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COURT OF APPEALS

NO. 33326-1

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TACOMA WASH

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

ERNEST SYLVIA, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Vicki L. Hogan

No. 04-1-00097-3

BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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

1. Does the doctrine of invited error preclude this court's review of the propriety of the trial court's grant of defendant's motion to withdraw guilty plea when defendant affirmatively asked the court to grant his motion?
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3. Should this court find that there was sufficient evidence to support the jury's determination that defendant interfered with the report of a domestic violence crime when the evidence showed that defendant disconnected the phone lines to the Strom residence so that 911 could not be called?

B. STATEMENT OF THE CASE.

1. Procedure

On January 8, 2004 the Pierce County prosecutor's office charged appellant, ERNEST ANDREW SYLVIA (defendant), with attempted murder in the first degree, interfering with the reporting of domestic

violence, and failure to register as a sex offender. CP 1-5. The State also alleged a deadly weapon enhancement on the attempted murder count. CP 1-5.

On June 2, 2004, defendant entered a guilty plea to an amended information charging him with assault in the first degree pursuant to a plea agreement. CP 6, 8-15. Following the plea but prior to sentencing, there was a change in defendant's counsel. CP 153. Defendant's new counsel moved the court to allow withdrawal of the guilty plea based upon a "miscalculated" offender score. CP 114-120. The defendant filed a declaration in support of this motion asking the court to allow him withdrawal of his plea so that he could proceed to trial. CP 154-155. The State filed a response opposing the motion to withdraw arguing that any change in the offender score was due to defendant's failure to fully disclose his criminal history and not due to "miscalculations." CP 121-150. The matter apparently came before the court for hearing but the record of this proceeding has not been transcribed for appellate review. The court ultimately granted defendant's motion to withdraw his plea and the amended information. CP 18.

The case proceeded to trial before the Honorable Vicki L. Hogan on April 11, 2005. RP 1-3. The court granted defendant's uncontested motion to sever the trial on the failure to register count from the other two counts. CP 28; RP 3. Ultimately, the failure to register charge was

dismissed. CP 81-82. After hearing the evidence, the jury convicted defendant as charged. RP 584-586, CP 63-65.

At the sentencing held on May 31, 2005, the court imposed a low-end standard range sentence of 218 ¼ months on the attempted murder count plus 24 months for the deadly weapon enhancement for a total of 242 ¼ months. CP 86-97; RP 623-624. The court imposed a 365 day suspended sentence on the gross misdemeanor of interfering with reporting of domestic violence. CP 98-102; RP 623 -624. The court also imposed other legal financial obligations and a community custody range of 24-48 months. CP 86-97; RP 623-624.

Defendant filed a timely notice of appeal. CP 66-80.

2. Facts

Jim and Jackie Strom have been married for 17 years and live at their home in Puyallup, Washington with their daughter Jamie and Jackie's son, Joe. RP 57, 155-156, 200. Jackie has one other son, the defendant, who goes by the name of "Jesse," but he does not reside with the family. RP 58-59, 156-157. The events described below occurred on January 6-7, 2004. RP 157, 200. That night Jamie also had a friend, Jennifer, staying with her. RP 160, 202.

Jim Strom testified that in the night he heard the sounds of a fight and found the defendant laying on top of his step-brother, Joe, and that they were hitting each other. RP 73-74. Defendant was saying "I will kill

you” to his brother. RP 74. Mr. Strom separated the brothers and told defendant to leave the home immediately. RP 75-76. When defendant told Mr. Strom that he wasn’t going to leave, Mr. Strom told defendant that he was going to call the police and went upstairs to do so. RP 77. At that point the defendant left the house and disconnected the phone line. RP 77-78, 126. Defendant came back into the house and told Mr. Strom that it wouldn’t do any good to try to use the phone because he had taken care of it. RP 78. Mr. Strom tried to use the phone but could not get a dial tone. RP 78.

Mr. Strom managed to get out of the house without defendant seeing him and went over to a neighbor’s house to call the police. RP 80-81, 134-135. While he was gone, defendant spoke to his mother in her bedroom. RP 161-165. Mrs. Strom described her son as agitated, as saying derogatory things about Mr. Strom, and as threatening to kill him. RP 165 -166. Defendant was carrying a kitchen knife. RP 166-167. After a while he left the room with the knife in hand. RP 170. Defendant saw Jamie and told her that her dad deserved to die because he had showed him pornography when he was eight years old. RP 223. Defendant told Jamie that he suspected that her dad was at the neighbor’s calling the cops. RP 223-224.

As Mr. Strom was walking back to his household from the neighbor’s, his daughter Jamie called out that he should not come in the house. RP 82-83, 230. The defendant came out of the attached garage,

ran toward Mr. Strom, while stating that he had a "surprise" for him, that he was going to "kill" him and that "you are a dead man." RP 83-84. Mr. Strom tried to get in the front door, but it was locked; defendant ran up behind him with a kitchen knife in his hand. RP 84-85, 87. Defendant held Mr. Strom against the front door with the knife blade to his chest and repeated that he was going to kill him. RP 85-91, 231-233, 234. In an effort to calm the defendant down, Mr. Strom told him that he had not called 911. RP 92, 236. Once Mr. Strom convinced defendant that he had not made the call, the defendant threw the knife down. RP 92-93, 236. Jamie Strom then ran out of the garage, picked up the knife and ran back inside with it. RP 94-95, 236. While defendant was distracted by Jamie's actions, Mr. Strom jumped off the front porch and ran into the house through the garage. RP 95-96.

Mr. Strom gathered everyone else in the house into his upstairs bedroom for safety. RP 96-97, 238. While Mr. Strom waited 20-30 minutes for the police to arrive, defendant tried to get him to come out of the bedroom, saying that he wanted to talk and that he had something for him. RP 99, 101. Two police cars arrived and deputies came to the front door. RP 102-103. Mr. Strom could hear defendant tell the officers that they must be mistaken as to the house and then closed the door quickly on them. RP 102-103. Defendant then ran upstairs, carrying a cleaver in his hand stating things such as "I am going to kill you. You are dead man, Jim. I am gong to kill you." RP 104, 107, 239. Defendant appeared very

upset that Mr. Strom had lied to him about calling 911. RP 105, 107. Defendant tried to push the bedroom door open; Mr. Strom initially prevented him from getting in by putting his weight against the door so it would not open. RP 107-109. The door came open about six inches. RP 110-111. Defendant inserted his arm through this opening and started swinging the cleaver, while stating "I am going to kill you. I am going to kill you." RP 111-112, 125, 183. Mr. Strom gave up on trying to keep the door closed and tried to control the arm holding the cleaver. RP 113. Defendant ended up on top of Mr. Strom trying to direct the cleaver toward him. At that point the deputies got into the room and arrested the defendant.

Pierce County Sheriff's Deputies Foster, Yamada, and Shook responded to the Strom residence around 12:30 a.m. on January 7, 2004, regarding a domestic violence call to 911. RP 24-27, 260-261, 343-346. Deputy Shook knocked on the front door; defendant answered. RP 265, 347. Defendant opened the door only a few inches and stuck his head out. RP 266, 347-348. Deputy Shook inquired if there was a problem as the police had received a call. RP 266, 348. Defendant told the deputies either that he hadn't called or that there was no problem here but maybe there was next door. RP 29, 266-267, 349. Defendant then slammed the door and locked it. RP 29, 268, 349-350. After that, Deputy Foster and Shook could hear screaming and yelling inside the house. RP 269, 350. Deputy Foster heard something to the effect of "You lied to me. You did

call the cops. I am going to f**cking kill you.” followed by the sound of someone running upstairs. RP 269. Deputy Foster decided to force the front door; after three or four body blows, he succeeded in forcing it open. RP 31, 270, 350-351. Deputy Foster entered and could see the defendant at the top of the stairs; defendant threw a stool at Foster as he started up the stairs. RP 271. Defendant was yelling “I will fucking kill you” at someone who was upstairs. RP 272. When Deputy Foster and Shook got to the top of the stairs in time to see the defendant go inside a bedroom; the door immediately slammed shut. RP 273, 352. The deputies were about to force that door open when it opened and Ms. Strom asked them to arrest her son. RP 274. The deputies could see the defendant wrestling with Mr. Strom on the floor beyond. RP 32-33, 274, 352-353. A large kitchen cleaver was also on the floor next to them. RP 33, 276-277.

The deputies took defendant into custody, took photographs, and gathered witness statements. RP 34-36, 275-276, 354-356. The knife and cleaver were photographed and taken into evidence. RP 38-40, 87, 125, 277.

The defense presented the testimony of defendant’s brother, Joseph Sylvia, and of the defendant himself. RP 377, 389. Joseph testified that he had started the fight with his brother and that his brother had never hit him. RP 380. He explained that the injury he had on his face that night was caused by him head-butting his brother. RP 380. Joseph could remember very few details about that evening other than he was certain

that he had started the fight. RP 378-379, 381, 383-386, 387-388. Joseph had prior convictions for theft in the third degree and theft in the second degree. RP 381.

The defendant testified that he was staying with his mother and step-father for the holidays in January 2004. RP 394-395. On the evening of January 6, 2004, defendant testified that he was downstairs watching television with others and that his step father came down twice to tell them to keep the noise down because he had to work the next day. RP 395-398. Defendant testified that some time later his step-father came down a second time due to noise. RP 397-399. The second time his step-father was angry and told defendant to leave right then. RP 399. Defendant argued with Mr. Strom, telling him that he did not want to leave then and would not. RP 399. Defendant is unclear exactly how this happened but recalls being in the front yard with his brother and getting into an argument with him. RP 401. Defendant testified that his brother came at him and took a swing at him. RP 401. Defendant testified that he took his brother to the ground, then grabbed onto his hair and pulled his head back, telling him that he did not want to fight. RP 401. Defendant indicated that his brother took another swing at him and that he then hit his brother in the nose. RP 401-402. At that point his step-father pulled him off of Joe from behind. RP 402. Mr. Strom again told defendant that he had to leave. RP 404. Defendant testified that he felt double teamed by his brother and step father; he went into the kitchen he grabbed a knife out of

the block. RP 402-403. When Joe walked into the kitchen, defendant told him not to "come at him." RP 403-405.

Defendant disconnected the phone lines to the house. RP 407-408. Defendant indicated that he did this so that Mr. Strom could not call 911. RP 410, 451-453, 462-463. Defendant did not want the police at the house. RP 454.

Defendant testified that he was not sure where his step-father was so he went upstairs looking for him; his mother was in the bedroom but not his step-father. RP 406. He still had the knife in his hand. RP 407. Defendant told his mother that his step-father was "a piece of sh*t," that Mr. Strom had molested him when he was a kid and that he was going to kill him. RP 407.

Defendant left the bedroom and continued to look for his step-father downstairs. RP 410-411. He met his sister, Jamie and told her that her dad deserves to die, that he was going to kill her dad and that her dad was going to die. RP 411. Defendant saw Mr. Strom coming back from the neighbors, and defendant concluded that he had called the police. RP 411-414. Defendant became angered by this and chased Mr. Strom with the knife. RP 414-416. Defendant caught up to Mr. Strom on the front porch, pressed the knife against his shirt and told him that he was going to kill him and that he was going to die. RP 417-418. He testified that Mr. Strom told him that he was only bluffing and that he hadn't called the police; defendant stated that he told Mr. Strom that he was only bluffing,

too, and threw down the knife. RP 418-419. Defendant saw his sister run up and retrieve the knife, then run off. RP 419-420. Defendant testified that Mr. Strom ran past him into the house and that he followed him inside. RP 421-422. Once inside, he found nobody else downstairs. RP 421-422. Defendant testified that he then acted like a lunatic because he was angry and wanted to lash out due to how everyone had treated him. RP 422. He testified that he walked around calling for Mr. Strom to come out and talk to him. RP 423.

After about 15 minutes of this, he heard a knock on the front door. RP 424. He went and got a cleaver from the kitchen thinking that his brother Joe might ambush him. RP 424. Defendant answered the door and saw that it was Pierce County Sheriff's deputies. RP 432-433. Defendant testified that he told them the 911 call had not come from this house and that it must have been from across the street. RP 433. Defendant told them this because he knew the call could not have come from the Strom house because he had unplugged the phones. RP 433. Defendant then shut the door and swung the deadbolt so the deputies could not get in. RP 433. Defendant stated that he ran upstairs to confront his step-father; as he went he was saying "I am going to kill you. You lied." RP 433-434. Because the bedroom door was shut, he pressed his body against it until he succeeded in getting his arm in. RP 434-435. This was the hand that was holding the cleaver. RP 435. He testified that once he

got his arm in, he wanted to throw down the cleaver, but couldn't because he was afraid someone might get cut. RP 436-437. He indicated that suddenly the door just flew open and he went flying through, landing on the ground next to his step-father. RP 437-438. Defendant testified that he then surrendered to the police. RP 439. Defendant testified that at no time during the evening did he have any intent to shed his step-father's blood or to kill him. RP 440. Defendant testified that his only intent was to scare him. RP 440. Defendant acknowledged that he had made threats to kill his step father in front of five different people and that he had made the threat at least ten times. RP 486-487. On several of these occasions defendant was armed with a knife at the time he uttered the threat. RP 487.

C. ARGUMENT.

1. THE DOCTRINE OF INVITED ERROR
PRECLUDES THIS COURT FROM
CONSIDERING WHETHER THE TRIAL COURT
ABUSED ITS DISCRETION IN GRANTING
DEFENDANT'S MOTION TO WITHDRAW HIS
GUILTY PLEA.

Under the doctrine of invited error a party may not set up error at trial and then complain of it on appeal. State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), overruled on other grounds by State v. Olson, 126 Wn.2d 315, 893 P.2d 629 (1995). The invited error doctrine prevents

parties from benefiting from an error they caused at trial regardless of whether it was done intentionally, negligently, or unintentionally. See City of Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002). The Washington Supreme Court has observed that the invited error doctrine appears to require affirmative actions by the defendant in which “the defendant took knowing and voluntary actions to set up the error; where the defendant's actions were not voluntary, the court did not apply the doctrine.” In re Pers. Restraint of Call, 144 Wn.2d 315, 328, 28 P.3d 709 (2001); In re Pers. Restraint of Tortorelli, 149 Wn.2d 82, 66 P.3d 606 (2003)(defendant who sought admission of an exhibit at trial without requesting limiting instruction precluded from raising challenge to the admission of such evidence). The doctrine has been applied to preclude review of errors of constitutional magnitude, including where an element of the offense was omitted from the “to convict” instruction. State v. Studd, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999); State v. Henderson, 114 Wn.2d 867, 869, 792 P.2d 514 (1990).

In the case before the court, defendant assigns error to an action made by the trial court in response to a motion filed by defendant:

[The] trial court abused its discretion in allowing Mr. Sylvia to withdraw his plea where there was insufficient evidence that enforcing the plea agreement would be a manifest injustice.

Appellant’s Assignment of error 1, Appellant’s Brief at p. 1.

The record before this court shows that defendant entered a guilty plea to an amended information on June 2, 2004. CP 6, 8-15. Following the plea but prior to sentencing, there was a change in defendant's counsel. CP 153. Defendant's new counsel moved the court to allow withdrawal of the guilty plea based upon a "miscalculated" offender score. CP 114-120. The defendant filed a declaration in support of this motion in which he averred that he had:

discussed this matter in great detail with my new attorney, Mr. Quillian. It remains my desire to withdraw my plea and proceed to trial in this matter.

CP 154-155. The State filed a response opposing the motion to withdraw arguing that any change in the offender score was due to defendant's failure to fully disclose his criminal history and not due to "miscalculations." CP 121-150. The matter apparently came before the court for hearing but the record of this proceeding has not been transcribed for appellate review.¹ The court ultimately granted defendant's motion to

¹ This provides another procedural basis for the court to refuse to review this claim of error. The appellate rules provide that "[a] party should arrange for the transcription of all those portions of the verbatim report of proceedings necessary to present the issues raised on review." RAP 9.2(b). Because defendant is presenting the issue for review, he has the burden of providing the record of the hearing where the court made its ruling. See, State v. Wade, 138 Wn.2d 460, 464, 979 P.2d 850 (1999); Allemeier v. University of Washington, 42 Wn. App. 465, 472-73, 712 P.2d 306 (1985), review denied, 105 Wn.2d 1014 (1986). His failure to provide the necessary report of proceedings leaves this court with an incomplete record for reviewing the trial court's exercise of discretion in granting the motion to withdraw. Id.

withdraw his plea. CP 18. Defendant now asserts the court abused its discretion in granting his motion to withdraw his plea.

This court should refuse to review this assignment of error under the invited error doctrine. Defendant took affirmative steps in the trial court to withdraw his plea. He voluntarily asked the court to grant his motion for withdrawal of his guilty plea and for his case to proceed to trial. Any error the trial court made in granting the defendant's motion was set up by the defendant himself. This case presents a classic example of the old adage "be careful what you ask for," because defendant, having asked for relief from entry of his guilty plea in the trial court, cannot complain in the appellate court that his request was granted.

2. SUFFICIENT EVIDENCE WAS ADDUCED TO SUPPORT THE JURY'S DETERMINATIONS OF GUILT.

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). 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); State v. Rempel, 114 Wn.2d 77, 82-83, 785 P.2d 1134 (1990)(citing State v. Green, 94 Wn.2d 216,

221-22, 616 P.2d 628 (1980) and Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). 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)). 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; the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given, should make these. 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.

In this case defendant challenges the sufficiency of the evidence regarding his convictions. He contends that there is insufficient evidence that he intended to kill on the attempted murder conviction and that he could not interfere with a report of a domestic violence incident as he had not committed a crime of domestic violence at the time he disabled the phone lines.

a. There Was Sufficient Evidence For A Rational Trier Of Fact To Find An Intent To Kill On the Attempted Murder Charge.

In order to find defendant guilty of attempted murder in the first degree the jury had to find that: 1) defendant did an act that was a substantial step toward the commission of murder in the first degree; 2) that the act was done with the intent to commit murder in the first degree; and, 3) that the acts occurred in Washington. Instruction No. 9, CP 44-62. Once a substantial step has been taken, and the crime of attempt is accomplished, the crime cannot be abandoned. State v. Workman, 90 Wn.2d 443, 450, 584 P.2d 382 (1978); State v. McGilvery, 20 Wn. 240, 55 P. 115 (1898).

The jury was also instructed as to the mens rea element of the completed crime of murder, including a standard instruction on the meaning of premeditated. Instruction Nos. 7 and 8, CP 44-62. The jury was instructed:

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take a human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

Instruction No 8, CP 44-62. Defendant now claims that there was insufficient evidence to supporting a determination that he was acting with a premeditated intent to kill.

The evidence in this case shows that on more than one occasion during the evening of January 6-7, 2004, defendant stated to Mr. Strom and other family members that he was going to kill Mr. Strom. RP 165 - 166, 83-91, 104, 107, 111-112, 183, 231-233, 234, 239. Defendant twice armed himself with deadly weapons out of the kitchen and pursued Mr. Strom with a weapon in hand. In the first attack, defendant chased after Mr. Strom until he pinned him at knife point against the front door telling him that he was "a dead man." RP 83-91, 231-233, 234. While Mr. Strom was able to defuse this situation by lying to defendant about calling 911, this does not preclude a jury from determining that defendant had formulated the intent to kill, acquired a knife from the kitchen and pursued

Mr. Strom with the knife to accomplish this goal. The inchoate crime of attempt was complete. The fact that, subsequently, defendant may have abandoned his attack, temporarily or otherwise, does not preclude a finding that defendant formed the intent and took a substantial step.

The jury's conclusion is further supported by the fact that defendant resumed his attack on Mr. Strom later that night. Defendant retrieved a second weapon from the kitchen and tried to coax Mr. Strom out of the safety of his bedroom so that they could have a face to face confrontation. RP 99, 101. When defendant was confronted with evidence that Mr. Strom had lied to him, he again announced his intent to kill, forced his way into the bedroom and attacked Mr. Strom. RP 105-112. Looking at this evidence in the light most favorable to the State and taking all reasonable inferences, there was sufficient evidence to support the jury's determination that defendant formulated a premeditated intent to kill Mr. Strom.

b. There Was Sufficient Evidence For a Jury to Conclude That Defendant Prevented James Strom or Another Witness From Reporting a Domestic Violence Crime.

The crime of interfering with reporting of domestic violence is proscribed in RCW 10.36.150(1), which provides:

(1) A person commits the crime of interfering with the reporting of domestic violence if the person:

(a) Commits a crime of domestic violence, as defined in RCW 10.99.020; and

(b) Prevents or attempts to prevent the victim of or a witness to that domestic violence crime from calling a 911 emergency communication system, obtaining medical assistance, or making a report to any law enforcement official..

See also, Instruction No 13, CP 44-62. Defendant contends that there is insufficient evidence that he committed an assault prior to the actions he took to prevent the reporting of the assault to authorities. Defendant claims that the blows he landed on his step-brother did not constitute the crime of assault because he was acting in self defense. He claims that the assaults he committed against his stepfather cannot be considered because he committed these assaults after he disconnected the phone. The State disagrees with both arguments.

The “to convict” instruction for the interference with the reporting of domestic violence required the jury to find that defendant had “committed the crime of Assault.” Instruction 13, CP 44-62. Defendant proposed some instructions on self defense but the court refused to give them. CP 34-41, RP 495-497. This instructional ruling is unchallenged on appeal. Appellant’s opening brief at p. 1. Thus, the trial court’s determination that defendant was not entitled to put the issue of self defense to the jury is the law of the case. Essentially, defendant ignores the legal ruling of the trial court that self defense did not apply as well as the jury’s determination that he did commit the crime of assault. Instead

he asks this court to do an independent assessment of the evidence and to find that his acts were justified and lawful. Any appellate assessment of a self defense claim would require credibility determinations and the weighing of evidence. Credibility determinations are for the trier of fact and not subject to appellate review. State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997).

Secondly, there is nothing in the statute proscribing interference with the reporting of domestic violence which requires the acts the perpetrator engages in to prevent the reporting of a domestic violence crime to occur *after* the crime sought to be reported. The statute and the instruction only requires that the person engage in conduct that is aimed at preventing a victim or witness of the crime from making a report or calling for aid. Thus, if person pulls the phone out of the wall so that it is not usable then immediately assaults his or her spouse, a jury could easily conclude that the disabling of the phone was done to prevent any reporting of the ensuing crime. Defendant attempts to add an element to the crime that does not exist.

Here, the evidence leads to a conclusion that defendant took steps to interfere with the reporting of his assault on his step-brother, which occurred before he disconnected the phone. Furthermore, once the phone was disconnected, defendant proceeded to assault Mr. Strom knowing that his victim or a witness to the assault would be unable to use the same phone to call the police to report this crime.

The evidence showed that Jim Strom found the defendant laying on top of his step-brother, Joe, and that they were hitting each other. RP 73-74. Defendant was saying “I will kill you” to his brother. RP 74. Mr. Strom separated the brothers and told defendant to leave the home immediately. RP 75-76. When defendant told Mr. Strom that he wasn’t going to leave, Mr. Strom told defendant that he was going to call the police and went upstairs to do so. RP 77. At that point the defendant left the house and disconnected the phone line. RP 77-78. Defendant came back into the house and told Mr. Strom that it wouldn’t do any good to try to use the phone because he had taken care of it. RP 78. Mr. Strom tried to use the phone but could not get a dial tone. RP 78. From this evidence the jury could reasonably find that defendant assaulted his step-brother and that this event was witnessed by Mr. Strom. Defendant then disconnected the telephone line into the Strom household to prevent Mr. Strom from calling the police. Defendant was successful in preventing Mr. Strom from calling 911 on his home phone. Thus, the evidence supports the jury’s finding of guilt.

Secondly, the evidence showed that defendant twice assaulted Mr. Strom with knives and that he was only able to deter the first attack by lying to defendant about calling 911. RP 92, 236. The evidence indicates that defendant became more violent and angry over whether 911 had been called than he was over being told to leave the Strom residence. RP 133. It is clear that defendant wanted to prevent any call to 911 regarding his

actions that night. No one inside the home was able to call 911 when this first attack on Mr. Strom occurred because the phone lines had been disconnected. After escaping from defendant's first attack, Mr. Strom and the rest of his family were essentially held captive in a bedroom for 20-30 minutes, unable to make any further calls to 911 to report that the defendant had become more violent by arming himself with a deadly weapon and assaulting Mr. Strom. RP 99.

Looking at the evidence in the light most favorable to the State, the jury could conclude that defendant disconnected the phone lines to the Strom residence for the purpose of preventing any one in his family from calling 911 to report his assaults on his brother or his step-father. This court should uphold the jury's verdict.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the convictions below.

DATED: May 23, 2006.

GERALD A. HORNE
Pierce County
Prosecuting Attorney


KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

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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.

5/23/06 J Johnson
Date Signature