

NO. 33833-5-II

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,  
Respondent,  
v.  
LLOYD HIGGINS,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR LEWIS COUNTY

The Honorable Nelson Hunt, Judge  
Cause No. 05-1-00329-9

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RESPONDENT'S BRIEF

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## I. ISSUES PRESENTED

- A. Does a search warrant that identifies the crime under investigation and is attached to an affidavit that describes the facts of an assault and the items of possible evidence that may be found at a specific residence satisfy the particularity requirement of the Fourth Amendment?
- B. Did the trial court properly exercise its discretion when it concluded that a lesser degree instruction was not appropriate because it was not supported by the facts presented during trial?
- C. Did the trial court properly exercise its discretion when it rejected Higgins' claim that a lack of confidence or trust constituted a "conflict" and approved Higgins' request to proceed *pro se*?
- D. Did the Legislature properly exercise its authority to define the elements of Assault in the Second Degree when it incorporated the common law definition of assault by reference?

## II. STATEMENT OF THE CASE

Lloyd Higgins (Higgins) was charged with, tried, and convicted of, Assault in the Second Degree under RCW 9A.36.021(1)(c) for his April 24, 2005, assault of his wife, Patti Higgins.<sup>1</sup>

On the evening of April 24, 2005, Higgins and his wife had a verbal argument that resulted in Higgins locking his wife out of their apartment.<sup>2</sup> When Higgins would not let her into the house, Ms. Higgins

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<sup>1</sup> Clerk's Papers (CP) 4-16.

<sup>2</sup> For purposes of clarity references to the Verbatim Report of Proceedings (VRP) will be noted by reference to the date of the proceeding in parentheses followed by the page number, colon, and the line numbers being referenced. VRP (9/6/05) 50:4-15; VRP (9/7/05) 4:3-5; 10:5-8.

contacted her landlord who suggested that she call 911 for assistance.<sup>3</sup> Centralia Police Officer Gonzales responded to the call and, after attempting to get Higgins' attention so that he would open the door, obtained a key from the landlord, and let Ms. Higgins into the residence.<sup>4</sup>

After letting Ms. Higgins into the residence, Officer Gonzales returned the key to the landlord and began apprising Officer Murphy, who had arrived after him, about what had happened.<sup>5</sup> As the officers were speaking to one another, they heard some arguing inside the Higgins residence and followed by a gunshot fired from inside the bedroom of the Higgins residence.<sup>6</sup> After he heard the gunshot, Officer Gonzales saw Higgins getting dressed in the bedroom and heading towards the front of the residence.<sup>7</sup> Higgins exited the residence through the front door and was taken into custody.<sup>8</sup> Shortly thereafter, Ms. Higgins came out of the front door of the residence and was also taken into custody.<sup>9</sup>

A search warrant to search the residence for evidence of the crime of Assault in the Second Degree was obtained.<sup>10</sup> The affidavit in support

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<sup>3</sup> VRP (9/7/05) 11:1-20.

<sup>4</sup> VRP (9/7/05) 36:22-25; 37:1-25; 38:1-24; 39:3-18.

<sup>5</sup> VRP (9/7/06) 39:20-25; 40:1-4.

<sup>6</sup> VRP (9/7/06) 40:11-16; VRP (9/6/05) 53:1-16.

<sup>7</sup> VRP (9/7/06) 41: 5-25.

<sup>8</sup> VRP (9/7/06) 41:24-25; 42:1-16.

<sup>9</sup> VRP (9/7/06) 42:23-25; 43:1-14.

<sup>10</sup> *See* CP 18-25.

of the search warrant was attached to the warrant itself.<sup>11</sup> During the search of the residence, officers discovered a bullet hole in the south bedroom wall, a slug near the exit hole on the side of the residence near the patio, a spent shell casing on the floor in the bedroom, a loaded pistol magazine and handgun in the bedroom.<sup>12</sup>

At trial, Ms. Higgins testified. She indicated that she and Higgins had had an argument on the morning when the shot was fired.<sup>13</sup> During that argument the Defendant threw a full can of Mountain Dew at Ms. Higgins.<sup>14</sup> Later in the day, the two argued again.<sup>15</sup> After the second argument Ms. Higgins and her husband went to a bar together.<sup>16</sup> When they left the bar that evening there was still tension between them.<sup>17</sup> After the two arrived home that evening, Higgins locked Ms. Higgins out of the residence.<sup>18</sup> He would not let her back in so she went over to the landlord's house and contacted 911 to ask for help getting into the house.<sup>19</sup> After she was let back into the house, Ms. Higgins walked to the bedroom.<sup>20</sup> When she reached the bedroom Higgins had was pointing a

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<sup>11</sup> CP 19.

<sup>12</sup> VRP (9/7/05) 44:15-25; 45:1-10; 46: 21-25; 47:1-25; 48:1-17; 49:6-9.

<sup>13</sup> VRP (9/7/05) 5:19-24.

<sup>14</sup> VRP (9/7/05) 5:19-24.

<sup>15</sup> VRP (9/7/05) 7:9-19.

<sup>16</sup> VRP (9/7/05) 8:9-19.

<sup>17</sup> VRP (9/7/05) 9: 13-25; 10: 1-11.

<sup>18</sup> VRP (9/7/05) 10:5-21.

<sup>19</sup> VRP (9/7/05) 10:15-25; 11: 1-20.

<sup>20</sup> VRP (9/7/05) 13:18-25.

gun at her head and “next thing [she] heard was the gun going off.”<sup>21</sup> After shooting the gun, Higgins grabbed Ms. Higgins and pushed her against the wall shattering her hip.<sup>22</sup>

At his preliminary appearance, Higgins was informed of the nature of the charges against him and the maximum possible penalty upon conviction.<sup>23</sup> He was also informed that Assault in the Second Degree was a strike offense and that the domestic violence allegation could result in the loss of his rights pertaining to possession of a firearm.<sup>24</sup> Higgins indicated that he could not afford an attorney and asked that one be appointed.<sup>25</sup> The court inquired about previous representation and Higgins indicated that he had been represented by Michael Underwood previously but that “he would not want him for an attorney again.”<sup>26</sup> Without inquiring into the reason for Higgins’ request, the court appointed Don McConnell.<sup>27</sup> Subsequently, Jonathan Meyer was substituted for Don McConnell.<sup>28</sup>

A little over one month later, on the day of trial confirmation, Mr. Meyer informed the court that Higgins wanted a new attorney and

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<sup>21</sup> VRP (9/7/05) 14:1-2; 14: 13-15.

<sup>22</sup> VRP (9/7/05) 14:7-9.

<sup>23</sup> VRP (4/25/05) 2:13-23.

<sup>24</sup> VRP (4/25/05) 2:22-25; 3:1-3.

<sup>25</sup> VRP (4/25/05) 3: 3-25; 4:20.

<sup>26</sup> VRP (4/25/05) 4:21-25.

<sup>27</sup> VRP (4/25/05) 5: 1-2.

<sup>28</sup> VRP (4/28/05) 7:10-19.

indicated that the two had experienced a breakdown in communication.<sup>29</sup> The court granted the motion for appointment of new counsel and appointed Mr. Underwood.<sup>30</sup> Higgins told the court he thought that Mr. Underwood had a conflict of interest because he did not feel that Mr. Underwood had done enough for him when he had previously represented Higgins.<sup>31</sup> The court gave Higgins the opportunity to choose between Mr. Meyer and Mr. Underwood to represent him.<sup>32</sup> Higgins indicated that he wanted to represent himself and the court engaged in the following colloquoy:

THE COURT: All right. I have to advise you that you have the right to represent yourself if you wish. There are certain difficulties inherent in representing yourself. You're going to be held to the same standard as any practicing attorney would be held. You're going to be held to the same knowledge of the rules of evidence as any attorney. You're going to be held to be able to try this case. You're going to be held to be able to deal with the prosecutor's office and research the legal issues. You're going to be held to the same standards as I indicated any attorney would be. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Have you represented yourself before?

THE DEFENDANT: No, sir.

THE COURT: What is the level of your education?

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<sup>29</sup> VRP (6/9/05) 13: 8-25; 14:1-17; 15.

<sup>30</sup> VRP (6/9/05) 16: 3-7.

<sup>31</sup> VRP (6/9/05) 16:8-16.

<sup>32</sup> VRP (6/9/05) 16: 17-20.

THE DEFENDANT: A degree.

THE COURT: Studies have shown that although you have the right to represent yourself, you generally do better with counsel than without, but it is your right to represent yourself if that's what you wish to do. Is that still your desire?

THE DEFENDANT: Yes, sir.<sup>33</sup>

Mr. Meyer also advised Higgins against self-representation.<sup>34</sup>

Higgins asked about access to a law library.<sup>35</sup> Mr. Underwood was later appointed as standby counsel to assist with his case preparation.<sup>36</sup> Higgins did not object to the appointment of Mr. Underwood as standby counsel.<sup>37</sup> Notably, the court had also previously appointed an investigator to assist with case preparation.<sup>38</sup> Later, Higgins expressed some dissatisfaction with Mr. Underwood because he had not provided Higgins with irrelevant information regarding a wash out provision; he did acknowledge that reference materials had been provided to him.<sup>39</sup> At that time, the Court clarified the role of standby counsel.<sup>40</sup> Higgins also indicated that he was glad that he was representing himself and expressed the belief that a public defender needed to believe that he was innocent in order to represent

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<sup>33</sup> VRP (6/9/05) 16:17-25; 17:1-21.

<sup>34</sup> VRP (6/9/05) 17:24-25; 18:1.

<sup>35</sup> VRP (6/9/05) 18:9-12;

<sup>36</sup> VRP (6/16/05) 20: 11-24.

<sup>37</sup> VRP (6/16/05) 21: 1-2.

<sup>38</sup> VRP (6/16/05) 22: 9-11.

<sup>39</sup> VRP (7/7/05) 6-13.

<sup>40</sup> VRP (7/7/05) 12:9-25; 13: 1-8.

him.<sup>41</sup> The court again reminded the Defendant of the perils of self-representation and Higgins expressed satisfaction that the case was in his own hands.<sup>42</sup>

### III. ARGUMENT

Higgins is not entitled to the relief requested on appeal. First, the search warrant in question satisfied the particularity requirement of the Fourth Amendment when it identified the crime being investigated. Additionally, a common sense reading of the search warrant, in conjunction with the affidavit that was attached to the warrant, indicates that the officer(s) conducting the search and the person whose property was being searched were on notice of the offense being investigated as well as the types of evidence being sought.

Second, Higgins was not entitled to an inferior degree instruction because the facts presented during trial do not support a conclusion that Higgins committed a lesser degree offense *instead of* Assault in the Second Degree. Evidence that Higgins committed two other assaults on the day in question, assaults that he was not charged with, does not satisfy the factual requirement for an inferior degree instruction.

Third, Higgins' waiver of his right to counsel and decision to proceed *pro se* was knowing, voluntary and intelligent. He was given the

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<sup>41</sup> VRP (7/7/05) 18: 4-18.

option of proceeding with counsel or *pro se* and chose the latter after being informed of the dangers associated with self-representation. Moreover, Higgins has no constitutional right to standby counsel, and general loss of confidence or trust in counsel, such as that expressed by Higgins, does not require substitution of counsel.

Finally, the legislature's incorporation by reference of the common law definition of assault is a valid exercise of legislative authority that does not violate the separation of powers doctrine.

For the reasons noted, each of the issues raised by Higgins lack merit. As such, this Court should deny the appeal and affirm Higgins' conviction for Assault in the Second Degree.

**A. A SEARCH WARRANT THAT IDENTIFIES THE CRIME UNDER INVESTIGATION AND IS ATTACHED TO AN AFFIDAVIT THAT DESCRIBES THE FACTS OF AN ASSAULT AND THE ITEMS OF POSSIBLE EVIDENCE THAT MAY BE FOUND AT A SPECIFIC RESIDENCE SATISFIES THE PARTICULARITY REQUIRMENT OF THE FOURTH AMENDMENT.**

A common sense reading of the search warrant and its supporting affidavit, which were attached to one another, supports a finding that the particularity requirement of the Fourth Amendment was met.

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<sup>42</sup> VRP (7/7/05) 19: 3-25.

This Court applies a *de novo* standard of review in determining whether a search warrant satisfies the particularity requirement of the Fourth Amendment.<sup>43</sup> The Fourth Amendment mandates that warrants describe with particularity the place to be searched and the persons or things to be seized.<sup>44</sup> The twin purpose of this constitutional requirement is to limit the executing officer's discretion and inform the person subject to the search what items the officer may seize.<sup>45</sup>

The "particularity" requirement is governed by the rules of practicality, necessity and common sense.<sup>46</sup> "Constitutional requirements of 'particularity' are met if the property is described with 'reasonable particularity.'"<sup>47</sup> "If the purpose of a search is to find a specific item of property, it should be described in the warrant with sufficient particularity to preclude an officer from seizing the wrong property."<sup>48</sup> "On the other hand, if the purpose of a search is to seize any property of a specified character . . . a general description . . . is all that can be reasonably expected."<sup>49</sup> In such cases, a search warrant must state the crime that is under investigation. "A search warrant that fails to specify the crime

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<sup>43</sup> *State v. Norlund*, 113 Wn.App. 171, 180, 53 P.3d 520 (2002).

<sup>44</sup> *State v. Perrone*, 119 Wn.2d 538, 545, 834 P.2d 611 (1992).

<sup>45</sup> *State v. Riley*, 121 Wn.2d 22, 28-29, 846 P.2d 1365 (1993).

<sup>46</sup> *State v. Withers*, 8 Wn.App. 123, 126-27, 504 P.2d 1151 (1972) (citations omitted).

<sup>47</sup> *Id.* (citations omitted).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

under investigation without otherwise limiting the items that may be seized violates the particularity requirement of the Fourth Amendment.”<sup>50</sup>

In the instant case, search warrant satisfies the particularity requirement. The offense being investigated, Assault in the Second Degree, was specified in the warrant itself. Moreover, specific items such as the gun, spent casings, and damage to the residence, were delineated in the affidavit that was attached to the warrant itself.<sup>51</sup> Accordingly, the two purposes of the particularity requirement were met by the warrant; the warrant and affidavit limited the officer’s discretion and informed “the person subject to the search” of the items that the officer might seize.<sup>52</sup> This conclusion is further supported by the application of a common sense reading of the facts at hand, which is the governing legal standard. Therefore, this Court should affirm the trial court’s determination that the particularity requirement was satisfied in the case at hand.

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<sup>50</sup> *Riley*, 121 Wn.2d at 27.

<sup>51</sup> *See* CP 19, Findings of Fact, Conclusions of Law and Order, Findings of Fact 1.2; *see also* Affidavit in Support of Search Warrant and Search Warrant attached to the Court’s Findings of Fact, Conclusions of Law and Order.

<sup>52</sup> *See Riley*, 121 Wn.2d at 29.

**B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT CONCLUDED THAT THE DEFENDANT WAS NOT ENTITLED TO AN INFERIOR DEGREE INSTRUCTION BECAUSE THE FACTS DID NOT SUPPORT THE INSTRUCTION.**

In the present case, the trial court denied the inferior degree instruction proposed by Higgins because he did not satisfy the requisite factual component for giving an inferior degree instruction.<sup>53</sup>

When a trial court refuses to give an instruction based on a factual dispute, this Court reviews that decision for abuse of discretion.<sup>54</sup> A trial court abuses its discretion when its decision is manifestly unreasonable or rests upon untenable grounds or reasons.<sup>55</sup> Untenable decisions are those decisions where no reasonable person would adopt the view of the court.<sup>56</sup>

In order to be entitled to an inferior degree offense instruction, a defendant must show that: 1) the statutes for both the charge offense and the proposed inferior degree offense proscribe the same offense; 2) the information charges an offense that is divided into degrees and the proposed offense is an inferior degree of the charged offense; and 3) there

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<sup>53</sup> VRP (9/8/05) 253-55.

<sup>54</sup> *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

<sup>55</sup> *State v. Cunningham*, 96 Wn.2d 31, 34, 633 P.2d 886 (1981).

<sup>56</sup> *Cunningham*, 96 Wn.2d at 34.

is evidence that the defendant committed only the inferior offense.<sup>57</sup> The third factor is the factual component of the test.<sup>58</sup>

In this matter, Higgins was tried for the commission of the single offense Assault in the Second Degree under the deadly weapon prong. The allegation was that Higgins pointed a firearm towards his wife and fired it. Evidence was presented during trial to support this allegation. No evidence was presented that would transform this assault into a lesser offense; it was not claimed that the gun was not a deadly weapon. Therefore, either the assault occurred, or it did not occur.

Evidence was also presented during trial indicating that Higgins committed two other assaults on the same day: 1) he threw a full Mountain Dew can at Ms. Higgins; and 2) he shoved Ms. Higgins into the wall shattering her hip. That evidence constituted *res gestae* relative to the crime charged. Higgins was not charged with either of these two assaults.

Higgins argues that the evidence of the third assault, shoving his wife and breaking her hip, supported his request for an Assault in the Fourth Degree instruction. Higgins is mistaken for two reasons.<sup>59</sup> First,

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<sup>57</sup> *State v. Fernandez-Medina*, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000).

<sup>58</sup> *Fernandez-Medina*, 141 Wn.2d at 455.

<sup>59</sup> Higgins also argues that the Court applied the wrong legal standard. While it is true that the wrong terminology, lesser included, was used the Court's discussion on the record clearly indicates that the proper legal standard was applied and the Court properly concluded that the factual prong of the inferior degree test had not been satisfied. *See* VRP (9/8/05) 253-55.

the only evidence relating to this assault indicates that bones were broken during the assault. Accordingly, the evidence is of a second Assault in the Second Degree that was committed by Higgins, not evidence of a lesser degree assault.

Second, and more importantly, Higgins is attempting to substitute one assault, an assault that he was not charged with, for another, one with which he was charged. His request would effectively enable him to amend the information and alter the crime that the State has charged. This position is not supported by the governing standard with regard to lesser degree offenses, that standard requires that the evidence must support the inference that the defendant committed the lesser offense *instead of* the charged offense.<sup>60</sup> There is no evidence in this case indicating that the Defendant committed a lesser degree offense instead of the Assault in the Second Degree with the gun. Any evidence of separate assaults, whether they are of equal or lesser degree, cannot be used to support a lesser degree instruction. This determination is supported by the evidence in the record. As such, the trial court did not abuse its discretion when it denied the inferior degree instruction. Therefore, Higgins' appeal must be denied.

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<sup>60</sup> *State v. Tamalini*, 134, Wn.2d 725, 731, 953 P.2d 450 (1998), *aff'd* 249 F.3d 895 (9<sup>th</sup> Cir. 2001); *see also State v. Iremia*, 78 Wn.App. 746, 755, 899 P.2d 16 (1995).

**C. THE COURT DID NOT ABUSE ITS DISCRETION WHEN IT REJECTED HIGGINS' CLAIM THAT MR. UNDERWOOD HAD A CONFLICT AND APPROVED HIGGINS' WAIVER OF COUNSEL.**

The Sixth Amendment of the United States Constitution and Article I, sec. 22 of the Washington State Constitution guarantee a criminal defendant the right to counsel.<sup>61</sup> This right does not include the right to counsel of the defendant's choosing.<sup>62</sup> "Whether an indigent defendant's dissatisfaction with his court-appointed counsel is meritorious and justifies the appointment of new counsel is a matter within the discretion of the trial court."<sup>63</sup> When a court finds that appointment of new counsel is not appropriate, "the court may require the defendant to either continue with current appointed counsel or to represent himself."<sup>64</sup> "If the defendant chooses not to continue with appointed counsel, requiring such a defendant to proceed pro se does not violate the defendant's constitutional right to be represented by counsel, and may represent a valid waiver of that right."<sup>65</sup> Notably, "there is no absolute right of the pro se defendant to standby counsel."<sup>66</sup>

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<sup>61</sup> *McInturf v. Horton*, 85 Wn.2d 704, 705-06, 538 P.2d 499 (1975).

<sup>62</sup> *State v. DeWeese*, 117 Wn.2d 369, 376, 816 P.2d 1 (1991).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *DeWeese*, 117 Wn.2d at 378.

When a criminal defendant waives his right to representation by counsel, he has a right to self-representation.<sup>67</sup> Waiver is proper when it is knowing, intelligent and unequivocal.<sup>68</sup> When evaluating a request to represent oneself the trial court must determine whether the waiver of the right to counsel has been made with the defendant's "eyes open," which includes an understanding of the dangers and disadvantages of the decision.<sup>69</sup> There is no checklist of issues that must be discussed in order for a waiver to be valid.<sup>70</sup>

It is within the trial court's discretion to determine whether a waiver of the right to counsel has been made. The determination of whether a defendant understands the import of his decision to represent himself is a factual determination that is reviewed for abuse of discretion.<sup>71</sup>

**1. The Trial Court Properly Gave Higgins The Option Of Proceeding With Mr. Underwood As Counsel Because A Disagreement With Or Lack Of Confidence In Mr. Underwood Is Not A Valid Reason For Appointment Of New Counsel.**

The trial Court did not abuse its discretion when it determined that the reason for Higgins' dislike of Michael Underwood was not a valid

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<sup>67</sup> *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525 (1975).

<sup>68</sup> *Faretta*, 422 U.S. at 835; *DeWeese*, 117 Wn.2d at 377.

<sup>69</sup> *State v. Hahn*, 106 Wn.2d 885, 895, 726 P.2d 25 (1986).

<sup>70</sup> *DeWeese*, 117 Wn.2d at 378.

<sup>71</sup> *Hahn*, 106 Wn.2d at 900; *see also State v. Dennison*, 115 Wn.2d 609, 620, 801 P.2d

basis for appointment of another attorney. The sole reason expressed by Higgins for not wanting Mr. Underwood as counsel was a lack of confidence in Mr. Underwood based on a disagreement with how he handled prior representation. This does not constitute a legitimate basis for appointing new counsel.

As noted above, although a criminal defendant has a right to representation by counsel, he does not have a right to representation by counsel of his choosing.<sup>72</sup> When appointment of new counsel is requested the trial court has the discretion to determine whether appointment of new counsel is justified.<sup>73</sup> If the trial court determines that appointment of new counsel is not appropriate, then “the court may require the defendant to either continue with current appointed counsel or represent himself.”<sup>74</sup> It is then the defendant’s decision whether to continue with court appointed counsel. If the defendant chooses not to proceed with assistance of the court appointed counsel, he can be required to proceed *pro se* without violating his right to representation.<sup>75</sup> The defendant bears the burden of proving that counsel actively represented conflicting interests and that the

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193 (1990).

<sup>72</sup> *DeWeese*, 117 Wn.2d at 376.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

actual conflict of interest adversely affected his lawyer's performance.<sup>76</sup>

A lack of confidence or trust does not require substitution of counsel.<sup>77</sup>

In the present case, the court properly gave Higgins a choice of proceeding with counsel who did not possess a true conflict. Higgins had simply expressed a lack of confidence or trust in Mr. Underwood, which the court properly concluded was not a valid reason for substituting counsel.<sup>78</sup> Thus, the trial court gave Higgins the option of choosing between Mr. Underwood and Mr. Meyer. Instead, Higgins chose to represent himself. He had been informed of the nature of the charges against him and the potential penalties at his preliminary appearance. When he expressed a desire to proceed *pro se* Higgins was also informed of the dangers of self-representation. Despite these warnings he chose to represent himself, and later expressed satisfaction with the choice he had made.<sup>79</sup>

As Higgins has no right to representation by counsel of his choice, and his stated concern about Mr. Underwood was not a valid reason for appointment of a different attorney, the trial Court acted within its discretion and properly denied Higgins's request for appointment of new counsel.

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<sup>76</sup> *State v. Martinez*, 53 Wn.App. 709, 715-16, 770 P.2d 646 (1989).

<sup>77</sup> *DeWeese*, 117 Wn.2d at 375.

<sup>78</sup> *Id.*

**2. The Trial Court Did Not Abuse Its Discretion When It Granted Higgins' Request To Proceed To Trial *Pro Se*; The Court Properly Determined That The Waiver Was Knowing, Voluntary And Unequivocal.**

Once Higgins' request for appointment of new counsel was denied he had the choice to proceed to trial with current counsel or represent himself.<sup>80</sup> While a criminal defendant does have the right to represent himself, his choice to do so must be made with an understanding of the dangers and disadvantages of self-representation.<sup>81</sup> In other words, he must have "at least a minimal knowledge of the task involved."<sup>82</sup> The preferred method for ascertaining whether a criminal defendant understands the dangers and disadvantages of self-representation is through a colloquy.<sup>83</sup> However, a colloquy is not required. If there is no colloquy:

[T]he record must reflect that the defendant understood the seriousness of the charge, the possible maximum penalty involved, and the existence of technical procedural rules governing the presentation of his defense.<sup>84</sup>

There is no checklist of required items that must be recited in order for a waiver to be valid.<sup>85</sup> The Court will consider "any evidence on the record

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<sup>79</sup> VRP (7/7/05) 18:4-18; VRP (6/9/05) 16:17-25; 17:1-21.

<sup>80</sup> See *DeWeese*, 117 Wn.2d at 376.

<sup>81</sup> See *Hahn*, *supra*.

<sup>82</sup> *DeWeese*, 117 Wn.2d at 378.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

that shows defendant's actual awareness of the risks of self-representation."<sup>86</sup>

After the trial Court denied Higgins's request for new counsel, and he indicated that he wanted to proceed *pro se*. The court inquired into his level of education, whether he had represented himself before, and informed him of the dangers and issues associated with self-representation. Higgins indicated that he still wanted to represent himself. In light of this exchange, the Court allowed Higgins to represent himself.

At a subsequent hearing Higgins was again apprised of the issues associated with self-representation. Higgins continued in his desire to represent himself. The court subsequently appointed standby counsel and an investigator to assist him in his trial preparation. Higgins had no absolute right to the assistance of standby counsel, nevertheless standby counsel was appointed.

Higgins argues that standby counsel had a conflict therefore his right to conflict free standby counsel was violated. However, the record is devoid of any evidence to support his contention that standby counsel had a conflict that would have disqualified him from serving in that capacity.

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<sup>86</sup> *City of Bellevue v. Acrey*, 103 Wn.2d 203, 211, 691 P.2d 957 (1984).

The sole basis cited, lack of confidence or trust, does not constitute a valid basis of appointment of alternative counsel.

**3. Higgins Was Properly Apprised Of The Risks Of Self-Representation; His Waiver Of His Right To Counsel Was Knowing And Intelligent In Light Of The Facts Of This Case.**

The record in this case supports the trial Court's conclusion that Higgins's waiver was knowing, voluntary, and intelligent. He was aware of the charge and the maximum penalty that he was facing. Even after he chose to represent himself, and was twice warned of the dangers associated with self-representation Higgins chose to continue representing himself and expressed satisfaction with his choice. It is within this context that Higgins indicated that he chose to represent himself at trial.

Higgins was also aware of the seriousness of the charge against him and the maximum punishment. He was charged by Information that informed him that he was facing the charge of Assault in the Second Degree, which carries a penalty of ten years in prison and a \$20,000 fine. At his preliminary appearance he was informed of this charge and the maximum penalty. He was also informed that Assault in the Second Degree is a strike offense and that the domestic violation allegation would impact his right to bear arms. Accordingly, the record indicates that he

was aware of the nature of the charge and the possible penalties that he was facing.

The record indicates that Higgins' waiver of his right to representation by counsel was knowingly, voluntarily and intelligently made. He was aware of the nature of the charge and associated penalty. He persisted in his decision even after he was twice advised of the concerns associated with self-representation. The trial Court did not abuse its discretion in granting Higgins' request.

**D. HIGGINS HAS NOT ESTABLISHED A SEPARATION OF POWERS VIOLATION; THE INCORPORATION OF A COMMON LAW DEFINITION OF ASSAULT, BY REFERENCE, IS A PROPER EXERCISE OF LEGISLATIVE AUTHORITY.**

The Legislature has established the elements of Assault in the Second Degree and provided for further definition of those elements through the incorporation, by reference, of common law definitions including the definition(s) of assault. This constitutes a proper exercise of legislative authority that does not implicate separation of powers.

RCW 9A.04.060 provides that the common law supplements Washington's criminal statute. Resort to the common law definition of assault to complement the criminal code adopted by the legislature is just one example of the effect of this statute. Higgins's argument directly

implicates the constitutionality of RCW 9A.04.060. However, he has made no effort to sustain the heavy burden born by a party challenging the constitutionality of a statute. Accordingly, his appeal must be denied.

**1. The Legislature Has Properly Exercised Its Authority To Define The Elements Of Custodial Assault; The Legislative Scheme Indicates The Legislature's Intent To Utilize Common Law Definitions To Supplement The Criminal Code.**

Defining the specific elements of a crime is the province of the Legislature.<sup>87</sup> In the present case, the Legislature has defined the elements of Assault in the Second Degree.<sup>88</sup> The elements of Assault in the Second Degree, as charged in the present case, are contained in RCW 9A.36.021(1)(c) which reads:

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

...

(c) Assaults another with a deadly weapon;

Moreover, RCW 9A.04.060 provides that:

The provisions of the common law relating to the commission of the crime and the punishment thereof, insofar as not inconsistent with the Constitution and statutes of this state, shall supplement all penal statutes of this state and all persons offending against the same shall be tried in the court of this state having jurisdiction of the offense.

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<sup>87</sup> *State v. Wadsworth*, 139 Wn.2d 724, 735, 991 P.2d 80 (2000).

<sup>88</sup> RCW 9A.36.021; RCW 9A.04.060.

Accordingly, the Legislature has performed its function of establishing and defining the elements of custodial assault.

Higgins contends that utilizing the common law to define Assault in the Second Degree somehow violates the separation of powers doctrine. Higgins cites no legal authority on point. Rather, he cites to cases that contain general discussions of the separation of powers doctrine, and a variety of cases applying the common law definition of assault since the Legislature's adoption of the 1909 criminal code. Based on this case law, Higgins asks this Court to conclude that the judiciary has affirmatively, and impermissibly, stepped into the role of legislature to define assault. This argument is not supported by the plain language of the statutes in question or the law governing separation of powers.

Higgins's argument necessarily implicates the constitutionality of RCW 9A.04.060 and 9A.36.100. Statutes are "presumed to be constitutional."<sup>89</sup> The party challenging a statute must prove that the statute is unconstitutional beyond a reasonable doubt.<sup>90</sup> "In interpreting a statute the Court must ascertain and give effect to the intent and purpose of the Legislature as expressed in the statute as a whole."<sup>91</sup> When the language of a statute is not ambiguous, then the only permissible

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<sup>89</sup> *Wadsworth*, 139 Wn.2d at 734.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

interpretation is that which gives effect to the plain language of the statute.<sup>92</sup> Additionally, the legislature is presumed to know the law, and to mean exactly what it says.<sup>93</sup>

Higgins has made no effort to satisfy his burden of proving RCW 9A.36.100 and 9A.04.060 unconstitutional beyond a reasonable doubt. The plain language of RCW 9A.36.100 indicates a clear legislative intent to include assault as an element of the crime of custodial assault. The plain language RCW 9A.04.060 also expresses the Legislature's intent to incorporate common law definitions, such as assault, into the criminal code by reference. The Legislature is presumed to know the common law definitions of assault. Accordingly, the Legislature has not only defined the specific elements of assault, but has also defined the specific term of assault through incorporation of the common law by reference. Additionally, the Legislature maintained control over the incorporation of common law by reference by limiting it to common law that does not conflict with legislation or the Constitution. The Legislature has legitimately exercised its authority and meaning should be given to the statutes that the Legislature has adopted.

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<sup>92</sup> *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001).

<sup>93</sup> *State v. Salavea*, 151 Wn.2d 133, 142, 86 P.3d 125 (2004); *Price v. Kitsap Transit*, 125 Wn.2d 456, 463, 886 P.2d 556 (1994).

**2. RCW 9A.04.060's Incorporation Of Common Law As A Legislative "Gap Filler" Does Not Violate Separation Of Powers.**

RCW 9A.36.021 and 9A.04.060 represent an appropriate exercise of legislative authority that recognizes the symbiotic relationship between legislation and common law that is inherent in the separation of powers doctrine. In *Carrick v. Locke*,<sup>94</sup> the Washington Supreme Court recognized that:

The validity of [the separation of powers] doctrine does not depend on the branches of government being hermetically sealed off from one another. The different branches must remain partially intertwined if for no other reason than to maintain an effective system of checks and balances, as well as effective government. . . . The separation of powers doctrine is grounded in flexibility and practicality, and rarely will offer a definitive boundary beyond which one branch may not tread.<sup>95</sup>

In *State v. Wadsworth*, the Washington Supreme Court considered a separation of powers challenge to a statute criminalizing possession of weapons in specific areas of courthouse facilities. In that case, the legislature assigned the task of designating the specific areas of prohibition to the "local judicial authority."<sup>96</sup> Mr. Wadsworth was charged with, and convicted of, unlawful possession of a weapon under

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<sup>94</sup> 125 Wn.2d 129, 882 P.2d 173 (1994).

<sup>95</sup> *Carrick*, 125 Wn.2d at 135. Notably, the separation of powers doctrine is an institutional interest, not a personal interest; it exists to protect one branch of government from performing the tasks of another. *Carrick*, 125 Wn.2d at 136.

<sup>96</sup> *Wadsworth*, 139 Wn.2d at 726.

that statutory scheme. He appealed the conviction claiming that the statute violated separation of powers because it is “equivalent to the judiciary defining the elements of a specific crime.”<sup>97</sup> After analyzing the statute itself and law governing separation of powers, the Court concluded that no improper delegation of legislative authority had occurred. The Court recognized that there are numerous instances in which the Legislature has constitutionally delegated its power, including the “established practice of defining prohibited acts in general terms, leaving to the judicial and executive branches the task of establishing specifics.”<sup>98</sup>

In the present case, the Legislature established the elements of custodial assault in RCW 9A.36.100 and defined assault itself through RCW 9A.04.060’s common law provision. At most, this falls within the practice of defining the elements and general terms of an offense combined with a resort to another branch of government or body of law to establish specifics.

Additionally, the Legislature’s incorporation of common law by reference does not constitute delegation of legislative authority because there is a distinct difference between the judicial branch that was created by the State and Federal constitutions, and the common law itself. The common law consists of rules and principles, “which derive their authority

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<sup>97</sup> *Wadsworth*, 139 Wn.2d at 733.

solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs.”<sup>99</sup> While the common law is developed through judicial decisions, it exists separate and apart from the judicial branch itself; judges are required to follow precedent and apply the rules contained in the common law in order to render decisions. Therefore, the common law supplementation statute constitutes very little, if any, delegation of legislative authority to the judicial branch itself. Certainly, if it does constitute a delegation of legislative authority it is consistent with the “long history of cooperation between the branches . . . [and] tends to militate against finding any separation of powers violation.”<sup>100</sup> As such, no separation of powers violation has occurred.

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<sup>98</sup> *Wadsworth*, 139 Wn.2d at 738, 743 and fn 73.

<sup>99</sup> BLACK’S LAW DICTIONARY 276 (6<sup>th</sup> ed 1990).

<sup>100</sup> *Carrick*, 125 Wn.2d at 136.

**IV. CONCLUSION**

For the foregoing reasons, the State respectfully requests that Higgins' conviction be affirmed and his appeal be denied.

Respectfully submitted this 30<sup>th</sup> day of June, 2006.

JEREMY RANDOLPH  
Lewis County Prosecuting Attorney

By:



AILEEN MILLER, WSBA #27943  
Deputy Prosecuting Attorney

CERTIFICATE

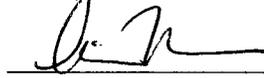
I certify that on June 30, 2006, I mailed a copy of the foregoing supplemental response by depositing it in the United States Mail, postage pre-paid, to the following parties at the addresses indicated:

David C. Ponzoha—Clerk  
Court of Appeals--Div. II  
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Suite 300  
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Manek R. Mistry  
Jodi R. Backlund  
203 East Fourth Avenue, Suite 404  
Olympia, WA 98501

FILED  
COURT OF APPEALS  
JUN 30 2006  
9:03 AM  
SEALING DIVISION  
CLERK

DATED this 30<sup>th</sup> day of June, 2006.



Aileen Miller  
Attorney for Respondent  
WSBA No. 27943

## **Appendix**

**Excerpts of Verbatim Report of Proceedings**

**April 25, 2005**

**April 28, 2005**

**June 9, 2005**

**June 16, 2005**

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF LEWIS

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STATE OF WASHINGTON,                    )  
  )  
  ) Plaintiff,                                )  
  )    ) NO. 05-1-00329-9  
vs.    )  
  )    )  
LLOYD HIGGINS,                            )  
  )    )  
  ) Defendant.                                )

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VERBATIM REPORT OF PROCEEDINGS  
April 25 & 28, 2005; June 2, 9, 16 & 30, 2005

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A P P E A R A N C E S

For the Plaintiff:                    ANDREW TOYNBEE  
  TERRI GAILFUS  
  CHRIS BAUM  
  Deputy Prosecuting Attorneys  
  Chehalis, Washington

For the Defendant:                    JONATHAN MEYER  
  (4/25; 6/2 & 6/9)                    Attorney at Law  
  Centralia, Washington

Stand-by Counsel:                    MICHAEL UNDERWOOD  
  (6/16 & 6/30)                        Attorney at Law  
  Olympia, Washington

Presiding Judge:                     NELSON E. HUNT  
  Dept. No. 1

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Cheri L. Davidson  
Official Court Reporter  
Lewis County Superior Court  
Chehalis, Washington 98532  
(360)740-1171

CSR #DA-VI-DC-L354QG

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APRIL 25, 2005.

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MR. TOYNBEE: Next is State versus Lloyd J. Higgins, 05-1-329-9. Mr. Higgins is present in custody. He is not currently accompanied by an attorney. Andrew Toynebee for the state.

The matter comes on for a preliminary appearance on charges of assault in the second degree with a deadly weapon and unlawful possession of a firearm in the first degree.

THE COURT: You are Lloyd James Higgins?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Higgins, as the prosecutor just indicated, you're charged with assault in the second degree, domestic violence, and unlawful possession of a firearm in the first degree. Both of those are Class B felonies punishable upon conviction with a maximum of 10 years in the state institution plus a \$20,000 fine. In addition, assault in the second degree is a most serious offense, is it not, Mr. Toynebee?

MR. TOYNBEE: I believe it is a strike offense, Your Honor.

THE COURT: All right. For purposes of the what's called three strikes and you're out. And also

1 the domestic violence conviction would result in the  
2 loss of any firearm privileges as well.

3 Do you wish to be represented by an attorney?

4 THE DEFENDANT: Yes, I do.

5 THE COURT: Are you going to be hiring your  
6 own or do you wish the court to consider appointing one  
7 to represent you?

8 THE DEFENDANT: I can't afford an attorney.

9 THE COURT: Okay. I have to ask you the same  
10 questions then.

11 Are you currently employed?

12 THE DEFENDANT: No. I'm disabled.

13 THE COURT: All right. Are you receiving  
14 funds from any source because of that disability?

15 THE DEFENDANT: Yes, I am.

16 THE COURT: How much?

17 THE DEFENDANT: I collect about \$400 Social  
18 Security.

19 THE COURT: Is that per month?

20 THE DEFENDANT: Yes.

21 THE COURT: Is there anyone dependent upon you  
22 for support?

23 THE DEFENDANT: My wife.

24 THE COURT: All right. The person who is  
25 alleged to be the victim in this matter?

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THE DEFENDANT: I beg your pardon?

THE COURT: The person who is alleged to be the victim in this matter?

THE DEFENDANT: I guess, yes.

THE COURT: Okay. Do you receive money from any other source?

THE DEFENDANT: I get \$108 every other week for the permanent disability from the company that, insurance company that I dealt with on a permanent disability.

THE COURT: All right. So you -- do you have any cash on hand?

THE DEFENDANT: I have about \$2.10 on the books.

THE COURT: Okay. Do you have any ownership interest in any real estate, stocks, bonds, trust funds, anything such as that?

THE DEFENDANT: No.

THE COURT: All right. I'll find that you're qualified for court-appointed counsel.

Have you ever dealt with an attorney in this area before?

THE DEFENDANT: Not in Lewis County but I have in Thurston. Underwood was my attorney, and I would not want him for my attorney again.

1 THE COURT: All right. Well, in that case  
2 I'll appoint Mr. McConnell to represent you.

3 Conditions of release?

4 MR. TOYNBEE: Your Honor, the state is asking  
5 for \$25,000 cash or bond. This is a serious offense.  
6 It involved a firearm, and Mr. Higgins has a prior,  
7 although quite a ways back, conviction from Oregon for  
8 attempted assault in the second degree. He also has a  
9 fairly recent DUI from 2003.

10 So because of the seriousness of the case and his  
11 prior history, the state feels that there is a basis for  
12 concern for community safety, and we are asking for  
13 \$25,000 plus other standard conditions of release,  
14 including no contact with the victim in this case.

15 THE COURT: Mr. Higgins, if you'd like to be  
16 heard on conditions of release and related matters such  
17 as bail, now is your opportunity. I caution you that  
18 anything you say can be used against you, but if you  
19 want to address that now is your time.

20 THE DEFENDANT: Well, first of all, I'm not a  
21 threat to the community. I have lived in this community  
22 for five years now.

23 I -- yes, I did get a DUI last year or actually the  
24 year before, and I paid for that.

25 This situation here I do not wish to discuss until

1 APRIL 28, 2005

2 \* \* \* \* \*

3 MS. GAILFUS: Next matter is State of  
4 Washington versus Lloyd James Higgins, 05-1-329-9. Mr.  
5 Higgins is present in the courtroom in custody. Mr.  
6 McConnell, his attorney, also is present.

7 Here before Your Honor for arraignment and trial  
8 set.

9 (Discussion off the record.)

10 MR. McCONNELL: Your Honor, I'm gonna ask that  
11 my partner, Mr. Meyer, be allowed to be substituted into  
12 this case, the reason being they gave me this case, and  
13 unless the court would grant a different speedy trial  
14 period, I'm going to be out of the country during  
15 15 days of the end of this, so I'm gonna ask that Mr.  
16 Meyer be able to take over.

17 THE COURT: Mr. Meyer, do you have any  
18 objection to that?

19 MR. MEYER: I don't.

20 THE COURT: All right. Are you ready to  
21 proceed with an arraignment then?

22 MR. MEYER: Yes, Your Honor. We will  
23 acknowledge receipt of the information, waive any formal  
24 reading, further advisement of rights, simply enter a  
25 plea of not guilty.

1 JUNE 9, 2005

2 \* \* \* \* \*

3 MR. TOYNBEE: State of Washington versus Lloyd  
4 James Higgins, Cause Number 05-1-329-9. Mr. Higgins is  
5 present in court in custody of the Lewis County Jail  
6 accompanied by his attorney, Jonathan Meyer. Andrew  
7 Toynbee for the state.

8 The matter is scheduled for trial confirmation. I  
9 don't believe that the parties will be confirming, and  
10 I'll defer to Mr. Meyer to address the court on that  
11 issue.

12 THE COURT: Mr. Meyer?

13 MR. MEYER: Your Honor, Mr. Higgins contacted  
14 my office the day before yesterday, indicated that he  
15 wanted a new attorney on this matter. I spoke with him  
16 yesterday. I feel that there has been a breakdown in  
17 communication. I don't think that I can continue to  
18 represent Mr. Higgins.

19 I did speak to Mr. Higgins and explained that if he  
20 were to request a new attorney that he may have to sign  
21 a waiver of speedy trial in order to effectuate any  
22 change. He indicated that he is willing to sign a  
23 waiver to give a new attorney some time.

24 So I would simply ask the court to inquire, and I  
25 would also ask the court to appoint Mr. Higgins a new

1 attorney.

2 THE COURT: Well, before I do that, what's the  
3 nature of the breakdown?

4 MR. MEYER: Simply we can't communicate. He's  
5 accused me of being untruthful with him. He's accused  
6 me of leaking information to his spouse. He's accused  
7 me of several different things. Every conversation we  
8 have either ends with Mr. Higgins hanging up on me or  
9 Mr. Higgins walking out of the visiting booth.

10 THE COURT: Well, how do you think it would be  
11 different with anybody else?

12 MR. MEYER: Well, sometimes personalities just  
13 clash, Your Honor. I'm hopeful that Mr. Higgins will be  
14 able to gel with another attorney, but based upon Mr.  
15 Higgins' best interest - and that's what I'm required to  
16 help protect - I think his best interest would be served  
17 by having another attorney.

18 THE COURT: Mr. Higgins, you don't have to say  
19 anything if you don't want to, but it's up to you now.

20 THE DEFENDANT: Well, I feel that it's  
21 inadequate counsel for me because I've asked him for a  
22 police report for the past three weeks and I have not  
23 seen a police report. He keeps telling me that there's  
24 one there, but I've not even seen one, nothing on it or  
25 anything else, and every time I turn around -- and I've

1           only talked to him once over the phone, and I've never  
2           hung up on him. Yes, I did walk out the one time that I  
3           did see him in visiting.

4           But I do feel that it is inadequate counsel and  
5           that I should have at least something because, like I  
6           said, he has lied to me, and I need somebody that's not  
7           going to and that is gonna stand up for me.

8           THE COURT: In what way has he lied to you?

9           THE DEFENDANT: About the police report. It's  
10          been three weeks ago and he hasn't even come by. My  
11          trial is set for next week. My trial is set for next  
12          week, and he hasn't even come up and asked me my side of  
13          the story. He has not once asked me what has happened  
14          through my point of view. And I mean -- and of course  
15          my trial is next week. That is -- that's --

16          MR. MEYER: Well, Your Honor, without getting  
17          into privileged communication, I'll simply say that I  
18          disagree with the comments made by Mr. Higgins. I think  
19          this is a perfect illustration as to why new counsel is  
20          necessary.

21          THE COURT: When is the expiration date?

22          MR. TOYNBEE: June 27th, Your Honor.

23          MR. MEYER: Mr. Higgins indicated that he'd be  
24          willing to sign a waiver with a new commencement date of  
25          today, which would be 60 days out. That would give the

1 court an August 7th expiration.

2 THE COURT: All right. If there's a waiver  
3 I'll grant the motion.

4 MR. MEYER: Your Honor, Mr. Higgins has signed  
5 the document, and I will present it to the court.

6 All right. I'll appoint Mr. Underwood to represent  
7 Mr. Higgins.

8 THE DEFENDANT: Can I say something, Your  
9 Honor?

10 THE COURT: Yes.

11 THE DEFENDANT: I had him in Thurston County,  
12 and that's a conflict of interest right there.

13 THE COURT: Why is it a conflict because he's  
14 represented you before?

15 THE DEFENDANT: Because he didn't do nothing  
16 for me then.

17 THE COURT: Okay. So now you want to tell me  
18 who is going to represent you. It's going to be Mr.  
19 Underwood or it's going to be Mr. Meyer. Which is your  
20 choice?

21 THE DEFENDANT: I'll represent myself, sir.

22 THE COURT: All right. I have to advise you  
23 that you have the right to represent yourself if you  
24 wish. There are certain difficulties inherent in  
25 representing yourself. You're going to be held to the

1 same standard as any practicing attorney would be held.  
2 You're going to be held to the same knowledge of the  
3 rules of evidence as any attorney. You're going to be  
4 held to be able to try this case. You're going to be  
5 held to be able to deal with the prosecutor's office and  
6 research the legal issues. You're going to be held to  
7 the same standards as I indicated any attorney would be.

8 Do you understand that?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Have you represented yourself  
11 before?

12 THE DEFENDANT: No, sir.

13 THE COURT: What is the level of your  
14 education?

15 THE DEFENDANT: A degree.

16 THE COURT: Studies have shown that although  
17 you have the right to represent yourself, you generally  
18 do better with counsel than without, but it is your  
19 right to represent yourself if that's what you wish to  
20 do. Is that still your desire?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: All right. Let's set the matter  
23 for trial then.

24 MR. MEYER: Your Honor, as my last official  
25 act as Mr. Higgins' attorney I would advise him against

1 representing himself.

2 THE COURT: I think actually your last  
3 official act was getting the waiver, but I appreciate  
4 the assistance.

5 All right. When is this set for trial?

6 THE DEFENDANT: Can I ask something, Your  
7 Honor?

8 THE COURT: Yes.

9 THE DEFENDANT: Can I have access to a law  
10 library?

11 THE COURT: Well, you'll be provided access to  
12 whatever you need within the bounds of the law.

13 MR. TOYNBEE: Your Honor, I would suggest  
14 trial the week of July 25th.

15 THE COURT: All right. July 25th. Mr.  
16 Higgins, do you have anything to say about that?

17 THE DEFENDANT: No, sir.

18 THE COURT: All right. July 25th it will be.

19 MR. TOYNBEE: That would make trial  
20 confirmation July 21st.

21 I would ask the court to inquire of Mr. Higgins if  
22 he would like a new omnibus hearing or not.

23 THE COURT: All right. Mr. Higgins, do you  
24 wish to have a new omnibus hearing?

25 THE DEFENDANT: I'd like to know what an

1 JUNE 16, 2005

2 \* \* \* \* \*

3 MR. BAUM: State of Washington versus Lloyd  
4 Higgins, Cause Number 05-1-329-9. It's on to address  
5 the issue of stand-by counsel for Mr. Higgins. Chris  
6 Baum for the state. Mr. Higgins is present. He's in  
7 custody.

8 THE COURT: All right. You are Lloyd James  
9 Higgins?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Mr. Higgins, you're here -- I put  
12 this matter on the docket in response to your letter  
13 which hit the file on June 13th. The request was to  
14 have access to the law library. That becomes difficult  
15 to do because you're in custody obviously, so I'm going  
16 to be appointing Mr. Underwood as your stand-by counsel.

17 I have already spoken to him. He's going to accept  
18 the appointment. He will be able to provide you with  
19 the legal documents that you need and give you advice in  
20 response to your questions, and that should provide the  
21 access that you need. Now, he's not your servant, but  
22 he is your stand-by counsel and will be able to give you  
23 the forms and legal access to legal materials that you  
24 need.

25 Do you have any questions?

1 THE DEFENDANT: Umm, how would I get -- how do  
2 I get in touch with him? How do I get anything across  
3 to him to --

4 THE COURT: Well, you can call him, and he's  
5 also standing right there.

6 MR. UNDERWOOD: Your Honor, if I could, it's  
7 my understanding that Mr. Higgins has been given  
8 discovery. I'd like a copy of discovery too, and I  
9 think Mr. Toynebee's position is as stand-by I may not be  
10 entitled to it?

11 THE COURT: Is that going to be your position?

12 MR. TOYNEBEE: I think that's the case, Your  
13 Honor. I think as stand-by he's there to assist Mr.  
14 Higgins with getting the things that he asks for,  
15 materials from the law library, cases, and that type of  
16 thing.

17 MR. UNDERWOOD: That's not my understanding of  
18 stand-by, Your Honor. I've been stand-by before.

19 THE COURT: Not mine either.

20 MR. UNDERWOOD: My understanding is if Mr.  
21 Higgins has a question, legal question or advice, then I  
22 advise him on that.

23 THE COURT: He's going to have to know what  
24 the case is about, otherwise he won't be able to know.

25 I'll direct that a copy of the discovery be

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provided to Mr. Underwood.

MR. TOYNBEE: All right.

MR. UNDERWOOD: Your Honor, when are hearings set on Mr. Higgins?

THE COURT: The next hearing is the omnibus hearing I think.

MR. UNDERWOOD: On the 30th?

THE COURT: Well, let me take a look.

Yes, omnibus is June 30th. You might also be advised, Mr. Underwood, that Mr. Armstrong has been appointed as far as providing any expert services as far as investigation goes.

MR. UNDERWOOD: Oh, okay. Jim Armstrong? Okay.

THE COURT: Yes.

(Proceedings were concluded.)

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C E R T I F I C A T E

STATE OF WASHINGTON )  
 ) ss  
COUNTY OF LEWIS )

I, Cheri L. Davidson, Notary Public, in and for the State of Washington, residing at Olympia, do hereby certify:

That the annexed and foregoing Verbatim Report of Proceedings was reported by me and reduced to typewriting by computer-aided transcription;

That said transcript is a full, true, and correct transcript of the proceedings heard before Judge Nelson E. Hunt on the 25th and 28th days of April, 2005, and the 2nd, 9th, 16th, and 30th days of June, 2005 at the Lewis County Courthouse, Chehalis, Washington;

That I am not a relative or employee of counsel or to either of the parties herein or otherwise interested in said proceedings.

WITNESS MY HAND AND OFFICIAL SEAL THIS 4th day of NOVEMBER, 2005.



*[Handwritten signature]*

Notary Public, in and for the State of Washington, residing at Olympia.

**Excerpts of Verbatim Report of Proceedings**  
**July 8, 2005**

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF LEWIS

STATE OF WASHINGTON, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
LLOYD JAMES HIGGINS, )  
 )  
Defendant. )  
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COPY

NO. 05-8-00329-9  
COA. 33833-5-II

VERBATIM REPORT OF PROCEEDINGS  
May 19, July 7, 8, 14,  
August 4, 18, 24,  
September 2, 2005  
(Various Motions)

A P P E A R A N C E S

For the Plaintiff: MR. ANDREW TOYNBEE  
MS. AILEEN MILLER  
MR. ERIC EISINGER  
DEPUTY PROSECUTORS  
Chehalis, Washington

For the Defendant: LLOYD JAMES HIGGINS, PRO SE  
MR. MICHAEL UNDERWOOD Standby Counsel  
ATTORNEY AT LAW  
Centralia, Washington

Presiding Judge: H. JOHN HALL  
DEPARTMENT 2

Kathleen M. Mahr, CSR NO. 2311  
Official Court Reporter  
Lewis County Superior Court  
Chehalis, Washington 98532  
(360)740-1173

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July 8, 2005

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THE COURT: Please be seated and good afternoon.

MR. TOYNBEE: Good afternoon, your Honor. The next matter is State of Washington versus Lloyd James Higgins, cause 05-1-329-9. For the record, Mr. Higgins is present, he's in custody of Lewis County Jail. He represents himself pro se, but he's accompanied in court by standby counsel, Michael Underwood. Andrew Toynbee for the state. This matter is scheduled for argument on Mr. Higgins' motion for bill of particulars hearing, motion for immediate dismissal, and his pleading entitled affirmative defense. I'll defer to him to discuss that, and the state also has a motion to be heard after his.

THE COURT: Mr. Higgins, you may proceed with your motions. You can select which one you want to argue first.

MR. HIGGINS: I'll take the immediate dismissal. On this, on the 29th of June, the day before my omnibus hearing was heard, Mr. Underwood came to see me in Lewis County jail and brought with him -- I thought this was Jeremy Randolph, but I take it this is Mr. Toynbee and he's from the district attorney's

1 office. I feel I have been ambushed from him because he  
2 came in and wanted to know my discoveries and everything  
3 else. It seemed to me that on that particular day that  
4 he wanted all of this stuff and was just sitting there  
5 badgering me about all of this stuff about my case right  
6 in front of Mr. Underwood here. And which Mr. Underwood  
7 was appointed to me by Judge Hunt to assist me and he  
8 let this harassment go on. And I feel it was harassment  
9 and he wanted to know about my discoveries, my  
10 subpoenas, and everything that had to do with that case.  
11 And I come out to find out that stuff didn't have to be  
12 in until 10 days before my trial date.

13 And I had asked Mr. Underwood previously on the  
14 29th -- or not on the 29th, but on the 23rd of June for  
15 some criminal rules, evidence rules and everything else  
16 that had to do with this. And I was told by Mr.  
17 Underwood that what I had asked for was impertinent to  
18 my case. I feel it was very important to my case to  
19 have these rules and to have these evidence rules and  
20 everything else for this. And it was -- what I had  
21 asked for was a printout of a washout law that criminal  
22 rule 3.1(f), 3.3, 3.5, 3.6, and ER 609. And as of the  
23 29th I was not given them. And as it turns out I need a  
24 lot more information to at least understand what this is  
25 all about here. And I feel Mr. Underwood knows that I

1           needed this, needed more of this information than that,  
2           and I never got any of this printout or anything else at  
3           all from Mr. Underwood until the day of my omnibus  
4           hearing which was the 30th. He came into court and  
5           handed me this omnibus the printout that I needed.  
6           Okay.

7                     And I do, I feel that this is obstruction of  
8           justice. It is not right. I feel that he is not the  
9           one to be my standby attorney because he has not done  
10          anything to try and help me prepare for this. And I  
11          have only got a ninth grade education. And I cannot  
12          stress that I am trying here to give the court the truth  
13          of the matter in all of this proceedings instead of the  
14          fantasy that I feel that Mr. Toynee is ready to put  
15          onto this court. And I also would like to have at least  
16          the book on criminal rules so that I can go through and  
17          read what is expected of me if I have to be here and be  
18          my own attorney. And I noticed that on my omnibus  
19          papers that there is a rule for 3.6, the criminal rule  
20          3.6 which has to do with the evidence and it is not  
21          checked off on my paperwork here. I would like to bring  
22          that seeings how I do not know what that rule had to do  
23          with or anything else and I do know I would like to have  
24          that marked on there so I can bring that up to the court  
25          for discussion also.

1                   And then while I'm at it, I feel that if these  
2 charges are brought up against me, there is a Centralia  
3 Police Department John Englebertson, badge 322, I would  
4 like arrested for accessory to any crimes having to do  
5 with any of this charge at all, period, on this case.

6                   THE COURT: Well, did you indicate that Mr.  
7 Underwood has given you copies of the criminal rules and  
8 evidence rules that you had previously requested?

9                   MR. HIGGINS: Yes, sir, he gave me the ones  
10 that I asked for, but -- and that was the date of my  
11 omnibus hearing so I had no prior knowledge, none, up  
12 until -- I couldn't even at the hearing look through  
13 them to see what was what. I didn't have any kind of --  
14 any kind of leeway as far as being able to read them  
15 over, understand. Could I advise the court, your Honor.

16                   THE COURT: Just a moment. What access do you  
17 have to your file while you're in custody as far as  
18 working on it?

19                   MR. HIGGINS: Sir, I have -- the only thing I  
20 have on my file is police reports. I have no access to  
21 the law library, I have no access.

22                   THE COURT: Well, but I'm assuming you're  
23 entitled to have the documents with you all the time.

24                   MR. HIGGINS: Yes, they're not harmful to the  
25 court, they're not harmful to me, they're not

1           jeopardizing anybody or anything in the jail or the way  
2           the jail has handled or anything else.

3                    THE COURT:   So if you had a book on Washington  
4           court rules you would have ample opportunity to review  
5           them?

6                    MR. HIGGINS:   Yes, sir.

7                    THE COURT:   Mr. Underwood.

8                    MR. UNDERWOOD:   Your Honor, Mr. Higgins gave  
9           me a laundry list of things he wanted copied including  
10          the sentencing guidelines, the statutes, certain court  
11          rules, and he wanted the statutes and case law on the  
12          washout.  On 6-23 I supplied him the sentencing  
13          guidelines and the statutes including the annotations as  
14          he requested.  I told him I was working on getting the  
15          court rules to him that he specifically requested.  I  
16          had a discussion with him as to why he thought he needed  
17          the washout rules since Mr. Toynbee had already agreed  
18          he was going to stipulate that he -- that his prior  
19          felony was washed out, it wasn't going to affect him.

20                   THE COURT:   Well, let me interrupt, it will  
21          affect him as far as one of the charges is concerned,  
22          the washout rule deals with sentencing.

23                   MR. UNDERWOOD:   I agree.

24                   THE COURT:   I don't know if Mr. Higgins  
25          understands that.

1 MR. UNDERWOOD: Then he said it does affect  
2 him because one of the charges he has against him is the  
3 unlawful possession of a firearm and that is not  
4 affected by the washout rule. So despite that, I told  
5 him, okay, fine, I will get you the washout statute and  
6 the case law that he asked for, and I supplied those to  
7 him in what I feel was a timely manner.

8 Mr. Higgins, I've tried to explain to him that he  
9 is not my only client. I have other clients. I have a  
10 contract here, I have a contract in Thurston County  
11 District Court, with City of Lacey. I can't drop  
12 everything anytime Mr. Higgins wanted copies of this.

13 MR. HIGGINS: That's understood, your Honor, I  
14 understand this. What Mr. Underwood brought me that one  
15 day, I told him, because it was on the list as far as my  
16 charges, as far as the printouts of an explanation of my  
17 charges, okay. Mr. Underwood did bring that the first  
18 time I saw him. But there was still the criminal rules  
19 and the evidence rules and that was on that list. I  
20 gave -- yes, I did give Mr. Underwood that list and it  
21 was -- he had already did part of it. But I feel that I  
22 needed the criminal rules and the evidence rules and  
23 there's still evidence rules and criminal rules that I  
24 need to understand this, what I'm going through.

25 You know, I have not gone through years and years

1 of schooling. I do not know your system. I have not  
2 been in your system. I do not know this, you know.  
3 This is all basically new to me. I have not gone  
4 through a jury trial, I've not gone through anything.  
5 I'm not used to talking to the judge besides your Honor.  
6 And this -- you know, I feel that he was -- he is  
7 appointed to assist me and that he was really not  
8 assisting me at all.

9 THE COURT: Well, Mr. Higgins, he is appointed  
10 as standby counsel. That generally means that he is to  
11 be available to answer questions.

12 MR. HIGGINS: To answer questions and to at  
13 least guide me to where -- okay, he can't do that, and  
14 this is why or this is what I took this as, that he's to  
15 guide me to where -- when Mr. Toynbee came in and  
16 started harassing me on that, he didn't tell me that I  
17 didn't have to do this or I didn't have to do that or I  
18 had to do this.

19 THE COURT: That's not his obligation as  
20 standby counsel. You're representing yourself and you  
21 have made that election evidently previously.

22 MR. HIGGINS: That's because I cannot get an  
23 attorney to look at the truth behind this case.

24 THE COURT: Well, but Mr. Underwood's duty is  
25 as standby counsel. Mr. Toynbee, as the attorney for

1 the state, can deal directly with you as your own  
2 attorney. As I said before, if you had questions of Mr.  
3 Underwood during that, you can ask him questions, but he  
4 can't interject something.

5 MR. HIGGINS: He can't see something's wrong  
6 and say, Mr. Higgins, he can't do this to you?

7 THE COURT: Not unless you ask him.

8 MR. HIGGINS: Okay, fair enough.

9 THE COURT: Mr. Toynbee.

10 MR. TOYNBEE: Thank you. I feel a little bit  
11 that I've been on the ropes here and I'm hoping the  
12 court has somewhat of a picture of what I have done. As  
13 soon as Mr. Higgins successfully convinced Judge Hunt  
14 that he wanted to represent himself, I informed Mr.  
15 Higgins now I could talk to him face-to-face I would be  
16 over to the jail at some point to talk to him. And he  
17 is his own opposing counsel. I think it is entirely  
18 appropriate to talk to him about the case. I can engage  
19 with plea negotiations with him, I can talk to him about  
20 discovery issues, I can ask him what his trial strategy  
21 is. There is a fine line between him wanting to  
22 incriminate himself or not and he drew that line very  
23 clearly with me and told me, I don't want to answer  
24 that, I think appropriately.

25 I think what he doesn't understand is he does have

1 an obligation to let me know what his defense is.  
2 Discovery rules say that he does and they even say he  
3 has to do it prior to the omnibus hearing. And I talked  
4 to him prior to omnibus. I was not trying to trick him.  
5 I explained to him I'm not his attorney, I'm the  
6 prosecuting attorney. It was clear to him that was the  
7 case. All the things I did with him I believe were  
8 legitimate, certainly not harassing. I tried not to  
9 argue with him, but we ended up arguing just because we  
10 have different positions on what the evidence is and  
11 what will be admissible. And I think the court can  
12 probably see by his allegations that I want to put a  
13 fantasy before the court and from what he has filed that  
14 he has strong beliefs in his theory of what the case is  
15 about and what the defense would be. I think that's  
16 another reason why perhaps Mr. Meyer wasn't able to  
17 represent him is that he is putting forth some defenses  
18 that quite frankly I don't know they're going to be even  
19 allowed by the court at his trial. That's to be  
20 determined by a judge, but some of the things that it  
21 sounds like he wants to put before the court as his  
22 defense are likely not going to be admissible. And he's  
23 facing quite a bit of time, and I tried to negotiate a  
24 plea with him. It became quite clear he didn't want to  
25 talk to me and basically directed me to leave at which

1           And that is why I'm sitting here today representing  
2           myself because I have got to read a lot of stuff that I  
3           had not even looked at when Mr. Meyer was my attorney.  
4           And there was -- there was a lot of things that once I  
5           saw that I am very glad that I did decide to take this  
6           myself.

7           You know, I could get an -- if I could get an  
8           attorney to actually listen to me and to see at least  
9           part of the way that this went down and everything else,  
10          I would be 110 percent willing to let them do this  
11          because I have no idea of what I am doing whatsoever.  
12          The only thing I can do, and this is the reason, is  
13          because this is my time that I'm going to be doing. I  
14          feel that a public defender has got to stand up if the  
15          person truly believes and is truly innocent of this why  
16          all the stuff that you have to go through just to get an  
17          attorney to believe you or to do what they basically  
18          signed a pledge and oath to do. Because in my heart I'm  
19          too old to be going through this just from my life is  
20          too old to be going through this. And if the police  
21          officer would have done what he was supposed to do that  
22          night, we would not be sitting here right now. And this  
23          is what I've have been trying to get the attorney and  
24          the district attorney to understand. That if this  
25          police officer would have done what he was supposed to

1 do that night we would not be here. I would not have  
2 been 75 days in that jail down their right now.

3 THE COURT: Well, Mr. Higgins, all of our  
4 contract defense attorneys are experienced attorneys.  
5 And they all have a good knowledge of criminal law. Mr.  
6 Meyer was your first attorney and he -- I can't see  
7 where a withdrawal order was entered, but he was  
8 evidently allowed to withdraw. And Mr. Underwood then  
9 was appointed as standby counsel. According to the  
10 clerk's minutes, Judge Hunt, when you requested to  
11 represent yourself, went through a colloquy with you  
12 about the perils of representing yourself and lack of  
13 knowledge of criminal procedure, criminal laws, and  
14 basic understanding of how courts operate at the time  
15 that he allowed you to represent yourself. I think you  
16 remember the questions he probably asked you, and you're  
17 faced with -- one of the perils you face when you  
18 represent yourself in a criminal felony proceeding.

19 MR. HIGGINS: This time is in my hands now.  
20 It is not in the hands of somebody else. I'm going to  
21 be the one doing the time if this all backfires on me.  
22 If I cannot get a public defender to see this that they  
23 are messing with my time.

24 THE COURT: Well, I don't know how to explain  
25 it other than you have the facts that the state will

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C E R T I F I C A T E

STATE OF WASHINGTON )  
 ) ss  
COUNTY OF THURSTON )

I, Kathleen Mahr, Notary Public, in and for the State of Washington, residing at Olympia, do hereby certify:

That the annexed and foregoing Verbatim Report of Proceedings consisting of 2 pages was reported by me and reduced to typewriting by means of computer-aided transcription;

That said transcript is a full, true, and correct transcript of my shorthand notes of the proceedings heard before the Honorable H. John Hall on the 2nd day of September, 2005, at the Lewis County Superior Court, Chehalis, Washington;

That I am not a relative or employee of counsel or to either of the parties herein or otherwise interested in said proceedings.

WITNESS MY HAND AND OFFICIAL SEAL this 14th day of November, 2005.



*Kathleen M. Mahr*  
KATHLEEN MAHR

Notary Public in and for the State of Washington, residing at Olympia.

**Excerpts of Verbatim Report of Proceedings  
September 6, 2005**

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF LEWIS

STATE OF WASHINGTON, )  
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Plaintiff, )  
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vs. )  
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LLOYD JAMES HIGGINS, )  
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Defendant. )  
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COPY

NO. 05-8-00329-9  
COA. 33833-5-II

VERBATIM REPORT OF PROCEEDINGS  
September 6, 2005  
(Trial - Day 1)

A P P E A R A N C E S

For the Plaintiff: MR. ANDREW TOYNBEE  
DEPUTY PROSECUTOR  
Chehalis, Washington.

For the Defendant: LLOYD JAMES HIGGINS, PRO SE  
MR. MICHAEL UNDERWOOD Standby Counsel  
ATTORNEY AT LAW  
Centralia, Washington

Presiding Judge: NELSON HUNT  
DEPARTMENT 1

Kathleen M. Mahr, CSR NO. 2311  
Official Court Reporter  
Lewis County Superior Court  
Chehalis, Washington 98532  
(360)740-1173

1 Q (By Mr. Toynbee) So after you met up with Officer  
2 Gonzales, and you two were about to leave, what  
3 happened?

4 A Well, just as we started walking, we were still in the  
5 back of the house, had taken a few steps, I could hear a  
6 male voice yelling from inside the house and a female  
7 voice yelling back. So I told Officer Gonzales to hold  
8 up.

9 Q Then what happened?

10 A It sounded like it was coming from -- well, the male  
11 voice was closer to me. Then the female voice, it  
12 sounded like it was coming from just the other side of  
13 the wall I was standing on which would have been the  
14 east side bedroom wall. I took a couple of steps closer  
15 to the wall to listen and all of a sudden a gunshot went  
16 off from the other side of the wall.

17 Q How did you know it was a gun shot?

18 A Very distinctive. I have been a police officer for over  
19 ten years, I've fired multiple weapons.

20 Q Did your training at the academy entail having to  
21 qualify and shoot various firearms?

22 A Right. We're required to qualify with a duty weapon at  
23 the academy and also a shotgun. But then Department's  
24 qualifications you're required to qualify with your duty  
25 sidearm, your backup, if you carry a backup, your rifle,

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C E R T I F I C A T E

STATE OF WASHINGTON )  
 ) ss  
COUNTY OF THURSTON )

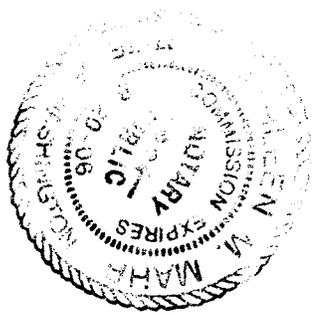
I, Kathleen Mahr, Notary Public, in and for the State of Washington, residing at Olympia, do hereby certify:

That the annexed and foregoing Verbatim Report of Proceedings consisting of 103 pages was reported by me and reduced to typewriting by means of computer-aided transcription;

That said transcript is a full, true, and correct transcript of my shorthand notes of the proceedings heard before the Honorable Nelson Hunt on the 6th day of September, 2005, at the Lewis County Superior Court, Chehalis, Washington;

That I am not a relative or employee of counsel or to either of the parties herein or otherwise interested in said proceedings.

WITNESS MY HAND AND OFFICIAL SEAL this 14th day of November, 2005.



*Kathleen M Mahr*  
KATHLEEN MAHR

Notary Public in and for the State of Washington, residing at Olympia.

**Excerpts of Verbatim Report of Proceedings  
September 7, 2005**

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF LEWIS

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STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	
	)	NO. 05-1-00329-9
vs.	)	
	)	
LLOYD HIGGINS,	)	
	)	
Defendant.	)	

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VERBATIM REPORT OF PROCEEDINGS  
September 7, 2005  
Volume I

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A P P E A R A N C E S

For the Plaintiff:           ANDREW TOYNBEE  
                                  Deputy Prosecuting Attorney  
                                  Chehalis, Washington

For the Defendant:         LLOYD HIGGINS, Pro Se

Standby Counsel:           MICHAEL UNDERWOOD  
                                  Attorney at Law  
                                  Olympia, Washington

Presiding Judge:           NELSON E. HUNT  
                                  Dept. No. 1

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Cheri L. Davidson  
Official Court Reporter  
Lewis County Superior Court  
Chehalis, Washington 98532  
(360)740-1171

CSR #DA-VI-DC-L354QG

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MR. TOYNBEE: Thank you.

Q. Now, you were married in what month?

A. June.

Q. 2004?

A. Yes.

Q. And when did you start living at 2830 Borst Avenue?

A. In January of 2005.

Q. What's the general arrangement of that apartment? Do you own it, do you rent it?

A. We rent it.

Q. And who do you rent it from?

A. Rose Kitchel.

Q. Okay. And on April 20th -- I'm gonna bring you back to April 24th of this year, of 2005. You and Mr. Higgins were living together at 2830 Borst Avenue at that time?

A. Yes, we were.

Q. Okay. What did you do during the early part of that day?

A. Well, we got up as usual, just, you know, had our coffee, watched television. I got up, and I don't know -- I had said something to him. This was like at 8 o'clock, 8:30 in the morning, and the next thing I know here come a full Mountain Dew can at me. I dodged it.

Q. So there was an argument in the morning?

1 A. No, sir.

2 Q. Okay. What happened next?

3 A. After we went to our friends' house and talked with them  
4 for a while we noticed -- the friend's mother was dying  
5 of cancer, and she looked like she needed a break. Her  
6 husband worked out of town. We were gonna try to find a  
7 babysitter for their children where they could go out  
8 with us for a little while, you know, just give her a  
9 break from it, and we got home -- we left there. We got  
10 home, and I went to go -- there was an argument started  
11 -- I don't know how it started. I don't remember what  
12 even, how it started, to tell you the truth about it; I  
13 just don't.

14 I had forgot my cigarettes over at their house, and  
15 I went to take my chaps off. I stood down and went to  
16 unbuckle, and he said You're not gonna go get your  
17 cigarettes, and I said Well, no, I don't see any reason  
18 for it, you know. I was kind of tired. And next thing  
19 I remember is seeing the carpet real close.

20 Q. So you two had argued about that issue of going to get  
21 the cigarettes or not?

22 A. Yes.

23 Q. Okay. And at some point did you decide to go out that  
24 evening?

25 A. Yes. When I got up off the floor -- I waited, hesitated

1 before I got up. I was looking for boots. I wanted to  
2 make sure, and I got up and went to the freezer. There  
3 was a half a pint of vodka in there. I took some of it,  
4 washed my mouth out, spit it out in the sink. I walked  
5 over to the phone. I picked up the phone. He in turn  
6 turns around and says to me Who the fuck you calling?  
7 And I said I'm calling the cab. I'm going to the bar.  
8 Q. What bar did you go to?  
9 A. I went to the 99 Bar.  
10 Q. Okay.  
11 A. I turned around and asked him if he wanted to go with  
12 me.  
13 Q. Okay. And did he end up going with you?  
14 A. Yes, he did.  
15 Q. Okay. Now, the 99 Bar, is that what was formerly known  
16 as the Harrison Sports Pub?  
17 A. Yes.  
18 Q. Okay. So did you and he end up going there?  
19 A. Yes, we did.  
20 Q. Okay. And about how long were you there?  
21 A. Oh, geez. I'd say a good four, four and a half hours.  
22 Q. Okay. Were you keeping close track of the time or is  
23 that just your estimation?  
24 A. That's just my estimation.  
25 Q. And did you have more to drink at the bar?

1 A. Yes, I did.

2 Q. What did you drink?

3 A. Vodka.

4 Q. Is it unusual for you to drink?

5 A. Yes. I'm not good at it. I quit drinking in '99, and I  
6 just started back when I got back with Lloyd.

7 Q. Okay. And do you recall about how much you had to drink  
8 while you were at the bar?

9 A. I think I had three shots of vodka and two beers.

10 Q. All right. And were you in a position to see what Mr.  
11 Higgins was drinking if anything?

12 A. He was drinking beer and tequila.

13 Q. And at some point did you decide to leave the bar?

14 A. After we were shooting pool and him calling me names  
15 from the deck outside he walked up and he says I'm  
16 leaving. I'm walking home. I said Well, I'm not  
17 walking. I knew I was too drunk to walk, you know, so I  
18 called a cab for me.

19 Q. About how far is it from the 99 Club to where you live?

20 A. I'd say six, seven blocks.

21 Q. So you called a cab?

22 A. Yes, I did.

23 Q. Okay. And is that how you got home?

24 A. Yes, it was.

25 Q. And what happened when you got home?

1 A. He wasn't there. I went in the front door, and I had  
2 been drinking beer, so I immediately took my coat off  
3 and put my stuff down and went directly to the bathroom.

4 Q. Okay.

5 A. I left the front door open. Well, I came back out and I  
6 looked out and he was sitting on the front steps, and I  
7 went out to say something to him and he brushed right  
8 past me, went in the house, and locked all the doors.

9 Q. Okay. And what did you do?

10 A. I asked for him to let me in. He wouldn't acknowledge I  
11 was there for a while.

12 Q. How did you -- in what way did you ask to get in?

13 A. I wasn't polite.

14 Q. Okay.

15 A. You know, I tried to reason with him for a couple times,  
16 but that wasn't gonna happen, and I realized then it --  
17 he come back in, and he said to me through the door  
18 That's what you get for leaving your shit in places.

19 Q. Okay. And at some point did you realize that he wasn't  
20 gonna let you in?

21 A. Yeah.

22 Q. And what did you do?

23 A. I went next door.

24 Q. Next door to where?

25 A. Ms. Rose.

1 Q. Okay.

2 A. My landlady.

3 Q. Okay. And why did you go there?

4 A. To see if she had a key where I could get in.

5 Q. Did she have one?

6 A. Yes, she did but not to the front door.

7 Q. Okay. And so what happened when you went and talked to

8 her?

9 A. When I went to ask her to call, she seen I was rather

10 upset and she said -- she asked me -- she says Call 911,

11 and she also said -- she said The reason I want you to

12 call 911, I'm afraid he's gonna hurt you.

13 Q. Okay. So did you call 911?

14 A. Yes, I did.

15 Q. And what was the purpose of calling?

16 A. To see if they could come let me into my own house.

17 Q. Did you talk to the 911 dispatcher?

18 A. Yes, I did.

19 Q. Did you ask to be let into your house?

20 A. Yes, I did.

21 Q. Did they ask you any questions about --

22 A. No, they didn't.

23 Q. Okay. And were you -- what happened next? Did an

24 officer arrive?

25 A. Officer arrived, and Ms. Rose and I had already come

1 Q. And you had to have police help to let you in?

2 A. Yes.

3 Q. Is it safe to say that you weren't real happy at that  
4 point?

5 A. No, I wasn't.

6 Q. Okay. So what did you do once you got in?

7 A. I wanted to see what was going on, why he was just  
8 totally ignoring everybody, you know. I was just  
9 shocked that he was even treating me that way. I mean,  
10 I was like --

11 Q. When you could look through the window, could you tell  
12 whether he was watching TV or not?

13 A. The TV was on.

14 Q. Could you hear it from outside?

15 A. No.

16 Q. Okay. So why don't you continue telling the jury what  
17 happened once you got in.

18 A. I got in the house, and you walk down one little jaunt  
19 hallway. Actually it's not a hallway. It's between the  
20 living room and the dining room area, like a little  
21 walkway area. I walked down, made a right like towards  
22 our bedroom. I got even with the washer and the dryer.  
23 I looked up, and he had the gun in his hand, and I just  
24 put my hands out. I didn't have any -- I didn't have  
25 anywhere to go.

1 Q. What happened next, Ms. Higgins?

2 A. Next thing I heard was the gun going off.

3 Q. Did you hear him saying anything before that?

4 A. He said, umm, something to the effect of You just don't  
5 understand and something about leaving.

6 Q. Okay. And what happened right after the gunshot?

7 A. I was grabbed from behind and actually pretty hard  
8 against the hallway wall. That's when my hip got  
9 shattered.

10 Q. Did you -- did Mr. Higgins say anything right after the  
11 gun was fired?

12 A. No. I did.

13 Q. And could you tell where the gun was pointing when it  
14 went off?

15 A. At my head.

16 Q. Okay. And did you see the gun before you saw it in his  
17 hands?

18 A. It was laying beside him on the bed. The clip was on  
19 the nightstand.

20 Q. Okay. Did you see him do anything with the clip or the  
21 gun before he pointed it at you?

22 A. No, I didn't.

23 Q. Are you -- during your military service, did you have  
24 exposure to firearms?

25 A. Yes, I did.

1 Q. Okay.

2 A. My landlady.

3 Q. Okay. And why did you go there?

4 A. To see if she had a key where I could get in.

5 Q. Did she have one?

6 A. Yes, she did but not to the front door.

7 Q. Okay. And so what happened when you went and talked to

8 her?

9 A. When I went to ask her to call, she seen I was rather

10 upset and she said -- she asked me -- she says Call 911,

11 and she also said -- she said The reason I want you to

12 call 911, I'm afraid he's gonna hurt you.

13 Q. Okay. So did you call 911?

14 A. Yes, I did.

15 Q. And what was the purpose of calling?

16 A. To see if they could come let me into my own house.

17 Q. Did you talk to the 911 dispatcher?

18 A. Yes, I did.

19 Q. Did you ask to be let into your house?

20 A. Yes, I did.

21 Q. Did they ask you any questions about --

22 A. No, they didn't.

23 Q. Okay. And were you -- what happened next? Did an

24 officer arrive?

25 A. Officer arrived, and Ms. Rose and I had already come

1 A. Centralia Police Department.

2 Q. How long have you been with the Centralia Police  
3 Department?

4 A. Over two and a half years.

5 Q. What did you do before that?

6 A. Spent 22 years in the Coast Guard and retired as a chief  
7 warrant officer.

8 Q. Chief warrant officer?

9 A. Yes.

10 Q. Did you have any other type of law enforcement  
11 experience while in the Coast Guard?

12 A. Yes.

13 Q. Can you explain to the jury what that entailed?

14 A. It entailed boarding vessels, looking for drugs, also  
15 fisheries, boarding crew leader.

16 Q. And prior to being hired hired by Centralia, did you  
17 attend the training academy?

18 A. Yes, I did.

19 Q. Okay. And how many hours was that at the time that you  
20 attended it?

21 A. Six months.

22 Q. Were you employed and on duty on April 24th of 2005?

23 A. Yes, I was.

24 Q. And were you dispatched to 2830 Borst Avenue, Number 1  
25 in Centralia?

1 A. Yes, I was.

2 Q. What was the nature of the call?

3 A. It came out as a 911 call. A lady was saying that her  
4 husband wouldn't let her back in the house.

5 Q. All right. And who was present when you arrived?

6 A. Mrs. Higgins.

7 Q. Anybody else at the time?

8 A. No, she was the only one standing on the porch.

9 Q. Okay. And what happened once you arrived there?

10 A. Well, I asked Ms. Higgins what was going on, and she  
11 said that she had an argument with her husband.

12 Q. Okay.

13 A. It was verbal only. I asked her if she was hurt in any  
14 way, if the argument was physical. She said no. I  
15 could smell a strong odor of intoxicants coming from  
16 her. She'd obviously been drinking.

17 Q. Okay. Did you ask her -- you asked her some questions?

18 A. Yes.

19 Q. Did she appear to understand what you were asking her?

20 A. Oh, yes, absolutely.

21 Q. And the answers that she gave, did they appear to  
22 correlate with the questions that you asked?

23 A. Yes.

24 Q. And did you -- did you make some efforts to readmit her  
25 back into the house?

1 A. Yes, I did.

2 Q. Okay. What did you do?

3 A. Knocked on the front door several times, identified  
4 myself as who I was, that I was with Centralia Police.  
5 I started going around back, and on the north side  
6 there's a window to the bedroom. I could see Mr.  
7 Higgins laying on the bed. I knocked on the window. He  
8 didn't acknowledge my presence whatsoever.

9 Q. Okay.

10 A. So I went around back on the east side of the house to  
11 the slider, sliding door, knocked on that several times,  
12 and no one came to the door then.

13 Ms. Higgins said that she had tried to get a key  
14 from the landlord.

15 Q. When you were at the window on the north side of the  
16 home, were you able to see if there was a television on  
17 or not?

18 A. Yes, there was a television.

19 Q. Could you hear it through the window at all?

20 A. Faintly, yes.

21 Q. All right. About how long did you try to knock on the  
22 door or window and the back slider? How long did that  
23 take? Could you approximate?

24 A. Oh, 10, 15 minutes?

25 Q. Was there any indication to you that Mr. Higgins

1           actually knew you were there?

2       A.    No.

3       Q.    Then what happened after you made these efforts to get  
4           his attention?

5       A.    Went over to the landlord's house, which is 2030, Number  
6           2, talked to the landlord.  She didn't think she had a  
7           key to the house 'cause they had changed the locks to  
8           the house, but she did have a key to the slider.  So I  
9           told her if I could borrow that I would try and get her  
10          in the house.

11      Q.    Okay.  So the -- was the door unlocked or the slider?

12      A.    No.  All the doors and windows were locked.

13      Q.    Okay.  Eventually was the door unlocked?

14      A.    Yes.

15      Q.    Okay.  And what happened after the door was unlocked?

16      A.    Ms. Higgins thanked me for letting her back in.  She  
17          closed the slider.  Before she closed the slider she  
18          said You may be back here later on.

19      Q.    And after she closed the slider, what did you do?

20      A.    I went and took the key back to the landlord.

21      Q.    And anything else after that?

22      A.    After that I started heading back north behind the  
23          houses, behind the duplexes, and Officer Murphy was  
24          coming around the south side of the duplexes.

25      Q.    Okay.  And what did you two do?

1 A. I let him know what was going on, what had happened. We  
2 started walking. When we got to the west side by the  
3 bedroom where there's no windows or anything, we heard a  
4 shot fired.

5 Q. Okay. Did you hear anything preceding the shot?

6 A. We did hear some arguing inside.

7 Q. Could you hear what was said?

8 A. No.

9 Q. All right. And how do you know it was a shot that you  
10 heard?

11 A. Well, based on my training and several years in the  
12 military as well as an avid hunter, I'm pretty aware of  
13 what a shot sounds like.

14 Q. Okay. Did you have any feeling at the time that it  
15 might have been a firework or something like that?

16 A. No, no. It sounded like a firearm.

17 Q. Okay. So what did you do when you heard that?

18 A. Officer Murphy radioed dispatch for a priority traffic,  
19 a shot had been fired, and we had already ducked down by  
20 that point, waiting to see if there was more fire, if  
21 there was gonna be more shots fired.

22 Q. Did you hear any more shots?

23 A. No, we didn't.

24 Q. What did you do in response after that?

25 A. Officer Murphy started toward the front and I started

1           behind him, and I stopped by the bedroom door where I'd  
2           seen Mr. Higgins earlier.

3       Q.    Were you able to see into the bedroom?

4       A.    Yes.

5       Q.    What did you see?

6       A.    I saw Mr. Higgins getting dressed.

7       Q.    Okay. Did you see anybody else in the bedroom?

8       A.    No, I did not.

9       Q.    Did the fact that you couldn't see anybody else cause  
10       you any alarm?

11      A.    Yes, absolutely.

12      Q.    Why?

13      A.    Well, nobody was screaming. Nobody was coming out the  
14       back door or coming out the front door.

15      Q.    And what concerned you about that exactly?

16      A.    That somebody had been shot.

17      Q.    Okay. So what did you do next?

18      A.    Well, Officer Murphy had taken position toward the front  
19       of the house, and when I saw Mr. Higgins get up and head  
20       that general direction in the house, I told Officer  
21       Murphy. He took another position over by the garage  
22       door, and I came around and took position as well.

23      Q.    All right. And what happened next?

24      A.    Mr. Higgins came out the front door. We asked him  
25       several times verbally to get down, to get down. He

1           wasn't being compliant.

2           Q.   Why were you asking him to get down?

3           A.   Because a shot had been fired.

4           Q.   All right.  And exactly what was your concern about Mr.

5           Higgins?

6           A.   That he had -- because no one else had come out of the

7           house, that he had been the person with the weapon.

8           Q.   Okay.

9           A.   And the officer safety.

10          Q.   Okay.  So what -- after Mr. Higgins was ordered several

11          times to get down, what happened?

12          A.   He was handcuffed by Officer Murphy.

13          Q.   Okay.  And was he standing up or down?

14          A.   He was down on his stomach.

15          Q.   All right.  Why was he placed on his stomach?

16          A.   For officer safety.

17          Q.   Okay.

18          A.   In case he had more weapons on him.

19          Q.   Is that a standard thing to do in this type of

20          situation?

21          A.   Yes, yes.

22          Q.   And did Ms. Higgins eventually come out of the place?

23          A.   Well, as I was covering Officer Murphy you could see Ms.

24          Higgins.  She came out of the shadows.

25          Q.   Okay.  And who took control of her?

1 A. I took control of her.

2 Q. Why did you feel it was necessary to take control of  
3 her?

4 A. Well, at that point, now that we had two people, we had  
5 to do our investigation to determine who had actually  
6 fired the shot.

7 Q. Okay. And at that time you didn't know who had fired  
8 the shot?

9 A. No.

10 Q. So what happened with Ms. Higgins?

11 A. I placed her in handcuffs and detained her.

12 Q. Okay. Did you handcuff -- do you remember if you  
13 handcuffed her in front or in back?

14 A. In back.

15 Q. Okay. What happened after Mr. and Mrs. Higgins were  
16 placed in handcuffs?

17 A. Mr. Higgins was left out in the prone position on his  
18 stomach. I had control of Ms. Higgins. By that time  
19 Officer Compton had showed up, and Officer Murphy and  
20 Officer Compton entered the home to clear it in case  
21 there was anybody else in the house.

22 Q. Okay. Why don't you tell the jury what it means to  
23 clear the house?

24 A. Make sure there wasn't anybody else in the house that  
25 perhaps had weapons and could harm us.

1 Q. Do you also look to see if there's somebody else that  
2 might be hurt?

3 A. Yes.

4 Q. So after the residence was cleared, what happened?

5 A. The two officers came -- Officer Murphy and Officer  
6 Compton came back out. Mr. Higgins and Mrs. Higgins  
7 were arguing on the porch. They tried to get at each  
8 other, were fighting. I had to put Mr. Higgins back  
9 down with my foot.

10 Q. Okay. Where did you have your foot?

11 A. I put it on his back.

12 Q. Is that an unusual thing for you or people in your  
13 department to have to do?

14 A. No.

15 Q. Did you eventually obtain an authorization to search the  
16 interior of the house?

17 A. Yes.

18 Q. And did you participate in that search yourself?

19 A. Yes, I did.

20 Q. What if anything did you collect in the house?

21 A. We collected what we thought was a Glock. It turned out  
22 not to be a Glock but a .40 caliber handgun.

23 Q. Where was that?

24 A. It was located next to the bed.

25 Q. All right. And do you remember what side of the bed it

1           was on?

2       A.    It would have been on the -- as you enter the room it  
3           would have been on the right side of the bed.

4       Q.    So if you were sitting on the bed, which side would it  
5           have been on?

6       A.    Left side.

7       Q.    Okay.  And it was where in relation to the left side of  
8           the bed?

9       A.    Down by the coffee -- by the end table.

10      Q.    All right.

11                   MR. TOYNBEE:  Your Honor, may I approach the  
12           witness?

13                   THE COURT:  Yes.

14      Q.    Showing you what has been marked for identification as  
15           Plaintiff's 6 and 7, showing you 6 first.  Do you  
16           recognize what's depicted in that photograph?

17      A.    Yes.

18      Q.    And how do you recognize what's in that photograph?

19      A.    That being the weapon that was at the scene.

20      Q.    Okay.  Do you recognize what's next to it?

21      A.    Yes.

22      Q.    What's next to it?

23      A.    There's the lamp that was next to the bed which was next  
24           to the coffee table.

25      Q.    Okay.  Now I'm showing you Number 7.  Do you recognize

1           what's in that photograph?

2       A.    Yes.

3       Q.    What's in the photograph?

4       A.    The same weapon.

5       Q.    Is that -- does that photograph depict how the weapon  
6           was found?

7       A.    Yes.

8       Q.    Is that where it was located?

9       A.    Yes.

10      Q.    All right.

11                       MR. TOYNBEE:  Your Honor, I'm moving for  
12                       admission at this time of Identifications 6 and 7.

13                       MR. HIGGINS:  That's fine.

14                       THE COURT:  Mr. Higgins?

15                       MR. HIGGINS:  Yes, sir.

16                       THE COURT:  Any objection?

17                       MR. HIGGINS:  No, sir.

18                       THE COURT:  They will be admitted as 6 and 7.

19                                       (Exhibit Nos. 6 & 7 were  
20                                       admitted.)

21      Q.    Did you find anything else in the bedroom?

22      A.    Yes, we found a spent casing.

23      Q.    All right.  And where was the spent casing found?

24      A.    I don't recall off the top of my head.

25      Q.    Okay.  Anything else in the bedroom related to the

1           firearm?

2       A.    Yes, we found a box which the serial numbers matched the  
3            weapon.

4       Q.    Did the firearm have a clip in it when it was found?

5       A.    No.

6       Q.    Okay.  And did you locate a clip?

7       A.    Yes, we did.

8       Q.    Where was that?

9       A.    Next to the bed as I recall.

10      Q.    Showing you what's been admitted as Exhibit Number 4.  
11            Do you recognize what's depicted in that photograph?

12      A.    Yes.

13      Q.    What does that show?

14      A.    It shows the clip for the .40 caliber weapon.

15      Q.    And is it -- is that where it was found when you  
16            conducted the search?

17      A.    Yes.

18      Q.    Showing you what's been admitted as Exhibit Number 5.  
19            Do you recognize what's depicted in that photograph?

20      A.    Yes.

21      Q.    And what is that?

22      A.    That would be the exit hole or the entrance hole from  
23            the bedroom.

24      Q.    All right.  What part of the bedroom does that show?

25      A.    That would be the south side of the house, south side of

1 the bedroom, which goes into a hall.

2 Q. All right. And is that the condition that you found  
3 that wall when you conducted your search?

4 A. Yes.

5 Q. Did you also search outside of the home?

6 A. Yes, we did.

7 Q. And what if anything did you collect as evidence?

8 A. Well, we did still photography and video photography of  
9 an exit hole and another entrance hole where the bullet  
10 had gone through.

11 Q. Okay. I'm showing you what's been marked as Exhibit  
12 Numbers 12 and 13. Do you recognize what's in the one  
13 on top?

14 A. Yes.

15 Q. And what is that?

16 A. The flashlight is actually shining on the bullet itself.

17 Q. Okay.

18 A. Which was located right there.

19 Q. And who is holding the flashlight, can you tell?

20 A. I can't tell.

21 Q. All right. Is it a Centralia officer?

22 A. Yes.

23 Q. And directing your attention to the other exhibit. Do  
24 you recognize that?

25 A. Yes.

1 THE COURT: Number what, Mr. Toynbee?

2 MR. TOYNBEE: I believe it's Number 12.

3 THE WITNESS: 13.

4 MR. TOYNBEE: I'm sorry. It's Number 13.

5 THE COURT: Thank you.

6 Q. And what does that depict?

7 A. That's the actual bullet that was on the patio.

8 Q. Did you handle the firearm at all?

9 A. No, I did not.

10 Q. All right.

11 (Discussion off the record.)

12 MR. TOYNBEE: Thank you, officer. I have no  
13 further questions at this time.

14 THE COURT: All right. Before cross  
15 examination we will take our morning recess and be back  
16 at 5 after 11.

17 (Jury out.)

18 THE COURT: All right. So 5 after 11 then.

19 (Recess.)

20 (Jury in.)

21 THE COURT: You may be seated.

22 Mr. Higgins, a number of the jurors have voiced  
23 some concern through the bailiff that they can't hear  
24 you, so you need to watch that. I've talked to you  
25 about it a couple of times. If they can't hear your

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C E R T I F I C A T E

STATE OF WASHINGTON )  
 ) ss  
COUNTY OF LEWIS )

I, Cheri L. Davidson, Notary Public, in and for the State of Washington, residing at Olympia, do hereby certify:

That the annexed and foregoing Verbatim Report of Proceedings, Volume I, was reported by me and reduced to typewriting by computer-aided transcription;

That said transcript is a full, true, and correct transcript of the proceedings heard before Judge Nelson E. Hunt on the 7th day of September, 2005 at the Lewis County Courthouse, Chehalis, Washington;

That I am not a relative or employee of counsel or to either of the parties herein or otherwise interested in said proceedings.

WITNESS MY HAND AND OFFICIAL SEAL THIS 10th day of October, 2005.



*Cheri L. Davidson*

Notary Public, in and for the State of Washington, residing at Olympia.

**Excerpts of Verbatim Report of Proceedings  
September 8, 2005**

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF LEWIS

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STATE OF WASHINGTON, )  
 )  
Plaintiff, )  
 ) NO. 05-1-00329-9  
vs. )  
 )  
LLOYD HIGGINS, )  
 )  
Defendant. )

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VERBATIM REPORT OF PROCEEDINGS  
September 8, 2005  
Volume II

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A P P E A R A N C E S

For the Plaintiff: ANDREW TOYNBEE  
Deputy Prosecuting Attorney  
Chehalis, Washington

For the Defendant: LLOYD HIGGINS, Pro Se

Standby Counsel: MICHAEL UNDERWOOD  
Attorney at Law  
Olympia, Washington

Presiding Judge: NELSON E. HUNT  
Dept. No. 1

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Cheri L. Davidson  
Official Court Reporter  
Lewis County Superior Court  
Chehalis, Washington 98532  
(360) 740-1171

CSR #DA-VI-DC-L354QG

1 not inclined to give that one either.

2 MR. TOYNBEE: No, I think Instruction 9 covers  
3 what the definition of assault is.

4 THE COURT: Any objection to withdrawing that  
5 one, Mr. Higgins?

6 MR. HIGGINS: No, sir.

7 THE COURT: All right. With respect to the  
8 state's case then, I think we are finished, are we not?  
9 You didn't object to any -- I've had my own objections,  
10 and I've taken care of it.

11 MR. HIGGINS: Yes.

12 THE COURT: All right. Now, with respect to  
13 the proposal for the lesser included offense -- well,  
14 let's do the ones that we know are going to come in.  
15 There's three proposed instructions by the defense. One  
16 is on lesser included, the other is defendant didn't  
17 testify, and the third is the out-of-court statements.  
18 The last two must be given if requested, so I'm going to  
19 give those. So that leaves only one more to talk about,  
20 and that's the lesser included offense.

21 Mr. Toynbee, I'll do the same process for you.  
22 That means you have the floor as to if you do object to  
23 that instruction why.

24 MR. TOYNBEE: Your Honor, I do object. I  
25 don't think that assault four is a lesser included of

1 assault with a deadly weapon, and I also don't think  
2 that it meets the factual test in this case.

3 It appears that the evidence isn't that there was  
4 an assault four or assault, what could be construed as a  
5 fourth degree assault. There's no evidence of that.  
6 The evidence is either an assault second happened or  
7 there was no assault. In those circumstances I don't  
8 think it's proper to give the lesser included  
9 instruction.

10 THE COURT: Mr. Higgins, what is your response  
11 to this? This is one of those areas that's complicated  
12 for anybody, but this is a particularly complex area.  
13 What's your response to why it is you want the lesser  
14 included instruction?

15 MR. HIGGINS: Mr. Underwood agrees with what  
16 Mr. Toynebee says and I have no idea whatever, what's  
17 what.

18 THE COURT: Okay. Well, let me --

19 MR. HIGGINS: All I can do is --

20 THE COURT: Well, let me try to explain it to  
21 you.

22 For a lesser included offense instruction to be  
23 given it must be a lesser included offense both  
24 generally under the law and factually, that the facts of  
25 the case show that that offense was committed, that

1           there is some construction of the evidence that would  
2           show that that offense and that offense only was done.

3           The charge here is an assault with a deadly weapon.  
4           Since there was no battery or touching, there was either  
5           an assault with a deadly weapon, which is assault in the  
6           second degree, or there was no assault at all, which  
7           would mean a finding of not guilty. There is no basis  
8           for me to give either in law or under the facts of this  
9           case a lesser included instruction of assault in the  
10          fourth degree for that reason.

11          In this case if it were given it would be to give  
12          the jury an opportunity to do a compromise verdict and  
13          that's improper, so I'm not going to give it, all right?

14          All right. Now, what I would propose to do, since  
15          we have finished this - or it seems that we have  
16          finished - is I will assemble a set, and I will have it  
17          ready for you by 1:20. If we could have the defendant  
18          back here by 1:15? Is that going to be possible?

19          Okay. I'll have it not later than 1:20, and I'll  
20          leave them on your desk. If you get here at 1:15  
21          hopefully we will have them, but they won't be any later  
22          than 1:20. So unless there's any reason to keep on the  
23          record here, we can go to recess until we are back.  
24          Once you've reviewed the set, then you can let me know  
25          when we are ready to start.

C E R T I F I C A T E

STATE OF WASHINGTON )  
 ) ss  
COUNTY OF LEWIS )

I, Cheri L. Davidson, Notary Public, in and for the State of Washington, residing at Olympia, do hereby certify:

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That said transcript is a full, true, and correct transcript of the proceedings heard before Judge Nelson E. Hunt on the 8th day of September, 2005 at the Lewis County Courthouse, Chehalis, Washington;

That I am not a relative or employee of counsel or to either of the parties herein or otherwise interested in said proceedings.

WITNESS MY HAND AND OFFICIAL SEAL THIS 10<sup>th</sup> day of October, 2005.



*Cheri L. Davidson*

Notary Public, in and for the State of Washington, residing at Olympia.