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STATE OF WASHINGTON
BY GA
DEPUTY

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

IN RE THE PERSONAL RESTRAINT
PETITION OF:

AARON MICHAEL DAVIS,

Petitioner.

NO. 35706-2

STATE'S RESPONSE TO PERSONAL
RESTRAINT PETITION

A. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION:

1. Must the petition be dismissed where the petitioner cannot show actual prejudice to a constitutional right or a fundamental defect that results in a complete miscarriage of justice?
2. Has petitioner failed to establish that he was provided ineffective assistance of counsel during trial?
3. Has petitioner failed to establish that the trial court erred in its determination that the petitioner's current offenses did not constitute the same criminal conduct?

- 1 4. Has petitioner failed to establish that his sentence exceeds the statutory
- 2 maximum in violation of Blakely v. Washington¹?
- 3 5. Has petitioner failed to establish that he was provided ineffective assistance
- 4 of counsel throughout the appellate process?
- 5 6. Has petitioner failed to establish that he is entitled to relief under the
- 6 cumulative error doctrine?
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9 B. STATUS OF PETITIONER:

10 Petitioner, AARON MICHAEL DAVIS, is restrained pursuant to Judgment and
11 Sentence entered in Pierce County Cause Number 03-1-04572-3. (Judgment and Sentence,
12 Appendix A). A jury convicted the petitioner of one count of unlawful imprisonment, one
13 count of first degree assault, and one count of violation of a protection order. (App. A).

14 The court sentenced petitioner to 300 months in the Department of Corrections. (App. A).

15 Petitioner timely appealed to the Court of Appeals, Division Two. See COA No.
16 31910-1-II. Through counsel, petitioner argued that the trial court erred in admitting (1)
17 evidence of injuries sustained by the victim when she fell out of the vehicle; and (2)
18 testimonial statements to the police by a witness. In a Statement of Additional Grounds for
19 Review (SAG), petitioner claimed (1) that the trial court erred in denying his motion for
20 new trial; (2) that counsel was ineffective for not calling certain witnesses; (3) that the
21 prosecutor committed misconduct during closing argument; and (4) sufficiency of the
22 evidence. The Court of Appeals found no error and affirmed petitioner's conviction in an
23 unpublished opinion. (Unpublished Opinion, Appendix B).

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¹ 542 U.S. 296, 305-06, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004).

1 This is petitioner's first personal restraint petition and it is timely. Petitioner now
2 collaterally attacks his conviction, and again claims ineffective assistance of trial and
3 appellate counsel, sentencing error and cumulative error.

4 The State has no information to dispute petitioner's claim of indigence.

5
6 C. GENERAL PRP LAW.

7 Personal restraint procedure came from the State's habeas corpus remedy, which is
8 guaranteed by article 4, § 4 of the state constitution. In re Hagler, 97 Wn.2d 818, 823, 650
9 P.2d 1103 (1982). Fundamental to the nature of habeas corpus relief is the principle that
10 the writ will not serve as a substitute for appeal. A personal restraint petition, like a
11 petition for a writ of habeas corpus, is not a substitute for an appeal. Id. at 824.

12 "Collateral relief undermines the principles of finality of litigation, degrades the
13 prominence of the trial, and sometimes costs society the right to punish admitted
14 offenders." Id. (citing Engle v. Issac, 456 U.S. 107, 102 S. Ct. 1558, 71 L.Ed.2d 783
15 (1982)). These costs are significant and require that collateral relief be limited in state as
16 well as federal courts. Id.

17 In order to prevail in a personal restraint petition, a petitioner must meet an
18 especially high standard. A petitioner asserting a constitutional violation must show actual
19 and substantial prejudice. In re Haverty, 101 Wn.2d 498, 681 P.2d 835 (1984). The rule
20 that constitutional errors must be shown to be harmless beyond a reasonable doubt has no
21 application in the context of personal restraint petitions. In re Mercer, 108 Wn.2d 714,
22 718-721, 741 P.2d 559 (1987); In re Hagler, 97 Wn.2d at 825. Mere assertions are
23 insufficient in a collateral action to demonstrate actual prejudice. Inferences, if any, must
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1 be drawn in favor of the validity of the judgment and sentence and not against it. In re
2 Hagler, 97 Wn.2d at 825-26.

3 A petitioner relying on non-constitutional arguments must demonstrate a
4 fundamental defect, which inherently results in a complete miscarriage of justice. In re
5 Cook, 114 Wn.2d 802, 810-11, 792 P.2d 506 (1990).

6 Reviewing courts have three options in evaluating personal restraint petitions:

- 7 1. If a petitioner failed to meet the threshold burden of showing actual
8 prejudice arising from constitutional error, the petition must be
9 dismissed;
- 10 2. If a petitioner makes at least a prima facie showing of actual
11 prejudice, but the merits of the contentions cannot be determined
12 solely on the record, the court should remand the petition for a full
13 hearing on the merits or for a reference hearing pursuant to RAP
14 16.11(a) and RAP 16.12;
- 15 3. If the court is convinced a petitioner has proven actual prejudicial
16 error, the court should grant the personal restraint petition without
17 remanding the cause for further hearing.

18 In re Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983). As set forth below, petitioner claims
19 that error occurred but fails to meet the threshold burden of showing actual prejudice. This
20 petition must therefore be dismissed.

21 D. ARGUMENT:

- 22 1. PETITIONER FAILS TO ESTABLISH THAT HE WAS
23 PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL AT
24 TRIAL.

25 Petitioners who claim their lawyers ineffectively assisted them must prove their
lawyers (1) performed deficiently *and* (2) prejudiced their defense. State v. Bowerman,
115 Wn.2d 794, 808, 802 P.2d 116 (1990)(quoting Strickland v. Washington, 466 U.S.
668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984)). The first element of Strickland is met

1 by showing that, based on all the circumstances, counsel's performance was not reasonably
2 effective under prevailing professional norms *and* that the challenged action or decision
3 was not sound strategy. In re Davis, 152 Wn.2d 647, 673, 101 P.3d 1 (2004). The second
4 test is met by showing a reasonable probability that, but for counsel's unprofessional
5 errors, the result would have been different. There is a strong presumption that the lawyer
6 provided effective representation. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251
7 (1995).

8
9 Petitioner claims that his counsel was ineffective for: (1) offering an erroneous
10 self-defense instruction; (2) failing to object to the first aggressor instruction; (3) failing to
11 make a motion to suppress the gun; (4) failing to recommend a sentence below the
12 standard range; and (5) failing to investigate the size of the knife. Because petitioner raises
13 this issue in the context of a personal restraint petition, he must show actual and substantial
14 prejudice resulting from counsel's deficient performance. Petitioner cannot sustain this
15 heavy burden.

- 16 a. Petitioner has not established that counsel was
17 ineffective for offering an erroneous self-defense
18 instruction.

19 Relying principally on State v. Rodriguez, 121 Wn. App. 180, 87 P.3d 1201 (2004),
20 and State v. Walden, 131 Wn.2d 469, 932 P.2d 1237 (1997), petitioner claims that his
21 counsel was ineffective for offering an erroneous self-defense instruction.²

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24 ² The invited error doctrine generally prohibits a defendant from claiming error based on
25 instructions that were proffered by the defense. See State v. Studd, 137 Wn.2d 533, 538,
973 P.2d 1049 (1999). Petitioner here has raised the instruction issue in the context of an
ineffective assistance claim. Review is not precluded where invited error is the result of
ineffectiveness of counsel. State v. Aho, 137 Wn.2d 736, 744-45, 975 P.2d 512 (1999).

1 A defendant is entitled to a jury instruction on self-defense once some evidence
2 demonstrating self-defense has been produced. Walden, 131 Wn.2d at 473. Once such
3 evidence is produced, the burden shifts to the prosecution to prove the absence of self-
4 defense beyond a reasonable doubt. Id. A jury may find self-defense on the basis of the
5 defendant's subjective, reasonable belief of imminent harm from the victim. State v.
6 LeFaber, 128 Wn.2d 896, 899, 913 P.2d 369 (1996). This requires the jury to perform a
7 subjective evaluation in that the jury must "stand in the shoes of the defendant and consider
8 all the facts and circumstances known to him or her." Walden, 131 Wn.2d at 474. The
9 jury must also perform an objective analysis in that it must evaluate the information
10 available to the defendant to determine what "a reasonably prudent person similarly
11 situated would have done." Id.

12
13 Jury instructions on self-defense must more than adequately convey the law.
14 LeFaber, 128 Wn.2d at 900. Read as a whole, the jury instructions must make the relevant
15 legal standard manifestly apparent to the average juror. Id.

16 The jury here was instructed, based on WPIC 17.02, that:

17 It is a defense to a charge of assault that the force used was lawful
18 as defined in this instruction.

19 The use of force upon or toward the person of another is lawful
20 when used by a person who reasonably believes that he is about to be
21 injured in preventing or attempting to prevent an offense against the
22 person and when the force is not more than is necessary.

23 The person using the force may employ such force and means as a
24 reasonably prudent person would use under the same or similar conditions
25 as they appeared to the person, taking into consideration all of the facts
and circumstances known to the person at the time of the incident.

The State has the burden of proving beyond a reasonable doubt
that the force used by the defendant was not lawful. If you find that the
State has not proved the absence of this defense beyond a reasonable
doubt, it will be your duty to return a verdict of not guilty.

1 (Court's Instructions to the Jury (Inst. No. 29), Appendix C). Necessary was defined for
2 the jury as:

3 ... [U]nder the circumstances as they reasonably appeared to the actor at
4 the time, (1) no reasonably effective alternative to the use of force
5 appeared to exist and (2) the amount of force used was reasonable to affect
6 the lawful purpose intended.

7 (App. C, Inst. No. 30). The court also instructed the jury based on WPIC 17.04 that the
8 defendant is entitled to act on appearances in defending himself:

9 A person is entitled to act on appearances in defending himself if that
10 person believes in good faith and on reasonable grounds that he is in
11 actual danger of *great bodily harm*, although it afterwards might develop
12 that the person was mistaken as to the extent of the danger. Actual danger
13 is not necessary for the use of force to be lawful.

14 (App. C, Inst. No. 31)(emphasis added). And as part of the first degree charge to the jury,
15 the court defined "great bodily harm" as follows:

16 *Great bodily harm* means bodily injury that creates a probability of death,
17 or which causes significant permanent disfigurement, or that causes a
18 significant permanent loss or impairment of the function of any bodily part
19 of organ.

20 (App. C, Inst. No. 20). This is the only definition of "great bodily harm" that the jury was
21 provided. And when this definition is read into the "act on appearances" self-defense
22 instruction, the jury is required to find that in order to act in self-defense, petitioner had to
23 believe he was in actual danger of probable death, or serious permanent disfigurement, or
24 loss of a body part of function. This is an improper statement of the law. Our Supreme
25 Court disapproved of the use of the term "great bodily harm" in the "act on appearances"
instruction in 1997 in Walden, noting that great bodily harm is a distinctly defined element
of first degree assault. Walden, 131 Wn.2d at 475 n.3; *See also* cmt., WPIC 2.04.01
(because "great bodily harm" is an element of first degree assault and is distinctly defined

1 in that context, it should not be used in instructions on self-defense). It is more appropriate
2 to use the term “great personal injury” when instructing on self-defense in first degree
3 assault cases. Id.

4 Division Three found improper the same instructions that were given in this case in
5 State v. Rodriguez, 121 Wn. App. 180, 185-87, 87 P.2d 1201 (2004). As the Rodriguez
6 court noted, it is improper to require the jury to find that “in order to act in self-defense,
7 [the defendant] had to believe he was in actual danger of probable death, or serious
8 permanent disfigurement, or loss of a body part of function.” Id. at 186; *see also*, Walden,
9 131 Wn.2d at 476-77. Like the instructions in Walden and Rodriguez, the instructions here
10 “[b]y defining [great bodily injury] to exclude ordinary batteries, a reasonable juror could
11 read [the instruction] to prohibit consideration of the defendant’s subjective impressions of
12 all the facts and circumstances, i.e., whether the defendant reasonably believed the battery
13 at issue would result in great personal injury.” Rodriguez, 121 Wn. App. at 186 (citing
14 Walden, 131 Wn.2d at 477). Walden issued in 1997, and Rodriguez issued in April, 2004.
15 This case was tried just days after the Rodriguez opinion issued. Counsel should have
16 known that his proposed instruction was erroneous.³ Counsel’s performance was therefore
17 deficient.
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19 But in order to prove ineffective assistance of counsel, petitioner must still prove
20 that counsel’s deficient performance was prejudicial. In a direct appeal, there is a
21 presumption of prejudice when instructional error occurs and it is the State’s burden to
22 prove the error harmless. But this presumption does not exist in a collateral attack. In re
23 Benn, 134 Wn.2d 868, 940, 952 P.2d 116 (1998). On collateral review, the burden shifts to
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1 the petitioner to establish that the error was not harmless; in other words, to establish that
2 the error was prejudicial. A petitioner must show “the error worked to his actual and
3 substantial prejudice” in order to prevail on a collateral review. In re St. Pierre, 118 Wn.2d
4 321, 329, 823 P.2d 492 (1992). Actual prejudice is determined in light of the totality of
5 circumstances of guilt, and other relevant factors in evaluating whether a particular
6 instruction caused actual prejudice.” In re Music, 104 Wn.2d 189, 191, 704 P.2d 144
7 (1985). Because this is a collateral attack, defendant must show that he was actually and
8 substantially prejudiced by the instructional error. In other words, to be entitled to relief,
9 petitioner has to show that the jury would have acquitted him had the court instructed them
10 properly. Bare assertions and conclusory allegations are not sufficient to command judicial
11 consideration and discussion in a personal restraint proceeding. In re Rice, 118 Wn.2d
12 876, 886, 828 P.2d 1086 (1992). Here, petitioner provides nothing more than a conclusory
13 allegation that the verdict would have been different had the correct instruction been given.
14 This is simply insufficient to meet his burden. Additionally, a review of the record reveals
15 that the verdict would not have changed had the jury been instructed properly.

17 First, the act on appearances instruction requires that a person believe in good faith
18 and on reasonable grounds that he or she is in actual danger of great personal injury.
19 WPIC 17.04. Great personal injury means an injury that the slayer reasonably believed, in
20 light of all the facts and circumstances known at the time, would produce severe pain and
21 suffering. WPIC 2.04.01. Here, there were only two factual scenarios presented to the jury
22 about the assault: the State’s scenario (McCorrister pulled out a can of pepper spray but
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25 ³ This is true even though the current pattern jury instruction for “act on appearances” still includes the term “great bodily harm.” See WPIC 17.04.

1 was unsure whether she sprayed it) and petitioner’s scenario (McCorrister pulled out a can
2 of pepper spray and sprayed him in the back of the head). In either scenario, the threat of
3 injury was nothing more than pepper spray to the back of the head. On this record, the
4 threat to petitioner, if any, was so minimal that it does not support a conclusion that he had
5 a good faith belief based on reasonable grounds that he was in actual danger of great
6 personal injury. Because no reasonable jury could have found that petitioner acted in self-
7 defense, petitioner cannot show that he was prejudiced by the erroneous instruction.
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9 Second, the instructional error had no effect on the verdict because the jury did not
10 believe the petitioner’s testimony. As stated above, there were two scenarios presented to
11 the jury – the State’s and the petitioner’s. Petitioner testified that he did not force
12 McCorrister into the car, did not threaten her with a gun and did not prevent her from
13 getting out of the vehicle. RP 441-43. Yet, the jury convicted petitioner of unlawful
14 imprisonment. This shows that they rejected his testimony. If the jury had believed the
15 petitioner’s testimony, but determined that he had not met the burden under the erroneous
16 self-defense instruction, they would have acquitted him of the unlawful imprisonment (to
17 which the self-defense instruction did not apply) and convicted him of first degree assault.
18 But the jury’s conviction of the petitioner for unlawful imprisonment shows that they
19 rejected his testimony in its entirety. Thus, the jury didn’t reject petitioner’s self-defense
20 claim because they didn’t think he was in fear of great bodily harm (the incorrect standard)
21 or even great personal injury (the correct standard). Rather, the jury rejected his claim
22 because they simply did not believe him. “Credibility determinations are for the trier of
23 fact and cannot be reviewed on appeal.” State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d
24 850 (1990).
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1 Because there is no likelihood that the requested instruction affected the outcome of
2 the trial, petitioner cannot establish prejudice. Petitioner’s claim of ineffectiveness thus
3 fails.

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5 b. Petitioner has not established that counsel was
6 ineffective for failing to object to the first aggressor
7 instruction.

8 Petitioner claims that counsel’s failure to object to an aggressor instruction
9 amounted to ineffective assistance of counsel. As stated above, petitioner must show that
10 counsel’s performance was deficient and that the deficient performance prejudiced the
11 defense. Strickland, 466 U.S. at 687. Here, there is no need to consider whether petitioner
12 received deficient representation because the instruction was properly presented to the jury
13 and petitioner was not prejudiced. See In re Rice, 118 Wn.2d at 889 (a reviewing court
14 need not consider whether counsel’s performance was deficient if the court can say that the
15 defendant was not prejudiced by the alleged deficiency).

16 “Jury instructions are sufficient if they [are supported by substantial evidence,]
17 permit each party to argue [their] theory of the case and properly inform the jury of the
18 applicable law.” State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). When a
19 defendant in an assault case raises the issue of self-defense, the State bears the burden of
20 proving the absence of self-defense beyond a reasonable doubt. State v. Acosta, 101
21 Wn.2d 612, 619-20, 683 P.2d 1069 (1984); State v. Redwine, 72 Wn. App. 625, 629-30,
22 865 P.2d 552 (1994). Although at times disfavored, aggressor instructions are warranted
23 when supported by “credible evidence from which the jury can conclude that it was the
24 defendant who provoked the need to act in self-defense.” State v. Birnel, 89 Wn. App.
25 459, 473, 949 P.2d 433 (1998). The provoking act must be intentional and an act that a

1 jury could reasonably believe would provoke a belligerent response from the victim. Id.
2 Thus, where the evidence supports that the defendant made the first move by drawing a
3 weapon, an aggressor instruction is appropriate. Riley, 137 Wn.2d at 909. This is true
4 even where the evidence is conflicting as to whether the defendant's conduct precipitated a
5 fight. Id. at 909-10 (citing State v. Davis, 119 Wn.2d 657, 666, 835 P.2d 1039 (1992)).
6 The reviewing court should defer to the trier of fact on issues of conflicting testimony,
7 credibility of witnesses, and persuasiveness of the evidence. State v. Thomas, 150 Wn.2d
8 821, 875, 83 P.3d 970 (2004)(citing State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81
9 (1985)). An appellate court reviews the adequacy of jury instructions de novo as a
10 question of law. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).
11

12 Although there was conflicting evidence about what happened during the assault,
13 evidence presented at trial supported the giving of an aggressor instruction. McCorrister
14 testified that there was a protection order in effect on the day of the incident that prohibited
15 the petitioner from contacting her. RP 34-37. Even so, the two had contact during the
16 days leading up to the incident. RP 34-37. On the day of the incident, petitioner told
17 McCorrister that he wanted her to get his car back for him.⁴ RP 39. McCorrister told him
18 that she would go alone because the people who had the car did not want the petitioner at
19 their house. RP 39. In response, petitioner grabbed a gun from the headboard of the bed,
20 put it to McCorrister's head and demanded that they go together. RP 39, 100-103.
21 McCorrister proceeded to get into petitioner's truck. RP 41, 100. Petitioner placed the gun
22 under the dashboard. RP 42. McCorrister didn't want to take the petitioner to Spanaway,
23 where the car was being stored, so she the petitioner to drive towards Graham. RP 44. At
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⁴ McCorrister had taken the car to a friend's house in Spanaway while the petitioner was in jail. RP 94.

1 one point, petitioner stopped at a stoplight and McCorrister attempted to jump out of the
2 truck. RP 45, 108. Petitioner grabbed a knife from the stick shift area and told
3 McCorrister that he would stab her if she tried to leave. RP 47. McCorrister was scared so
4 she shut the door and stayed in the truck. RP 47, 108. McCorrister and the petitioner
5 continued to drive around in Graham until McCorrister saw some friends sitting outside
6 their house just off the road. RP 47, 110. McCorrister told the petitioner that his car was
7 there because she wanted to get help from her friends. RP 47, 110. Petitioner pulled over.
8 McCorrister's friend, Rick, approached the car and he and petitioner started yelling at each
9 other. RP 48, 113. McCorrister grabbed pepper spray from her purse. RP 48-49, 113.
10 When McCorrister attempted to spray the petitioner, he leaned over and stabbed
11 McCorrister in the arm with the knife. RP 48-49, 113. After he stabbed McCorrister,
12 petitioner gunned the accelerator and McCorrister fell out of the open door of the truck.
13 RP 50, 114. Petitioner didn't stop to offer aid. RP 50, 114.

15 All of this evidence supports the giving of an aggressor instruction. Petitioner's act
16 of pointing a gun at McCorrister's head, if believed, was clearly an "intentional act
17 reasonably likely to provoke a belligerent response." State v. Wasson, 54 Wn. App. 156,
18 159, 772 P.2d 1039, review denied, 113 Wn.2d 1014 (1989). If the gun pointing was
19 insufficient, then clearly petitioner's display of the knife and threat to stab McCorrister
20 when she tried to jump out of the vehicle was enough. Because the instruction was
21 properly given, petitioner did not suffer prejudice when his attorney failed to object.
22 Petitioner's claim of ineffectiveness thus fails.
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1 c. Petitioner has not established that counsel was
2 ineffective for failing to make a motion to suppress
3 the gun.

4 Petitioner claims that counsel was ineffective for failing to make a motion to
5 suppress the gun. Petitioner claims that this motion had merit because the property
6 owner's consent to search was involuntary.

7 Failure to move for suppression of evidence is not necessarily considered deficient
8 representation. McFarland, 127 Wn.2d at 336. When an ineffectiveness allegation is
9 premised upon counsel's failure to litigate a motion or objection, defendant must
10 demonstrate not only that the legal grounds for such a motion or objection were
11 meritorious, but also that the verdict would have been different if the motion or objections
12 had been granted. Kimmelman, 477 U.S. at 375; United States v. Molina, 934 F.2d 1440,
13 1447-48 (9th Cir. 1991). An attorney is not required to pursue strategies that appear
14 unlikely to succeed. McFarland, 127 Wn.2d at 334 n.2.

15 Here, a motion to suppress based on lack of consent would have been denied; thus
16 petitioner cannot show deficient performance. Additionally, suppression of the gun would
17 not have changed the verdict so petitioner cannot establish prejudice.

18 First, petitioner had standing to raise the consent issue on only one of the four
19 counts.⁵ A person challenging a search on federal Fourth Amendment grounds must have
20 a legitimate expectation of privacy in the area searched in order to have standing. United
21 States v. Salvucci, 448 U.S. 83, 100 S. Ct. 2547, 65 L.Ed.2d 619 (1980); State v. Simpson,

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24 ⁵ Ordinarily, standing must first be challenged in the trial court. Tyler Pipe Indus., Inc. v.
25 Department of Revenue, 105 Wn.2d 318, 327, 715 P.2d 123 (1986), cert. denied, 486 U.S. 1040,
108 S. Ct. 2030, 100 L.Ed.2d 615 (1988). But the State, as respondent, may contest a defendant's
standing for the first time on review because of the appellate court's duty to affirm the trial court
upon any ground supported by the record. State v. Carter, 74 Wn. App. 320, 324 n.2, 875 P.2d 1
(1994), affirmed on other grounds, 127 Wn.2d 836 (1995).

1 95 Wn.2d 170, 622 P.2d 1199 (1980). On the other hand, a person challenging a search
2 under the more protective provisions of article I, section 7 of the Washington Constitution
3 has automatic standing to challenge a search where (1) he is charged with an offense for
4 which possession in an essential element and (2) he was in possession of the seized
5 property *at the time of the contested search*. State v. Jones, 146 Wn.2d 328, 332, 45 P.3d
6 1062 (2002)(emphasis added). Here, the only crime that contains a possession element is
7 the crime of unlawful possession of a firearm (UPOF). Petitioner thus satisfies the first
8 requirement, but only with respect to the UPOF charge. Petitioner does not have standing
9 to challenge the search on any of the remaining counts because none of them contain an
10 element of possession.
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12 The second requirement may be satisfied by either actual or constructive possession
13 of the contraband at the time of the contested search. Jones, 146 Wn.2d at 333; State v.
14 Goucher, 124 Wn.2d 778, 787-88, 881 P.2d 210 (1994); State v. Zakel, 119 Wn.2d 563,
15 568, 834 P.2d 1046 (1992); State v. Barnes, 85 Wn. App. 638, 659, 932 P.2d 669 (1997).
16 Here, officers found the gun buried in the backyard of petitioner's sister's house. RP 188-
17 89. Petitioner had already fled the home and was not on the premises at the time the gun
18 was found. In addition, petitioner denied that the gun belonged to him and denied that he
19 ever possessed the weapon. RP 453. Because petitioner did not live at his sister's house,
20 was not present when the police found the gun, and ultimately denied ever having the
21 weapon, he did not have actual or constructive possession at the time of the search.
22 Petitioner therefore would not have had standing to contest the search on any of the
23 charges. Zakel, 119 Wn.2d at 570. Because petitioner lacked standing to challenge the
24 search, counsel was not ineffective for failing to bring a motion to suppress.
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1 Moreover, even if petitioner had standing to challenge the search, the officer's
2 search was a consensual search. Under the Fourth Amendment and Article 1, Section 7 of
3 the Washington Constitution, warrantless searches and seizures are per se unreasonable.
4 State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). There are, however, a few
5 "jealously and carefully drawn" exceptions to the warrant requirement. Williams, 102
6 Wn.2d at 736 (quoting State v. Houser, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980)). The
7 burden is on the State to show that the particular search or seizure falls within one of these
8 exceptions. Williams, 102 Wn.2d at 736; Houser, 95 Wn.2d at 149. A search conducted
9 pursuant to consent is a well-accepted exception to the warrant requirement. State v.
10 Hastings, 119 Wn.2d 229, 234, 830 P.2d 658 (1992). Two issues are involved in any
11 consent case: whether someone gave valid, voluntary consent, and whether the search
12 exceeded the scope of the consent. Id. The voluntariness of consent is a question of fact to
13 be determined by considering all the circumstances, including (1) whether Miranda
14 warnings were given prior to obtaining consent, (2) the degree of education and
15 intelligence of the consenting person, and (3) whether the consenting person was advised
16 of his right not to consent. State v. Bustamante-Davila, 138 Wn.2d 964, 981-82, 983 P.2d
17 590 (1999); State v. Shoemaker, 85 Wn.2d 207, 212, 533 P.2d 123 (1975). While
18 knowledge of the right to refuse consent is relevant, it is not a prerequisite to finding
19 voluntary consent, however. State v. O'Neill, 148 Wn.2d 564, 588, 62 P.3d 489 (2003);
20 State v. Nelson, 47 Wn. App. 157, 163, 734 P.2d 516 (1987). In addition, the court may
21 weigh any express or implied claims of police authority to search, previous illegal actions
22 of the police, the defendant's cooperation, and police deception as to identity or purpose.
23 State v. Flowers, 57 Wn. App. 636, 645, 789 P.2d 333 (1990). Voluntary consent can be
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1 obtained either from the person whose property is being searched or from a third party who
2 possesses common authority over the premises. State v. Cotton, 75 Wn. App. 669, 678-79,
3 879 P.2d 971 (1994). The State has the burden of demonstrating that the consent was
4 voluntary. State v. Smith, 115 Wn.2d 775, 789, 801 P.2d 975 (1990).

5 Here, police contacted petitioner's sister, Tarah Davis, while she and her husband,
6 Everett Colvin, were driving around.⁶ Officers believed that the petitioner might be in the
7 vehicle. RP 183. Upon contact, officers asked permission to return to the couple's house
8 to look for petitioner. RP 184, 279, 375. Davis and Colvin agreed and returned with the
9 police to their home. RP 184, 279, 375. Colvin testified at trial that he let the police into
10 his home to look for petitioner. RP 375. According to Deputy Kevin Johnson, Davis and
11 Colvin were eager to talk to the police and to tell them about the incident. RP 313. Both
12 Davis and Colvin signed a Consent to Search Form., which advised them that they had the
13 right to refuse consent. (Exhibits 30 and 31, Appendix D); RP 279-81. Deputy Johnson
14 testified that officers did not use threats or coercion at any time throughout the contact. RP
15 313. Colvin also testified that the police never threatened him and gave him the
16 opportunity to write a statement. RP 386.

17
18 There is simply no evidence in the record that the search was anything but
19 voluntary. Petitioner supports his argument with an affidavit from his sister, in which she
20 claims that she was coerced into signing the consent form. See Brief of Petitioner, at
21 Appendix. Her affidavit is the only evidence of this alleged coercion. Petitioner's sister
22

23
24
25 ⁶ Petitioner fled Ms. Davis's house after he heard that police were in the area. RP 275. After he
fled, Ms. Davis and her husband drove around to see what was going on. RP 278. Ms. Davis saw
that petitioner's friend had been pulled over by police so she decided to pull over too. RP 278.
Ms. Davis testified that they pulled over because "we knew we was next." RP 278.

1 says nothing about being coerced to testify under oath at trial, where she testified that her
2 consent was voluntary. RP 279-82. As such, her affidavit should be viewed with
3 skepticism and is not sufficient evidence to warrant a reference hearing on this matter.

4 Finally, even assuming *arguendo* that counsel argued the motion and it was
5 granted, petitioner fails to show that the verdict would have been different. There were
6 two versions of events presented at trial – the victim’s and the petitioner’s. McCorrister
7 testified that the petitioner put a gun to her head, forced her to get into the truck and then
8 placed the gun within arm’s reach throughout the incident. Petitioner’s theory at trial was
9 that he never had a gun and that the gun that was found belonged to his friend, who was
10 also present at Tara’s house prior to the gun’s discovery. Whether the jury saw the actual
11 gun was immaterial to his defense theory. After all, if petitioner was claiming that the gun
12 wasn’t his, why would he care that the jury saw the gun? The presence of the physical gun
13 was immaterial to petitioner’s defense. The jury either believed the petitioner or they did
14 not. Had the court granted a motion to suppress, the verdict would not have changed.
15 Petitioner has therefore failed to establish prejudice.

17 Petitioner has failed to show that counsel was ineffective for failing to bring a
18 motion to suppress the gun. Counsel’s decision *not* to bring the motion was appropriate
19 because petitioner did not have standing and, even if he did, the motion lacked merit.
20 Finally, even assuming *arguendo* that counsel argued the motion and it was granted,
21 petitioner has failed to show that the verdict would have been different. Petitioner’s claim
22 of ineffective assistance of counsel thus fails.
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1 d. Petitioner has not established that counsel was
2 ineffective for failing to recommend a sentence
3 below the standard range.

4 Petitioner claims that counsel was ineffective for failing to ask the judge for a
5 sentence below the standard range.

6 RCW 9.94A.535 allows a trial court to deviate downward from a standard sentence
7 if it finds that certain mitigating factors warrant such a departure. One such mitigating
8 circumstance is when “to a significant degree, the victim was an initiator, willing
9 participant, aggressor, or provoker of the incident.” RCW 9.94A.535(1)(a). Our Supreme
10 Court has expressly held that “the mitigating circumstances enumerated in [the statute]
11 represent failed defenses.” State v. Hutsell, 120 Wn.2d 913, 921, 845 P.2d 1325
12 (1993)(interpreting former RCW 9.94A.390, now codified as RCW 9.94A.535).

13 Here, petitioner claims that the victim was the aggressor and that this provided a
14 mitigating factor under RCW 9.94A.535(1)(a). But, as argued in section (1)(b) above, the
15 evidence does not support petitioner’s claim that McCorrister was the aggressor. As such,
16 counsel was not deficient for failing to argue this mitigating circumstance to the sentencing
17 court.

18 Moreover, even if petitioner could show deficient performance, he cannot show that
19 the deficiency prejudiced him. In order to establish prejudice, petitioner must show that
20 there is a reasonable probability that the sentencing judge would have imposed a sentence
21 below the standard range. There is no evidence in the record, and petitioner does not
22 provide any, that the judge would have imposed a downward sentence had petitioner asked
23 for one. The standard range for each of petitioner’s felony convictions was:
24
25

Count I (Unlawful Imprisonment + FASE): 17-22 + 18 months
Count III (1st Degree Assault + FASE + DWSE): 162-216 + 60 + 24 months
Count V (Unlawful Possession of a Firearm): 41-54 months

(App. A). The State recommended the high end of the standard range on each count based on the defendant's violent history.⁷ RP (6/11/04) 14. The victim's father asked the court to impose the maximum sentence possible. *Id.* at 18. The defense asked for the low end of the standard range. RP (6/11/04) 23. After listening to the recommendations, the court imposed a *high-end* sentence. RP (6/11/04) 28. The court made the following statement when imposing sentence:

. . . I believe [the sentence is] justified by the conduct that was involved here and your record. Whatever resulted in your getting an Assault 2 conviction and a previous Assault 3 conviction involving this person, it's clear that you have a record that involves violent behavior and disrespect of people, perhaps people that you care for. It's resulted in serious, very serious, acts of violence and in this case the use of a heavy knife to inflict very serious harm on this victim.

RP (6/11/04) 28-29. Clearly, the court did not believe that the victim was responsible for any part of the incident. Moreover, if the court refused to impose a sentence at the low end of the standard range, it most certainly would not have imposed a sentence *below* the standard range.

As petitioner does not meet his burden of establishing prejudice, his ineffective assistance of counsel claim fails.

⁷ Petitioner has a prior second degree assault where he shot somebody two to three times in the back, in addition to a prior assault against the victim in this case. *Id.* at 14-15.

1
2 e. Petitioner has not established that counsel was
3 ineffective for failing to make a motion to dismiss
4 the charge of unlawful possession of a firearm at
5 the conclusion of the State's case.

6 Petitioner claims that counsel was ineffective for failing to make a motion to
7 dismiss the charge of unlawful possession of a firearm charge because the State failed to
8 present any evidence that petitioner had been previously convicted of a serious offense.
9 Petitioner's claim is wholly without merit. *Prior to* resting its case, the State presented a
10 stipulation that petitioner signed acknowledging that he had a prior conviction for a
11 serious offense. (Exhibit 34, Appendix E); RP 421. Because the State presented evidence
12 that petitioner had previously been convicted of a serious offense, counsel was not
13 ineffective for failing to make a motion to dismiss based on lack of evidence.

14 f. Petitioner has not established that counsel was
15 ineffective for failing to investigate the size the
16 knife.

17 Petitioner's final claim is that counsel was ineffective for failing to investigate the
18 size of the knife. Specifically, petitioner claims:

19 Had trial counsel made Mr. Davis aware of the significance of the length
20 of the blade of the knife used, Mr. Davis would have relinquished the
21 knife to counsel so it could be admitted into evidence and proved that the
22 knife was not a deadly weapon according to the statute. The blade of the
23 knife was under 3 inches.

24 Brief of Petitioner, at 19. Petitioner's post-conviction claim that the knife blade was
25 shorter than three inches is wholly without merit. Petitioner testified *under oath* at trial
that the blade of the knife was about four inches in length. RP 521. McCorrister described
the knife as having a blade of about six inches. RP 45. Dr. Steven Pace, who treated

1 McCorrister, testified that her stab wound was consistent with a 6-7 inch blade. RP 231.
2 Petitioner's post-conviction claim that the blade is not three inches or longer is unreliable
3 and not supported by any independent evidence. "Bare assertions and conclusory
4 allegations are not sufficient to command judicial consideration and discussion in a
5 personal restraint proceeding." In re Personal Restraint of Webster, 74 Wn. App. 832, 833,
6 875 P.2d 1244 (1994). Defendant's unsupported allegations are insufficient to warrant a
7 fact-finding hearing on this issue.

8
9 Petitioner's claim that he didn't know the significance of the blade is also without
10 merit. Petitioner was present throughout trial and was on notice that the length of the blade
11 was a significant issue in the case. Petitioner had ample opportunity to bring the knife
12 forward, but he did not. Any deficiency in performance was not the fault of counsel, but of
13 the petitioner.

14 Additionally, counsel's decision not to ask about the length of the blade, if true,
15 could have been a strategical decision. Whether the blade is short or long is a question that
16 a competent defense attorney may not want answered, especially when the State can't
17 produce the knife. It would be better in that case to argue that there is a reasonable doubt
18 as to the length of the blade.

19 Finally, even if the blade was under three inches, the jury could still find that the
20 knife was a deadly weapon.⁸ A knife with a blade 3 inches long or *less* is capable of

23 ⁸ The court instructed the jury, in pertinent part:

24 A deadly weapon is an implement or instrument, which has the capacity to inflict death
25 and from the manner in which it is used, is likely to produce or may easily and readily
produce death. The following instruments are examples of deadly weapons: ... any knife
having a blade longer than three inches ...

(App. C, Inst. No. 44)

1 inflicting death, and if used strategically is likely to produce death, so whether it is a deadly
2 weapon under the sentencing enhancement statute depends on the circumstances of its use
3 and is a question of fact for the jury. State v. Thompson, 88 Wn.2d 546, 548-49, 564 P.2d
4 323 (1977). The State must prove it was used in a way that was likely to produce death or
5 that it could have readily produced death. RCW 9.94A.602; State v. Zumwalt, 79 Wn.
6 App. 124, 130, 901 P.2d 319 (1995). The defendant's intent and ability, the amount of
7 force used, the part of the body the knife was applied to, and the injuries inflicted are
8 relevant to the determination. Zumwalt, 79 Wn. App. at 130. But the extent of a victim's
9 injuries is not determinative. State v. Cobb, 22 Wn. App. 221, 223, 589 P.2d 297 (1978).
10 The defendant, however, must have manifested a willingness to use the knife. State v.
11 Gotcher, 52 Wn. App. 350, 354, 759 P.2d 1216 (1988). Here, the petitioner stabbed
12 McCorrister in the upper arm. (Exhibit 13, Appendix F); RP 48. As petitioner described it,
13 he "swung at the [pepper spray] can" and then "felt something go in, I felt something come
14 out, and I knew I was in deep, deep, deep trouble." RP 447. Almost a year after the
15 incident, McCorrister still had limited feeling in her hand and was unable to hold a pen
16 correctly. RP 57-58. Dr. Pace testified that the nerve damage in the hand indicated that the
17 weapon was longer and the wound deeper than what is depicted in the pictures. RP 252.
18 This evidence would have been sufficient to find that the knife was a deadly weapon *even*
19 *if* the blade was shorter than three inches.
20
21

22 Petitioner had not shown that counsel's performance was deficient. Nor has
23 petitioner shown that he was prejudiced by counsel's performance. It is petitioner's burden
24 to prove ineffective assistance of counsel. Petitioner has failed to do so and his ineffective
25 claim fails.

1
2 2. PETITIONER FAILS TO ESTABLISH THAT THE
3 TRIAL COURT ERRED IN ITS DETERMINATION
4 THAT PETITIONER'S CURRENT OFFENSES DID NOT
5 CONSTITUTE THE SAME CRIMINAL CONDUCT.

6 If concurrent offenses encompass the same criminal conduct, they are treated as one
7 crime for purposes of calculating the offender's sentence. RCW 9.94A.589; State v. Vike,
8 125 Wn.2d 407, 410, 885 P.2d 824 (1994). RCW 9.94A.589 is the statute governing
9 "same criminal conduct" analysis. The statute provides:

10 ...[W]henever a person is to be sentenced for two or more
11 current offenses, the sentence range for each current offense
12 shall be determined by using all other current and prior
13 convictions as if they were prior convictions for the purpose
14 of the offender score: PROVIDED, **That if the court
15 enters a finding that some or all of the current offenses
16 encompass the same criminal conduct then those
17 current offenses shall be counted as one crime.**

18 Sentences imposed under this subsection shall be served
19 concurrently. Consecutive sentences may only be imposed
20 under the exceptional sentence provisions of RCW
21 9.94A.535. **"Same criminal conduct," as used in this
22 subsection, means two or more crimes that require the
23 same criminal intent, are committed at the same time
24 and place, and involve the same victim ...**

25 RCW 9.94A.589(1)(a)(emphasis added). Therefore, crimes will be considered "same
criminal conduct" if they (1) have the same criminal intent, (2) are committed at the same
time and place, and (3) involve the same victim. State v. Williams, 85 Wn. App. 508, 511,
933 P.2d 1072 (1997). If any one element is missing, multiple offenses cannot be said to
encompass the same criminal conduct, and they must be counted separately in calculating
the offender score. State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992)(citing State
v. Dunaway, 109 Wn.2d 207, 743 P.2d 1237 (1987)). The statute is narrowly construed to
disallow most claims of same criminal conduct. State v. Palmer, 95 Wn. App. 187, 190-

1 91, 975 P.2d 1038 (1999). The trial court's determination whether current offenses
2 encompass the same criminal conduct will not be reversed absent clear abuse of discretion
3 or misapplication of the law. Id.; State v. Stearns, 61 Wn. App. 224, 233, 810 P.2d 41,
4 review denied, 117 Wn.2d 1012 (1991).

5 Petitioner claims that the trial court erred in its determination that the petitioner's
6 convictions for first degree assault, unlawful imprisonment and unlawful possession of a
7 firearm were not the same criminal conduct. But because the crimes involved different
8 criminal intents, the court's conclusion was proper.

9
10 The Washington Supreme Court has held that in construing the same criminal intent
11 prong, the standard is the extent to which the criminal intent, objectively viewed, changed
12 from one crime to the next. State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994).
13 Intent must be assessed objectively, not subjectively. State v. Lewis, 115 Wn.2d 294, 301-
14 02, 797 P.2d 1141 (1990); State v. Burns, 114 Wn.2d 314, 319, 788 P.2d 531 (1990); State
15 v. Collicot, 112 Wn.2d 399, 405, 771 P.2d 1137 (1989). This involves a two-step process.
16 State v. Rodriguez, 61 Wn. App. 812, 816, 812 P.2d 868, review denied, 118 Wn.2d 1006
17 (1991). The court must first objectively view each underlying statute and determine
18 whether the required intents are the same or different for each count. Id. (citations
19 omitted). If the intents are different, then the offenses count as separate crimes. Id. If they
20 are the same, then the next step is to objectively view the facts to determine whether a
21 defendant's intent was the same or different with respect to each count. Id. When dealing
22 with sequentially-committed crimes, this inquiry can be assisted in part by determining
23 whether one crime furthered the other. Vike, 125 Wn.2d at 411-12. However, the court
24 has repeatedly emphasized that the furtherance test in and of itself is not the lynchpin of
25

1 the same criminal conduct analysis. State v. Haddock, 141 Wn.2d 103, 114, 3 P.2d 733
2 (2000)(citing State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987)).

3 Furthermore, while the furtherance test may be helpful in analyzing fact patterns involving
4 sequentially-committed crimes, its application to crimes occurring literally at the same
5 time is limited. Vike, 125 Wn.2d at 412.

6 In this case, the intents for each of the three crimes are completely different. The
7 crime of unlawful imprisonment involves knowingly restraining another person. Assault in
8 the first degree requires an intent to inflict great bodily harm. Unlawful possession of a
9 firearm requires knowingly owning or possessing a firearm. Since all of these crimes
10 involve different intents, they are not the same criminal conduct and were properly counted
11 separately for offender scoring purposes.

12
13 Petitioner has not shown that the trial court abused its discretion or misapplied the
14 law when it determined that his offenses constituted separate criminal conduct.

15
16 3. PETITIONER FAILS TO ESTABLISH THAT THE
17 TRIAL COURT IMPOSED A SENTENCE IN EXCESS
18 OF THE STATUTORY MAXIMUM; THUS, THERE IS
19 NO BLAKELY VIOLATION.

20 The jury found by special verdict that petitioner was armed with a firearm and
21 deadly weapon at the time of the commission of the first degree assault. (Special Verdict
22 Forms, Appendix G). As a result, the sentencing court imposed an 84-month sentencing
23 enhancement.⁹ Pursuant to statute, the court ordered the enhancement to run consecutive
24 to petitioner's high-end standard range sentence. Petitioner now claims that the
25 enhancement violates Blakely because the sentencing enhancement exceeds the top of the

1 standard range. Brief of Petitioner, at 27. Petitioner relies on language in Blakely that the
2 statutory maximum *is* the standard range. See Brief of Petitioner, at 27 n.3. But petitioner
3 reads Blakely too literally. In Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348,
4 147 L.Ed.2d 435 (2000), the Supreme Court held that “[o]ther than the fact of a prior
5 conviction, any fact that increases the penalty for a crime beyond the prescribed statutory
6 maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Apprendi,
7 530 U.S. at 490. Blakely clarified that the statutory maximum “for Apprendi purposes is
8 the maximum sentence a judge may impose *solely on the basis of the facts reflected in the*
9 *jury verdict or admitted by the defendant.*” Blakely, 542 U.S. at 303. The sentencing
10 judge in this case adhered to these principles; the sentence enhancement was controlled by
11 the facts found by the jury.¹⁰ The petitioner’s sentence does not violate Blakely and the
12 enhancements did not create a sentence that exceeded petitioner’s statutory maximum.

14
15 4. PETITIONER FAILS TO ESTABLISH THAT HE WAS
16 PROVIDED INEFFECTIVE ASSISTANCE OF
17 COUNSEL ON APPEAL.

18 Petitioner claims that appellate counsel was ineffective for failing to challenge the
19 sufficiency of the evidence for unlawful imprisonment and first degree assault.

20 Petitioner’s claim fails because he cannot show that the issue had merit.

21 In general, a defendant challenging his conviction on the basis of ineffective
22 assistance of counsel must show prejudice resulting from counsel's allegedly deficient

23 ⁹ The court imposed 60 months for the firearm enhancement and 24 months for the deadly
24 weapon enhancement.

25 ¹⁰ In fact, the sentencing judge exercised extreme caution when dealing with the jury’s
special verdicts. Because of a scrivener’s error in the special verdict form for Count I
(unlawful imprisonment), the judge refused to impose a sentence enhancement on that
count even though the jury answered the special verdict in the affirmative. RP (6/11/04)
27-28.

1 conduct. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2068, 80 L.Ed.2d 674
2 (1984)(ineffective assistance of trial counsel); State v. Jeffries, 105 Wn.2d 398, 417-18,
3 717 P.2d 722 (1986). With respect to ineffective assistance of *appellate* counsel, a
4 petitioner must first show that the legal issue that appellate counsel failed to raise had
5 merit. In re PRP of Maxfield, 133 Wn.2d 332, 344, 945 P.2d 196 (1997). Second, the
6 petitioner must show that he or she was actually prejudiced by appellate counsel's failure
7 to raise the issue. Id. Courts normally require a petitioner to establish prejudice by
8 showing that there is a reasonable probability of reversal or modification of the judgment
9 on the issues, which the petitioner claims appellate counsel should have raised. In re PRP
10 of Frampton, 45 Wn. App. 554, 559, 726 P.2d 486 (1986); see, e.g., In re Spears, 204
11 Cal.Rptr. 333, 337-38, 157 Cal.App.3d 1203 (1984); Downs v. Wainwright, 476 So.2d 654
12 (Fla. 1985).

13 Petitioner cannot make the requisite showing on the record currently before this
14 court. As stated above, petitioner claims that appellate counsel should have argued
15 insufficient evidence for unlawful imprisonment and first degree assault. Specifically,
16 petitioner claims that there was insufficient evidence that (1) he restrained the victim
17 (unlawful imprisonment), (2) he intended to inflict great bodily harm (first degree assault);
18 and (3) he was armed with a firearm (firearm sentencing enhancement). Petitioner made
19 these same arguments to the jury and the jury rejected them. The jury's findings are
20 supported by sufficient evidence.

21 Evidence is sufficient to support a conviction if, viewed in the light most favorable
22 to the State, it permits any rational trier of fact to find the essential elements of the crime
23 beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).
24 "A claim of insufficiency admits the truth of the State's evidence and all inferences that
25 reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201. Circumstantial evidence

1 and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d
2 99 (1980).

3 **First Degree Assault**

4 To convict the petitioner of first degree assault, the State was required to prove the
5 following elements beyond a reasonable doubt:

6 (1) That on or about 28th day of September, 2003, the defendant assaulted Lana
7 McCorrister;

8 (2) That the assault was committed with a deadly weapon or by a force or means
9 likely to produce great bodily harm or death;

(3) That the defendant acted with intent to inflict great bodily harm; and

(4) That the acts occurred in the State of Washington.

10 (App. C, Inst. No. 22). The trial court defined “great bodily harm” in Instruction 20:

11 Great bodily harm means bodily injury that creates a probability of death,
12 or which causes significant serious permanent disfigurement, or that
13 causes a significant permanent loss or impairment of the function of any
14 bodily part or organ.

(App. C, Inst. No. 20).

15 Determining whether the force petitioner used was likely to cause great bodily harm
16 is a jury question. State v. Pierre, 108 Wn. App. 378, 384-85, 31 P.3d 1207 (2001)(kicking
17 alone can constitute force or means likely to produce death or great bodily injury). In
18 Pierre, Division One held that a jury “may consider the manner in which the defendant
19 exerted the force and the nature of the victim’s injuries to the extent that it reflects the
20 amount or degree of force necessary to cause the injury.” Pierre, 108 Wn. App. at 385.

21 Here, petitioner stabbed McCorrister in the upper arm. (App. G); RP 48. As
22 petitioner described it, he “swung at the [pepper spray] can” and then “felt something go
23 in, I felt something come out, and I knew I was in deep, deep, deep trouble.” RP 447.

24 Almost a year after the incident, McCorrister still had limited feeling in her hand and was
25

1 unable to hold a pen correctly. RP 57-58. Dr. Pace testified that the nerve damage in the
2 hand indicated that the weapon was longer and the wound deeper than what is depicted in
3 the pictures. RP 252. The injury clearly caused “significant permanent loss or
4 impairment” of McCorrister’s hand.

5 Petitioner claims that the evidence was insufficient to show that he intended to
6 cause her harm. But the jury was entitled to believe McCorrister’s testimony that the
7 petitioner put a gun to her head, forced her into the truck, threatened to stab her if she
8 exited the truck and then stabbed her in the arm when she confronted him with pepper
9 spray. "Credibility determinations are for the trier of fact and cannot be reviewed upon
10 appeal." State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)(citing State v.
11 Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).
12 McCorrister’s testimony provided sufficient evidence of petitioner’s intent to inflict great
13 bodily harm.

14
15 **Firearm Enhancement**

16 In order to prove a firearm or weapon enhancement, the State must prove that the
17 defendant was “armed” during the commission of the crime. RCW 9.94A.533(3). Being
18 armed is not confined to those defendants with a deadly weapon actually in hand or on
19 their person. State v. Gurske, 155 Wn.2d 134, 139, 118 P.3d 333 (2005). Rather, a person
20 is “armed” for purposes of the enhancement statute if a weapon is easily accessible and
21 readily available for use, either for offensive or defensive purposes. State v. Valdobinos,
22 122 Wn.2d 270, 282, 858 P.2d 199 (1993). The “easily accessible and readily available”
23 requirement means that where the weapon is not actually used in the commission of the
24 crime, it must be there “to be used” and it “must be easy to get to for use against another
25

1 person.” Gurske, 155 Wn.2d at 138. The use may be to facilitate the commission of the
2 crime, escape from the scene of the crime, protect contraband or the like, or prevent
3 investigation, discovery, or apprehension by the police. Gurske, 155 Wn.2d at 139; See
4 State v. Schelin, 147 Wn.2d 562, 572-73, 55 P.3d 632 (2002)(plurality).

5 When determining the sufficiency of the evidence in a case where the defendant
6 does not actually possess the weapon during the commission of the crime, the State must
7 prove that there is a nexus between the weapon and the defendant and between the weapon
8 and the crime. State v. Schelin, 147 Wn.2d 562, 567-68, 55 P.3d 632 (2002). In order to
9 establish this nexus, courts have examined the nature of the crime, the type of weapon and
10 the circumstances under which the weapon is found (e.g., whether in the open, in a locked
11 or unlocked container, in a closet on a shelf, or in a drawer). Gurske, 155 Wn.2d at 142
12 (citing Schelin, 147 Wn.2d at 570). Jury instructions need not, however, expressly contain
13 “nexus” language. Id. (citing State v. Willis, 153 Wn.2d 366, 103 P.3d 1213 (2005)).

14 McCorrister’s testimony provided sufficient evidence to prove that defendant was
15 armed within the meaning set forth above. McCorrister testified that the petitioner put a
16 gun to her head, forced her into the truck and then put the gun under the dashboard while
17 they drove. Petitioner also had a knife that he threatened McCorrister with when she
18 attempted to get out of the truck. The jury was entitled to believe, based on this evidence,
19 that the gun was: placed in the truck in order to facilitate the crime; easily accessible and
20 readily available for the petitioner’s use; and that there was a nexus between the gun, the
21 crime and petitioner. The evidence was therefore sufficient to establish that the petitioner
22 was “armed” with a firearm at the time of the assault.
23
24
25

1 **Unlawful Imprisonment**

2 To convict petitioner of unlawful imprisonment, the State was required to prove the
3 following elements beyond a reasonable doubt:

- 4 (1) That on or about the 28th day of September, 2003, the defendant
5 knowingly restrained Lana McCorrister;
6 (2) That such restraint was accomplished by physical force, intimidation
7 or deception;
8 (3) That such restraint was without legal authority; and
9 (4) That the acts occurred in the State of Washington.

10 (App. C, Inst. No. 17). The trial court defined “restraint” in Jury Instruction No. 11:

11 Restraint or restrain means to restrict another person’s movements without
12 consent and without legal authority in a manner, which interferes
13 substantially with that person’s liberty. Restraint is without consent if it is
14 accomplished by physical force, intimidation or deception.

15 (App. C, Inst. No. 11).

16 Here, McCorrister’s testimony, if believed, provided sufficient evidence to prove
17 all elements of unlawful imprisonment. McCorrister testified that the petitioner put a gun
18 to her head, forced her into the truck and then threatened her with a knife when she
19 attempted to exit the vehicle at an intersection. McCorrister’s testimony is sufficient to
20 support the jury's verdict.

21 Viewing the evidence in the light most favorable to the State, any rational trier of
22 fact could have found the elements of first degree assault (firearm enhanced) and unlawful
23 imprisonment. Petitioner thus fails to show that a sufficiency of evidence claim had merit.
24 Having failed to make this requisite showing, petitioner cannot show that appellate counsel
25 was ineffective for not asserting these claims.

1 5. PETITIONER FAILS TO ESTABLISH THAT HE IS
2 ENTITLED TO RELIEF UNDER THE CUMULATIVE
3 ERROR DOCTRINE.

4 The cumulative error doctrine applies when several errors occurred at the trial court
5 level, none of which alone warrants reversal, but the combined errors effectively denied
6 the defendant a fair trial. State v. Hodges, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003).
7 Even so, “[a]bsent prejudicial error, there can be no cumulative error that deprived the
8 defendant of a fair trial.” State v. Saunders, 120 Wn. App. 800, 826, 86 P.3d 232 (2004).
9 The defendant bears the burden of proving an accumulation of error of sufficient
10 magnitude that retrial is necessary. In re Pers. Restraint of Lord, 123 Wn.2d 296, 332, 868
11 P.2d 835, clarified, 123 Wn.2d 737, 870 P.2d 964, cert. denied, 513 U.S. 849 (1994).

12 Here, petitioner has demonstrated no prejudicial errors, individual or cumulative.
13 Therefore, his claim of cumulative error also fails.

14
15 D. CONCLUSION:

16 For the foregoing reasons, the State respectfully requests this court dismiss this
17 petition.

18 DATED: April 12, 2007.

19 GERALD A. HORNE
20 Pierce County
21 Prosecuting Attorney

22 *Alicia Burton by K. Proctor #14861*
23 ALICIA BURTON
24 Deputy Prosecuting Attorney
25 WSB #29285

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail to petitioner true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

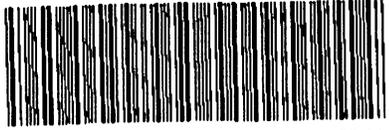
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Date Signature

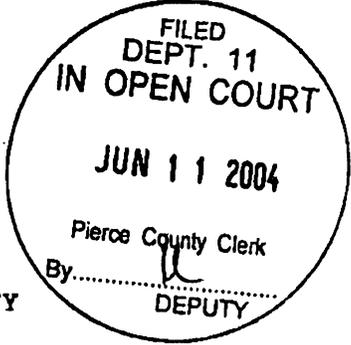
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DIVISION II
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STATE OF WASHINGTON
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APPENDIX “A”

Judgment and Sentence



03-1-04572-3 21158628 JDSWCD 06-14-04



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO: 03-1-04572-3

vs

AARON MICHAEL DAVIS,

WARRANT OF COMMITMENT

JUN 14 2004

- 1) County Jail
- 2) Dept. of Corrections
- 3) Other Custody

Defendant.

THE STATE OF WASHINGTON TO THE DIRECTOR OF ADULT DETENTION OF PIERCE COUNTY:

WHEREAS, Judgment has been pronounced against the defendant in the Superior Court of the State of Washington for the County of Pierce, that the defendant be punished as specified in the Judgment and Sentence/Order Modifying/Revoking Probation/Community Supervision, a full and correct copy of which is attached hereto.

[] 1. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Pierce County Jail).

[X] 2. YOU, THE DIRECTOR, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections, and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Department of Corrections custody).

03-1-04572-3

[] 3. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement or placement not covered by Sections 1 and 2 above).

Dated: 6/11/04

By direction of the Honorable

John A. McCarthy
JUDGE
JOHN A. MCCARTHY
KEVIN STOCK
CLERK
By: *Chris Hutton*
DEPUTY CLERK

CERTIFIED COPY DELIVERED TO SHERIFF

~~JUN 14 2004~~ *Chris Hutton*

FILED
DEPT. 11
IN OPEN COURT
JUN 11 2004
Pierce County Clerk
By: *[Signature]*
DEPUTY

STATE OF WASHINGTON

ss:

County of Pierce

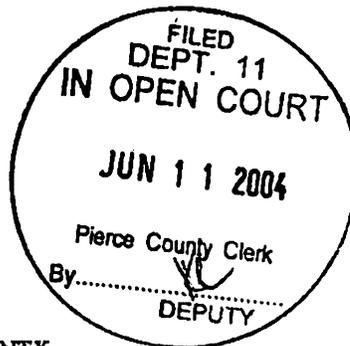
I, Kevin Stock, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.

IN WITNESS WHEREOF, I hereunto set my hand and the Seal of Said Court this _____ day of _____, _____.

KEVIN STOCK, Clerk

By: _____ Deputy

lw



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 03-1-04572-3

vs.

JUDGMENT AND SENTENCE (JS)

AARON MICHAEL DAVIS

Defendant.

- Prison
- Jail One Year or Less
- First-Time Offender
- SSOSA
- DOSA
- Breaking The Cycle (BTC)

JUN 14 2004

SID: WA19538592
DOB: 2/03/75

I. HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 5/13, 2004 by plea jury-verdict bench trial of:

COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO.
I	UNLAWFUL IMPRISONMENT-DV FASE (Charge Code: DDD1)	9A.40.040 9.41.010 9.94A.310/9.94A.510 9.94A.370/9.94A.530 10.99.020	*F	9/28/03	PCSD 03-271-1157
III	ASSAULT IN THE FIRST DEGREE-DV FASE/DWSE (Charge Code: E23)	9A.36.011(1)(a) 9.94A.125/9.94A.602 9.94A.310/9.94A.510 9.94A.370/9.94A.530 10.99.020 9.41.010 9.94A.310/9.94A.510 9.94A.370/9.94A.530	*F *D	9/28/03	PCSD 03-271-1157

04-9-02063-4

03-1-04572-3

COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO.
V	UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE (Charge Code: GGG66)	9.41.040(1)(a)	N/A	10/02/03	PCSD 03-271-1157

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Horn, See RCW 46.61.520, (JP) Juvenile present.

as found guilty by jury.

- A special verdict/finding for use of firearm was returned on Count(s) I and III RCW 9.94A.602, .510.
 A special verdict/finding for use of deadly weapon other than a firearm was returned on Count(s) III. RCW 9.94A.602, .510.
 The crime charged in Count(s) I and III involve(s) domestic violence.
 Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):
 Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J ADULT JUV	TYPE OF CRIME
1	ASSAULT 2	6/05/01	Pierce Cty/WA	10/02/00	Adult	NV
2	PSP 3	12/04/02	Pierce Cty/WA	12/04/02	Adult	NV
3	ASSAULT 3	1/16/03	Pierce Cty/WA	5/15/02	Adult	NV
4	BAIL JUMPING		Pierce Cty/WA	5/15/02	Adult	NV
5	MM 3/DV		Pierce Cty Dist/WA	2/01/97	Adult	Misd
6	CCW		Pierce Cty Dist/WA	4/21/99	Adult	Misd
7	HARASS/DWLS		Pierce Cty/WA	5/09/01	Adult	Misd
8	FAIL TRANS TITLE		Pierce Cty Dist/WA	11/24/01	Adult	Misd
9	DWLS 3		Pierce Cty Dist/WA	3/08/02	Adult	Misd
10	ATT TAMP WITNESS	1/16/03	Pierce Cty/WA	5/17/02	Adult	Misd
11	DWLS		Pierce Cty Dist/WA	7/10/02	Adult	Misd
12	DWLS		Pierce Cty Dist/WA	10/02/02	Adult	Misd
	OTHER CURRENT 03-1-05357-2					

- The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

03-1-04572-3

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	5	III	22-29 mos 17-22	F-18 mos	40-47 mos 35-40	5yrs/ \$10,000
III	6	XII	178-236 mos 162-216	F- 60 mos D-24 mos	262-320 mos 246-300	LIFE/ \$50,000
V	5	VII	57-75 mos 41-54	None	57-75 mos 41-54	10yrs/ \$20,000

2.4 EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence above below the standard range for Count(s) _____. Findings of fact and conclusions of law are attached in Appendix 2.4. The Prosecuting Attorney did did not recommend a similar sentence.

2.5 LEGAL FINANCIAL OBLIGATIONS. The judgment shall upon entry be collectable by civil means, subject to applicable exemptions set forth in Title 6, RCW. Chapter 379, Section 22, Laws of 2003.

The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

The following extraordinary circumstances exist that make payment of nonmandatory legal financial obligations inappropriate:

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are attached as follows:

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1.

3.2 The court DISMISSES Counts _____ The defendant is found NOT GUILTY of Counts _____

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court: (Pierce County Clerk, 930 Tacoma Ave #110, Tacoma WA 98402)

JASS CODE

RTN/RVN \$ _____ Restitution to: _____

\$ _____ Restitution to: _____

(Name and Address--address may be withheld and provided confidentially to Clerk's Office).

PCV \$ 500.00 Crime Victim assessment

03-1-04572-3

1
2
3 DNA \$ 100.00 DNA Database Fee
4 PUB \$ _____ Court-Appointed Attorney Fees and Defense Costs
5 FRC \$ 110.⁰⁰ Criminal Filing Fee
6 FCM \$ _____ Fine

OTHER LEGAL FINANCIAL OBLIGATIONS (specify below)

\$ _____ Other Costs for: _____

\$ _____ Other Costs for: _____

\$ 710.⁰⁰ TOTAL

[X] All payments shall be made in accordance with the policies of the clerk, commencing immediately, unless the court specifically sets forth the rate herein: Not less than \$ _____ per month commencing _____ RCW 9.94.760. If the court does not set the rate herein, the defendant shall report to the clerk's office within 24 hours of the entry of the judgment and sentence to set up a payment plan.

4.2 RESTITUTION

[X] The above total does not include all restitution which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

[] shall be set by the prosecutor.

[X] is scheduled for 8-11-04

[] defendant waives any right to be present at any restitution hearing (defendant's initials): _____

[] RESTITUTION. Order Attached

[] Restitution ordered above shall be paid jointly and severally with:

NAME of other defendant	CAUSE NUMBER	(Victim name)	(Amount-\$)
RJN			

4.3 COSTS OF INCARCERATION

[] In addition to other costs imposed herein, the court finds that the defendant has or is likely to have the means to pay the costs of incarceration, and the defendant is ordered to pay such costs at the statutory rate. RCW 10.01.160.

4.4 COLLECTION COSTS

The defendant shall pay the costs of services to collect unpaid legal financial obligations per contract or statute. RCW 36.18.190, 9.94A.780 and 19.16.500.

4.5 INTEREST

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090

03-1-04572-3

4.6 COSTS ON APPEAL

An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.

4.7 [] HIV TESTING

The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

4.8 [X] DNA TESTING

The defendant shall have a blood/biological sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

4.9 NO CONTACT

The defendant shall not have contact with Lana McConister (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for 6/16/6 years (not to exceed the maximum statutory sentence).

[] Domestic Violence Protection Order or Antiharassment Order is filed with this Judgment and Sentence.

4.10 OTHER:

Empty rectangular box for additional information.

4.11 BOND IS HEREBY EXONERATED

4.12 CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:

(a) CONFINEMENT. RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

22 months on Count I _____ months on Count _____

216 months on Count III _____ months on Count _____

54 months on Count V _____ months on Count _____

A special finding/verdict having been entered as indicated in Section 2.1, the defendant is sentenced to the following additional term of total confinement in the custody of the Department of Corrections:

60 months on Count No III _____ months on Count No _____

24 months on Count No III _____ months on Count No _____

_____ months on Count No _____ months on Count No _____

03-1-04572-3

Sentence enhancements in Counts _ shall run
 concurrent consecutive to each other.
 Sentence enhancements in Counts _ shall be served
 flat time subject to earned good time credit

Actual number of months of total confinement ordered is: 300 months

(Add mandatory firearm and deadly weapons enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

CONSECUTIVE/CONCURRENT SENTENCES. RCW 9.94A.589. All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____

The sentence herein shall run consecutively to all felony sentences in other cause numbers prior to the commission of the crime(s) being sentenced. _____

Confinement shall commence immediately unless otherwise set forth here: _____

(b) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: 253 days

4.13 COMMUNITY PLACEMENT (pre 7/1/00 offenses) is ordered as follows:

Count _____ for _____ months,

Count _____ for _____ months,

Count _____ for _____ months,

COMMUNITY CUSTODY is ordered as follows:

Count III for a range from: 24 to 48 Months,

Count _____ for a range from: _____ to _____ Months,

Count _____ for a range from: _____ to _____ Months,

or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A for community placemet offenses -- serious violent offense, second degree assault, any crime against a person with a deadly weapon finding, Chapter 69.50 or 69.52 RCW offense. Community custody follows a term for a sex offense -- RCW 9.94A. Use paragraph 4.7 to impose community custody following work ethic camp.]

03-1-04572-3

While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community service; (3) not consume controlled substances except pursuant to lawfully issued prescriptions; (4) not unlawfully possess controlled substances while in community custody; (5) pay supervision fees as determined by DOC; and (6) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

- The defendant shall not consume any alcohol.
- Defendant shall have no contact with: _____
- Defendant shall remain within outside of a specified geographical boundary, to wit: _____
- The defendant shall participate in the following crime-related treatment or counseling services: _____
- The defendant shall undergo an evaluation for treatment for domestic violence substance abuse
- mental health anger management and fully comply with all recommended treatment.
- The defendant shall comply with the following crime-related prohibitions: _____

Per
CCO

Other conditions may be imposed by the court or DOC during community custody, or are set forth here: _____

4.14 **WORK ETHIC CAMP.** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.15 **OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections: _____

V. NOTICES AND SIGNATURES

5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to

03-1-04572-3

10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505.

5.3 NOTICE OF INCOME-WITHHOLDING ACTION. If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.7602.

5.4 CRIMINAL ENFORCEMENT AND CIVIL COLLECTION. Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. Per section 2.5 of this document, legal financial obligations are collectible by civil means. RCW 9.94A.634.

5.5 FIREARMS. You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.6 SEX AND KIDNAPPING OFFENDER REGISTRATION. RCW 9A.44.130, 10.01.200. N/A

5.7 OTHER: _____

DONE in Open Court and in the presence of the defendant this date: 6/11/04

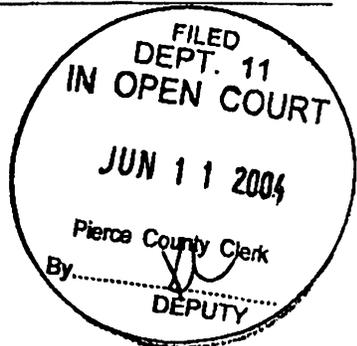
JUDGE
Print name

John A. McCarthy
JOHN A. MCGARTHY

[Signature]
Deputy Prosecuting Attorney
Print name: Sven Nelson
WSB # 24275

[Signature]
Attorney for Defendant
Print name: Thomas D. ...
WSB # 6790

[Signature]
Defendant
Print name: Aaron Davis



03-1-04572-3

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CERTIFICATE OF CLERK

CAUSE NUMBER of this case: 03-1-04572-3

I, KEVIN STOCK Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: _____

Clerk of said County and State, by: _____, Deputy Clerk

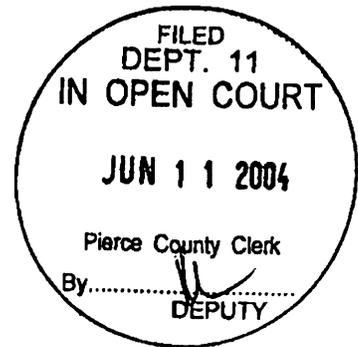
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03-1-04572-3



IDENTIFICATION OF DEFENDANT

SID No. WA19538592 Date of Birth 2/03/75
(If no SID take fingerprint card for State Patrol)

FBI No. 696471KB0 Local ID No. UNK

PCN No. 537939761 Other

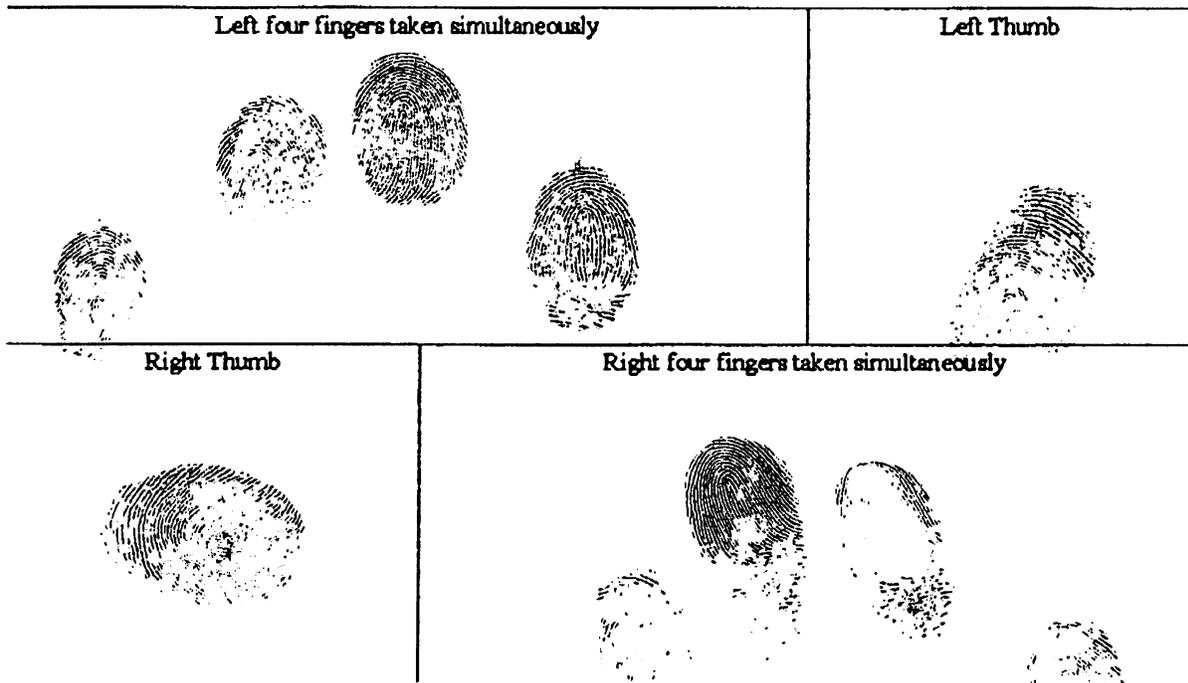
Alias name, SSN, DOB: _____

Race: Asian/Pacific Islander Black/African-American Caucasian Native American Other : _____

Ethnicity: Hispanic Non-Hispanic

Sex: Male Female

FINGERPRINTS



I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto. Clerk of the Court, Deputy Clerk [Signature] Dated: 6/11/04

DEFENDANT'S SIGNATURE: [Signature]

DEFENDANT'S ADDRESS: _____

APPENDIX “B”

Unpublished Opinion, State v. Davis, COA No. 31910-1

FILED
COURT OF APPEALS
DIVISION II

05 OCT 18 AM 8:40

STATE OF WASHINGTON

BY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

No. 31910-1-II

Respondent,

v.

AARON MICHAEL DAVIS,

UNPUBLISHED OPINION

Appellant.

QUINN-BRINTNALL, C.J. — Aaron Davis appeals convictions for first degree assault, first degree unlawful possession of a firearm, unlawful imprisonment, and violation of a protection order. Those convictions stem from an incident in which Davis stabbed his girl friend as she attempted to escape from his moving vehicle. Through counsel, Davis maintains that the trial court erred in admitting (1) evidence of injuries sustained by the girl friend when she fell out of the vehicle; and (2) testimonial statements given to the police by a witness. Davis also raises numerous other issues in a Statement of Additional Grounds (SAG).¹ Finding no reversible error, we affirm.

FACTS

On September 28, 2003, Davis and his on-and-off girl friend, Lana McCorrister, had an argument when she refused to take him to retrieve one of his cars from her friend's house. McCorrister had a protection order against Davis at that time. According to McCorrister, Davis got angry and forced her at gunpoint to get into his truck and direct him to the friend's house.

¹ RAP 10.10.

No. 31910-1-II

McCorrister attempted to escape from the truck at some point, but Davis pulled out a hunting knife and threatened to stab her. McCorrister again decided to escape when Davis drove past her friend, Rick Lovitt, who was standing outside of his house. McCorrister told Davis that his car was at Lovitt's house. Davis stopped the truck and, as he began yelling at Lovitt, McCorrister reached into her purse to grab a bottle of pepper spray. When McCorrister attempted to use the pepper spray, Davis stabbed her in the arm with the hunting knife. Davis then started to drive away, but as he did so, McCorrister opened the door and jumped out.

After Davis had driven off, Lovitt came to McCorrister's aid. Lovitt drove her to a local fire station where law enforcement was called. Sergeant Rex McNicol responded to the call and interviewed Lovitt, who was "almost at a state of panic." 2 Report of Proceedings (RP) at 146. Lovitt had a hard time standing still, he "had blood covering him from head to toe," and he was "talking very rapidly, very dry-mouthed." 2 RP at 146. Lovitt told Sergeant McNicol that he personally knew Davis and McCorrister. Lovitt also told Sergeant McNicol that he had not taken McCorrister to a hospital because he was afraid that Davis would "intercept" them.

Davis was charged with first degree assault, first degree kidnapping, first degree unlawful possession of a firearm, and violation of a protection order.

At Davis's trial, Sergeant McNicol testified to Lovitt's statements at the fire station. The trial court ruled that although Lovitt did not testify, his statements to Sergeant McNicol were admissible as excited utterances.

McCorrister did testify. In addition to relaying the events surrounding the stabbing, McCorrister testified as to her injuries caused by the stabbing and her jump from the truck. Davis had argued that evidence of jump-related injuries was irrelevant. The trial court ruled that

No. 31910-1-II

because of the close proximity of the stabbing and jump, the jump injuries were “res gestae of the whole surrounding circumstance.” 2 RP at 69.

McCorrister testified that the stabbing had broken her arm and caused permanent nerve damage rendering three of her fingers inoperable. As to the jump, McCorrister testified that she landed on her hand, causing the skin and palm muscle to be completely torn off. McCorrister also testified that she suffered a black eye, swollen foot, lacerations, bruises, and a split scalp requiring staples. As part of McCorrister’s testimony, the State introduced photos taken at the hospital that documented her injuries from the jump.

The State also presented the testimony of McCorrister’s treating physician. The physician was asked about what would happen to someone with McCorrister’s jump-related injuries if they were not brought in for treatment. The physician testified that, depending on the injury, there might have been infections, chronic pain, or more permanent disabilities. Davis objected to this testimony on the ground that it was irrelevant.

The jury found Davis guilty of first degree assault, first degree unlawful possession of a firearm, unlawful imprisonment (a lesser included of the first degree kidnapping charge), and violation of a protection order. This appeal followed.

ANALYSIS

EVIDENCE OF MCCORRISTER’S JUMP-RELATED INJURIES

Davis assigns error to the trial court’s decision to admit McCorrister’s testimony about the injuries she sustained when she jumped from Davis’s truck; photos documenting those injuries; and the treating physician’s opinion regarding what would have happened to McCorrister if she had not received medical treatment. We review a trial court’s decision to admit evidence for an abuse of discretion. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967,

No. 31910-1-II

cert. denied, 528 U.S. 922 (1999). An abuse of discretion occurs only when no reasonable judge would have made the same decision. *State v. Bourgeois*, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997).

We may affirm the trial court's admission of evidence on any basis supported in the record. *State v. Avery*, 103 Wn. App. 527, 537, 13 P.3d 226 (2000). Davis argued below that the jump injuries were not relevant to the charged crimes.² Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. The relevance threshold is very low and even minimally relevant evidence is admissible. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

McCorrister's jump-related injuries were relevant to the first degree kidnapping charge. As charged, the jury was asked to find that Davis intentionally abducted McCorrister with intent to inflict extreme mental distress on her. *See* RCW 9A.40.020(1)(d). "Abduct" was defined as restraining a person by use or threatened use of deadly force. *See* RCW 9A.40.010(2). The seriousness of the jump-related injuries indicated how fast the truck was moving when McCorrister jumped out; which in turn indicated how far McCorrister was willing to go to escape from Davis; which in turn indicated McCorrister's unwillingness to be in the truck and how much force Davis was using to keep her there. This evidence tended to make it more probable that McCorrister had been abducted. Accordingly, McCorrister's testimony, the photos, and the treating physician's testimony concerning the extent of McCorrister's jump-

² Davis argues on appeal that this evidence also should have been excluded as unduly prejudicial under ER 403. But Davis did not raise this specific objection below and it is therefore waived. *State v. Roberts*, 73 Wn. App. 141, 145, 867 P.2d 697, *review denied*, 124 Wn.2d 1022 (1994).

No. 31910-1-II

related injuries were relevant admissible evidence and the trial court did not abuse its discretion in admitting them.³

LOVITT'S HEARSAY STATEMENTS

In *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the Court overruled its prior holdings that the Confrontation Clause permitted the admission of hearsay statements containing an adequate indicia of reliability. The Court held that the right of confrontation was satisfied by the admission of “testimonial” hearsay only if the declarant was unavailable and the defendant had a prior opportunity for cross-examination. *Crawford*, 541 U.S. at 68. The *Crawford* Court’s limited definition of “testimonial” included statements made during police interrogation and “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.” 541 U.S. at 51 (quoting 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)) (alteration in original). The Court also noted: “An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” *Crawford*, 541 U.S. at 51.

Under pre-*Crawford* precedent, Davis’s right of confrontation was not violated by the admission of Lovitt’s excited utterances to Sergeant McNicol. *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980); *State v. Woods*, 143 Wn.2d 561, 595, 23 P.3d 1046, cert. denied, 534 U.S. 964 (2001). But Davis’s trial came two months after *Crawford*. If Lovitt’s statements were testimonial in nature, they were inadmissible because Lovitt did not

³ Because we hold that the evidence was relevant and admissible to prove the crime charged, we do not address the trial court’s ruling that McCorrister’s testimony and the photos documenting her jump were “res gestae of the whole surrounding circumstance” of the stabbing. 2 RP at 69.

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testify.⁴ For purposes of this appeal, and because the State does not argue otherwise, we presume that Lovitt's statements were testimonial⁵ and therefore inadmissible. We therefore must determine whether the admission of Lovitt's statements was harmless beyond a reasonable doubt. *See State v. Davis*, 154 Wn.2d 291, 304, 111 P.3d 844 (2005).

The State contends and we agree that error, if any, was harmless because Lovitt's statements were cumulative of other testimony. Lovitt's statements to Sergeant McNicol contained two assertions: that he personally knew Davis and McCorrister, and that he had not taken McCorrister to a hospital because he was afraid that they would be intercepted by Davis. The first assertion was content neutral and both McCorrister and Davis testified that they knew Lovitt. As to the second assertion, McCorrister testified without objection that Lovitt "was taking me to the hospital, and when we pulled out, I didn't want to go in the same direction that Aaron went because I was scared. And so he went the opposite direction." 2 RP at 52. Because Lovitt's statements were cumulative of other testimony, any error in admitting those statements was harmless beyond a reasonable doubt.⁶

SAG

Davis also raises several nonmeritorious issues in a SAG. *See* RAP 10.10.

Davis cites to the trial court's refusal to grant a mistrial after two jurors supposedly overheard a conversation between McCorrister and her victim advocate. According to the victim

⁴ The State does not assert that Davis waived this issue by failing to object on *Crawford* grounds. *See generally* RAP 2.5(a).

⁵ *But see State v. Davis*, 154 Wn.2d 291, 302, 111 P.3d 844 (2005) (suggesting that a statement is not testimonial if it qualifies as an excited utterance).

⁶ Because this error, if error, was harmless and as it is the only actual error that Davis raises in this appeal, we need not address Davis's cumulative error argument. *See State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) (a defendant may be entitled to a new trial where he shows that multiple harmless errors had the cumulative effect of impugning the integrity of his trial).

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advocate, the conversation concerned how “the defendant, in the past, has had his head shaven and appeared -- looked mean. But now, with his hair grown out, looks more like a ‘choir boy.’” 4 RP at 474. But both jurors told the trial court that they did not hear what was said during the conversation. Accordingly, the trial court did not abuse its discretion in refusing to grant a mistrial. *State v. Jungers*, 125 Wn. App. 895, 901-02, 106 P.3d 827 (2005) (“A trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant receives a fair trial.”).

Davis argues that his trial counsel was ineffective for (1) not calling unnamed witnesses who would testify on Davis’s behalf; (2) not calling Lovitt to impeach his statements to Sergeant McNicol with accusations that he was manufacturing methamphetamine on the day of the stabbing; and (3) not calling Andy Jones to attack statements he had given to the police about witnessing Davis in possession of a gun after the stabbing. Decisions concerning the calling and cross-examination of witnesses are presumed to be legitimate trial tactics that will not support an ineffective assistance claim. *In re Personal Restraint of Davis*, 152 Wn.2d 647, 742, 101 P.3d 1 (2004); *In re Personal Restraint of Stenson*, 142 Wn.2d 710, 735, 16 P.3d 1 (2001). And with regard to Lovitt and Jones, it was reasonable not to call individuals who either witnessed the alleged stabbing or, as the record reflects, could have testified as to Davis’s attempts to elude police in the days after the stabbing.

Davis argues that the prosecutor committed misconduct during closing argument. But Davis’s failure to provide a transcript of closing argument precludes review of this issue. *State v. Wade*, 138 Wn.2d 460, 464-65, 979 P.2d 850 (1999).

Davis argues that McCorrister’s testimony was not credible because she had admitted to consuming methamphetamine within two days of the stabbing. “Determinations of credibility

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are for the fact finder and are not reviewable on appeal.” *State v. Hughes*, 154 Wn.2d 118, 152, 110 P.3d 192 (2005).

Davis appears to argue that he should not be found guilty of violating a protection order because prior to the stabbing, he and McCorrister were often in each other’s presence. This claim references matters outside the record and is therefore not subject to review. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

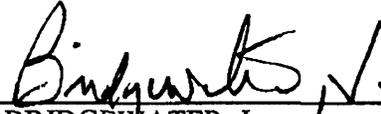
Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

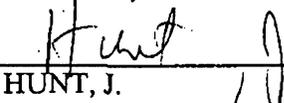


QUINN-BRINTNALL, C.J.

We concur:



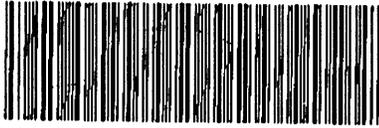
BRIDGEWATER, J.



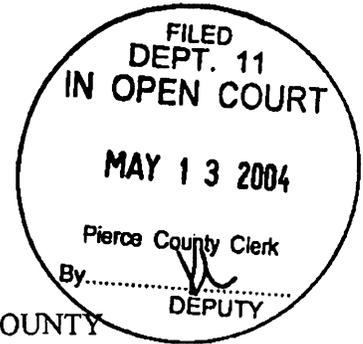
HUNT, J.

APPENDIX “C”

Court's Instructions to the Jury



03-1-04572-3 20998085 CTINJY 05-14-04



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 03-1-04572-3

vs.

AARON MICHAEL DAVIS

Defendant.

COURT'S INSTRUCTIONS TO THE JURY

DATED this 12 day of May, 2004.

John A. McCarthy
JUDGE

INSTRUCTION NO. 1

It is your duty to determine which facts have been proved in this case from the evidence produced in court. It also is your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

A charge has been made by the prosecuting attorney by filing a document, called an information, informing the defendant of the charge. You are not to consider the filing of the information or its contents as proof of the matters charged.

The only evidence you are to consider consists of the testimony of the witnesses and the exhibits admitted into evidence. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence that either was not admitted or that was stricken by the court. You will not be provided with a written copy of testimony during your deliberations. Any exhibits admitted into evidence will go to the jury room with you during your deliberations.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and of what weight is to be given the testimony of each. In considering the testimony of any witness, you may take into

account the opportunity and ability of the witness to observe, the witness' memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

The attorneys' remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court.

The attorneys have the right and the duty to make any objections that they deem appropriate. These objections should not influence you, and you should make no assumptions because of objections by the attorneys.

The law does not permit a judge to comment on the evidence in any way. A judge comments on the evidence if the judge indicates, by words or conduct, a personal opinion as to the weight or believability of the testimony of a witness or of other evidence. Although I have not intentionally done so, if it appears to you that I have made a comment during the trial or in giving these instructions, you must disregard the apparent comment entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. The fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful.

You are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdict. Throughout your deliberations you will permit neither sympathy nor prejudice to influence your verdict.

INSTRUCTION NO. 2

The defendant has entered a plea of not guilty, which puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of that defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

INSTRUCTION NO. 3

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 4

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

INSTRUCTION NO. 5

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

INSTRUCTION NO. 6

As we have explained before, evidence has been introduced in this case, on the subject of prior written statements and statements made to police officers and others. If you find such prior statements were, in fact, made, they are not be considered by you as proof of the matters recited in such statements, rather for the limited purpose of assisting you in evaluating the credibility of witnesses.

INSTRUCTION NO 7

Evidence that the defendant has previously been convicted of a crime is not evidence of the defendant's guilt. Such evidence may be considered by you in deciding what weight or credibility should be given to the testimony of the defendant and for no other purpose.

INSTRUCTION NO. 8

A person commits the crime of kidnapping in the first degree when he or she intentionally abducts another person with intent to inflict extreme mental distress on that person.

INSTRUCTION NO. 9

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result, which constitutes a crime.

INSTRUCTION NO. 10

Abduct means to restrain a person by using or threatening to use deadly force.

INSTRUCTION NO. 11

Restraint or restrain means to restrict another person's movements without consent and without legal authority in a manner, which interferes substantially with that person's liberty.

Restraint is without consent if it is accomplished by physical force, intimidation or deception.

INSTRUCTION NO. 12

To convict the defendant of the crime of kidnapping in the first degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 28th day of September, 2003, the defendant intentionally abducted another person;
- (2) That the defendant abducted that person with intent to inflict extreme mental distress on that person; and
- (3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 13

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of Kidnapping in the First Degree as charged in Count I, the defendant may be found guilty of any lesser crime, the commission of which is necessarily included in the crime charged, if the evidence is sufficient to establish the defendant's guilt of such lesser crime beyond a reasonable doubt.

The crime of Kidnapping in the First Degree necessarily includes the lesser crimes of Kidnapping in the Second Degree and Unlawful Imprisonment.

When a crime has been proven against a person and there exists a reasonable doubt as to which of two or more crimes that person is guilty, he or she shall be convicted only of the lowest crime.

INSTRUCTION NO. 14

A person commits the crime of Kidnaping in the Second Degree when under circumstances not amounting to Kidnaping the First Degree he or she intentionally abducts another person.

INSTRUCTION NO. 15

To convict the defendant of the crime of Kidnaping in the Second Degree, each of the following elements of the crime must be proved beyond a reasonable doubt.

- (1) That on or about the 28th day of September, 2003, the defendant intentionally abducted another person; and
- (2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 16

A person commits the crime of unlawful imprisonment when her or she knowingly restrains another person.

INSTRUCTION NO. 17

To convict the defendant of the crime of unlawful imprisonment, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 28th day of September, 2003, the defendant knowingly restrained Lana McCorrister;
- (2) That such restraint was accomplished by physical force, intimidation or deception;
- (3) That such restraint was without legal authority; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 18

A person commits the crime of assault in the first degree when, with intent to inflict great bodily harm, he or she assaults another with any deadly weapon or by any force or means likely to produce great bodily harm or death.

INSTRUCTION NO. 19

An assault is an intentional touching or striking or cutting of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking or cutting or shooting is offensive, if the touching or striking or cutting or shooting would offend an ordinary person who is not unduly sensitive.

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

An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

INSTRUCTION NO. 20

Great bodily harm means bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

INSTRUCTION NO. 21

Bodily injury, physical injury or bodily harm means physical pain or injury, illness or an impairment of physical condition.

INSTRUCTION NO. 22

To convict the defendant of the crime of assault in the first degree as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about 28 day of September, 2003, the defendant assaulted Lana McCorrister;
- (2) That the assault was committed with a deadly weapon or by a force or means likely to produce great bodily harm or death;
- (3) That the defendant acted with intent to inflict great bodily harm; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 23

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of Assault in the First Degree as charged in Count III, the defendant may be found guilty of any lesser crime, the commission of which is necessarily included in the crime charged, if the evidence is sufficient to establish the defendant's guilt of such lesser crime beyond a reasonable doubt.

The crime of Assault in the First Degree necessarily includes the lesser crimes of Assault in the Second Degree and Assault in the Third Degree.

When a crime has been proven against a person and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree.

INSTRUCTION NO. 24

A person commits the crime of assault in the second degree when under circumstances not amounting to assault in the first degree he or she assaults another with a deadly weapon.

INSTRUCTION NO. 25

Deadly weapon means any weapon, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily injury.

INSTRUCTION NO. 26

To convict the defendant of the crime of assault in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 28th day of September, 2003, the defendant assaulted Lana McCorrister with a deadly weapon; and

(2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 27

A person commits the crime of Assault in the Third Degree when under circumstances not amounting to assault in either the First or Second Degree he or she with criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.

INSTRUCTION NO. 28

To convict the defendant of the crime of Assault in the Third Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 28th day of September, 2003, the defendant caused bodily harm to Lana McCorrister;
- (2) That the physical injury was caused by a weapon or other instrument or thing likely to produce bodily harm;
- (3) That the defendant acted with criminal negligence; and
- (4) That the acts occurred in the State of Washington

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 29

It is a defense to a charge of assault that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 30

Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to affect the lawful purpose intended.

INSTRUCTION NO. 31

A person is entitled to act on appearances in defending himself if that person believes in good faith and on reasonable grounds that he is in actual danger of great bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

INSTRUCTION NO. 32

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self defense and thereupon use, offer or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

INSTRUCTION NO. 33

A person commits the crime of violation of a protection order when he or she, knowing of the existence of a protection order, violates the provisions of the order that exclude that person from a residence, workplace, school, or day care or restrain that person from committing acts of domestic violence or having contact with another person.

INSTRUCTION NO. 34

To convict the defendant of the crime of violation of a protection order as charged in Count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 28th day of September, 2003, the defendant violated the provisions of a protection order that excluded him from a residence, or workplace, or school, or restrained him from committing acts of domestic violence or having contact with Lana McCorrister or Lana McCorrister's children;

(2) That the defendant knew of the existence of the protection order; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 35

A person commits the crime of unlawful possession of a firearm in the first degree when he has previously been convicted of a serious offense and knowingly owns or has in his possession or control any firearm.

INSTRUCTION NO. 36

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result, which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

INSTRUCTION NO. 37

Possession means having a firearm in one's custody or control. It may be either actual or constructive. Actual possession occurs when the weapon is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item, and such dominion and control may be immediately exercised.

INSTRUCTION NO. 38

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

INSTRUCTION NO. 39

To convict the defendant of the crime of unlawful possession of a firearm in the first degree as charged in Count V, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 28th day of September, 2003, the defendant knowingly owned a firearm or had a firearm in his possession or control;
- (2) That the defendant had previously been convicted of a serious offense; and
- (3) That the ownership, or possession or control of the firearm occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 40

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and change your opinion if you become convinced that it is wrong. However, you should not change your honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

INSTRUCTION NO. 41

Upon retiring to the jury room for your deliberation of this case, your first duty is to select a presiding juror. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed, and that every juror has an opportunity to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted in evidence, these instructions, and a verdict form for each count.

When completing the verdict forms, you will first consider the crime of Kidnapping the First Degree as charged in Count I. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form A the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A.

If you find the defendant guilty on Verdict Form A, do not use Verdict Forms B or C. If you find the defendant not guilty of the crime of Kidnapping in the First Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Kidnapping in the Second Degree. If you unanimously agree on a verdict, you must fill in the blank provided on Verdict Form B the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided on Verdict Form B.

If you find the defendant guilty of Kidnapping in the Second Degree on form B, do not use Verdict Form C. If you find the defendant not guilty of the crime of Kidnapping in the Second Degree, or if after full and careful consideration of the evidence you cannot agree on that

crime, you will consider the lesser crime of Unlawful Imprisonment. If you unanimously agree on a verdict, you must fill in the blank provided for the crime of Unlawful Imprisonment on Verdict Form C the words "not guilty" or the word "guilty," according to the decision you reach.

If you find the defendant guilty of the crime of Kidnapping but have a reasonable doubt as to which of two or more degrees of that crime the defendant is guilty, it is your duty to find the defendant not guilty on Verdict Form A and to find the defendant guilty of the lesser included crime of Kidnapping in the Second Degree on Verdict Form B.

You will then consider the crime of Assault in the First Degree as charged in Count III. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form D, the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form D.

If you find the defendant guilty on verdict form D, do not use Verdict Form E. If you find the defendant not guilty of the crime of Assault in the First Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Assault in the Second Degree. If you unanimously agree on a verdict, you must fill in the blank provided in Verdict Form E the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided on Verdict Form E for the lesser included charge of Assault in the Second Degree.

If you find the defendant guilty of Assault in the Second Degree on form E, do not use Verdict Form ^F. If you find the defendant not guilty of the crime of Assault in the Second Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Assault in the Third Degree. If you unanimously agree on a

verdict, you must fill in the blank provided for the crime of Assault in the Third Degree on Verdict Form F the words "not guilty" or the word "guilty," according to the decision you reach.

If you find the defendant guilty of the crime of Assault but have a reasonable doubt as to which of two or more degrees of that crime the defendant is guilty, it is your duty to find the defendant not guilty on Verdict Form D and to find the defendant guilty of the lesser included crime of Assault in the Second Degree or Assault in the Third Degree on Verdict Form E or F.

You will then consider the crime of Violation of a Protection Order as charged in Count IV and Unlawful possession of a Firearm as charged in Count V. You will fill in the blanks on the remaining Verdict Forms G and H, the word "not guilty" or the word "guilty" according to the decision you reach.

Since this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper form of verdict or verdicts to express your decision. The presiding juror will sign it and notify the judicial assistant, who will conduct you into court to declare your verdict.

INSTRUCTION NO. 42

You will also be furnished with special verdict forms. If you find the defendant not guilty do not use the special verdict forms. If you find the defendant guilty, you will then use the special verdict forms and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict forms "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no."

INSTRUCTION NO. 43

For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime charged in Count I - Kidnapping the First Degree or the lesser included crime of Kidnapping the Second Degree or Unlawful Imprisonment and Count III Assault in the First Degree or the lesser crime of Assault in the Second Degree or Assault in the Third Degree. For each count, the State must also prove beyond a reasonable doubt that there is a connection between the firearm and defendant and between the firearm and the crime.

A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive purposes.

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

INSTRUCTION NO. 44

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime in Count III - Assault in the First Degree or the lesser included crimes of Assault in the Second Degree or Assault in the Third Degree. The State must also prove beyond a reasonable doubt that there is a connection between the deadly weapon and the defendant , and between the deadly weapon and the crime.

A person is armed with a deadly weapon if, at the time of the commission of the crime, the deadly weapon is easily accessible for offensive or defensive purposes.

A deadly weapon is an implement or instrument, which has the capacity to inflict death and from the manner in which it is used, is likely to produce or may easily and readily produce death. The following instruments are examples of deadly weapons: blackjack, sling shot, billy, sand club, sandbag, metal knuckles, any dirk, dagger, any knife having a blade longer than three inches, any razor with an unguarded blade, and any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas.

APPENDIX “D”

Consent to Search Forms (Exhibits 30 and 31)

CONSENT TO SEARCH WITHOUT WARRANT

I, EVERETT COLVIN have been asked to consent to a search of my residence and other property listed below.

- Residence address: 8522 LAWNDALE AVE SW
- Outbuildings: SHED
- Vehicles: _____
- Other: YARD

I understand that I do not have to consent to this search. I understand that if I do not consent, that a search warrant may be required. I have the right to refuse my consent and that I may revoke my consent at any time. I may limit this consent to specific areas of my home or area to be searched.

Knowing and fully understanding my rights, I am voluntarily giving up those rights and hereby freely consent to the search by the officers or agents of: LAKWOOD PD/PCSD. I authorize law enforcement the right to take from my property any letters, papers, materials or other property which they believe may have evidentiary value.

The limitations on the search are:

- None
- Listed as follows:

DATED: 10-02-03

Everett Colvin
 Signature
 Printed name: Everett J Colvin JR.

WITNESSES:

S. Honeycutt #422

STATE OF WASHINGTON, County of Pierce
 ss: I, Kevin Stock, Clerk of the above
 entitled Court, do hereby certify that this
 foregoing instrument is a true and correct
 copy of the original now on file in my office.
 IN WITNESS WHEREOF, I hereunto set my
 hand and the Seal of said Court this
9th day of April, 20 07
 Kevin Stock
 By *[Signature]* Deputy

CONSENT TO SEARCH WITHOUT WARRANT

I, TARAH DAVIS (colvin) have been asked to consent to a search of my residence and other property listed below.

- Residence address: 8522 LAUNDALIE AVE SW
- Outbuildings: SHED
- Vehicles: _____
- Other: YARD

I understand that I do not have to consent to this search. I understand that if I do not consent, that a search warrant may be required. I have the right to refuse my consent and that I may revoke my consent at any time. I may limit this consent to specific areas of my home or area to be searched.

Knowing and fully understanding my rights, I am voluntarily giving up those rights and hereby freely consent to the search by the officers or agents of: LAKWOOD PD/PCSD. I authorize law enforcement the right to take from my property any letters, papers, materials or other property which they believe may have evidentiary value.

The limitations on the search are:

- None
- Listed as follows:

DATED: 10-02-03

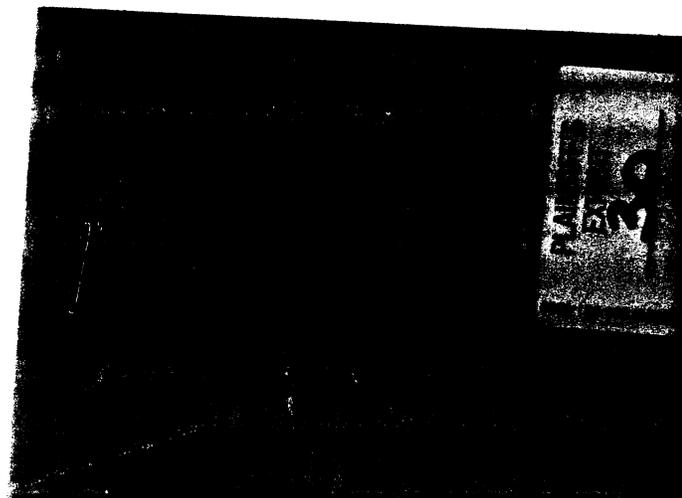
Tarah Davis Colvin
 Signature
 Printed name: Tarah Davis Colvin

WITNESSES:

S. Honeycutt #422

STATE OF WASHINGTON, County of Pierce
 ss: I, Kevin Stoen, Clerk of the above
 entitled Court, do hereby certify that this
 foregoing instrument is a true and correct
 copy of the original now on file in my office.
 IN WITNESS WHEREOF, I hereunto set my
 hand and the Seal of said Court this
22 day of October, 2003
 By Kevin Stoen Deputy

Z-1341 (9/98)



APPENDIX “E”

Stipulation to Prior Serious Offense (Exhibit 34)

1
2
3
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5
6
7
8 SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

9 STATE OF WASHINGTON,

10 Plaintiff,

CAUSE NO. 03-1-04572-3

11 vs.

12 AARON MICHAEL DAVIS,

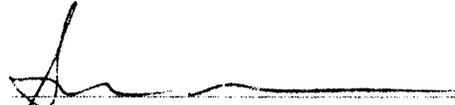
STIPULATION

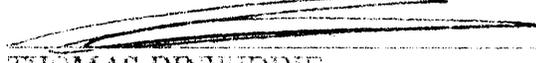
13 Defendant

14 IT IS HEREBY STIPULATED by and between the parties as follows:

15 Exhibit # 16 was processed by the Forensic Investigation Section of the Pierce County
16 Sheriff's Department. No fingerprints were found.

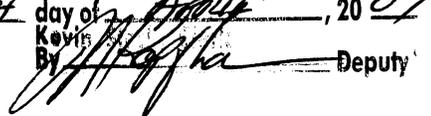
17 DONE IN OPEN COURT this 19 day of May, 2004.

18
19
20 
OWEN E. NELSON
Deputy Prosecuting Attorney
WSB# 24235

21
22 
THOMAS DINWIDDIE
Attorney for Defendant
WSB# 6790

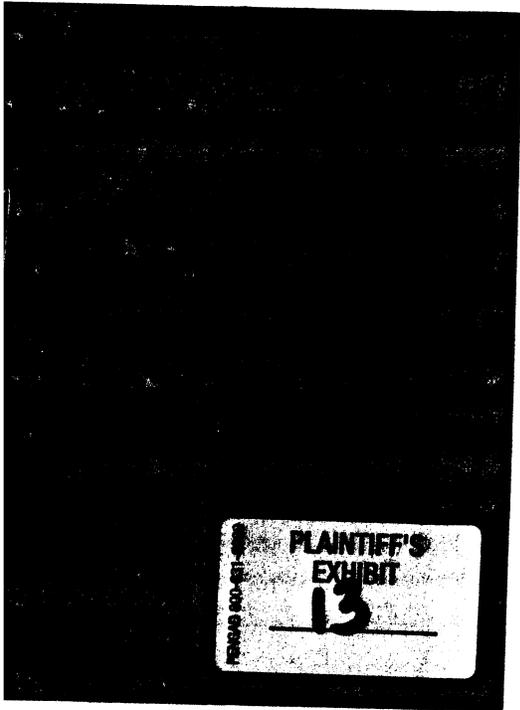
23
24
25 STATE OF WASHINGTON, County of Pierce
ss: I, Kevin Stock, Clerk of the above
entitled Court, do hereby certify that this
foregoing instrument is a true and correct
copy of the original now on file in my office.
26 IN WITNESS WHEREOF, I hereunto set my
hand and the Seal of said Court this

27 
AARON DAVIS
28 Defendant

27 19 day of May, 20 07
By  Deputy

APPENDIX “F”

Photo of Injury to Arm (Exhibit 13)



PLAINTIFF'S
EXHIBIT
13

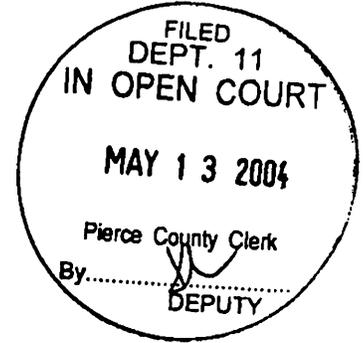
STATE OF WASHINGTON, County of Pierce
ss: I, Kevin Stock, Clerk of the above
entitled Court, do hereby certify that this
foregoing instrument is a true and correct
copy of the original now on file in my office.
IN WITNESS WHEREOF, I hereunto set my
hand and the Seal of said Court this
11th day of April, 20 07
Kevin
by [Signature] Deputy

APPENDIX “G”

Special Verdict Forms for Count III, Assault in the First Degree



03-1-04572-3 21000395 SVRD 05-14-04



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,

vs.

AARON MICHAEL DAVIS

Defendant.

CAUSE NO. 03-1-04572-3

MAY 14 2004

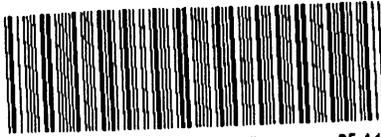
SPECIAL VERDICT FORM – Count III – Assault in the First Degree or lesser included charge of Assault in the Second Degree or lesser included charge of Assault in the Third Degree

We, the jury, return a special verdict by answering as follows:

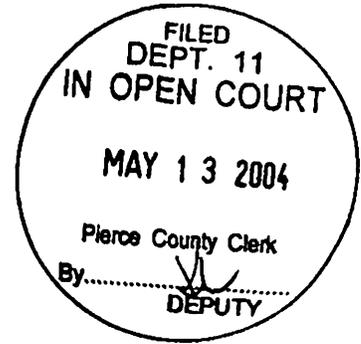
Was the defendant Aaron Michael Davis armed with a firearm at the time of the commission of the crime in Count III?

ANSWER: Yes (Yes or No).

Marcel Ferguson
PRESIDING JUROR



03-1-04572-3 21000385 SVRD 05-14-04



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,

vs.

AARON MICHAEL DAVIS

Defendant.

CAUSE NO. 03-1-04572-3

MAY 14 2004

SPECIAL VERDICT FORM – Count III – Assault in the First Degree or lesser included charge of Assault in the Second Degree or lesser included charge of Assault in the Third Degree

We, the jury, return a special verdict by answering as follows:

Was the defendant Aaron Michael Davis armed with a deadly weapon at the time of the commission of the crime in Count III?

ANSWER: Yes (Yes or No).

Marcel Ferguson
PRESIDING JUROR

CERTIFIED COPY

PLAINTIFF'S EXHIBIT 27

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,	Plaintiff,	CAUSE NO. 03-1-04572-3
vs.		
AARON MICHAEL DAVIS,	Defendant.	STIPULATION

IT IS HEREBY STIPULATED by and between the parties as follows:

As of September 28, 2003, the defendant had previously been convicted of a serious offense as is required to be proved beyond a reasonable doubt by the State of Washington for the offense of Unlawful Possession of Firearm in the First Degree as charged in Count Five.

DONE IN OPEN COURT this 4 day of May, 2004.

[Signature]
 SVEN K. NELSON
 Deputy Prosecuting Attorney
 WSB# 24235

[Signature]
 THOMAS DINWIDDIE
 Attorney for Defendant
 WSB# 6740

STATE OF WASHINGTON, County of Pierce
 ss: I, Kevin Stock, Clerk of the above
 entitled Court, do hereby certify that this
 foregoing instrument is a true and correct
 copy of the original now on file in my office.
 IN WITNESS WHEREOF, I hereunto set my
 hand and the Seal of said Court this
 day of May, 2004.
 Kevin Stock, Clerk
[Signature]

[Signature]
 AARON DAVIS
 Defendant

STATE OF WASHINGTON
 DEPUTY
 APR 22 - 2 PM 2:07
 COURT REPORTERS
 WASHINGTON