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No. 56460-9-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

ALI ELMI,

Appellant.

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

The Honorable Richard McDermott

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APPELLANT'S OPENING BRIEF

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**TABLE OF CONTENTS**

A. ASSIGNMENTS OF ERROR ..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .... 1

C. STATEMENT OF THE CASE ..... 3

    1. Procedural history. ..... 3

    2. Trial testimony. . . . . . 4

D. ARGUMENT ..... 12

    1.    THERE WAS INSUFFICIENT  
          EVIDENCE OF INTENT TO KILL OR  
          PREMEDITATION. .... 12

        a. Criminal convictions must be supported by sufficient  
evidence. ..... 12

        b. Proof of attempted first degree murder requires proof of  
an intent to kill and premeditation. ..... 13

        c. There was no evidence of intent to kill. ..... 14

        d. There was insufficient evidence of premeditation. ... 18

        e. Dismissal of the attempted murder conviction  
is required ..... 21

    2.    THERE WAS INSUFFICIENT  
          EVIDENCE TO PROVE FIRST  
          DEGREE ASSAULT AS TO THE  
          COUNTS INVOLVING KAMAL NUR,  
          ASHA ABDULLA, AND AHMED  
          ABDULLA. .... 21

a. <u>First degree assault required proof of specific intent to cause bodily injury in Nur, Abdulla and Abdulla, or specific intent to cause them to have apprehension of harm.</u> . . . . .	21
b. <u>There was no evidence of specific intent to cause bodily injury to the children, or specific intent to create apprehension of harm in the children.</u> . . . . .	24
c. <u>Dismissal of the three assault convictions in counts 3, 4 and 5 is required.</u> . . . . .	29
3. THE "TRANSFERRED INTENT" INSTRUCTION RELIEVED THE STATE OF ITS BURDEN OF PROVING EVERY ELEMENT OF THE THREE ASSAULT COUNTS. . . . .	29
4. MR. ELMI'S RIGHT TO JURY UNANIMITY WAS VIOLATED AS TO THE THREE CONVICTIONS FOR ASSAULT IN COUNTS 3, 4 AND 5. . . . .	31
a. <u>A criminal defendant has a right to an expressly unanimous jury verdict.</u> . . . . .	31
b. <u>The three definitions of common law assault create alternative means.</u> . . . . .	33
c. <u>The State failed to prove all three forms of common law assault.</u> . . . . .	35
d. <u>It cannot be determined that the verdicts were founded upon one method of assault with regard to which substantial evidence was introduced.</u> . . . . .	36
5. THE TRIAL COURT FAILED TO PROPERLY VACATE MR. ELMI'S FIRST DEGREE ASSAULT CONVICTION IN COUNT 2 AND	

<p style="text-align: center;">INSTEAD MERELY DECLINED TO IMPOSE SENTENCE, IN VIOLATION OF DOUBLE JEOPARDY PROHIBITIONS. ....</p>	40
<p style="padding-left: 40px;">a. <u>The remedy for a double jeopardy violation is vacation of the duplicative conviction.</u> ....</p>	40
<p style="padding-left: 40px;">b. <u>Mr. Elmi must be resentenced.</u> ....</p>	42
<p style="padding-left: 20px;">6. THE IMPOSITION OF FIREARM ENHANCEMENTS IN ADDITION TO MR. ELMI'S FIRST DEGREE ASSAULT CONVICTIONS VIOLATED HIS DOUBLE JEOPARDY PROTECTIONS. ....</p>	43
<p style="padding-left: 40px;">a. <u>The double jeopardy provisions of the federal and state constitutions protect criminal defendants from multiple punishment for the same "offense."</u> ....</p>	44
<p style="padding-left: 40px;">b. <u>The question of legislative intent as to firearm enhancements must be reexamined after <i>Blakely v. Washington's</i> reconception of the meaning of what constitutes an offense and the elements of an offense.</u> ....</p>	44
<p style="padding-left: 20px;">7. THE MULTIPLE FIREARM ENHANCEMENTS IMPOSED BY THE COURT FOR USE OF A SINGLE FIREARM VIOLATED DOUBLE JEOPARDY. ....</p>	48
<p>E. CONCLUSION .....</p>	50

## TABLE OF AUTHORITIES

### WASHINGTON CASES

<u>State v. Alvarez</u> , 128 Wn.2d 1, 904 P.2d 754 (1995) . . . . .	12
<u>State v. Austin</u> , 59 Wn. App. 186, 796 P.2d 746 (1990) . . . . .	23
<u>State v. Baeza</u> , 100 Wn.2d 487, 670 P.2d 646 (1983). . . . .	12
<u>State v. Bingham</u> , 105 Wn.2d 820, 719 P.2d 109 (1986). . . . .	20
<u>State v. Bland</u> , 71 Wn. App. 345, 860 P.2d 1046 (1993). . . . .	30,31,33,36,39
<u>State v. Bonds</u> , 98 Wn.2d 1, 653 P.2d 1024 (1982), <u>cert. denied</u> , 464 U.S. 831 (1983), <u>implied overruling on other grounds</u> <u>recognized by State v. Bargas</u> , 52 Wn. App. 700, 763 P.2d 470 (1988). . . . .	39
<u>State v. Brown</u> , 147 Wn.2d 330, 58 P.3d. 889 (2002) . . . . .	31
<u>In re Personal Restraint of Burchfield</u> , 111 Wn. App. 892, P.3d 840 (2002) . . . . .	40
<u>State v. Byrd</u> , 125 Wn.2d 707, 887 P.2d 396 (1995) . . . . .	23,29,30
<u>State v. Caldwell</u> , 47 Wn. App. 317, 734 P.2d 542, <u>review denied</u> , 108 Wn.2d 1018 (1987) . . . . .	47
<u>State v. Caliguri</u> , 99 Wn.2d 501, 664 P.2d 466 (1983) . . . . .	15
<u>State v. Corrado</u> , 81 Wn. App. 640, 915 P.2d 1121 (1996), <u>review</u> <u>denied</u> , 138 Wn.2d 1011 (1999). . . . .	21,29
<u>State v. Daniels</u> , 87 Wn. App. 149, 940 P.2d 690 (1997) . . . . .	23,24,27
<u>State v. Delmarter</u> , 94 Wn.2d 634, 618 P.2d 99 (1980). . . . .	24

<u>State v. Dunbar</u> , 117 Wn.2d 587, 817 P.2d 1360 (1991) . . . .	14,27
<u>State v. Eastmond</u> , 129 Wn.2d 497, 919 P.2d 577 (1996) . . .	23,30
<u>State v. Esters</u> , 84 Wn. App. 180, 927 P.2d 1140 (1996) . . . . .	23
<u>State v. Franco</u> , 96 Wn.2d 816, 639 P.2d 1320 (1982) . . . . .	32
<u>State v. Hoffman</u> , 116 Wn.2d 51, 804 P.2d 577 (1991) . . . . .	16,19
<u>State v. Gallo</u> , 20 Wn. App. 717, 582 P.2d 558, <u>review denied</u> , 91 Wn.2d 1008 (1978) . . . . .	16
<u>State v. Garcia</u> , 20 Wn. App. 401, 579 P.2d 1034 (1978). . . . .	24
<u>State v. Gentry</u> , 125 Wn.2d 570, 888 P.2d 1105, <u>cert. denied</u> , 116 S.Ct. 131 (1995). . . . .	13,20
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980). . . . .	13,32
<u>State v. Hale</u> , 65 Wn. App. 752, 829 P.2d 802 (1992) . . . . .	17
<u>State v. Hall</u> , 104 Wn. App. 56, 14 P.3d 884 (2000). . . . .	23
<u>State v. Heaven</u> , 127 Wn. App. 156, 110 P.3d 835 (2005) . .	38,39
<u>State v. Hursh</u> , 77 Wn. App. 242, 890 P.2d 1066, <u>review denied</u> , 126 Wn.2d 1025 (1995). . . . .	32,36,39
<u>State v. Hutton</u> , 7 Wn. App. 726, 502 P.2d 1037 (1972). . . . .	18
<u>State v. Johnson</u> , 92 Wn.2d 671, 600 P.2d 1249 (1979) . . . . .	41
<u>State v. Kitchen</u> , 110 Wn.2d 403, 756 P.2d 105 (1988) . .	32,35,39
<u>State v. Krup</u> , 36 Wn. App. 454, 676 P.2d 507, <u>review denied</u> , 101 Wn.2d 1008 (1984) . . . . .	22,23

<u>State v. Laico</u> , 97 Wn. App. 759, 987 P.2d 638 (1999) . . . . .	34
<u>State v. Louthier</u> , 22 Wn.2d 497, 156 P.2d 672 (1945). . . . .	14
<u>State v. Luoma</u> , 88 Wn.2d 28, 558 P.2d 756 (1977). . . . .	20
<u>State v. Nelson</u> , 17 Wn. App. 66, 561 P.2d 1093, <u>review denied</u> , 89 Wn.2d 1001 (1977). . . . .	23
<u>State v. Neslund</u> , 50 Wn. App. 531, 749 P.2d 725, <u>review denied</u> , 110 Wn.2d 1025 (1988) . . . . .	18,19
<u>State v. Nicholson</u> , 119 Wn. App. 855, 84 P.3d 877 (2003) . .	22,34
<u>State v. Odom</u> , 83 Wn.2d 541, 520 P.2d 152, <u>cert. denied</u> , 419 U.S. 1013, 42 L. Ed. 2d 287, 95 S. Ct. 333 (1974) . . . . .	16,17
<u>State v. Ollens</u> , 107 Wn.2d 848, 733 P.2d 984 (1987). . .	18,19,20
<u>In re Pers. Restraint of Orange</u> , 152 Wn.2d 795, 100 P.3d 291 (2004) . . . . .	41
<u>State v. Ortega-Martinez</u> , 124 Wn.2d 702, 881 P.2d 231 (1994) . . . . .	32,36
<u>State v. Ortiz</u> , 119 Wn.2d 294, 831 P.2d 1060 (1992) . . . . .	20
<u>State v. Pentland</u> , 43 Wn. App. 808, 719 P.2d 605, <u>review denied</u> , 106 Wn.2d 1016 (1986) . . . . .	47
<u>State v. Pirtle</u> , 127 Wn.2d 628, 643, 904 P.2d 245 (1995) . . . . .	20
<u>State v. Rehak</u> , 67 Wn. App. 157, 834 P.2d 651 (1992), <u>review</u> <u>denied</u> , 120 Wn.2d 1022 (1993). . . . .	19
<u>State v. Rivas</u> , 97 Wn. App. 349, 984 P.2d 432 (1999). . . . .	37
<u>State v. Schulze</u> , 116 Wn.2d 154, 804 P.2d 566 (1991) . . . . .	30

<u>Seattle v. Slack</u> , 113 Wn.2d 850, 784 P.2d 494 (1989). . . . .	13
<u>State v. Smith</u> , 115 Wn.2d 775, 801 P.2d 975 (1990). . . . .	13
<u>State v. Smith</u> , 124 Wn. App. 417, 102 P.3d 158 (2004), <u>review granted</u> , 154 Wn.2d 1020, 116 P.3d 399 (2005). . . . .	34,35
<u>State v. Stephens</u> , 93 Wn.2d 186, 607 P.2d 304 (1980) . . . .	32,36
<u>State v. Wilson</u> , 125 Wn.2d 212, 883 P.2d 320 (1994) . .	25,26,27
<u>State v. Winings</u> , 126 Wn. App. 75, 107 P.3d 141, 149 (2005) .	34
<u>State v. Woo Won Choi</u> , 55 Wn. App. 895, 781 P.2d 505 (1989), <u>review denied</u> , 114 Wn.2d 1002 (1990) . . . . .	14,15,17

UNITED STATES SUPREME COURT CASES

<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) . . . . .	44,45
<u>Ball v. United States</u> , 470 U.S. 856, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985) . . . . .	42,43
<u>Blakely v. Washington</u> , 542 U.S. 296, 124 S.Ct. 2531, 2536, 159 L.Ed.2d 403 (2004) . . . . .	44,45
<u>Burks v. United States</u> , 437 U.S. 1, 57 L. Ed. 2d 1, 98 S. Ct. 2141 (1978) . . . . .	21,29
<u>Chapman v. California</u> , 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) . . . . .	31
<u>Jackson v. Virginia</u> , 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979) . . . . .	12
<u>Jones v. United States</u> , 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999) . . . . .	45

<u>Neder v. United States</u> , 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) .....	31
<u>North Carolina v. Pearce</u> , 395 U.S. 711, 726, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), <u>overruled on other grounds</u> , <u>Alabama v. Smith</u> , 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989) .....	44
<u>Ring v. Arizona</u> , 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) .....	44,45
<u>Sandstrom v. Montana</u> , 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) .....	12
<u>Schad v. Arizona</u> , 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991) .....	34
<u>Whalen v. United States</u> , 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980) .....	49
<u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) .....	12

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. 5 .....	21,29, 44, 49
U.S. Const. amend. 14 .....	12,35
Wash. Const. art. I, § 9 .....	44, 49
Wash. Const. art. 1, §21 .....	32

TREATISES

W. LaFave & A. Scott, <u>Criminal Law</u> (2d ed. 1986) .....	28
Rollin M. Perkins, <u>Criminal Law</u> (2d ed. 1969) .....	36

STATUTES AND COURT RULES

RCW 9.94A.510 .....	45,46
RCW 9.94A.533 .....	45,46
RCW 9.41.010 .....	46
RCW 9.94A.030(11) .....	41
RCW 9A.04.060 .....	22
RCW 9A.36.011(1)(a) .....	22
RCW 9A.08.010(1)(a) .....	15
RCW 9A.28.020(1) .....	13,18
RCW 9A.32.030(1)(a) .....	13,18
RAP 2.5(a) .....	12

## **A. ASSIGNMENTS OF ERROR**

1. There was insufficient evidence of intent and premeditation to support conviction as to count 1.

2. There was insufficient evidence of the specific intent required for assault in counts 3, 4 and 5.

3. The jury instruction on “transferred intent” relieved the jury of its obligation to find all of the elements of first degree assault as to counts 3, 4 and 5.

4. The verdicts on counts 3, 4 and 5 must be reversed for lack of jury unanimity.

5. The conviction on count 2 that violated double jeopardy was required to be vacated.

6. The imposition of firearm enhancements in addition to convictions for first degree assault violated double jeopardy.

7. The imposition of multiple firearm enhancements based on a single firearm violated double jeopardy.

## **B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether there was insufficient evidence of intent and premeditation to support the conviction for attempted first degree

murder in count 1, where the defendant shot a firearm through the window of a house.

2. Whether there was insufficient evidence of specific intent as to the first degree assault convictions in counts 3, 4 and 5, where the defendant did not know the alleged victims were present in the house.

3. Whether the jury instruction on “transferred intent” relieved the jury of its obligation to find all of the elements of first degree assault as to counts 3, 4 and 5.

4. Whether the verdicts on counts 3, 4 and 5 must be reversed for lack of jury unanimity, where there was not sufficient evidence of every form of assault, and where it cannot be determined that the verdicts were founded upon one particular form of assault, as to which there was sufficient evidence.

5. Whether the first degree assault conviction on count 2 that violated double jeopardy was required to be vacated, rather than merely “not punished.”

6. Whether the imposition of firearm enhancements in addition to convictions for first degree assault, charged as assault with a firearm, violated double jeopardy.

7. Whether the imposition of multiple firearm enhancements based on a single firearm violated double jeopardy.

### **C. STATEMENT OF THE CASE**

**1. Procedural history.** Mr. Elmi was charged and subsequently convicted by a jury of attempted murder in the first degree of his estranged wife Fadumo Aden; assault in the first degree of Ms. Aden; three additional counts of assault in the first degree, one count each as to Aden's three year old son Kamal Nur, Aden's five year old sister Asha Abdulla, and Aden's three year old brother Ahmed Abdulla; and one count misdemeanor violation of a protection order. The felony verdicts included firearm findings on the felony counts. CP 1, 11, 142, 221-30; 4/14/05RP at 51-52. The convictions were based on evidence of a 911 call made by Ms. Aden identifying Mr. Elmi as the person who fired gunshots through the window of her home, statements Aden repudiated at trial. 4/14/05RP at 72-73; 4/25/05RP at 23, 46; Supp. CP \_\_\_\_, Sub # 300 (Exhibit list, State's exhibit 6).

At sentencing, the trial court found that the assault of Ms. Aden merged with the attempted murder count. 6/24/05RP at 4. The court sentenced Mr. Elmi to consecutive sentences on the

felony counts, along with consecutive firearm enhancements, for a total term of incarceration of 699 months. CP 221-24, 227.

Mr. Elmi appeals. CP 219.

**2. Trial testimony.** The principal trial witness was Fadumo Aden, the defendant's estranged wife. Ms. Aden testified that she and the defendant separated in the Spring of 2002, about a month before the incident in question. 4/14/05RP at 36-37. Ms. Aden obtained a restraining order against Mr. Elmi in March of 2002. 4/14/05RP at 38-39; Supp. CP \_\_\_\_, Sub # 300 (Exhibit list, State's exhibit 1).

Ms. Aden and Mr. Elmi shared a 1997 Volkswagen Jetta that was financed under her name, but Mr. Elmi drove it during the time after they separated. 4/14/05RP at 41-42. In April and May of 2002, there was an "issue" between them concerning Mr. Elmi's desire that Ms. Aden renew the license plate tabs so that he could drive the car. 4/14/05RP at 44-45.

On May 18, 2002, Ms. Aden was at SeaTac Mall with a friend, Ms. Nur, who received a call on her cellular telephone and handed the phone to Ms. Aden, saying that it was Mr. Elmi. 4/14/05RP at 47-48. Mr. Elmi was unhappy about the car tabs not

having been renewed. 4/14/05RP at 48-50. Ms. Aden testified that the argument was heated and there was yelling, but she did not “recall him saying, I will kill you or any sort of thing that I recall.” 4/14/05RP at 50-51.

Ms. Aden hung up on Mr. Elmi, and after leaving the mall, she went to her mother’s house in SeaTac. 4/14/05RP at 51. Ms. Aden’s mother and other relatives were at the home, but as it got later they left, leaving Ms. Aden at the house with her three year old son Kamal Nur, along with Aden’s siblings, five year old Asha Abdulla, and three year old Ahmed Abdulla. 4/14/05RP at 51-52. Ms. Aden and the children stayed in the living room. 4/14/05RP at 52. Ms. Aden was watching television from the couch, and the children were on the floor or in a small chair. 4/14/05RP at 55.

Around 9:30 or 10 p.m, Ms. Aden heard a voice and looked out the curtains of the large picture window in the living room. 4/14/05RP at 57-58. She saw figures or shadows, and a car behind a tree. She could hear the car running. 4/14/05RP at 58. Ms. Aden could not make out anyone’s face or identity. 4/14/05RP at 58. She looked out the window once or twice, and there appeared to be two people having an argument. 4/14/05RP at 59.

Ms. Aden testified that she then heard gunshots. 4/14/05RP at 59. At least one bullet came though the window, shattering the glass. 4/14/05RP at 59-60. Ms. Aden screamed, and the children “reacted to how I reacted . . . which was, oh, my God, let’s move and go to another room.” 4/14/05RP at 60. Ms. Aden stated that it was her reaction that had the children “freaked out.” 4/14/05RP at 60.

Ms. Aden testified she did not see who had shot the bullets. 4/14/05RP at 61. After the shots, she called 911. 4/14/05RP at 61. Although she admitted telling the 911 operator it was Mr. Elmi who fired the shots, she testified the operator was insisting she identify someone and she felt forced to say a name. 4/14/05RP at 62.

The 911 tape, in which Ms. Aden initially said the shooter was Ali Elmi, was identified and admitted as State’s exhibit 6. 4/14/05RP at 72-73; State’s exhibit 6. Ms. Elmi also told the 911 operator that the front of the house had lights on a motion detector, and that these lights “just turned on.” 4/14/05RP at 73-74.

Ms. Aden testified that she honestly did not see Mr. Elmi that night. 4/25/05RP at 23. She testified that she “said on the 911

tape that it was him because it was the first person that crossed my mind." 4/25/05RP at 46.

After the shooting, Ms. Aden's family returned to the house later that night. 4/25/05RP at 24-25. They were angry and blamed Ms. Aden for what had happened, and told her that she knew who the shooter was. 4/25/05RP at 25. Ms. Aden testified that "things were crazy" and she "felt like she had to say something."

4/25/05RP at 25. She believed one of the reasons she identified the shooter as Mr. Elmi was so that one of her parents would "come back [her] way."<sup>1</sup> 4/25/05RP at 47.

And I've said so many times that I didn't see him and have tried taking back -- I didn't see, I couldn't see. I was not an idiot enough to stare out of the window that long. And I think I just went along with this, for one, being scared of taking me back, second being scared that people would just leave me if I had said I couldn't see who it was. And I didn't want to come off like a liar, because the moment I changed my story, everybody just all of a sudden seemed to not hear me anymore. And I have made attempts to say I couldn't see anyone. Regardless of what I had said, I couldn't see. I couldn't see.

4/25/05RP at 48.

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<sup>1</sup>Ms. Aden described the fact that Mr. Elmi was from a Somalian tribe, the Tumul, that was of a significantly lower caste than her family's, the Majaftan. 4/25/04RP at 13-14. Her family hated Mr. Elmi and called him names equivalent to the "N word." 4/25/04RP at 14. The Tumul tribe was a slave tribe, and if Ms. Aden had married Mr. Elmi in Somalia, she would have been killed or disowned. 4/25/05RP at 14-15.

Deputy Roger Juvet testified that when he spoke with Ms. Aden on the night of the shooting, she was upset and afraid, and she said that when she looked out the window, before the shots, she saw “four nondescript males trying to hold back a black male wearing a red jacket of some sort.” 4/26/05RP at 36-37. Ms. Aden testified at trial that she told Juvet that she did not know anyone who would shoot at the house. 4/25/05RP at 59.

Importantly, the trial court, with the agreement of counsel, later gave the jury instruction no. 7, which instructed the jury that Ms. Aden’s statements in the 911 tape and to Deputy Juvet, which the court had admitted as excited utterances, could be considered for the truth of the matter asserted. CP 168; 5/3/05RPRP at 72. The remainder of Ms. Aden’s statements, which were made to various law enforcement personnel or in prior testimony (and in which she had claimed that Mr. Elmi was the shooter<sup>2</sup>), could be

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<sup>2</sup>Ms. Aden admitted that she had given a statement to Detective Gary Murray from Kent three days after the incident, stating that the defendant had fired the shots. 4/14/04RP at 67-69. She also admitted making a similar statement, identifying Mr. Elmi as the shooter, to Detective Jesse Anderson on May 29, 2002. 4/14/04RP at 69-71. She admitted that she told Detective Anderson that Mr. Elmi had threatened to kill her when she spoke with him on the morning of the 18th. 4/25/05RP at 30-31. Ms. Aden stated that when she spoke with Detectives Murray and Anderson, she “didn’t want to say I couldn’t see anything after I had provided a description of what I thought I’d seen, so I followed what I’d said in the 911 tape.” 4/25/05RP at 46.

considered by the jury only for "evaluating the credibility" of Ms. Aden. CP 168; 5/3/05RP at 72.

King County Sheriff's Deputies determined that four bullets had been fired. One hit the exterior wall of the house and three traveled through the window, damaging the television and a kitchen cabinet. 4/25/05RP at 134-40. Four shell casings were found on the ground outside the house, approximately from 5 to 10 feet from the house. 4/25/05RP at 143-45. Three slugs were found, one underneath the front window outside, one inside the living room below the curtain, and one behind the television, in the wall. 4/25/05RP at 146-47.

On June 20th, 2002, Mr. Elmi left a message on Ms. Aden's voicemail in which he told his son, Kamal Nur, that he loved him, "that he will be home," and that Kamal Nur would be in his heart for the rest of his life. 4/26/05RP at 51-52.

Months after the shooting incident, on July 4, 2002, Ohio police responded to a disturbance at an apartment complex in Franklin Township, an area surrounding Columbus. 4/25/05RP at 72-76. Police located a 1994 gold-colored Toyota Camry, and prepared a report for someone involved carrying a concealed weapon. 4/25/05RP at 76-77. The police had no contact with

anyone named Ali Elmi. 4/25/05RP at 75, 118. The Camry had Oregon plate "letter V, as in Victor, letter V, as in Victor, and Z as in zebra, 406." 4/25/05RP at 78. During an inventory search, the police located a 10 millimeter semiautomatic handgun under the back seat of the car. 4/25/05RP at 78-79, 85. The Washington State Patrol Crime Laboratory concluded after testing that the shell casings were fired from this 10 millimeter handgun. 4/26/05RP at 132.

On October 8, 2002, an Ohio sheriff's deputy in Columbus stopped a 1994 Toyota Camry, with Oregon license plate "Victor, Victor, 2406," on the basis of a "be on the lookout for" order. 4/25/05RP at 65-68, 70. Mr. Elmi was driving the car, and there were five other young Somali males in the vehicle. 4/25/05RP at 68, 70-71. Mr. Elmi was taken into custody. 4/25/05RP at 69.

The State introduced a note written by Mr. Elmi while in custody prior to trial. 4/26/05RP at 137; Supp. CP \_\_\_\_, Sub # 300 (Exhibit list, State's exhibit 43). The note had been passed to another inmate, "D," and asked this person to call Ms. Aden and tell her his lawyers were doing their best to help him. 4/26/05RP at 139. The note stated Mr. Elmi needed Ms. Aden to tell the judge and the prosecutor that she had discovered the defendant's leather

jacket missing from the closet before the incident, and that around the same time a neighbor had seen a Somalian man outside the house looking at the window. 4/26/05RP at 140-41.

Defense witness Saynab Ali, Mr. Elmi's brother in law, testified that Mr. Elmi was at her home all day and all night on May 18, through to the next morning. 4/27/05RP at 38-40. Saynab Ali told Mr. Elmi on May 20 that the police were accusing him of the shooting, and it was shortly thereafter that Mr. Elmi left for Ohio. 4/27/05RP at 45-49. Mohamed Karie testified that the person who shot at Ms. Aden's house was a person named Abdul, who left Karie's home in Seattle on the night of the 18th and fired at the home while other men tried to hold him back. 4/28/05RP at 10-14. Karie witnessed the shooting from his vehicle. 4/28/05RP at 12. Ahmed Ahmed, a friend of Ms. Aden's, testified that Fadumo Nur, the friend of Ms. Aden's who was with Aden at the mall the day of the shooting, admitted to him that she had arranged for her cousin to shoot at the house, but not to hurt anyone. 5/2/05RP at 67-69. Ms. Nur acted out of her dislike for Mr. Elmi and a desire to falsely accuse him of a crime, because of his membership in a lower Somalian tribe. 5/2/05RP at 66-67. Ms. Nur was at the house on the night of the shooting, and she testified that Ms. Aden had never

looked out the window. 5/2/05RP at 65-66. After the incident, Ms. Nur's cousin fled to Ohio with the gun he had used in the shooting. 5/2/05RP at 60-61.

#### **D. ARGUMENT**

##### **1. THERE WAS INSUFFICIENT EVIDENCE OF INTENT TO KILL OR PREMEDITATION.**

**a. Criminal convictions must be supported by sufficient evidence.**<sup>3</sup> In order to convict a defendant of a charged crime, the State bears the burden of producing evidence sufficient to prove every element of the offense beyond a reasonable doubt.

Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); In re Winship, 397 U.S. 358, 363, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Baeza, 100 Wn.2d 487, 490, 670 P.2d 646 (1983). A conviction unsupported by sufficient evidence violates a defendant's constitutional right to due process. U.S. Const. amend. 14;<sup>4</sup> Jackson v. Virginia, 443 U.S. 307, 319, 61 L.

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<sup>3</sup>Because they raise claims of constitutional magnitude, each of Mr. Elmi's challenges to the sufficiency of the State's evidence may be raised for the first time on appeal. State v. Alvarez, 128 Wn.2d 1, 10, 904 P.2d 754 (1995); RAP 2.5(a).

<sup>4</sup>The Fourteenth Amendment provides that "no person shall be deprived of life, liberty, or property without due process of law." U.S. Const. amend. 14.

Ed. 2d 560, 99 S. Ct. 2781 (1979); Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989).

In considering a claim of insufficiency of the evidence, an appellate court must determine "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. at 323; State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

**b. Proof of attempted first degree murder requires proof of an intent to kill and premeditation.** In order to prove attempted murder in the first degree, as to count 1 involving Ms. Aden, the State was required to prove beyond a reasonable doubt that Mr. Elmi, with a premeditated intent to cause Ms. Aden's death, took a substantial step toward the commission of that crime. CP 172-76; RCW 9A.28.020(1); RCW 9A.32.030(1)(a); State v. Smith, 115 Wn.2d 775, 782, 801 P.2d 975 (1990). Evidence of an element of a charge is sufficient only if, viewed in the light most favorable to the state, a rational trier of fact could have found that element beyond a reasonable doubt. State v. Gentry, 125 Wn.2d 570, 596, 888 P.2d 1105, cert. denied, 116 S.Ct. 131 (1995).

**c. There was no evidence of intent to kill.** Because the crime of murder is defined by the result of death, “the crime of attempted murder requires the specific intent to cause the death of another person.” State v. Dunbar, 117 Wn.2d 587, 590, 817 P.2d 1360 (1991). Specific intent to kill a person must be proved “as an independent fact and cannot be presumed from the commission of the unlawful act.” State v. Louther, 22 Wn.2d 497, 503, 156 P.2d 672 (1945). This means that the defendant’s act of shooting cannot by itself constitute sufficient evidence of intent to kill, as opposed to intent to injure.

Although the evidence in this case allowed the jury to infer that it was the defendant who fired the gun, the shooting of a firearm into the window of Ms. Aden’s home, however, does not establish intent to kill beyond a reasonable doubt. There was a mild argument on the telephone between Mr. Elmi and Ms. Aden earlier on the day in question. But this did not provide evidence of any intent to kill Ms. Aden. For example, in State v. Woo Won Choi, 55 Wn. App. 895, 906, 781 P.2d 505 (1989), review denied, 114 Wn.2d 1002 (1990), the evidence of intent to kill was sufficient where the defendant and the victim had an angry physical altercation during gambling at a casino, and the defendant

immediately followed the victim in his car when he left the establishment. Choi then pulled his car up next to the victim's, raised a gun, and fired at him, striking him. State v. Woo Won Choi, 55 Wn. App. at 898-99. The Court of Appeals concluded that intent to kill was proved, stating that "[e]vidence of intent to kill 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. Woo Won Choi, 55 Wn. App. at 906.

Here, the shooting of the firearm alone, from outside a house through a window, in the absence of any prior threat to kill or any violent relationship between Mr. Elmi and Ms. Aden, is insufficient to prove that Mr. Elmi intended to kill Ms. Aden. This evidence of the defendant's conduct alone may establish intent to assault, but it does not show intent to kill any person. Intent exists only where a known or expected result is also the defendant's purpose or objective. State v. Caliguri, 99 Wn.2d 501, 505, 664 P.2d 466 (1983) (citing RCW 9A.08.010(1)(a)). Ms. Aden testified that the defendant had not threatened her, much less threatened to kill her. 4/14/05RP at 50. She reiterated in cross-examination that Mr. Elmi did not threaten her in any way that day, and there was no

evidence of any previous threat. 4/25/05RP at 18. This evidence fails to show that the defendant acted with the desired purpose of causing Ms. Aden's death.

Various cases have proclaimed that "[p]roof that a defendant fired a weapon at a victim is, of course, sufficient to justify a finding of intent to kill." State v. Hoffman, 116 Wn.2d 51, 84-85 and n. 45, 804 P.2d 577 (1991) (citing State v. Gallo, 20 Wn. App. 717, 729, 582 P.2d 558, review denied, 91 Wn.2d 1008 (1978); State v. Odom, 83 Wn.2d 541, 550, 520 P.2d 152, cert. denied, 419 U.S. 1013, 42 L. Ed. 2d 287, 95 S. Ct. 333 (1974)). But these cases involve far more extensive facts than the instant case. For example, in Hoffman, the defendants transported multiple weapons to the scene, hid and waited for police officers to approach, and then opened fire on them. 116 Wn.2d at 83-84. In State v. Gallo, the defendant threatened "to take care of" the victim, and during the attack a few hours later he threatened to hurt her if she failed to cooperate, and then "took careful aim before shooting her in the head." 20 Wn. App. at 729. And in State v. Odom, the defendant arrived at a government employment office and became angry with a supervisor about having to fill out paperwork for benefits. He left, returning half an hour later, and announced an intention to "settle

this matter once and for all.” 83 Wn.2d at 542-43. He then pointed a .44 caliber magnum pistol at the supervisor and fired twice. Outside the office, he was approached by two officers in a vehicle, whereupon he fired at one officer as he exited the police vehicle, and then fired through the windshield of the vehicle while the other patrolman was still sitting in the front seat. State v. Odom, 83 Wn.2d at 542-43. This was deemed sufficient evidence of intent to kill. State v. Odom, 83 Wn.2d at 550.

Nothing in the present case shows that Mr. Elmi possessed the purpose or objective to take Ms. Aden’s life, and the mere act of firing through or toward a window is inadequate. The evidence in this case in fact shows that the shooter, standing as close as five or ten feet from the “large picture window”, did not even fire all the shots through the window itself, instead hitting the exterior wall. 4/14/05RP at 57-58; 4/25/05RP at 146-47. Without evidence of some unusually serious prior altercation or a threat to kill, this was insufficient evidence of intent to kill in the present case. State v. Woo Won Choi, 55 Wn. App. at 906. (prior physical altercation); State v. Hale, 65 Wn. App. 752, 757, 829 P.2d 802 (1992) (clear and unequivocal threat to kill constituted necessary independent evidence of intent to kill). Any conclusion that the defendant

intended to kill Ms. Aden was speculation, unsupported by independent evidence beyond a reasonable doubt.

The existence of a fact cannot rest upon guess, speculation, or conjecture. . . . In order to support a determination of the existence of a fact, evidence thereof must be substantial, i.e., it must attain that character which would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.

State v. Hutton, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). This Court should reverse the verdict of guilty on the attempted murder count.

**d. There was insufficient evidence of premeditation.**

Even if this Court deems that there was sufficient evidence of intent to kill, there was no evidence of premeditation. Premeditation is an essential element of murder in the first degree. RCW 9A.32.030(1)(a). It is defined as the deliberate formation of and reflection upon the intent to take a human life, and involves the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning, for a period of time, however short. State v. Neslund, 50 Wn. App. 531, 558, 749 P.2d 725, review denied, 110 Wn.2d 1025 (1988); State v. Ollens, 107 Wn.2d 848, 850, 733 P.2d 984 (1987). It must involve more than a moment in time. RCW 9A.32.020(1).

Cases such as State v. Hoffman, *supra*, State v. Ollens, 107 Wn.2d at 853, and State v. Neslund, 50 Wn. App. at 559, represent circumstances in which the factual record contained evidence that would allow the jury to reasonably conclude the defendants each premeditated a killing -- prior threats by the defendant, the bringing of a number of deadly weapons to the scene by the defendant, multiple shots fired by the defendant, the shooting of a victim from behind, and statements clearly indicating premeditation. Thus in State v. Hoffman, 116 Wn.2d at 84-85, premeditation was proved where the defendants brought multiple guns to a location, fired on police officers, and continued to fire as the victims crawled away, coordinating their gunfire with flares they had brought to illuminate the scene of the shooting. "Such conduct is evidence of calculated actions and premeditated intent to kill." State v. Hoffman, 116 Wn.2d at 84-85.

For further example, evidence showing the victim was shot three times in the head, twice after he had fallen to the ground, supports a finding of premeditation. State v. Rehak, 67 Wn. App. 157, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022 (1993). But in contrast, evidence of strangulation, alone, does not support

an inference of premeditation. State v. Bingham, 105 Wn.2d 820, 826, 719 P.2d 109 (1986).

Here, the shooter's conduct involved the firing of a weapon through a window. The Supreme Court has stated that bringing a weapon to the scene is evidence of premeditation. State v. Gentry, 125 Wn.2d at 599 (citing State v. Ollens, 107 Wn.2d at 853; State v. Ortiz, 119 Wn.2d 294, 312-13, 831 P.2d 1060 (1992)). But in Gentry the defendant attempted to sexually assault the victim, and killed her with 8 to 15 blows from a rock. Gentry, 125 Wn.2d at 599-601. In Ollens, the defendant approached from behind, stabbed the victim numerous times, and then slashed the victim's throat. Ollens, 107 Wn.2d at 853. And in State v. Ortiz, the killing was committed by multiple knife wounds, the victim also suffered other facial injuries, and the victim exhibited defensive wounds indicating a prolonged struggle. 119 Wn.2d at 312-13.

In this case, without any evidence of this nature, there is insufficient evidence of premeditation. Premeditation can be proved by circumstantial evidence only where the inferences drawn by the jury are reasonable and the evidence supporting the jury's verdict is substantial. State v. Pirtle, 127 Wn.2d 628, 643, 904 P.2d 245 (1995); State v. Luoma, 88 Wn.2d 28, 33, 558 P.2d 756

(1977). Evidence of the shooter's conduct of firing of a gun into and toward a window does not allow a reasonable inference of deliberate formation of and reflection upon the intent to take a human life. The defendant's conviction for first degree attempted murder must be reversed.

**e. Dismissal of the attempted murder conviction is required.** A finding of insufficient evidence in support of a verdict necessitates dismissal with prejudice rather than remand for a new trial. U.S. Const. amend. 5; Burks v. United States, 437 U.S. 1, 57 L. Ed. 2d 1, 98 S. Ct. 2141 (1978); State v. Corrado, 81 Wn. App. 640, 645, 915 P.2d 1121 (1996), review denied, 138 Wn.2d 1011 (1999). Mr. Elmi's conviction for attempted murder must be reversed and the charge dismissed.

**2. THERE WAS INSUFFICIENT EVIDENCE TO PROVE FIRST DEGREE ASSAULT AS TO THE COUNTS INVOLVING KAMAL NUR, ASHA ABDULLA, AND AHMED ABDULLA.**

**a. First degree assault required proof of specific intent to cause bodily injury in Nur, Abdulla and Abdulla, or specific intent to cause them to have apprehension of harm.** In order to convict Mr. Elmi of assault in the first degree on counts 3, 4 and 5,

the State had to prove, beyond a reasonable doubt, that, with the intent to inflict great bodily harm, he assaulted each of the children with a firearm. RCW 9A.36.011(1)(a); see CP 177. In addition to being given the instruction on first degree assault, the jury was instructed on the three forms of "assault" recognized in Washington: (1) an intentional touching that is harmful or offensive (actual battery); (2) an act done with intent to inflict bodily injury on another but failing to do so (attempted battery); and (3) an act done with intent to put another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting that harm (frequently referred to as "common law" assault). CP 178; see State v. Nicholson, 119 Wn. App. 855, 860, 84 P.3d 877 (2003). The State was required to prove "assault" in order to prove first degree assault. State v. Krup, 36 Wn. App. 454, 457, 676 P.2d 507, review denied, 101 Wn.2d 1008 (1984); see also RCW 9A.04.060 (common law provisions supplement criminal statutes).

Because the named complainants in counts 3, 4 and 5 were not subjected to assault by actual battery, the State was required to prove that Mr. Elmi specifically intended to assault them. Of the three forms of assault, assault by actual battery requires only the general intent to do the physical act constituting the assault, and

does not require specific intent. State v. Hall, 104 Wn. App. 56, 62, 14 P.3d 884 (2000). In contrast, assault by attempting to inflict bodily injury (attempted battery) requires the specific intent to cause bodily injury, and assault by placing a person in reasonable apprehension of harm ("common law" assault) requires the specific intent to create apprehension of harm. State v. Daniels, 87 Wn. App. 149, 155, 940 P.2d 690 (1997) (citing State v. Eastmond, 129 Wn.2d 497, 500, 919 P.2d 577 (1996); State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995)). Thus in Byrd, the Court stated,

the State must prove the Defendant acted with an intent to create in his or her victim's mind a reasonable apprehension of harm.

State v. Byrd, 125 Wn.2d at 714 (citing State v. Austin, 59 Wn. App. 186, 192-93, 796 P.2d 746 (1990); Krup, 36 Wn. App. at 458-59).

The term "specific intent" means the intent to produce a result in addition to the intent to do the physical act which the crime requires, State v. Esters, 84 Wn. App. 180, 184, 927 P.2d 1140 (1996), while the term "general intent" means the intent to do the physical act which the crime requires. State v. Nelson, 17 Wn. App. 66, 72, 561 P.2d 1093, review denied, 89 Wn.2d 1001 (1977).

If Mr. Elmi had actually struck the named complainants in

counts 3, 4 and 5, his intent to fire the gun would be the only intent required to convict. Daniels, 87 Wn. App. at 155. But the present case was not contended as involving involve actual battery. 5/3/05RP at 37. Therefore, proof of assault of Nur, Abdulla and Abdulla required proof of specific intent to assault those individuals.

**b. There was no evidence of specific intent to cause bodily injury to the children, or specific intent to create apprehension of harm in the children.** A specific criminal intent “may be inferred from the conduct [of the accused] if it is plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). However, in Mr. Elmi’s case, there is no evidence that he possessed a specific intent to cause bodily injury to the children, or to create apprehension of harm by in the children. The children involved in these counts were not subjected to assault by actual battery, as none of the children were shot. See State v. Garcia, 20 Wn. App. 401, 403, 579 P.2d 1034 (1978). Mr. Elmi’s intentional act of firing the gun cannot supply the required specific intent for either of the remaining forms of assault.

The Washington Supreme Court has stated that a defendant may be found guilty of assault by battery of “unintended victims” where he acts intentionally, and by his intentional act he mistakenly

subjects a third person to battery. These were the circumstances in State v. Wilson, 125 Wn.2d 212, 213-14, 883 P.2d 320 (1994), in which the defendant fired a gun into the window of a bar, intending to shoot two persons with whom he had been arguing, but instead hit two different persons. Wilson was convicted by a jury of four counts of first degree assault, one count as to each of the four individuals. State v. Wilson, 125 Wn.2d at 214.

On initial review, the Court of Appeals ruled the trial court erred in "allowing proof of Wilson's intent to inflict great bodily harm on his intended victims to [also] support charges of assault in the first degree against the two unintended victims." State v. Wilson, 125 Wn.2d at 214. However, the Supreme Court reversed, holding that conviction on the counts involving the two unintended victims was supported by the very language of the first degree assault statute, RCW 9A.36.011. Wilson, 125 Wn.2d at 218-19. The Supreme Court read the first degree assault statute in conjunction with the three common law forms of assault:

Under a literal interpretation of RCW 9A.36.011, a person is guilty of assault in the first degree if he or she, with the intent to inflict great bodily harm, assaults another with a firearm, administers poison to another, or assaults another person and causes great bodily harm. The *mens rea* for this crime is the "intent to inflict great bodily harm." 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.

Reading the various assault statutes, in combination with the common law definitions for assault, we are persuaded that Wilson assaulted Hurles and Hensley in the first degree when, with an intent to cause great bodily harm to Jones or Judd or both, Wilson discharged bullets from a firearm into the neck of Hurles and into the side of Hensley. Even though Wilson may not have intended to assault Hensley and Hurles, both men were the unintended victims of Wilson's intentional assault on Jones and Judd. Under a literal interpretation of RCW 9A.36.011, Wilson assaulted Hensley and Hurles.

Wilson, 125 Wn.2d at 218-19. The Court noted that conviction did not require reliance on any doctrine of "transferred intent."

We hold the doctrine of transferred intent is unnecessary to convict Wilson of assaulting Hensley and Hurles in the first degree. Under a literal interpretation of RCW 9A.36.011, once the *mens rea* is established, RCW 9A.36.011, not the doctrine of transferred intent, provides that any unintended victim is assaulted if they fall within the terms and conditions of the statute. Transferred intent is only required when a criminal statute matches specific intent with a specific victim. RCW 9A.36.011 does not include such a rigid requirement.

Wilson, 125 Wn.2d at 219. The Wilson Court's reading of the first degree assault statute makes sense in that case, which involved

actual battery in which the two “unintended victims” in question were subjected to harmful touching. Wilson, 125 Wn.2d at 215, 218-19. The intent required for actual battery is the intent to do the act of shooting. State v. Hall, supra, 104 Wn. App. at 62 (assault by battery requires only the intent to do the physical act). That intentional shooting, when paired with any victim of battery, establishes the crime of first degree assault by actual battery. The lesson of Wilson is that where the underlying assault element does not require that the defendant’s intent be matched with a particular victim, intent may be paired with any unintended victim. Because assault by battery requires only a general intent to “pull the trigger,” that intent can be paired with any victim who is battered, and establish assault by battery.

In a case involving the other two forms of common law assault, however, the assertion that conviction does not require that the intent match a particular victim cannot hold true, since assault by attempted battery requires the specific intent to cause bodily injury, and assault by placing a person in reasonable apprehension of harm requires the specific intent to create apprehension of harm. State v. Daniels, 87 Wn. App. 149, 155; see State v. Dunbar, 117 Wn.2d at 590 (where a crime is defined in terms of acts causing a

particular result, a defendant charged with attempt must have specifically intended to accomplish that criminal result) (citing W. LaFare & A. Scott, Criminal Law § 6.2(c), at 500 (2d ed. 1986)). Therefore, in order to find that there was sufficient evidence of assault of the children, the State was required to produce evidence of assault by attempted battery, or by common law assault, and the required specific intent to batter or cause apprehension in the three victims in these counts. The aforementioned cases of Byrd and Eastmond make clear that these forms of assault are specific intent crimes. But Mr. Elmi had no specific intent as to these named victims. To allow the defendant to be convicted of assault in counts 3, 4 and 5 would be to do so without the required proof of specific intent and would thus render the defendant culpable simply on the basis that there were other persons present when the defendant assaulted Ms. Aden -- persons of whose presence the defendant was unaware. Although the first degree assault charges alleged that Mr. Elmi possessed intent to inflict great bodily harm, there is no evidence in the present case that he intended to inflict such harm on Nur, Abdulla or Abdulla. The State's theory at trial would allow the defendant who attempts but fails to batter to be convicted of assault not only as to the person he failed to batter but any other

person of whose presence he was unaware and whom his bullets also did not hit. It would also allow the defendant to be culpable as to any person who feared apprehension regardless of whether the defendant knew of their presence. But nothing in Wilson or any other Washington case authorizes conviction for assault by attempted battery, or by causing apprehension, without the required mental state of specific intent to batter or to cause apprehension in those victims.

**c. Dismissal of the three assault convictions in counts 3, 4 and 5 is required.** A finding of insufficient evidence in support of a verdict or verdicts necessitates dismissal with prejudice rather than remand for a new trial. U.S. Const. amend. 5; Burks v. United States, *supra*; State v. Corrado, *supra*.

**3. THE “TRANSFERRED INTENT”  
INSTRUCTION RELIEVED THE STATE  
OF ITS BURDEN OF PROVING  
EVERY ELEMENT OF THE THREE  
ASSAULT COUNTS.**

Instructing the jury in a manner that relieves the State of its burden of proof is an error of constitutional magnitude that a defendant can raise for the first time on appeal. State v. Byrd, 125 Wn.2d at 714. In this case, jury instruction 20 on “transferred intent” erroneously instructed the jury that it could convict the

defendant without finding the required element of specific intent. CP 181. This was constitutional error, because assault by attempted battery or by causing apprehension of harm requires proof of specific intent as to the named victims. See Part D.2, supra.

Therefore, the instructions, taken in their entirety, must inform the jury that the State bears the burden of proving James Byrd acted with an intent either to create in John Lindemulder's mind a reasonable apprehension of harm or to cause bodily harm.

State v. Byrd, 125 Wn.2d at 714 (citing State v. Schulze, 116 Wn.2d 154, 167-68, 804 P.2d 566 (1991); State v. Bland, 71 Wn. App. 345, 350-51, 860 P.2d 1046 (1993)). As observed in Byrd,

the omission of a specific intent instruction impermissibly allowed the jury to find the defendant guilty of second degree assault on the mere basis of his intentional drawing of the gun, a physical act he admitted, without finding any actual intent to injure or cause fear.

State v. Eastmond, 129 Wn.2d at 503 (citing Byrd, 125 Wn.2d at 715). The jury in this case could infer that the defendant intended to cause great bodily harm to Ms. Aden, but the transferred intent instruction in this case erroneously instructed the jury that this intent could substitute for the intent required to convict Mr. Elmi on counts 3, 4 and 5.

The Washington Supreme Court follows the holding of Neder v. United States, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999), that jury instruction that misstate the elements of the offense are subject to harmless error analysis." State v. Brown, 147 Wn.2d 330, 340, 58 P.3d. 889 (2002). A constitutional error such as misstating the elements of the crime is harmless only if it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Brown, 147 Wn.2d at 341 (citing Neder, 527 U.S. at 15 (quoting Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967))). "When applied to an . . . misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence." Brown, 147 Wn.2d at 341. Here, as argued in Part D.2, supra, the evidence was insufficient to show that Mr. Elmi had a specific intent to batter or to cause apprehension of harm in the complainants involved in counts 3, 4 and 5. These convictions must be reversed.

**4. MR. ELMI'S RIGHT TO JURY UNANIMITY WAS VIOLATED AS TO THE THREE CONVICTIONS FOR ASSAULT IN COUNTS 3, 4 AND 5.**

**a. A criminal defendant has a right to an expressly unanimous jury verdict.** Criminal defendants have a right to a

unanimous jury verdict. U.S. Const, amend. 14; Wash. Const. art. 1, §21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). An essential aspect of this right is express jury unanimity on the means by which the defendant is found to have committed the crime. State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994) (citing Wash. Const. art. 1, §21); State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).

Where a single offense may be committed in more than one way, the jury must be instructed that it has to be unanimous as to the means employed, in order to convict. State v. Kitchen, 110 Wn.2d at 410; State v. Hursh, 77 Wn. App. 242, 248, 890 P.2d 1066, review denied, 126 Wn.2d 1025 (1995). If the jury is not so instructed, the usual remedy is reversal. State v. Kitchen, 110 Wn.2d at 410; State v. Hursh, 77 Wn. App. at 248.

However, absent a jury instruction on unanimity, a guilty verdict in an alternative means case may nonetheless be affirmed, if sufficient evidence exists to support each of the alternative means presented to the jury. State v. Franco, 96 Wn.2d 816, 823, 639 P.2d 1320 (1982); State v. Green, 94 Wn.2d at 232. But if this test fails, the reviewing court can then only affirm the verdict if it

can be sure that the verdict was founded on one particular means,  
and if there is sufficient evidence to support that means:

If one of the alternative means upon which a charge is based fails and there is only a general verdict [no instruction on unanimity], the verdict cannot stand unless the reviewing court can determine that the verdict was founded upon one of the methods with regard to which substantial evidence was introduced.

State v. Bland, 71 Wn. App. 345, 354, 860 P.2d 1046 (1993).

Mr. Elmi's convictions for first degree assault on counts 3, 4 and 5 fails each of these tests and those convictions must be reversed. His right to a unanimous jury was violated as to these assault counts, because the jury was not instructed that it had to be unanimous as to which alternative means of common law assault was committed, and the State failed to prove all of the three alternative means of committing assault, or to prove one particular means of assault upon which it solely relied for conviction.

**b. The three definitions of common law assault create alternative means.** As noted, the jury was instructed on the three forms of "assault" recognized in Washington: (1) actual battery; (2) attempted battery; and (3) putting another in apprehension of harm (common law assault). CP 178. The Court of Appeals has ruled that the various definitions of common law assault -- battery,

attempted battery, and assault by causing apprehension of harm -- do not create "alternative means" for purposes of this rule. State v. Winings, 126 Wn. App. 75, 107 P.3d 141, 149 (2005); State v. Smith, 124 Wn. App. 417, 426-27, 102 P.3d 158 (2004), review granted, 154 Wn.2d 1020, 116 P.3d 399 (2005). The appellate cases have not been consistent on this issue, however. In State v. Laico, 97 Wn. App. 759, 762, 987 P.2d 638 (1999), Division One held "definition statutes do not create additional alternative means." But in State v. Nicholson, 119 Wn. App. 855, 860, 84 P.3d 877 (2003), without disavowing its Laico decision, Division One held that the three assault definitions do create alternative means of committing the crime.

State v. Nicholson represents the better rule, that the three forms of assault "are alternative means of committing the crime of assault." State v. Nicholson, 119 Wn. App. at 860. As has been said under federal unanimity law, although a State Legislature may define different acts or mental states as alternative means of committing an offense, when the alternative means are so disparate as to constitute separate offenses, the Fourteenth Amendment right to due process requires jury unanimity. Schad v. Arizona, 501 U.S. 624, 632-33, 111 S.Ct. 2491, 115 L.Ed.2d 555

(1991); U.S. Const., amend. 14. The three forms of common law assault are part of the assault statutes. RCW 9A.04.060 (common law provisions supplement criminal statutes). They are too disparate to be considered the same offense for purposes of excusing any requirement of unanimity, because a jury that disagrees whether the defendant actually battered a complainant, or attempted to strike a complainant, or intentionally placed a complainant in fear of battery, cannot be deemed unanimous as to the defendant's actions. In fact, the Washington Supreme Court recently granted review in State v. Smith on July 12, 2005, agreeing to decide the question "whether the definition of assault describes alternative means of committing the crime, and if so, whether the evidence supports all of the means." State v. Smith, 154 Wn.2d 1020, 116 P.3d 399 (2005) (granting review). A decision has yet to be issued. This Court should conclude that the definition of assault does create "alternative means" of committing the offense.

**c. The State failed to prove all three forms of common law assault.** Washington cases have stated that a particular expression by the jury of its unanimity is "not required" if substantial evidence supports each alternative means. State v. Kitchen, 110

Wn.2d at 410; State v. Hursh, 77 Wn. App. 242, 248, 890 P.2d 1066, review denied, 126 Wn.2d 1025 (1995). The test for substantial evidence is under Jackson v. Virginia, i.e., whether the evidence would justify a rational trier of fact to find guilt beyond a reasonable doubt. State v. Ortega-Martinez, 124 Wn.2d 708 (citing Jackson v. Virginia, 443 U.S. at 318). In this case, the State failed to prove at least one form of common law assault as to counts 3, 4 and 5. The defendant plainly did not assault Nur, Abdulla, or Abdulla by “actual battery.” State v. Garcia, 20 Wn. App. at 403 (a battery is a touching that is unlawful because it was neither legally consented to nor otherwise privileged, and was either harmful or offensive) (citing Rollin M. Perkins, Criminal Law, ch. 2, § 2.A.1, at 107-08 (2d ed. 1969)). The State failed to prove all of the three forms of common law assault.

Therefore, the verdicts in this case on counts 3, 4 and 5 cannot stand unless the reviewing court can determine that the verdicts were “founded upon one” method of assault with regard to which substantial evidence was introduced. (Emphasis added.) State v. Bland, 71 Wn. App. at 354.

**d. It cannot be determined that the verdicts were founded upon one method of assault with regard to which**

**substantial evidence was introduced.** In determining whether a verdict was based on a particular alternative means, the court considers the charging document and the trial record, including the parties' arguments. State v. Rivas, 97 Wn. App. 349, 353, 984 P.2d 432 (1999).

As noted, the jury was instructed on all three forms of "assault" recognized in Washington: (1) actual battery; (2) attempted battery; and (3) assault by putting another in apprehension of harm. CP 178. In closing, the State discussed all three forms of assault. 5/3/05RP at 35-36. The State excluded the possibility of a verdict based on actual battery in counts 3, 4 and 5 by conceding that these complainants were not subjected to battery. 5/3/05RP at 37.

However, the State's closing argument did not seek a verdict based specifically upon a theory that Mr. Elmi attempted to batter the children, or upon a theory that he intentionally placed them in apprehension of harm. These forms of assault were discussed but no distinction or choice was made between them. See 5/3/05RP at 35-40. The most concrete discussion of Mr. Elmi's conduct toward these complainants was that he created a "probability of death" by firing "four rounds into that house" when "there were four [sic] kids

there.” 5/3/05RP at 39. The State conceded that there was no reason to think that Mr. Elmi knew the children were in the house. 5/3/05RP at 37-38. Even if this conduct had established assault by attempted battery or assault by causing apprehension of harm (see Part D.2, supra), and the specific intent to injure or place fear in those victims required for those forms of assault, there was no election by the prosecutor of one of these alternative means.

This is inadequate to cure the lack of express unanimity. Circumstances demonstrating unanimity in the absence of an expression of unanimity must be clear enough to assure a reviewing court the jury was in fact unanimous. State v. Heaven, 127 Wn. App. 156, 110 P.3d 835, 837-38 (2005). In Heaven, a multiple acts case, the Court of Appeals correctly held that in the absence of a unanimity instruction, or specificity in the charging document, along with testimony at trial on multiple acts, the State’s non-exclusive discussion in closing argument of certain acts as supporting certain charged counts did not amount to a clear election:

The charging document did not refer to specific acts, and it did not segregate charging periods among the three counts. The State came close to informing the jury which acts to rely upon when the prosecutor told jurors, “You could say all of the breast touches were

one count and you could say the vagina touch the victim was anticipated to talk about was another count and the humping motion the defendant made in early January of '02 was the third count." VRP (January 22, 2004 RP) at 173. But the State ultimately chose not to elect particular acts to be relied upon for conviction on each count.

State v. Heaven, 127 Wn. App. at 161-62. Here, it cannot be said that the verdicts were founded upon one method of assault, much less one means as to which substantial evidence was introduced. See State v. Bland, 71 Wn. App. at 354. Put another way, it cannot be said that the record plainly shows that the jury was unanimous as to the means. State v. Bonds, 98 Wn.2d 1, 18, 653 P.2d 1024 (1982), cert. denied, 464 U.S. 831 (1983), implied overruling on other grounds recognized by State v. Bargas, 52 Wn. App. 700, 707, 763 P.2d 470 (1988). Therefore, absent any express assurances of unanimity, or other indications permitting affirmance of the verdicts in the absence of express unanimity, the assault verdicts must be reversed. State v. Kitchen, 110 Wn.2d at 410; State v. Hursh, 77 Wn. App. at 248; State v. Bland, 71 Wn. App. at 354.

**5. THE TRIAL COURT FAILED TO PROPERLY VACATE MR. ELMI'S FIRST DEGREE ASSAULT CONVICTION IN COUNT 2 AND INSTEAD MERELY DECLINED TO IMPOSE SENTENCE, IN VIOLATION OF DOUBLE JEOPARDY PROHIBITIONS.**

The trial court improperly failed to vacate Mr. Elmi's conviction for first degree assault of Ms. Aden, and instead merely declined to impose punishment on that count. The State conceded in its June 17, 2005 sentencing memorandum that Mr. Elmi's conviction for first degree assault of Ms. Aden in count 2 violated double jeopardy, considering his conviction on count 1 for attempted first degree murder of Ms. Aden. CP 13-14. The trial court agreed that there was a double jeopardy violation, but did not vacate the conviction on count 2, and instead merely declined to impose any punishment on the count. CP 221-24, 227.

**a. The remedy for a double jeopardy violation is vacation of the duplicative conviction.** Where two convictions violate the protection against double jeopardy, the remedy is to vacate the lesser of the two convictions. In re Personal Restraint of Burchfield, 111 Wn. App. 892, 899, 46 P.3d 840 (2002) (noting

double jeopardy violation occurs where jury convicts defendant of two crimes that are the same in law and fact, and court enters convictions for both); see also State v. Johnson, 92 Wn.2d 671, 680-81, 600 P.2d 1249 (1979) (observing that while the prosecutor may have the right to charge the separate offenses, both convictions cannot be allowed to stand without violating double jeopardy prohibitions).

Under the SRA, a “conviction” is defined as “an adjudication of guilt pursuant to titles 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty.” RCW 9.94A.030(11). Here, notwithstanding the Supreme Court’s determination that a conviction for murder and first-degree assault violates constitutional protections against double jeopardy, In re Pers. Restraint of Orange, 152 Wn.2d 795, 820-21, 100 P.3d 291 (2004) (convictions for attempted first degree murder and first degree assault violate double jeopardy where based on the same shot directed at the same victim), the trial court’s judgment and sentence left Mr. Elmi’s conviction for first degree assault intact. Instead, the court merely declined to impose punishment on count 2. CP 221-24, 227.

The failure to vacate the conviction for assault of Ms. Aden was double jeopardy error. In Ball v. United States, 470 U.S. 856, 864-65, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985), the Supreme Court explained the implication of leaving a second, unconstitutional conviction on the judgment:

The second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence. The separate conviction, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction.... Thus, the second conviction, even if it results in no greater sentence, is an impermissible punishment.

Ball v. United States, at 864-65.

Thus the Ball Court instructed that on remand, while the government could prosecute Ball for the two overlapping offenses, “[s]hould the jury return guilty verdicts for each count, however, the district judge should enter judgment on only one of the statutory offenses.” Id. at 865.

**b. Mr. Elmi must be resentenced.** The trial court entered judgment for both attempted first degree murder and first-degree

assault. CP 221-24, 227. The court's perfunctory correction of declining to impose sentence amounted to no more than a clerical act which failed to remedy the double jeopardy violation. Ball, 470 U.S. at 865. This Court should reverse the sentence and remand with direction that Mr. Elmi be resentenced and the first degree assault conviction vacated.

**6. THE IMPOSITION OF FIREARM ENHANCEMENTS IN ADDITION TO MR. ELMI'S FIRST DEGREE ASSAULT CONVICTIONS VIOLATED HIS DOUBLE JEOPARDY PROTECTIONS.**

Mr. Elmi was convicted of multiple convictions of first degree assault, each with a firearm enhancement. Because he was convicted of the assaults for assault with a firearm, while also being convicted of firearm enhancements for being armed with a firearm during the offenses, he was in each case twice convicted and punished for using a firearm. This violated the prohibition against double jeopardy, and his firearm enhancements must be vacated. This argument is now supported by recent Supreme Court caselaw that makes clear that firearm "enhancements" are effectively elements of the offense to which they are attached – and here, a firearm was also an element of each assault charge.

**a. The double jeopardy provisions of the federal and state constitutions protect criminal defendants from multiple punishment for the same “offense.”** The double jeopardy clause includes protection against multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717, 726, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), overruled on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989); U.S. Const. amend. 5; Wash. Const. art. I, § 9. While the State may charge and the jury may consider multiple charges arising from the same conduct in a single proceeding, the court may not enter multiple convictions for the same constitutional offense. North Carolina v. Pearce, 395 U.S. at 717.

**b. The question of legislative intent as to firearm enhancements must be reexamined after *Blakely v. Washington’s* reconception of the meaning of what constitutes an offense and the elements of an offense.** A fact that exposes a person to increased punishment is an element of the offense punished. Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 2536, 159 L.Ed.2d 403 (2004); Ring v. Arizona, 536 U.S. 584, 604-05, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); Apprendi v. New

Jersey, 530 U.S. 466, 490, 494 n. 19, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); Jones v. United States, 526 U.S. 227, 243, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999) (Stevens, J., concurring). The relevant double jeopardy determination following Blakely and its predecessors is not what label the fact has been given by the Legislature or its placement in the statutory scheme, but rather the effect it has on the maximum sentence to which the person is exposed. Apprendi, 530 U.S. at 494; Ring, 536 U.S. at 602. This concept was succinctly stated in Ring:

If the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact, the core crime and the aggravating factor together constitute an aggravated crime. The aggravated fact is an element of the aggravated crime.

Ring v. Arizona, 536 U.S. at 605. The firearm enhancement statute renders the fact of being armed with a firearm a fact that increases punishment. RCW 9.94A.510, later recodified as RCW 9.94A.533, provides for additional time to be added to an offender's standard range if the offender or an accomplice was "armed with a firearm":

(3) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced

for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement. If the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any firearm enhancements, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(a) Five years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;

(b) Three years for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection;

\* \* \*

(f) The firearm enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony.

Former RCW 9.94A.510; RCW 9.94A.533.

Blakely's reasoning leads inescapably to the conclusion that crimes involving firearm elements, such as first degree assault as charged in the present case, when further "enhanced" by firearm

penalties, violate double jeopardy because such crimes include double punishment for the act of being armed with a firearm. Before the United States Supreme Court opinion in Blakely, the Washington Courts held that duplicative punishment such as that represented by the sentences imposed in the present case did not violate double jeopardy principles, holding, for example, that sentencing for both first degree burglary and a deadly weapon enhancement did not violate double jeopardy. State v. Caldwell, 47 Wn. App. 317, 734 P.2d 542, review denied, 108 Wn.2d 1018 (1987); accord, State v. Pentland, 43 Wn. App. 808, 719 P.2d 605, review denied, 106 Wn.2d 1016 (1986) (first degree rape and deadly weapon enhancement). This Court reasoned that RCW 9.94A.310 clearly showed the Washington Legislature's intent that a person who commits certain crimes while armed with a deadly weapon receive an enhanced penalty even if being armed with a deadly weapon was an element of the offense. Caldwell, 47 Wn. App. at 320; Pentland, 43 Wn. App. at 811.

These opinions, however, did not have the benefit of the United States Supreme Court's analysis in Blakely, and thus did not address, under the newly emerging constitutional understanding of the meaning of an "offense" and the "elements" thereof, whether a

person can be twice convicted and duplicatively punished for the same element of a crime. Blakely changes that equation. Mr. Elmi was given significant additional terms of years in prison for the firearm enhancements for his assault convictions. The addition of a firearm enhancement to each of Mr. Elmi's assault convictions placed him twice in jeopardy for the use of a gun and violated the state and federal constitutions. Because both punishments in each count were based upon the same facts and law, they violated the double jeopardy provisions of the federal and state constitutions. U.S. Const. amend. 5; Wash. Const. art. 1, § 9.

**7. THE MULTIPLE FIREARM ENHANCEMENTS IMPOSED BY THE COURT FOR USE OF A SINGLE FIREARM VIOLATED DOUBLE JEOPARDY.**

The imposition of multiple deadly weapon enhancements for possession of a single weapon violates double jeopardy protections. Based on a single act, Mr. Elmi's possession of a firearm in the course of the incident, the trial court imposed separate enhancements for each of the felony counts, which were ordered to be served consecutively to each other and to the underlying convictions as well. CP 221-24, 227.

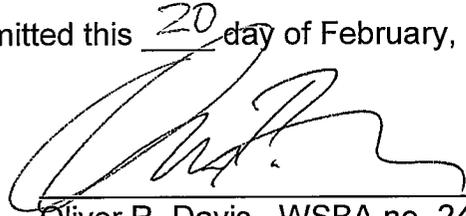
When a single act yields multiple punishments, double jeopardy principals are offended unless the Legislature has expressed its intent for such a result. Whalen v. United States, 445 U.S. 684, 689, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980); U.S. Const. amend. 5; Wash. Const. art. I, § 9. But nowhere in its language does the firearm enhancement statute require the imposition of a separate enhancement for each crime where a single act of firearm possession has occurred. Admittedly, the statute sets forth the procedure to be followed where multiple enhancements are imposed. But this is not the same as directing that multiple punishments be imposed based on the possession of a single weapon. The statute does not provide that the circumstances in this case warrant the imposition of multiple enhancements. In these circumstances, the rule of lenity requires the conclusion that the Legislature did not intend the stacking of enhancements for a single weapon. See Whalen, 445 U.S. at 694.

Because there is not a clear expression of legislative intent for multiple punishment, double jeopardy does not permit the imposition of two weapon enhancements on the robbery and the second degree assault convictions.

**E. CONCLUSION**

Based on the foregoing, Mr. Elmi respectfully requests that this Court reverse his convictions for attempted first degree murder on count 1, reverse his first degree assault convictions on counts 3, 4 and 5, and reverse his sentence.

Respectfully submitted this 20 day of February, 2006.



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