

FILED
COURT APPEALS

NO. 33961-7-II

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

BY  CLERK

STATE OF WASHINGTON,
Respondent,

v.

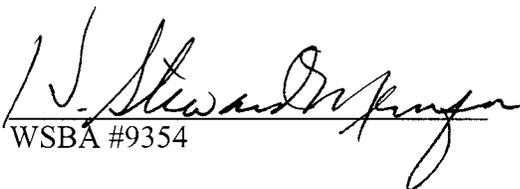
DWIGHT C. FEESER,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID FOSCUE, JUDGE

BRIEF OF RESPONDENT

H. STEWARD MENEFFEE
Prosecuting Attorney
for Grays Harbor County


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20/5/06

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COUNTERSTATEMENT OF THE CASE

In May, 2005, the defendant was living with his girlfriend, Fonda Dent, in a motor home parked next to his nephew, Michael Feeser's, house. The victim, Brian Sheets, also lived on the premises in a small trailer. (RP 16-17). In the afternoon of May 5, 2005, Michael Feeser came home from work and was met as he got out of his car by Fonda Dent who told him that the defendant and Brian Sheets were fighting in the house. Michael Feeser went into the house and found the defendant and Sheets arguing and shoving at each other in the kitchen of the house. (RP 19-20). Michael Feeser got between the two men in an effort to break up the fight and in the process, was struck once in the head by Brian Sheets. (RP 21-22). Michael Feeser thought he had gotten the two men calmed down and then left to go into his bedroom to change his clothes. While he was in the bedroom, he heard the defendant and Sheets begin to argue again. (RP 25-26).

Michael Feeser changed his clothes. While he was leaving his bedroom, he heard a gunshot. He ran into the living room and saw the defendant standing with a gun in his right hand and Sheets laying on the porch just outside of the front door. (RP 27-28). Michael Feeser also saw blood splatter in the living room area of his house and heard the defendant say something indicating that now he had to clean this mess up. Michael Feeser then ran out of the house, jumped into his truck and immediately

drove into the nearest town where he flagged down a police officer and reported the shooting. (RP 29-30).

An autopsy conducted on Brian Sheets' body revealed that the victim died as a result of a single gunshot wound to the chest. (RP 251-253). Testing by the Washington State Patrol Crime Laboratory indicated that the fatal shot had been fired from a distance of 12 to 36 inches from the victim. (RP 300).

The defendant was charged with Second Degree Murder by the intentional killing of Brian Sheets or in the alternative, causing the death of Brian Sheets in the course of or and in furtherance of the crime of Assault in the Second Degree. (CP 1-3). The defendant did not challenge the sufficiency of the Information or the adequacies of the to convict jury instructions for intentional Second Degree Murder and Second Felony Murder which was submitted to the jury in the form of WPIC 27.02 and WPIC 27.04.

At trial, the defendant testified that he had armed himself with the .410 sawed-off shotgun to intimidate or scare the victim, Brian Sheets. (RP 312-313). The defendant also admitted that he shot the victim once in the chest with the .410 sawed-off shotgun, but claimed that the shot was fired in self-defense. (RP 306-307).

The defendant was found guilty by the jury and was sentenced by the court on October 10, 2005. (CP 4-9). Prior to sentencing, the State filed a Statement of Prosecuting Attorney outlining the defendant's

criminal history indicating the defendant had an offender score of 1 based upon a conviction for Unlawful Possession of a Firearm in the Second Degree in 1997. The State also indicated that the defendant had two other prior felony convictions, one for Unlawful Taking of a Motor Vehicle in the Second Degree in 1970 and one for Grand Larceny in 1977, both of which the State indicated “washed out”. (Appendix 1). At sentencing, the defendant did not object to the calculated offender score of 1 and requested the court sentence the defendant to the bottom of the standard range and that the court not impose the Firearm Enhancement. (RP 430, 432).

RESPONSE TO ASSIGNMENTS OF ERROR

I. The absence of premeditation is not an essential element of the crime of Second Degree Murder. (Response to Assignment of Error Nos. 1, 2, 3, and 4)

The defendant argues that Murder in the Second Degree under RCW 9A.32.050(1)(a) requires that the State both allege and prove the defendant acted without premeditation. The defendant argues that the absence of premeditation is an essential element of the crime and the State’s failure to allege the absence of premeditation in the Information and the court’s failure to instruct the jury that it had to find beyond a reasonable doubt the absence of premeditation in the jury instructions constitute reversible error.

A charging document must contain all of the essential elements of a crime in order to put the defendant on notice of the nature and cause of the accusation against him. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). An Information which charges a crime in the language of the statute which defines the crime is sufficient to apprise an accused person of the nature of the accusation, however it is not necessary to make the accusation in the exact language of the statute to sufficiently inform the defendant of the nature of the charge. State v. Leach, 113 Wn.2d 679, 686, 782 P.2d 552 (1989).

When the sufficiency of an Information is challenged for the first time on appeal, it is liberally reviewed to determine if the Information reasonably apprises the defendant of the elements of the crime and whether the defendant suffered any actual prejudice from any vague or inartful language contained in the Information. State v. Kjorsvik, at 102-106. However, before engaging in such an analysis, it is necessary to make a threshold determination that the Information omits an essential element of the crime. State v. Williams, 133 Wn.App. 714, 718, 136 P.3d 792 (2006).

In Williams, the court reviewed the Bail Jumping statute, RCW 9A.76.170, to determine if the statutory language which specifies the penalty classification of the crime depending on the classification of the underlying felony was an essential element which must be alleged in the Information. The court held that the jury did not need to know or consider

the penalty classification in order to determine whether the defendant committed the crime of Bail Jumping. It was not an essential element of the crime. For the same reason, the jury did not have to be instructed in the to convict instruction on the class of the underlying crime in order to find the defendant guilty. State v. Williams, 133 Wn.App. at 720-721.

The appeal courts have also addressed similar arguments on Felony Violation of No Contact Orders and Third Degree Theft. In State v. Ward, 148 Wn.2d 803, 64 P.3d 640 (2003), the Supreme Court addressed the issue of whether the statutory language, which described the Assault element in the crime of Violation of No Contact Order as one that does not amount to Assault in the First or Second Degree, constituted an essential element of a Felony Violation of a No Contact Order. State v. Ward, 148, Wn.2d at 810-811. The Supreme Court in Ward held that the “does not amount to” provision elevates no contact violations when any assault is committed and thus, did not function as an essential element of Felony Violation of a No Contact Order, but rather served to explain that all assaults committed in violation of a no contact order will be penalized as felonies. State v. Ward, 148 Wn.2d at 812-813. The Ward court went on to point out that if they were to interpret the “does not amount to” language as an essential element of the crime, it would not advance the Legislature’s purpose and would place the defendant in the awkward

position of arguing that his conduct amounted to a higher degree than that charged by the State. State v. Ward, 148 Wn.2d at 813.

The court also addressed a similar argument in State v. Tinker, 155 Wn.2d 219, 118 P.3d 885 (2005). In Tinker, the court addressed the issue of whether the language in the Third Degree Theft statute, RCW 9A.56.050(1), which describes theft of property or services which does not exceed \$250.00, makes the value of the goods and services stolen an essential element of the crime of Third Degree Theft. The Supreme Court in Tinker held that since the valuation was a maximum value, it only distinguished the crime of Third Degree Theft from the higher degrees of theft which have minimum value thresholds. State v. Tinker, 155 Wn.2d at 222. The court also pointed out that to hold otherwise would place the defendant in the awkward position of arguing that his conduct amounted to a higher degree crime than that charged by the State. State v. Tinker, 155 Wn.2d at 224.

More persuasive and to the point are the line of cases which analyze the Second Degree Murder statute under State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978), to determine if it constituted a lesser included offense to the crime of First Degree Murder. The first prong of the Workman test required that each element of lesser included offense must be necessary element of the charged offense. State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

The Washington Supreme Court in State v. Bowerman, 115 Wn.2d 794, 802 P.2d 116 (1990) applied the Workman test to determine if Second Degree Murder was a lesser included offense of Aggravated First Degree Murder. In analyzing the essential elements of Second Degree Murder, the court held that the combination of causing the death of another and intent to cause the death constituted the essential elements of intentional Second Degree Murder and as such, met the first legal prong of the Workman test as a lesser included offense. State v. Bowerman, 115 Wn.2d at 805.

The Washington Court of Appeals reached a similar conclusion in State v. Pettus, 89 Wn.App. 688, 951 P.2d 284 (1998). In Pettus, the court cited to State v. Harris, 121 Wn.2d 317, 320, 849 P.2d 1216 (1993), stating that if it is possible to commit the greater offense without necessarily committing the lesser offense, then the lesser offense is not an included offense. State v. Pettus, 89 Wn.App. 697-98. The court in Pettus went on to hold that Second Degree Murder is a lesser included offense of First Degree Murder and satisfied the legal prong of Workman. State v. Pettus, 89 Wn.App at 698. The Washington Supreme Court had also previously reached the same conclusion in State v. Ortiz, 119 Wn.2d 294, 831 P.2d 1060 (1992).

If the analysis of these previous Supreme Court and Court of Appeals cases is correct, then absence of premeditation cannot be an essential element of Second Degree Intentional Murder. The absence of

premeditation cannot be sustained in the charge of First Degree Premeditated Murder. Furthermore, the defendant is placed in the awkward position of then arguing as a defense that he, in fact, committed the greater offense of First Degree Premeditated Murder. The statutory language “but without premeditation” contained in RCW 9A.32.050(1)(a) can not be an essential element of the crime of Second Degree Intentional Murder if it is lesser included offense of First Degree Premeditated Murder.

To constitute an essential element, its proof must be necessary to establish the very illegality of the behavior. State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992). The illegality of the behavior addressed by the Legislature under RCW 9A.32.050(1)(a) is causing the death of another with intent to cause death. The additional language “but without premeditation” only distinguishes Second Degree Intentional Murder from the greater crime of First Degree Premeditated Murder. In the same manner that the language of the Third Degree Theft statute distinguishes theft of property or services which does not exceed \$250.00 in value from the greater crime of Theft in the Second Degree. It is not an essential element which must be contained in the Information or upon which the jury must be instructed to establish the crime of Second Degree Intentional Murder under RCW 9A.32.050(1)(a).

II. The absence of a Legislative definition of Assault and the use of a judicially created common law definition of Assault does not violate the separation of powers doctrine. (Response to Assignment of Errors Nos. 5, 6 and 7)

The defendant asserts that since the Legislature has not adopted a statutory definition of the term “assault” and, by doing so, has unconstitutionally invited or permitted the judiciary to encroach upon the legislative function. The defendant’s argument that the Legislature has not defined the term “assault”, and that the courts have supplied the common law definition of that term, is correct. However, that does not establish an unconstitutional violation of the separation of powers.

The defendant’s argument was specifically answered by this court in State v. Chavez, 134 Wn.App. 657, 142 P.3d 1110 (2006). In Chavez, the court directly addressed the Second Degree Assault statute and the argument that the Legislature’s failure to define an essential element of the crime together with the use of a judicial definition violates the separation of powers doctrine. The court stated:

“The principle is violated when ‘the activity of one branch threatens the independence or integrity or invades the prerogatives of another’. State v. Moreno, 147 Wn.2d 500, 505-06, 58 P.3d 265 (2002) (quoting Carrick, 125 Wn.2d at 135). But the doctrine does not require that the various branches be ‘hermetically sealed off from one another’. Carrick, 125 Wn.2d at 135. They ‘must remain partially intertwined if for no other reason than to maintain an effective system of checks and balances, as well as an effective government.’ Carrick, 125 Wn.2d at 135 (citing In Re Salary of Juvenile Director, 87 Wn.2d 232, 239-40, 552 P.2d 163 (1976).” The court held that the Legislature

had a history of delegating to the judiciary how statutes will be specifically applied which demonstrated the practice did not offend the separation of powers doctrine and that the Legislature had instructed that the common law must supplement all of the criminal statutes pursuant to RCW 9A.04.060.”

State v. Chavez, 134 Wn.App. at 667. The court concludes “in summary, consistent with their history, the legislative and judicial branches have cooperated in defining the offense of assault”. State v. Chavez, 134 Wn.App. 668.

This court has also recently addressed the same argument as it pertains to the Vehicular Homicide statute and the use of the common law definition of proximate cause. In State v. David, 134 Wn.App. 470, 141 P.3d 646 (2006), the court held:

“It has never been the law in Washington that courts cannot provide definitions for criminal elements that the Legislature has listed, but has not specifically defined. Nor has this practice generally been viewed as a judicial encroachment on legislative powers. On the contrary, the judiciary would be acting contrary to the Legislature’s legitimate expressed expectations, as well as failing to fulfill judicial duties, if the courts had not employed longstanding common law definitions to fill in legislative blanks in statutory crimes”.

State v. David, 134 Wn.App at 481. The court in David also held that the definition of some criminal elements are not purely legislative functions and that the Legislature has historically left to the judiciary the task of defining some criminal elements. State v. David, 134 Wn.App. at 482.

The use of the judicial definition of assault does not render the Second Degree Felony Murder statute unconstitutional due to violation of the separations of powers doctrine.

**III. The defendant's offender score was not miscalculated.
(Response to Assignment of Error Nos. 8, 9, 10, 11, 12 and 13)**

The defendant asserts that his offender score was miscalculated because the defendant's conviction for Unlawful Possession of a Firearm in the Second Degree had washed out prior to the commission of the current crime. This assertion appears to be solely based on the fact that the defendant's conviction for Unlawful Possession of a Firearm in the Second Degree was entered in 1997 and the current offense was committed in May of 2005. However, the mere passage of time alone does not wash out a felony conviction for purposes of sentencing under RCW 9.94A.525. RCW 9.94A.525(2) states "...class C prior felony convictions other than sex offenses shall not be included in the offender score if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction." The record does not support the conclusion of the defendant that, since the date of the entry of his previous Judgment and Sentence for Unlawful Possession of a Firearm in the Second Degree or his last day of release

from confinement, he had spent five consecutive years in the community without committing any crime that subsequently resulted in a conviction.

In fact, the defendant was convicted of Negligent Driving in the First Degree on November 28, 1998 and then later was convicted of one count of Driving Under the Influence of Alcohol on July 16, 2003. (Appendix 2). Furthermore, the State in its pre-sentence report, specifically informed the court that the defendant had a long history of criminal activity including misdemeanors and specifically informed the court that his previous felonies in 1969, 1970 and 1977 had washed out. (Appendix 1). At the sentencing, the State again pointed out that for purposes of sentencing, the defendant's 1997 conviction for Unlawful Possession of a Firearm in the Second Degree had not washed out, but that the other criminal convictions had washed out for purposes of sentencing. (RP 424-425). The defendant did not, at any point, object to the State's statement of the defendant's criminal history or to the State's calculation of an offender score of one. In fact, at sentencing, the defendant's counsel specifically agreed to the State's assessment of the defendant's criminal history and to the offender score. (RP 430). The defendant's pre-sentence recommendation filed with the court affirmatively stated that the defendant's standard range was 134 months to 234 months. (Appendix 3). This is the same standard range specified by the State based on an offender score of one.

The court was entitled to rely on the defendant's acknowledgment under RCW 9.94A.530(2) which states:

In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledge or proved in a trial or at the time of sentencing or proven pursuant to RCW 9.94A.537. Acknowledgment includes not objecting to information stated in the presentence reports. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The fact shall be deemed proved at the hearing by a preponderance of the evidence except as otherwise specified in RCW 9.94A.537.

In this case, the defendant clearly acknowledged the State's calculation of the defendant's offender score as one and at no time asserted that the 1997 Unlawful Possession of a Firearm in the Second Degree conviction had washed out for purposes of sentencing. The defendant's counsel had the defendant's criminal history and it is significant to note that in the 1998 Negligent Driving in the First Degree conviction, the defendant was represented by the same trial counsel that represented him at sentencing in the current case.

In the event that the defendant's failure to object to his offender score does not constitute an acknowledgment that the previous 1997 Unlawful Possession of a Firearm in the Second Degree conviction has not washed out, then the case should be remanded to the sentencing court for a sentencing hearing to allow the court to develop a record and make a determination of the facts concerning the status of the defendant's 1997 conviction.

The Washington Supreme Court has held that a defendant cannot agree to a punishment in excess of that which the Legislature has established and thus, as a general rule, a defendant cannot waive a challenge to a miscalculated offender score. Personal Restraint Petition of Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002). However, the court in Goodwin also indicated that there were limitations to that holding and that while waiver may not apply where the sentencing error is a legal error, a waiver could be found where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion. Personal Restraint Petition of Goodwin, 146 Wn.2d at 874. Generally as a threshold matter on appeal, the defendant must still show the existence of an error of fact or law on the face of his judgment and sentence. State v. Rosland, 52 Wn.2d 220, 231, 95 P.3d 1225 (2004).

In the present case, the determination of whether his 1997 conviction washes out requires the court to make both a legal and factual determination relating to the existence of subsequent convictions and the timing of those convictions. By failing to object to the offender score, the defendant did not trigger an evidentiary hearing at which the court would be presented with evidence of any subsequent conviction and allowed to make a factual and legal ruling on the defendant's objection. By doing so, the defendant has waived his postsentencing objection to the calculation of his offender score.

Assuming arguendo that the courts does not find that the defendant has waived his objection to the calculation of his offender score, he has by failing to put the court on notice as to any apparent defects in the calculation of his offender score, deprived the court of the ability to have an evidentiary hearing and the court should remand the case in such a situation to the sentencing court to conduct the evidentiary hearing to the determine whether the 1997 conviction has washed out. State v. Ward, 137 Wn.2d 472, 485, 973 P.2d 452 (1999); See also State v. Labarbera, 128 Wn.App. 343, 350, 115 P.3d 1038 (2005).

The defendant also argues ineffective assistance of counsel in relation to the failure to object to the offender score. To establish ineffective assistance of counsel, the defendant must establish that his attorney's performance fell below an objective standard of reasonableness and that that deficiency was prejudicial to the defendant. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Great judicial deference is to counsel's performance as given due to the strong presumption that counsel's performed effectively. Strickland v. Washington, 466 U.S. 668, 689, 104 Sup.Ct. 2052, 80 L.Ed.2d 674 (1984).

In this case as we have already noted, the defendant's counsel was aware of the defendant's criminal history. Indeed, counsel had represented the defendant during the 1998 case which resulted in a conviction for Negligent Driving in the First Degree. Counsel was aware raising objections to the use of the 1997 conviction on the basis of wash out

would simply result in the State's submission to the court of proof of the defendant's subsequent criminal violations.

Defendant's counsel was asking the court to impose the bottom of the standard range on the defendant and argued that the crime currently before the court was not related to the defendant's use of alcohol or drugs and that it was brought on by the belligerence of the victim who had been drinking. The State had argued to the court that the defendant was constantly becoming involved in fights, use of drugs and alcohol and that family members felt it was only a matter time before something serious occurred.

Clearly, counsel made a considered judgment not to fight a battle over convictions which he knew existed and which would strengthen the State's argument that the defendant used alcohol and was dangerous. Certainly, the defense counsel's failure to object to the use of the 1997 conviction did not prejudice the defendant since those convictions were readily available to the State and could be easily proven at an evidentiary hearing. Under the facts of this case, counsel's decision to agree to the properly calculated offender score was neither improper or ineffective.

CONCLUSION

The absence of premeditation is not an essential element of the crime of Second Degree Intentional Murder and does not have to be contained in the charging language of the State's Information and the jury does not have to be instructed that it is an element they must find beyond a

reasonable doubt to convict the defendant of the crime of Second Degree Intentional Murder.

The Legislature's failure to define the term "assault" for purposes of the criminal statutes and its acquiescence in the use of judicially determined common law for the definition of that term, does not violate the separation of powers doctrine and render RCW 9A.32.050(1)(b) unconstitutional.

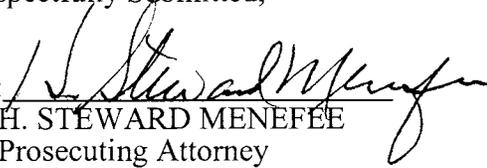
Furthermore, the defendant's offender score was not miscalculated and the defendant's acknowledgment of the offender score as calculated by the State waives the defendant's subsequent challenge on appeal to that calculation based upon the claim that the conviction had washed out.

Therefore, the State respectfully requests that the court affirm the defendant's conviction and the trial court's Judgment and Sentence in this matter.

DATED this 4th day of December, 2006.

Respectfully Submitted,

By:


H. STEWARD MENEFEÉ
Prosecuting Attorney
For Grays Harbor County
WSBA #9354

HSM/jfa

APPENDIX 1

FILED
IN THE OFFICE
OF COUNTY CLERK
GRAYS HARBOR COUNTY

05 OCT -7 P4 28

CHERYL BROWN
COUNTY CLERK

Certificate of Clerk of the Superior Court of
Washington in and for Grays Harbor County.
The above is a true and correct copy of the
original instrument which is on file or of
record in this court.

Done this 4th day of Dec 2006
Cheryl Brown, Clerk By B. [Signature]
Deputy Clerk



SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

STATE OF WASHINGTON,

Plaintiff,

No.: 05-1-278-9

v.

STATEMENT OF
PROSECUTING ATTORNEY

DWIGHT C. FEESER,

Defendant.

COMES NOW H. Steward Menefee, Prosecuting Attorney for Grays Harbor County,
Washington, and submits the following report for consideration at the sentencing of the
defendant in the above-entitled cause.

NATURE OF CASE

The defendant, Dwight C. Feeser, was charged by Information with one count of Second
Degree Murder for killing Brian Sheets. The Information included an allegation that the
defendant was armed with a deadly weapon (firearm) at the time of the commission of the
offense. After completion of a jury trial, a verdict of guilty was returned on September 29, 2005.
The jury also found that the defendant was armed with a deadly weapon (firearm) at the time of
the commission of the offense. The defendant is now before the court for sentencing.

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4 **CURRENT OFFENSE**

5 On May 5, 2005, the defendant was living in a motor home with his girlfriend, Fonda
6 Dent, next to the house owned by his nephews Michael and James Feeser. Brian Sheets, the
7 victim, also lived on the premises in a small travel trailer. The defendant was apparently related
8 to the victim by marriage and had known the victim for a number of years. The two men had
9 lived together from time-to-time in the past.

10 Some time around 4 p.m. or shortly thereafter on May 5, 2005, the victim shouted from
11 the house out to the motor home that the defendant owed him \$50. The defendant disputed the
12 amount of the debt and left the motor home and went into the house where an argument began
13 between the two men. The argument was still going on when Michael Feeser arrived home from
14 work at approximately 4:30 p.m. that afternoon.

15 The argument escalated from a loud argument to a physical confrontation as Michael
16 Feeser entered the house. Michael Feeser saw the victim and the defendant at each other's throats
17 in the kitchen area of the house and immediately got between the two men in an attempt to break
18 it up. In the course of breaking up the physical fight, Michael Feeser got hit once in the head
19 around the eye by the victim. Michael Feeser was certain that the blow was not intended for him
20 but had been aimed the defendant. Neither the defendant or the victim were armed.

21 Michael Feeser told the two of them to "knock it off or get out of his house and off his
22 property." The defendant then left the house and Michael Feeser continued to talk to the victim
23 in the kitchen area. The defendant then returned with a sawed-off shotgun and declared that the
24 victim "didn't know who he was f-ing with" and that "I could kill you." Michael Feeser again
25 interceded to calm the situation down and then went into his room to change out of his work
26 clothes. A short time later after he had changed his clothes, as he was coming out of his
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4 bedroom, he heard a gunshot coming from the living room area of the house. Michael Feeser ran
5 down the hallway into the living room where he saw the defendant standing holding a sawed-off
6 .410 shotgun and he saw the victim lying on the porch just outside the doorway. As Michael
7 Feeser was coming down the hallway into the living room, he saw Fonda Dent in the living room
8 and heard her say words to the effect, "Oh my God, he shot him."

9 Michael Feeser then ran over and saw a large apparent gunshot wound the victim's chest
10 and blood on the floor just inside the doorway and on the porch. It was clear to Michael Feeser
11 that the victim, Brian Sheets, was dead. Michael Feeser then left, driving directly into McCleary
12 where he flagged down a McCleary police officer and reported the shooting.

13 Shortly after Michael Feeser left, the defendant slapped Fonda Dent and told her to calm
14 down and threatened to kill her and her family if she told anyone about the shooting. The
15 defendant then gave Fonda Dent the shotgun and told her to put it up in the Oldsmobile. While
16 she was doing that, the defendant got a plastic tarp and covered the body on the porch. Shortly
17 after this took place, Marjorie Feeser arrived unexpectedly while the defendant was attempting to
18 hose off the porch area to wash the blood away. Fonda Dent asked Marjorie Feeser to take her
19 into McCleary to the bank. They both left the residence and went into the town of McCleary. A
20 few minutes after Marjorie Feeser left, Hank and Ginger Feeser arrived.

21 When Hank and Ginger Feeser arrived, the defendant was still hosing down the porch and
22 ramp area of the house to eliminate the blood. They asked the defendant what had taken place.
23 The defendant told them there had been a fight and that he had busted Brian Sheets in the face,
24 splitting open his nose and causing the large amount of blood that Hank and Ginger Feeser were
25 observing on the porch and ramp area of the house. The defendant denied that there had been a
26 shooting and told both Hank and Ginger Feeser that Michael Feeser and the victim had left the
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4 premises. Hank and Ginger Feeser then left the premises and went back to their house on Church
5 Road. Shortly after they left, the police arrived and placed the defendant into custody. The
6 defendant initially told police officer that there had not been a shooting, that there simply had
7 been a fight and that Brian Sheets had left walking away from the house through the backyard.
8 As officers searched the premises, they discovered the body of Brian Sheets wrapped in plastic
9 tarps in a wheelbarrow at the back of the house. Officers also discovered a .410 shotgun under
10 the seat of an Oldsmobile located on the premises. Fonda Dent and Michael Feeser both
11 identified the shotgun as being the shotgun the defendant had used to shoot the victim.

12 An autopsy revealed that the victim had been killed by a single .410 gunshot wound to the
13 chest, which had torn open his aorta and pulmonary artery, damaged the left lung and
14 disintegrated one of the victim's ribs. The Washington State Patrol Crime Laboratory analysis
15 estimated distance from muzzle to wound to be more than 1 foot and less than 3 feet, most
16 probably somewhere about 2 feet in distance. The gun was so close to the victim's chest that the
17 wadding from the shotgun shell was found embedded in the wound area.

18
19 **PRIOR RECORD**

20 The defendant has a felony criminal history going back to November 20, 1969, when he
21 was convicted Unlawful Taking of a Motor Vehicle. In 1974, the defendant was again convicted
22 for Unlawful Taking of a Motor Vehicle and Burglary in the Second Degree. In 1977, the
23 defendant was convicted of Grand Larceny and his parole on the Burglary in the Second Degree
24 charge was revoked. In 1997, the defendant was charged and convicted of Unlawful Possession
25 of a Firearm in the Second Degree.
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4 In addition, the defendant has numerous misdemeanor and gross misdemeanor
5 convictions for driving under the influence and other traffic offenses. A previous Assault Fourth
6 Degree - Domestic Violence conviction 1996, and at the time this crime was committed, he had a
7 pending Assault Fourth Degree - Domestic Violence charge in the Grays Harbor County District
8 Court in which Fonda Dent was the victim.
9

10 EVALUATION

11 The defendant's convictions for Unlawful Taking of a Motor Vehicle 1969, Burglary in
12 the Second Degree in 1974, and Grand Larceny in 1977 have washed out for offender score
13 purposes. The defendant's previous conviction for Unlawful Possession of a Firearm in the
14 Second Degree gives the defendant an offender score of 1.
15

16 At the time of the current offense, the defendant was pending trial on an Assault Fourth
17 Degree - Domestic Violence case and was subject to a no contact order by the Grays Harbor
18 County District Court prohibiting contact with Fonda Dent and possessing firearms.
19 Additionally, the defendant, because of his prior felony record and his prior domestic violence
20 assault conviction, was prohibited from possessing a firearm. The defendant ignored both the
21 court's no contact order and its order not to possess firearms and furthermore ignored the fact
22 that he could not possess firearms as a convicted felon when he moved in with Fonda Dent and
23 purchased the sawed-off .410 shotgun.

24 In addition to the defendant's long criminal history, his disregard for the orders of the
25 courts and the law, the defendant has established a propensity for violence. Despite a previous
26 Fourth Degree Assault - Domestic Violence conviction against him for assaulting Fonda Dent,
27 and a pending Assault Fourth Degree - Domestic Violence charge involving an assault against

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4 Fonda Dent, the defendant continued to live with Fonda Dent and threatened and abused her.
5 She testified in court that on a previous occasions he had threatened to kill her and her family if
6 she left him. She also testified that he assaulted her after the shooting of Brian Sheets and
7 threatened her not to tell anyone about what had taken place. Michael Feeser has also told police
8 officers that the defendant and Brian Sheets were always fighting and that the defendant had
9 beaten Fonda Dent on previous occasions while they were living at 15 West Elma Hicklin Road.
10 Henry Feeser, the defendant's brother, recognized the defendant's propensity for violence when
11 he testified that he told the defendant on the day of the shooting that "the drinking and drugging
12 and fighting has got to stop."

13 In the end, the only explanation the State can find for the defendant's shooting an
14 unarmed friend in the chest with the .410 shotgun at near point blank range, is uncontrolled
15 anger. The combination of the defendant's history and his clear inability to control his anger
16 makes the defendant a dangerous person to be at large in the community.

17
18 **RECOMMENDATION**

19 The defendant has an offender of 1, which results in a standard range for Murder in the
20 Second Degree of 134 to 234 months and the seriousness level is XIV. Additionally, based upon
21 the deadly weapon firearm finding by the jury, an additional 5 years, 60 months, must be added
22 to the sentence the court imposes to be served consecutively.

23 The State recommends that the court impose the top end of the standard range, 234
24 months, in addition to the 60 months to be served for the possession and use of a firearm in the
25 commission of this offense. The total sentence time recommended by the State is therefore 294
26 months. The State also recommends that the court sentence the defendant to community custody
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for a range of 24 to 48 months, or for the period of earned early release, whichever is longer. The State is also asking the court to require the defendant to pay court costs, defense attorney cost and fees, statutorily imposed costs and assessments, and restitution to the family of Brian Sheets for any funeral costs they have incurred.

H. STEWARD MENEFEE
Prosecuting Attorney
for Grays Harbor County


WSBA #9354

APPENDIX 2

[X] Dept. 1, 102 W. Broadway, P.O. Box 647, Montesano, WA 98563 Tele. (360) 249-3441
[] Dept. 2, 2109 Sumner Ave., P.O. Box 142, Aberdeen, WA 98520 Tele. (360) 532-7061

Defendant: Dwight Feezer was present, represented by counsel K. Paulsen, and found guilty by (plea) (verdict) on 11/25/98 of the crime(s) of:
Case No: 221140 Count 1: RCW 46.01.03249 Negligent Duty 1st Degree
Case No: _____ Count 2: RCW
and is adjudged guilty and sentenced as follows:

JAIL: Count 1: 90 days, all suspended except _____ days/_____ consecutive hours upon the condition set forth herein. [] Credit for time served of _____ days.
Count 2: _____ days, all suspended except _____ days/_____ consecutive hours upon the condition set forth herein. [] Credit for time served of _____ days.
Sentence concurrent ([] consecutive) on all Counts; [] Work release recommended.

FINE: Count 1: \$ 350 Suspended: \$ _____ Subtotal: \$ 350
Count 2: \$ _____ Suspended: \$ _____ Subtotal: \$ _____

COSTS: Count 1: Attorney fees: \$ 125 Other: *\$ 125 Subtotal: \$ 250
Count 2: Attorney fees: \$ _____ Other: *\$ _____ Subtotal: \$ _____

* [] Warrant fee [X] Breath/blood test fee [] Wildlife reimbursement amount
[] Community service in lieu of [] fine, [] costs, approved. TOTAL: \$ 600

ADDITIONAL CONDITIONS OF SUSPENDED/DEFERRED SENTENCE:

[X] Compliance with payment agreement.
[X] PROBATION: 24 months; supervision fee \$ 40 /month [] Unsupervised bench probation. [X] Report as required by probation officer, [X] report in writing all address changes and comply with all sentence and probation conditions.
[] COMMUNITY SERVICE: Complete and file proof with the court _____ hours of community service each month for _____ months beginning 30 days from today - _____ hours total.
[] RESTITUTION: Pay restitution of \$ _____ or as may be ordered by the Court. Restitution is payable through the Clerk of the Court to: _____

Address: _____
[X] COUNSELING/TREATMENT: [X] Obtain an alcohol/substance abuse evaluation/complete at state certified agency treatment program recommended. [] Obtain anger management evaluation/complete program recommended. [X] Attend next Victim Impact Panel sponsored by District Court Probation and pay cost of attending in sum of \$ _____. [] File evaluation(s) within _____ days.
[] OTHER CONDITIONS: [] Shall not drive a motor vehicle without a valid license to drive. [] Shall not commit any further violations of Chapter _____ RCW. [X] Shall not consume alcohol. [X] Shall not commit any alcohol related offenses. [] Shall not engage in assaultive behavior and/or any other behavior defined by law as Domestic Violence. [] Obey "No Contact Order" entered in this case
Substant to CIA/BAC at Request of probation

[] DRIVER'S LICENSE/PRIVILEGE: Surrender of driver's license required. Affidavit must be signed for lost license.

SENTENCE EFFECTIVE FOR () 6 MONTHS () 1 YEAR (X) 2 YEARS () _____ FROM DATE BELOW.
[] SENTENCE MAY BE REVIEWED IN _____ months.

DATED: Nov. 25, 1998. [Signature]
JUDGE

I was present in court when this order was entered and acknowledge receipt of a copy:
_____, Defendant.

November 16, 2003
By: B. Ballinger

2003
NOV 16 10:10 AM
CLERK OF COURT

GRAYS HARBOR COUNTY DISTRICT COURT

State of Washington,

Plaintiff,

NO. C319443

vs.

Dwight Feeser,
Defendant.

JUDGMENT & SENTENCE
(DUI/Physical Control)

Defendant above named was present, represented by J. Feste and found guilty by plea verdict on 7/1/03 of the following crimes as charged in the citation or complaint:

Count 1: **Driving Under the Influence, RCW 46.61.502** BAC \leq .14/none BAC \geq .15/refusal;
[**Actual Physical Control Under the Influence, RCW 46.61.504.**] The court reviewed defendant's JIS case history and DOL record this date - Prior offenses: None One Two or more
Count 2: dismissal

Whereupon the court imposes the following sentence:

Jail: Count 1: 365 days, suspended except for 180 consecutive days hours
Count 2: days, suspended except for consecutive days hours
Credit for time served. Sentence concurrent unless checked consecutive.

EHM: Count 1: days of Electronic Home Monitoring with alcohol detection, at defendant's expense
 EHM in lieu of 24/48 hours jail; EHM to commence immediately upon release from jail.

Fine: Count 1: \$2400 with \$ suspended (inc. PSEA&Crim.Traf.Fee [640/880/1640-880/1280/2480])
Count 2: \$ with \$ suspended (inc. PSEA&Crim.Traf.Fee)

Costs: BAC fee: \$125 Jail R&B: \$ Atty. fee: \$ Wnt. fee: \$ Crim Traff \$180

Total of Fine & Costs: \$ 2605

Restitution: The Defendant shall pay restitution as may be ordered by the court and as stated herein: Amount: \$ payable through Clerk of Court to:

Payment terms: Payment agreement required. Community service in lieu of fine & costs, if checked. Report community service hours each month in lieu of payment.

Probation: 60 months, defendant to report as required, pay scheduled probation fees, immediately report all address changes, comply with all probation & sentence conditions. Probation may be terminated earlier upon order of the court.

Alcohol/Substance Abuse Evaluation/Treatment: Defendant to obtain and file within 45 days an alcohol/substance abuse evaluation from a state certified agency, enter into and timely complete the recommended treatment program. No alcohol or drug consumption except prescription; submit to UA/BAC testing as requested.

after release

Victims Panel: Defendant shall pay for and attend within 90 days a DUI Victim Impact Panel.

after release

Driver's License: As a result of this conviction, defendant's license/privilege to drive is suspended and the license must be surrendered to the court.

License surrendered Lost or stolen (sign affidavit) None

Ignition Interlock: After any applicable period of suspension, revocation, or denial of driving privileges, the defendant may drive only a motor vehicle equipped with a functioning ignition interlock breath alcohol device for ~~one~~ five ten years pursuant to RCW 46.20.720, installed by a WSP certified vendor; the defendant shall bear all costs of installation and maintenance of the ignition interlock device, said device to be installed within 10 days of the date the defendant's driving privilege is reinstated; the ignition interlock device shall be monitored by the vendor/installer at least once every sixty days, and shall have the following minimum settings: **Fail level of .03; Warn level of .02; Hum is required; Re-tests are required; Horn is required; 3 maximum violations; 72 hour grace period.** The defendant shall not adjust, tamper with, remove, or circumvent any ignition interlock breath alcohol device, the wiring of any ignition interlock breath alcohol device, or the ignition system of any vehicle equipped with an ignition interlock breath alcohol device. In addition to the one, five and ten year periods noted above, **in the event the defendant obtains an occupational or other limited license** during the applicable period of suspension, revocation or denial, **the defendant may drive only a motor vehicle equipped with a functioning ignition interlock breath alcohol device** installed under the same conditions noted above.

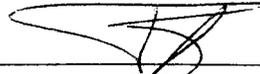
Other Conditions:

The defendant shall not drive a motor vehicle without a valid license to drive and proof of financial responsibility for the future, and/or while having an alcohol concentration of 0.08 or more within two hours after driving, and/or shall not refuse to submit to a breath or blood test to determine alcohol concentration upon request of a law enforcement officer who has reasonable grounds to believe defendant was driving or was in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor;

- Defendant shall not drive a motor vehicle after consuming any alcohol;
- Defendant shall not commit any major traffic or alcohol-related offenses.
-

Sentence Effective for Five Years from date hereof (except as may be otherwise ordered by the court).

Dated: 7/16/03



J U D G E

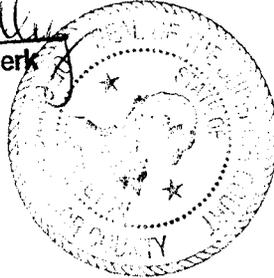
I was present in court when this order was entered; I acknowledge receipt of a copy:


Defendant (sign here)

APPENDIX 3

Certificate of Clerk of the Superior Court of Washington in and for Grays Harbor County. The above is a true and correct copy of the original instrument which is on file or of record in this court.

Done this 21st day of Dec 2005
Cheryl Brown, Clerk By [Signature] Deputy Clerk



'05 OCT -4 08:50

COUNTY CLERK

SUPERIOR COURT OF WASHINGTON
COUNTY OF GRAYS HARBOR

STATE OF WASHINGTON)	
)	
Plaintiff)	NO. 05-1-278-9
)	
vs.)	RECOMMENDATION ON SENTENCE BY DEFENSE
)	
DWIGHT FEESER)	
)	
Defendant)	
_____)	

Comes now the defendant, by and through his attorney, Kyle Imler, and requests the Court to Consider the following in sentencing the defendant:

The defendant was found guilty by a jury of Murder in the Second Degree on September 29, 2005.

SENTENCING RANGE

The range for the defendant in this case is 134 months to 234 months. The defense is requesting the Court to impose a sentence of 135 months with credit for time served since May 5, 2005. This Recommendation is not made lightly but with a view to punishing the defendant but also taking into Consideration the circumstances of that day and the lack of recent felony history by the defendant.

There is no doubt the victim was using both alcohol and drugs the day of his death. While not an Excuse for his death, the Court heard the facts of the case and the behavior of the victim prior to his death.

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Dwight Feeser and Brian Sheets had been friends for years. And while they had their differences they had been able to coexist prior to this incident. He provided a place for Brian to stay when he could stay nowhere else. The pain of Brian's death will haunt Dwight for the rest of his life.

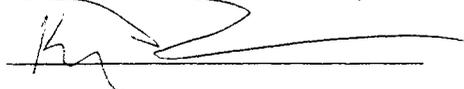
COSTS

The Court should note that the defendant was found to be indigent. With the large amount of time he is looking at; and the minimal amount given for good time in the correctional facility, it is unlikely the defendant will be able to pay anything toward costs.

FIREARM ENHANCEMENT

The Court should not impose the 5 year enhancement. Under the Blakely decision the Court may not impose any exceptional or enhancement unless found by the jury and proven by the prosecutor. In this case the definition of firearm in the jury instructions is not defined as it is under WPIC 2.10. Also nowhere in the instructions are the jury told the State must prove beyond a reasonable doubt that the defendant was armed with a firearm. (WPIC 2.10.01). The only instruction regarding a firearm and a special verdict is in the final instruction and makes no reference to the prosecutor (State) proving anything. Only that they be satisfied beyond a reasonable doubt that yes is the correct answer. Because the jury was not given the proper instruction the Court should not impose the firearm enhancement as the Court can not be sure if the jury was aware of the proof necessary and by whom.

RESPECTFULLY SUBMITTED,



Kyle Imler
Attorney
WSBA #14188

FILED
COURT

06 DEC -6 PM 1:17

BY _____

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

STATE OF WASHINGTON,

Respondent,

No.: 33961-7-II

v.

DECLARATION OF MAILING

DWIGHT C. FEESER,

Appellant.

DECLARATION

I, Janie Anderson hereby declare as follows:

On the 5th day of December, 2006, I mailed a copy of the Brief of Respondent to Manek R. Mistry and Jodi R. Backlund; Backlund & Mistry; 203 East Fourth Avenue, Suite 404; Olympia, WA 98501 and to Dwight C. Feeser; #625703; Florence Correctional Center; P.O. Box 6291; Florence, AZ 85232-0629, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Janie Anderson