

Roberta Davis was shopping in the mall with her husband. RP 290. They were near the central intersection of the main mall concourse at Helzberg Diamonds. RP 291-292. Davis heard what she thought were firecrackers. RP 292. Davis turned and saw flashes. RP 292-293. Davis noted others running and she and her husband tried to do the same thing. RP 292-293. Quickly, Davis felt a burning pain in her leg. RP 293. Davis kept moving to an exit. Davis realized that she had been shot by a bullet that entered the back of her upper leg and exited out the front. RP 294-295.

Amit Ben Yahuda was in the mall with friends. RP 1057. Ben Yahuda heard noise which he took to be gunshots. RP 1055. Ben Yahuda dropped to the ground and realized that he was bleeding from leg wounds. RP 1056. Ben Yahuda would later learn that he had been hit by shrapnel as opposed to a whole bullet. RP 1062. Ben Yahuda saw a man with a gun in the direction of the JC Penney store and crawled on his back away

from the man toward the mall's food court where he received assistance. RP 1058, 1063.

Ruth Jackson was at the mall with a friend. Jackson was window shopping near Spencer's store. RP 248. Jackson heard loud gunshots. RP 248. Jackson realized that a man with a gun was moving her way from the T-Mobile kiosk area firing shots. RP 250. Jackson stood still for a time before dashing across the width of the mall looking for cover. Jackson managed to take cover inside a store. RP 252-253. Jackson realized that she was bleeding from wounds to her legs and belly. Jackson received assistance and later learned that she had been hit by shrapnel as opposed to a whole bullet. RP 254-255.

Dan McKown worked in the mall and was visiting friends in the Kit's Camera Store. RP 337-338. McKown heard loud bangs he recognized as gunshots from the main mall concourse. RP 338. McKown was armed with a 9mm handgun. McKown drew his gun and moved from the interior of Kit's Camera to very near its main entrance. RP 338. McKown had an obstructed view of the mall concourse because the front of the neighboring store jutted out into the mall. RP 338-340. McKown noted that the shooting seemed to stop. McKown placed his gun in his waistband. RP 340. Suddenly McKown saw defendant walk past. Defendant was very close, several feet away. Defendant was carrying a rifle low as if it were luggage. RP 341-344. Defendant saw McKown and began to turn. McKown told defendant to put his gun down. RP 345.

Defendant began to raise the rifle and McKown drew his pistol as fast as he could. Defendant fired several shots at McKown. McKown was unable to return fire. RP 345. McKown suffered grazing wounds on each side of his body and three gunshots to his midsection. At least one of the shots produced catastrophic injury that left McKown paralyzed. RP 345-348. McKown lost his gun and fell to the ground, unable to move. RP 349. McKown was tended to by citizens inside the store. RP 349-352. Defendant moved along. RP 348.

Joseph Hudson and Katrina Higgins worked at Sam Goody music store. RP 614-615, 718-719. John Black and 13 year old Phi-Ho Phan were shoppers there. RP 672-673, 694-695. All dropped to the floor when they determined that a gun was being fired near them. Defendant entered the Sam Goody store and fired shots over the counter then across the mall toward the Disney Store. RP 619-620, 674, 697-698, 719-721. Many others had been in the store but escaped prior to the arrival of defendant. RP 747-752. Defendant put a gun to the back of Hudson's head and told him he would shoot him if he didn't cooperate. RP 623-624, 676.

Defendant ordered Black, Hudson, and Riggans to the rear of the store. RP 619-620, 699-700, 720-721. Phan managed to hide under shelving and was not initially detected. RP 675-678. Defendant fired shots over the store's front counter, into the ceiling at security cameras and the across the mall toward the Disney Store. RP 619-620, 698-701,

719-721. Defendant told his captives that he had shot people and he wouldn't hesitate to shoot them. RP 655. Defendant immediately called 911 and demanded a negotiator. RP 600-603, 721, 858-859. Defendant ordered Riggans to lower the front gate and told her that if she tried to flee he would shoot Black and Hudson. RP 624, 722.

Defendant then ordered his hostages to create barricades at the front and rear of the store. RP 621-622, 677, 701-702, 723. Once the barricades were completed, defendant ordered Black to sit on a stool and stand guard and directed Hudson to reload ammunition magazines. RP 626, 679-680, 703, 724. Defendant proceeded to carry on protracted conversations over the phone with police, media, and friends. RP 630-631, 725. Eventually defendant allowed police safe passage to remove the critically injured McKown. RP 726-727, 841-842.

At some point Phan was discovered and directed to join the hostages. RP 639-640, 679-682, 705, 726. Defendant spent a considerable amount of time describing life events that led up to the shooting including an incident at a police camp. Defendant indicated that he wanted to shoot a police officer involved then die in return police gunfire. 633-636, 685-687, 707, 724-725. After negotiations Phan was released. RP 687, 726-727, 844-846.

Initially defendant was decisive, clear, and demanding with his orders. RP 624, 632-633, 645, 655, 699-700, 701-702, 721, 854. Over

time he became despondent and eventually turned his weapons over to the hostages and surrendered. RP 639, 642-643, 710-711, 727-728, 855.

Defendant was arrested and told detectives that he intended for the incident to get him media attention so he could publicize his life's problems and extract justice from police who mistreated him. RP 924-927, 929. Defendant told investigators that he never intended to shoot anyone and made no threats. RP 927, 932. Defendant said he thought he fired 25 or 26 rounds. Investigators recovered a total of 24 spent shell casings from the scene; 15 from the main mall concourse and nine from the Sam Goody store. RP 899.

A search warrant was served at defendant's residence. RP 887. In defendant's bedroom officers found a journal, a whiteboard, gun catalogues, and silhouette shooting targets. RP 890-891, 906, 980, 1039. On the whiteboard was written "Today is the day I will be heard." RP 891, 903-904. Throughout the journal defendant made reference to needing another/bigger gun for what he had planned. RP 908-912, 1157-1158.

Defendant presented a defense of diminished capacity. Psychiatrist Williams Sack, MD opined that defendant suffered from a dissociative fugue at the time of the shooting because defendant cited ongoing emotional trauma and claimed lapses of memory regarding the shooting. RP 1087-1091. Greg Gagliardi, Ph.D. at Western State Hospital offered the opinion that while defendant likely suffered from a major

mood disorder, defendant's actions and statements before, during and after the incident made it clear that he had the capacity to form necessary levels of intent. RP 1212-1225, 1227-1229. Defendant did not testify at trial. RP 1191.

The parties entered a Stipulation regarding defendant's prior conviction for a serious offense. CP 60.

C. ARGUMENT.

1. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S FINDING THAT DEFENDANT WAS GUILTY OF THE ASSAULT IN THE FIRST DEGREE.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review 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. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988)(citing *State v.*

Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)(citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)(citations omitted).

Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

Defendant challenges four of his convictions for assault in the first degree pertaining to victim Torres (count III), victim Toomey (Count IV), victim Davis (count V) and victim Stiles (count VII).

The jury was instructed, with only the name of the victim or count number changing from instruction to instruction, that to convict defendant of the crime of assault in the first degree, the following elements had to be proved beyond a reasonable doubt:

- (1) That on or about the 20th day of November, 2005, the defendant assaulted [a particular victim];
 - (2) That the assault was committed with a firearm or with any deadly weapon or by any force or means likely to produce great bodily harm or death;
 - (3) That the defendant acted with intent to inflict great bodily harm; and
 - (4) That the acts occurred in the State of Washington.
- ...

See Instruction Nos. 16-19, CP 91-153.

Defendant challenges only the element of intent and asserts that evidence presented at trial was insufficient to support the jury's conclusion that defendant intended to inflict great bodily harm as to those four victims.

The jury was further instructed that assault meant:

- 1) an intentional shooting of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A shooting is offensive if the shooting

would offend an ordinary person who is not unduly sensitive.

2) an act done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied by the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

See Instruction No. 11 CP 91-153.

Evidence adduced at trial supported the jury's determination that defendant intended to inflict great bodily harm on Toomey, Torres, Stiles, and Davis.

Toomey testified that defendant fired into the T-Mobile kiosk knowing that it was occupied. RP 87. Toomey testified that he and Torres sold cell phone products by attracting attention in order to draw people to their booth. Toomey testified that prior to the shooting defendant walked past the T-Mobile kiosk twice. On both occasions Toomey called out to defendant from inside the kiosk and both times defendant acknowledged Toomey. RP 69-71. Torres testified that during a lull in the shooting he raised his head to look over the counter to find defendant. Torres saw defendant move past the kiosk then turn and fire directly into the kiosk as Torres peered over the counter at him. RP 101-103.

Defendant made no effort to warn the crowd or fire in a direction that would reduce risk of injury. Several witnesses testified that defendant fired the first shots with the gun at his shoulder in a level position. RP 100, 156, 174-175, 331. The rounds were fired from the area of the T-

Mobile kiosk in the general direction of the Macy's store down the occupied mall concourse. Stiles and Davis were in defendant's line of fire and were hit by gunfire. To the extent defendant fired shots high it was because the gun rode upward from recoil rather than any effort made by defendant. Torres testified that defendant fired the gun "wherever he wanted." RP 107-110.

In addition, Forensic Technician Renae Campbell testified that a bullet was lodged in a Qwest computer monitor approximately five feet off the ground and over 500 feet directly down the mall from the shooter, again in the direction of Stiles and Davis. RP 477-480. A mannequin in a storefront in the general shooting scene suffered a bullet strike to the leg. RP 468. The kiosk where Stiles was standing suffered at least two bullet strikes. RP 458-460.

Campbell collected 15 spent shell casings from the general mall concourse. RP 499. Most can be attributed to being fired at people. Latimer single gunshot wound. RP 241. Stiles single gunshot wound. RP 272. Davis single gunshot wound. RP 295. T-Mobile kiosk three gunshot strikes. RP 102. McKown five gunshot wounds. RP 346. Qwest computer monitor single bullet strike. RP 477-480. In all, 14 bullets were fired into, in the direction of, or at a level consistent with hitting people.

In contrast to his shooting inside the occupied mall concourse, defendant apparently did make an effort not to shoot at people once inside

the Sam Goody store. RP 620. Witnesses testified that defendant fired several shots in the store but all were directed into the ceiling at surveillance cameras or fired over a counter that defendant knew people were kneeling behind. RP 619-620, 623, 698, 719-721. Defendant also fired two shots from the Sam Goody store across the mall into the Disney Store. RP 698. Forensic Technician Campbell testified that the two bullets that entered the front windows of the Disney Store did so at a level of over nine feet off the ground. RP 463.

In addition to a factual basis to support the verdicts the jury was provided with a legal basis to reach the conclusions it did. Regarding finding intent the jury was instructed:

In order to find the defendant guilty of Assault in the first Degree you must find that he had the intent to inflict great bodily harm upon some person at the time he engaged in the assaultive conduct. It is not necessary to match the specific conduct with a specific victim.

See Instruction No. 12, CP 91-153, and *State v. Wilson*, 125 Wn.2d 212, 883 P.2d 320 (1994).

Wilson held that proof of the specific intent to inflict great bodily harm is necessary to prove the crime of assault in the first degree, but not that the specific intent must match a specific victim. *Wilson*, 125 Wn.2d at 218-219. The court noted that the proof of the specific intent is established “usually by proving that the defendant intended to inflict great bodily harm on a specific person.” *Id.* (emphasis added). The court did

not hold that it was *necessary* to prove it this way or that the law required proof that the specific intent was aimed at a specific person.

Ultimately and inescapably defendant's conduct allowed the jury to conclude intent. Defendant entered a shopping mall during business hours with shoppers present. Defendant was armed with two high capacity firearms and carried with him nearly two hundreds rounds of ammunition for each weapon.

Prior to entering the mall defendant loaded over a dozen ammunition magazines, concealed the weapons and ammunition on his person then proceeded to the mall concourse. Defendant uncovered himself and without warning fired shots that hit people.

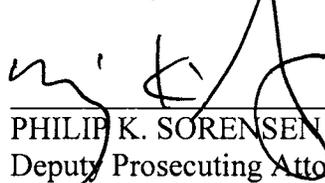
Witnesses testified that while they could not identify specific people defendant might have shot at, many people were in defendant's line of sight and defendant appeared to do nothing to avoid shooting people. The facts are uncontroverted that defendant directed his gun in such a manner that Roberta Davis and Francis Stiles were hit directly by bullets that passed through their bodies. James Toomey and Daniel Torres were protected by a wood and glass kiosk. Defendant utilized a rifle that fired exceptionally lethal, 7.62 x 39, ammunition that tore through people, wood, and glass. Defendant's actions revealed his intent.

D. CONCLUSION.

The jury properly found defendant guilty of assault in the first degree regarding victims Toomey (count III), Torres (Count IV), Davis (count VII), and Stiles (count VIII) having been provided sufficient evidence of intent. The State respectfully asks this court to affirm the convictions below.

DATED: NOVEMBER 3, 2008

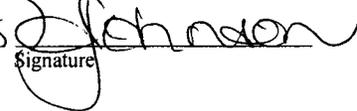
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11/3/08 
Date Signature

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STATE OF WASHINGTON
BY  DEPUTY
COURT OF APPEALS
DIVISION II