

COURT OF APPEALS  
DIVISION TWO  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON )

Respondent, )

v. )

CARL W CUNNINGHAM  
(your name) )

Appellant. )

CTTC-9 11/12/25

STATE OF WASHINGTON

BY [Signature]

No. 36481-6-II

STATEMENT OF ADDITIONAL  
GROUNDS FOR REVIEW

R.A.P 10.10(b)  
may BE submitted in  
Handwriting.

I, Carl W Cunningham have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

- GROUND 1. "consecutive v concurrent" see ATTACHED ARGUMENT
- GROUND 2. "consecutive v concurrent" see ATTACHED ARGUMENT
- GROUND 3. unauthorized interest see ATTACHED ARGUMENT
- GROUND 4. no credit given for earned time see ATTACHED ARGUMENT
- GROUND 5. Plain and ordinary meaning of consecutive see ATTACHED ARGUMENT

- APPENDIX
- A Robbery plea # 92-1-01239-3
  - B Robbery Judgment and sentence 92-1-01239-3
  - C uncited illustration
  - D Alliance one debt collection on vacated -  
- Uncharged manslaughter From 1992. #92-1-00443-9

## GROUND 1

For This court's knowledge it is important to note that CUNNINGHAM along with the State on his current manslaughter plea attached a stipulation that CUNNINGHAM CAN TAKE A direct appeal ON ARGUMENTS that ATTACK the consecutive v concurrent nature of this sentence. A plea is a contract. See Santobello v. NEW YORK, 404 U.S. 257 262, 30 L.Ed 2d 427, 92 S.Ct 495 (1971)

Cunningham with the language of the contract asks this court to view his prior robbery plea 92-1-01239-3 APPENDIX A, and judgement and sentence APPENDIX B to determine if the robbery is facially invalid, IF the court finds the robbery constitutionally invalid, this court should order resentencing that the invalid robbery cannot be used at ANY sentencing hearing, thus the sentence's CANNOT be set consecutive.

CUNNINGHAM notes that this argument is solely on the allowable use of his robbery at the current manslaughter sentencing. IF the robbery is found constitutionally facially invalid it cannot be used to set consecutive. CUNNINGHAM "is not" seeking withdrawal of the robbery here is the instant appeal. CUNNINGHAM is ONLY seeking a determination on his current manslaughter, whether the invalid robbery could be used to set consecutive, as agreed in the current plea/stipulation/contract.

GROUND 1 "CONTINUED"

A constitutionally invalid prior cannot be used at a sentencing hearing. See; STATE V. HOLSWORTH, 93 WN 2d 148, 607 P.2d 845 (1980); STATE V. AMMONS 105 WN 2d at 189 citing; IN RE BUSH, SUPRA at 497-98; UNITED STATES V. TUCKER, 404 U.S. 443, 30 L. Ed. 2d 592, 92 S. Ct. 589 (1972); BURGETT V. TEXAS, 389 U.S. 109 19 L. Ed. 2d 319, 88 S. Ct. 258 (1967).

CUNNINGHAM'S Robbery prior is invalid for two reasons. A look at the face of the robbery plea will show this court there was no advisement of mandatory community placement, yet he was sentenced to one year community placement. See STATE V. TURLEY, 149 WN 2d 395 69 P 3d 338 (2003) (Held, mandatory community placement is a direct consequence of a guilty plea because it produces a definite, immediate and automatic effect on a defendant's range of punishment." Id. Therefore, failure to inform a defendant that he will be subject to mandatory community placement if he pleads guilty WILL RENDER THE PLEA INVALID.) Turley at 399

Because CUNNINGHAM has shown that his robbery CHARGE/PLEA CONTAINED NO ADVISEMENT OF MANDATORY community placement The robbery plea is invalid.

## GROUND 1 "CONTINUED"

The second reason the Robbery plea is constitutionally invalid on its face is there is a uncharged manslaughter listed as criminal history this can be seen on the face of the plea.

This court's opinion by Judge Van Doren to the Washington State Supreme Court stated Cunningham was never charged for the 1992 manslaughter, the Supreme Court agreed with Van Doren and on May 8th 2006 opinioned to vacate the uncharged manslaughter.

The state must be anxious to concede that because there is a uncharged manslaughter on the prior robbery and because it was uncharged and vacated the prior robbery is without a doubt invalid, void, involuntary as this court and the Supreme Court effectively wiped out the 1992 manslaughter.

The constitution requires a plea to be knowing, intelligent and voluntary. see Boykin v Alabama, 395 U.S. 238 243-44 89 S. Ct. 1709 23 L. Ed 2d 274 (1969); Prp of Hews 99 WN 80 (1983)

The uncharged 1992 manslaughter increased his punishment, with the uncharged manslaughter his offender score was 9 with a standard range of 129-171 months and without the uncharged manslaughter score 7 standard range 87-116 months. Thus, Cunningham was not informed properly of the correct range of punishment, and the plea is invalid on its face.

GROUND 1 "CONTINUED"

Because The Robbery IN 92-1-01239-3  
is constitutionally invalid on its face due to a  
increase in punishment by a uncharged manslaughter  
and a uniformed community placement this court  
should order resentencing on the current manslaughter  
with the instructions that the trial cannot use the  
invalid robbery in any fashion this would strike the  
consecutive nature of the manslaughter as it rely's on  
the invalid robbery. This court should find that  
to allow the use of a invalid robbery prior at  
the new manslaughter would RENEW A DUE PROCESS  
violation.

See PRP OF STODMIRE 141 Wn2d 342 (2000)

•• constitutionally invalid on its face means a conviction  
without further elaboration evidences infirmities of a  
constitutional magnitude" Id at 188

The phrase on its  
face has been interpreted to mean those documents  
signed as part of a plea agreement. State v Phillips,  
94 Wn App 313, 317 972 P.2d 932 (1999) (citing  
Ammons, 105 Wn 2d at 187-189)

11-29-2007

DATED

(Ground 1 concluded)  
Carl W Cunningham  
CARL W CUNNINGHAM

## GROUND 2

Did the trial court exceed its Authority by ordering the current manslaughter to be served consecutive to the Robbery in cause # 92-1-01239-3.

The below illustration is found in a unpublished opinion thus is not cited by rule, but is allowed for illustrative use.

START OF ILLUSTRATION [The state argues that the plain meaning of the statute defines convictions on current but unsentenced offenses to be included as prior convictions in calculating the appellant's offender score. A "prior conviction" is defined as "a conviction which exists before the date of sentencing for which the offender score is being computed." R.C.W. 9A.02.050 (1) current convictions are included in the computation of the offender score R.C.W. 9A.02.050 (1) (a). BUT we note that including other current convictions trigger the provisions precluding imposition of consecutive sentence absent a finding of aggravating circumstances supporting an exceptional sentence, therefore according to this reading of the statute, the court properly included Harrison's May 18th 2001 conviction in computing the offender score BUT because Harrison's standard range included additional time caused by including his conviction for the January assault, it improperly ordered the sentences be served consecutively.] END OF ILLUSTRATION. SEE APPENDIX C

## GROUND 2

The illustration is exactly CUNNINGHAM'S Argument, That because The Robbery 92-1-01239-3 included 2 points For The 1992 uncharged manslaughter see APPENDIX B Showing The Robbery included Two Points bringing the standard range From 87-116 To 153-195mo. Cunningham is mindful That the manslaughter used to enhance The offender score was vacated, However, The conduct is still the same, meaning the same conduct was used to enhance the Robbery, Cunningham Honestly Does not know what this Appellate Court will rule ON this argument because the uncharged manslaughter is technically no longer there, however the enhanced Punishment remains on the Robbery so there is A definite consequence. But back to the argument, The Robbery was enhanced by the uncharged manslaughter, and The Instant manslaughter was ordered consecutive to The Robbery. Because The 1992 manslaughter / conduct increased The penalty on the Robbery, and under former 9.94A.400 This triggers other current offenses for scoring purposes, Thus The new manslaughter court cannot sentence Cunningham to A consecutive sentence Absent A consecutive sentence That was imposed because aggravating circumstances. And as part of the new manslaughter plea The state wrote they will not seek A exceptional sentence, so technically The contract has sub silentio been breached. The consecutive sentence is without statutory authority AND should be set concurrently.

11-29-2007

DATED

(Ground 2  
concluded)

Carl W Cunningham  
CARL W CUNNINGHAM

### GROUND 3

### UNAUTHORIZED INTEREST / Breach of Plea/contract

There is undisputed record that Cunningham's 1992 Manslaughter was vacated, as such so was the restitution for that charge. namely \$1071.00 payable to crime victim advocates, and \$100.00 victim assessment.

The state in the new plea/contract for manslaughter wrote that Cunningham will agree to pay the \$1071.00 to CVA \$100.00 victim assessment same as 1992. (see new plea)

The state then asked the trial court to impose interest from 1992 up to now. The trial judge agreed and on page 4 of 9 on the new judgment and sentence section 4.5 "The financial obligations imposed in this judgment shall bear interest from July 7th 1992, the date the amounts were originally imposed in counts II, III, IV, and V until payment in full, at the rate applicable to civil judgments R.C.W 10.82.090"

There are several problems with this order. The first is the plea/contract is binding and only agrees to the original \$1071.00 CVA; and \$100.00 victim assessment. Then at sentencing the state switched gears and asked for more interest.

Because the plea is a contract with the state due process entitles Cunningham to specific performance, even if its terms conflict with the law. See STATE V HARRISON, 148 Wn 2d 550, 556-57 61 P.3d 1104 (2003) (citations omitted) Cunningham thus asks for specific performance of his contract, \$1071 CVA and \$100.00 victim assessment.

The second problem is the statute "10.82.090" in no way authorized any trial judge to impose interest on a uncharged vacated charge thus the court had zero authority to impose interest.

GROUND 3

"CONTINUED"

Finally, The state has sold the old uncharged manslaughter debt/Restitution/Fees to A collection Agency (Alliance one) now The Agency is Tacking on Thousands of dollars For their own Private Fees, See APPENDIX D This is A recent Amnesty letter offered to me by Alliance one under the old vacated manslaughter debt. 92-1-00443-9 notice the Amount due \$ 5,267.59 (Five Thousand Two hundred sixty seven dollars and fifty nine cents)

So does the state really expect Cunningham to pay \$ 5,267.59 to Alliance one on A uncharged manslaughter that has been vacated, plus The new Restitution on the charged manslaughter of \$ 1071 CVA plus \$100 crime victim, plus the new unauthorized interest from 1992 which who knows how much this will tally, plus P.O.C is still collection on the old uncharged manslaughter so were talking about 3 (Three) different Payments for one crime Two Avenues are uncharged crime one is from A charged crime, IN total Cunningham owes over \$15,000 dollars. I dont believe the legislature would ever dream of authorizing such A blatant Tactic creating A unlawful hardship Three times over is not the Purpose of the law.

I'll pay what I agreed to in my contract/plea, I ask this court to Remand to the trial court that the plea is binding, and order The debt collection for the uncharged manslaughter void for lack of Jurisdiction

11-24-2007  
DATED

Carl W Cunningham!!  
CARL W CUNNINGHAM

GROUND 4

The trial court did not give me credit for any earned time on the 1992 manslaughter. See VRP 6-15-2007 page 42 "OKay so you are adding 4 months to the total sentence, but you are giving me over a year to do?"

The court: I am. I have made my ruling. I don't know how to answer your question Mr. Cunningham."

Please see page 16 VRP 6-15-2007 where Larranaga cited State v Phelan 100 Wn 2d 508 and notified the court that the state neglected to put in their table for time served any good time that the defendant recovered,

The problem here is that the trial court did not calculate into my time served, the credited good conduct time, and earned time, from # 92-1-00443-9, from Pierce county Jail, and the Department of Corrections.

my question is then to this court of appeals. Is the trial court suppose to give me all my credit earned?

I would argue "yes" that this court should order the court to fully credit my earned time, make my sentence accurate.

11-29-2007

DATED

Carl W. Cunningham  
SIGNED

credit for earned time, -1 of 1

Ground 5

IF The trial court after remand by this court, Finds the sentence fully served, can then the Trial court order A consecutive sentence?

This court should find that to make A already served sentence consecutive would be against legislative intent under the plain and ordinary meaning of consecutive. The word consecutively as found in BLACKS LAW DICTIONARY FIFTH EDITION. consecutive sentences. - when one sentence of confinement is to follow another point in time the "second" sentence is to be deemed to be consecutive. (emphasis added)

See also Webster's Concise Dictionary (2000) edition consecutive adj. 1. Following in uninterupted succession; successive (page 150); SUCCESSION n. 1. The act of following consecutively (page 735); Follow v. t. 1. To go or come after page (275)

This court should find that An already served sentence cannot be ordered consecutive, as there is not even 1 (one) second left to follow. IN 1992 The state got the benefit of consecutive, Today The trades have changed and Mr Cunningham benefits.

11-29-2007  
DATED

Curtis Cunningham!!  
SIGNED

Plain and ordinary meaning of consecutive - 1-OF-1

## **APPENDIX "A"**

*Statement of Defendant on Plea of Guilty  
Pierce County Superior Court Cause No. 92-1-01239-3*

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

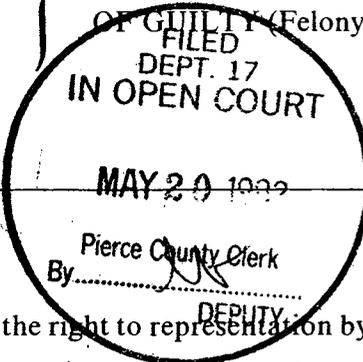
vs.

CARL CUNNINGHAM

Defendant.

NO. 92-1-01239-3

STATEMENT OF DEFENDANT ON PLEA OF GUILTY (Felony)



MAY 22 1992

1. My true name is CARL CUNNINGHAM

2. My age is 20 B/D 3-8-72

3. I went through the LITV grade in school.

4. I have been informed and fully understand that I have the right to representation by a lawyer and that if I cannot afford to pay for a lawyer, one will be provided at no expense to me. My lawyer's name is:

LLOYD ALTON

5. I have been informed and fully understand that I am charged with the crime(s) of ROBBERY IN THE FIRST DEGREE (WITH DEADLY WEAPON)

The elements of the crime(s) are: ON OCT 8, 92, IN PIERCE COUNTY, DID UNLAWFULLY TAKE PERSONAL PROPERTY WITH INTENT TO STEAL FROM THE PERSON OR IN THE PRESENCE OF KENNETH H. BURNS, AGAINST SUCH PERSONS WILL BY USE OR THREATENED USE OF IMMEDIATE FORCE, VIOLENCE OR FEAR OR INJURY TO KENNETH BURNS, AND IN THE COMMISSION THEREOF, OR IN IMMEDIATE FLIGHT THEREOF, CARL CUNNINGHAM WAS ARMED WITH A DEADLY WEAPON TO-WIT: A RIFLE

The maximum sentence(s) is (are):

LIFE years and \$ 50,000

fine(s).

In addition, I understand that I may have to pay restitution for crime(s) to which I enter a guilty plea and for any other uncharged crime(s) for which I have agreed to pay restitution. The standard sentence range for the crime(s) is/are at least 129 mo (+24 mo) and no more than 171 mo (+24 mo)

Based upon my criminal history which I understand the Prosecutor presently knows to be:

2 JUVENILE (1 POINT)

OTHER CURRENT	MANSLAUGHTER 1	^	✓
OTHER CURRENT	ASSLT 2	^	✓
OTHER CURRENT	BURGL 1	^	✓
OTHER CURRENT	PSP 2	^	NU
OTHER CURRENT	UPCS	^	NU

I represent to the court that my criminal history set out above is true, accurate and complete to the best of my knowledge and belief.

[ ] Criminal history attached as appendix \_\_\_\_\_ and incorporated by reference.

I have been given a copy of the information.

And I further understand that if I am a First Time Offender, the court may decide not to impose the standard sentence range, and then the court may sentence me for up to 90 days of total confinement and two years of community supervision.

6. I have been informed and fully understand that:

(a) I have the right to a speedy and public trial by an impartial jury in the county where the crime is alleged to have been committed.

(b) I have the right to remain silent before and during trial, and I need not testify against myself.

(c) I have the right to hear and question any witness who testifies against me.

(d) I have the right at trial to have witnesses testify for me. These witnesses can be made to appear at no expense to me.

(e) I am presumed innocent until the charge(s) is (are) proven beyond a reasonable doubt, or I enter a plea of guilty.

(f) I have the right to appeal a determination of guilt after a trial.

(g) If I plead guilty, I give up the rights in statements (a) through (f) of this paragraph 6.

7. I plead Guilty to the crime(s) of ROB 1° (w/ Deadly Weapons)

\_\_\_\_\_, as charged in the original information.

8. I MAKE THIS PLEA FREELY AND VOLUNTARILY.

9. No one has threatened harm of any kind to me or to any other person to cause me to make this plea.

10. No person has made promises of any kind to cause me to enter this plea except as set forth in this statement.

11. I have been informed and fully understand that the Prosecuting Attorney will make the following recommendations to the court: OPEN

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

12. I have been informed and fully understand that the standard sentencing range is based on the crime charged and my criminal history. Criminal history includes prior convictions, whether in this state, in federal court, or elsewhere. Criminal history also includes convictions of guilty pleas at juvenile court that are felonies and which were committed when I was fifteen years of age or older. Juvenile convictions count only if I was less than twenty-three years of age at the time I committed the present offense. I fully understand that if criminal history in addition to that listed in paragraph 5 is discovered, the standard sentence range may increase. Even so, I fully understand that my plea of guilty

to this charge is binding upon me if accepted by the court, and I cannot change my mind without court approval if additional criminal history is discovered and the standard sentence range and the Prosecuting Attorney's recommendation increases:

I further understand that if additional criminal history is discovered the Prosecuting Attorney's recommendation may increase up to the high end of the new standard range and if I have been sentenced, the Prosecuting Attorney may seek to have me resentenced based on my new criminal history.

13. I have been informed and fully understand that the court does not have to follow anyone's recommendation as to sentence. I have been fully informed and fully understand that the court must impose a sentence within the standard sentence range unless the court finds substantial and compelling reasons not to do so. If the court goes outside the standard sentence range, either I or the state can appeal that sentence. If the sentence is within the standard sentence range, no one can appeal the sentence. I also understand that the court must sentence to a mandatory minimum term, if any, as provided in paragraph 14 and that the court may not vary or modify that mandatory minimum term for any reason.

14. I have been further advised that the crime(s) of Ross 1<sup>st</sup> w/PERCUT WEAPON

with which I am charged carries with it a term of total confinement of not less than 2 years. I have been advised that the law requires that a term of total confinement be imposed and does not permit any modification of this mandatory minimum term. (If not applicable, any or all of this paragraph may be stricken and initialed by the defendant and the judge).

15. I have been advised that the sentences imposed in Counts N/A will run consecutively/concurrently unless the court finds substantial and compelling reasons to run the sentences concurrently/consecutively.

16. I understand that if I am on probation, parole, or community supervision, a plea of guilty to the present charge(s) will be sufficient grounds for a Judge to revoke my probation or community supervision or for the Parole Board to revoke my parole.

17. I understand that if I am not a citizen of the United States, a plea of guilty to an offense punishable as a crime under state law is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

18. The court has asked me to state briefly in my own words what I did that resulted in my being charged with the crime(s) in the information. This is my statement: ON OCT 8, 1991 I ~~HAD~~ POINTED A

RIFLE AT KENNETH BURNS AND STOLE A TRUCK FROM HIM. CC  
in Pierce County (TBS)

19: I have read or have had read to me and fully understand all of the numbered sections above (1 through 19) and have received a copy of this "Statement of Defendant on Plea of Guilty" form. I have no further questions to ask of the court.

Carl W Cunningham  
Defendant

Lilah Amos  
Deputy Prosecuting Attorney

[Signature]  
Defendant's Attorney

The foregoing statement was read by or to the defendant and signed by the defendant in the presences of his or her attorney, and the undersigned Judge, in open court. The Court finds the defendant's plea of guilty to be knowingly, intelligently and voluntarily made, that the court has informed the defendant of the nature of the charge and the consequences of the plea, that there is a factual basis for the plea, and that the defendant is guilty as charged.

Further, the court finds that acceptance of this plea is consistent with prosecuting standards and the interests of justice.

Dated this 20 day of \_\_\_\_\_

May  
FILED  
DEPT. 192  
IN OPEN COURT  
[Signature]  
MAY 20 1992  
Pierce County Clerk  
By \_\_\_\_\_  
DEPUTY

\_\_\_\_\_  
Judge

**Certificate of translator:**

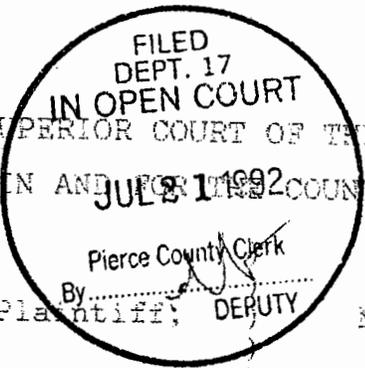
I \_\_\_\_\_, certify that I am fluent in the defendant's language, \_\_\_\_\_, that the written statement above has been translated by me orally/in writing and that the defendant acknowledges that he/she understands the translation.

**I have been given a copy of the information.**



**JUDGMENT AND SENTENCE  
PIERCE COUNTY CAUSE NO. 92-1-01239-3  
ROBBERY 1**

**APPENDIX "B"**



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

STATE OF WASHINGTON,

By [Signature]  
Pierce County Clerk  
Plaintiff; DEPUTY

NO. 92-1-01239-3

vs.

JUDGMENT AND SENTENCE  
(FELONY)

CARL WILLIAM CUNNINGHAM aka  
CARL WILLIAM AMBURGEY,  
Defendant.

DOB: 03/08/72  
SID No.: WA13980515  
Local ID No.:

JUL 20 1992

**CONTINUED TO DATA**

I. HEARING

1.1 A sentencing hearing in this case was held on July 21, 1992

1.2 The defendant, the defendant's lawyer, LLOYDE ALTON, and the  
deputy prosecuting attorney, BARBARA COREY-BOULET and LILAH M. AMOS,  
were present.

II. FINDINGS

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

2.1 CURRENT OFFENSES(S): The defendant was found guilty on May 20,  
1992 by

plea  jury-verdict  bench trial of:

Count No.: I  
Crime: ROBBERY IN THE FIRST DEGREE WHILE ARMED WITH A DEADLY WEAPON  
RCW: 9A.94A.125, 9A.94A.370, 9A.56.190 and 9A.56.200(1)(a)  
Date of Crime: October 8, 1991  
Incident No.: 91-281-0795

Additional current offenses are attached in Appendix 2.1.  
 A special verdict/finding for use of deadly weapon was ~~returned~~ pleaded to  
on Count X I.  
 A special verdict/finding of sexual motivation was returned on  
Count(s).

ENTERED  
JUDGMENT # \_\_\_\_\_

92-9-06399-0

Office of Prosecuting Attorney  
946 County-City Building  
Washington 98402-2171  
te: 591-7400

- 1  
2  
3  A special verdict/finding of a RCW 69.50.401(a) violation in a  
4 school bus, public transit vehicle, public park, public transit  
5  Other current convictions listed under different cause numbers  
6 used in calculating the offender score are (list offense and cause  
7 number):

- 8  Current offenses encompassing the same criminal conduct and  
9 counting as one crime in determining the offender score are (RCW  
10 9.94A.400(1)):

11 2.2 CRIMINAL HISTORY: Prior convictions constituting criminal  
12 history for purposes of calculating the offender score are (RCW  
13 9.94A.360):

<u>Crime</u>	<u>Sentencing Date</u>	<u>Adult or Juv. Crime</u>	<u>Date of Crime</u>	<u>Crime Type</u>
TMVWOP	05/31/89	J	01/16/89	
R BURN	07/27/89	J	07/18/89	
MANSLS 1°	07/07/92	A		
ASLT 2°	07/07/92	A		
BURG 1°	07/07/92	A		
PSP 2°	07/07/92	A		
UPCS	07/07/92	A		

- 14  Additional criminal history is attached in Appendix 2.2.  
15  Prior convictions served concurrently and counted as one offense  
16 in determining the offender score are (RCW 9.94A.360(11)):

17  
18  
19  
20 2.3 SENTENCING DATA:

	<u>Offender Score</u>	<u>Seriousness Level</u>	<u>Range Months</u>	<u>Maximum Years</u>
Count No. I:	9	IX	129-171 + <u>24</u> <u>24</u> DW ENHANCEMENT 153-195	LIFE

- 21  
22  
23  
24  Additional current offense sentencing data is  
25 attached in Appendix 2.3.

26 2.4 EXCEPTIONAL SENTENCE:

- 27  Substantial and compelling reasons exist which justify a sentence  
28  above  below the standard range for Count(s)\_\_\_\_. Findings  
of fact and conclusions of law are attached in Appendix 2.4.

JUDGMENT AND SENTENCE  
(FELONY) - 2

Office of Prosecuting Attorney  
946 County-City Building  
Tacoma, Washington 98402-2171  
Telephone: 591-7400

1  
2  
3 92-1-01239-3

4 2.5 RESTITUTION:

5 [ ] Restitution will not be ordered because the felony did not result  
6 ~~[ ]~~ Restitution should be ordered. ~~A hearing is set for~~

7 [ ] Extraordinary circumstances exist that make restitution  
8 inappropriate. The extraordinary circumstances are set forth in  
9 Appendix 2.5.

10 2.6 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS: The court has  
11 considered the defendant's past, present and future ability to pay  
12 legal financial obligations, including the defendant's financial  
13 resources and the likelihood that the defendant's status will  
14 change. The court specifically finds that the defendant has the  
15 ability to pay:

16 [ ] no legal financial obligations.  
17 ~~[ ]~~ the following legal financial obligations:

- 18 ~~[ ]~~ crime victim's compensation fees.
- 19 ~~[ ]~~ court costs (filing fee, jury demand fee, witness costs,  
20 sheriff services fees, etc.)
- 21 [ ] county or interlocal drug funds.
- 22 [ ] court appointed attorney's fees and cost of defense.
- 23 [ ] fines.
- 24 [ ] other financial obligations assessed as a result of the  
25 felony conviction.

26 A notice of payroll deduction may be issued or other income-  
27 withholding action may be taken, without further notice to the  
28 offender, if a monthly court-ordered legal financial obligation payment  
is not paid when due and an amount equal to or greater than the amount  
payable for one month is owed.

29 2.7 SPECIAL FINDINGS PURSUANT TO RCW 9.94A.120:

- 30 [ ] The defendant is a first time offender (RCW  
31 9.94A.030(20)) who shall be sentenced under the  
32 waiver of the presumptive sentence range pursuant  
33 to RCW 9.94A.120(5).
- 34 [ ] The defendant is a sex offender who is eligible for  
35 the special sentencing alternative under RCW  
36 9.94A.120(7)(a). The court has determined,  
37 pursuant to RCW 9.94A.120(7)(a)(ii), that the  
38 special sex offender sentencing alternative is  
appropriate.

JUDGMENT AND SENTENCE  
(FELONY) - 3

Office of Prosecuting Attorney  
946 County-City Building  
Tacoma, Washington 98402-2171  
Telephone: 591-7400

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92-1-01239-3

III. JUDGMENT

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

3.2 [ ] The court DISMISSES.

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 LEGAL FINANCIAL OBLIGATIONS. Defendant shall pay to the Clerk of this Court:

\$ 2733.42, Restitution to:  
Group Health Cooperative - \$978.42  
Kenneth Burns + \$ 1755.<sup>00</sup>/

\$ 110.<sup>00</sup>/, Court costs (filing fee, jury demand fee, witness costs, sheriff service fees, etc.);

\$ 100.<sup>00</sup>/, Victim assessment;

\$ \_\_\_\_\_, Fine; [ ] VUCSA additional fine waived due to indigency (RCW 69.50.430);

\$ \_\_\_\_\_, Fees for court appointed attorney;

\$ \_\_\_\_\_, Drug enforcement fund of \_\_\_\_\_;

\$ \_\_\_\_\_, Other costs for: \_\_\_\_\_;

\$ 2943.42, TOTAL legal financial obligations  including restitution [ ] not including restitution.

Payments shall not be less than \$ 25.<sup>00</sup>/ per month. Payments shall commence on 60 days after release from institution.

*If defendant earns any funds in the Dept. of Corrections, restitution may be required from defendant while in DOC.*  
[ ] Restitution ordered above shall be paid jointly and severally with:

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92-1-01239-3

The defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to ten years from the date of sentence or release from confinement to assure payment of the above monetary obligations.

Any period of supervision shall be tolled during any period of time the offender is in confinement for any reason.

Defendant must contact the Department of Corrections at 755 Tacoma Avenue South, Tacoma upon release ~~W/MAY~~ \_\_\_\_\_.

Bond is hereby exonerated.

92-1-01239-3

4.2 CONFINEMENT OVER ONE YEAR: The court imposes the following sentence:

(a) CONFINEMENT: Defendant is sentenced to following term of total confinement in the custody of the Department of Corrections commencing

195 months on Count No. 1 [ ] concurrent [X] consecutive
months on Count No. [ ] concurrent [ ] consecutive
months on Count No. [ ] concurrent [ ] consecutive

[ ] Actual number of days of total confinement ordered is: 5850

[X] This sentence shall be [ ] concurrent [X] consecutive with the sentence in

Pierce County Cause #92-1-00443-9

[X] Credit is given for 0 days served.

(b) COMMUNITY PLACEMENT (RCW 9.94A.120(8)(b)). The defendant is sentenced to community placement for [X] one year [ ] two years or up to the period of earned early release awarded pursuant to RCW 9.94A.150(1) and (2), whichever is longer. The terms of community placement shall include the following conditions:

- (i) The defendant shall report to and be available for contact with the assigned community corrections officer as directed.
(ii) The defendant shall work at Department of Corrections-approved education, employment and/or community service.
(iii) The defendant shall not consume controlled substances except pursuant to lawfully issued prescriptions.
(iv) The defendant shall not unlawfully possess controlled substances while in community custody.
(v) The defendant shall pay supervision fees as determined by the Department of Corrections.

[X] OTHER SPECIAL CONDITIONS AND CRIME RELATED PROHIBITIONS:

No possession of firearms
Drug use to be monitored.
No consumption / possession alcohol - monitor compliance
DOC shall approve defendant's residence and living conditions.

CCO may direct participation in crime-related treatment and counseling.

No contact with Kenneth Burns.

92-1-01289-3

(c)  HIV TESTING. The Health Department or designee shall test the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing.

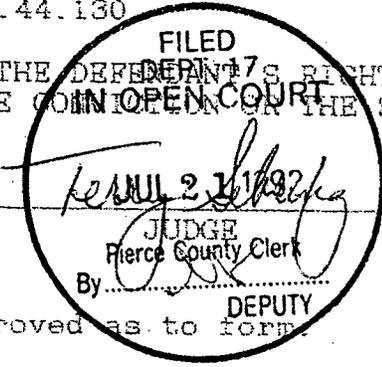
(d)  DNA TESTING. The defendant shall have a blood sample drawn for purpose of DNA identification analysis. The county shall be responsible for obtaining the sample prior to the defendant's release from confinement.

EACH VIOLATION OF THIS JUDGMENT AND SENTENCE IS PUNISHABLE BY UP TO 60 DAYS OF CONFINEMENT. (RCW 9.94A.200(2)).

ANY DEFENDANT CONVICTED OF A SEX OFFENSE MUST REGISTER WITH THE COUNTY SHERIFF FOR THE COUNTY OF THE DEFENDANT'S RESIDENCE WITHIN 30 DAYS OF DEFENDANT'S RELEASE FROM CUSTODY. RCW 9A.44.130

PURSUANT TO RCW 10.73.090 AND 10.73.100, THE DEFENDANT'S RIGHT TO FILE ANY KIND OF POST SENTENCE CHALLENGE TO THE COMPLETION OF THE SENTENCE MAY BE LIMITED TO ONE YEAR.

Date: July 21, 1992



Presented by:

Approved as to form

Lilian Amos  
Deputy Prosecuting Attorney  
WSB # 7168

[Signature]  
Lawyer for Defendant  
WSB # 1992

[Signature]  
Deputy Prosecuting Attorney  
11778  
bjb

FINGERPRINTS

Right Hand

Fingerprint(s) of: CARL WILLIAM CUNNINGHAM, Cause #92-1-01239-3

Attested by: \_\_\_\_\_ CLERK

By: DEPUTY CLERK Date: \_\_\_\_\_

CERTIFICATE

OFFENDER IDENTIFICATION

I, \_\_\_\_\_  
Clerk of this Court, certify that  
the above is a true copy of the  
Judgment and Sentence in this  
action on record in my office.

State I.D. #WA19930515

Date of Birth 03/08/72

Sex MALE

Dated: \_\_\_\_\_

Race WHITE

\_\_\_\_\_  
CLERK

ORI \_\_\_\_\_

By: \_\_\_\_\_

DEPUTY CLERK

OCA \_\_\_\_\_

OIN \_\_\_\_\_

DOA \_\_\_\_\_



FINGERPRINTS

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AN OPEN COURT COUNTY OF PIERCE

FILED  
DEPT. 17  
JUL 21 1992  
Pierce County Clerk  
DEPUTY

STATE OF WASHINGTON,

Plaintiff,  
By .....

NO. 92-1-01239-3

JUL 20 1992

vs.

WARRANT OF COMMITMENT

CARL WILLIAM CUNNINGHAM,

- 1)  County Jail
- 2)  Department 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).

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).

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92-1-01233-3

[ ] 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: July 21, 1992

By Terry [Signature] of the Honorable  
IN OPEN COURT  
JUL 21 1992  
Pierce County Clerk  
By Ted Rutt  
DEPUTY CLERK

CERTIFIED COPY DELIVERED TO SHERIFF

Date 7/21/92 By [Signature] Deputy

STATE OF WASHINGTON, County of Pierce  
ss: I, Ted Rutt, 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 \_\_\_\_\_, 19\_\_\_\_.

TED RUTT, Clerk  
By: \_\_\_\_\_ Deputy

## APPENDIX C

### ILLUSTRATIVE CASE

Note\* Cunningham is not asking this court to consider the authority is contained herein, but only directs the court here for instructive analysis

See State v Golden, 112 WN APP 68, 47 P.3d 587 (2002)

(The state correctly notes that unpublished opinions may not be considered by any court, nor may they be cited for authority. RAP 10.4 (b) Mr Golden's counsel did not cite Christoph as authority in a brief either for trial or on appeal. The trial court did not consider contained therein and found our analysis instructive though. But the unpublished opinion was not cited to this court so the rule was not violated)  
Id Golden at 81.

**H****State v. Harrison** Wash.App. Div. 2, 2003.

NOTE: UNPUBLISHED OPINION, SEE RCWA 2.06.040

Court of Appeals of Washington, Division 2.

STATE of Washington, Respondent,

v.

Melvin R. HARRISON, Appellant.

Nos. 27484-1-II, 27800-6-II.

Aug. 26, 2003.

Appeal from Superior Court of Pierce County.

Rita Joan Griffith, Attorney at Law, Seattle, WA, for Appellant.Kathleen Proctor, Pierce County Prosecuting Atty Ofc., Tacoma, WA, for Respondent.

## UNPUBLISHED OPINION

QUINN-BRINTNALL, J.

\*1 Two separate juries convicted **Melvin Harrison** of a total of four counts of assaulting his girlfriend, Randella Phillips. The charges were based on incidents occurring in November 2000, and January 2001. Despite Phillips insisting at trial that the events never occurred, the juries convicted Harrison. The trial court sentenced Harrison to serve two consecutive standard range sentences. On appeal, Harrison alleges that he received ineffective assistance from his counsel, raises numerous evidentiary issues and disputes the trial court's computation of his offender score and imposition of consecutive sentences. We affirm Harrison's convictions but remand for resentencing on his second assault conviction.

## FACTS

## First Appeal-November Assaults (No. 27484-1-II)

Phillips met Harrison at the telemarketing company where she worked. When Phillips was 18, she and Harrison began a romantic relationship and Phillips became pregnant. Harrison and Phillips began renting an apartment together. In October 2000, Phillips's mother moved in with the couple at Harrison's request.

Phillips's mother testified that, on November 10, 2000, she witnessed an argument between Phillips, who was nine months pregnant, and Harrison. When Phillips got in her car and tried to leave, Harrison entered his car and rammed Phillips's car. Both vehicles were damaged, but Phillips was not physically injured. After ramming Phillips's car, Harrison got out of his car and entered the passenger side of Phillips's car. Harrison pulled a gun on Phillips and threatened to kill her. Because Phillips's mother acquiesced in Phillips's request that she not report the incident to the police, she did not report the incident to the Tacoma Police Department until February 5, 2001.

At trial, Phillips explained her damaged car very differently, claiming that her car was damaged in an accident in January 2001. She testified that she and Harrison were driving on Highway 99 when a truck ran them off the road, forcing her car into a ditch. Phillips denied that any assault occurred on November 10, 2000, and claimed that Phillips's mother fabricated the story because she disliked Harrison.

The jury found Harrison guilty on two counts of second degree assault (domestic violence) for the events occurring on November 10, 2000, but did not find that Harrison was armed with a deadly weapon on the second count. When the trial court calculated Harrison's offender score, the court noted the ramming of Phillips's vehicle and the subsequent threat to kill made after he entered her car as separate offenses. The court imposed a sentence of 43 months.

## Second Appeal-January Assaults (No. 27800-6-II)

On January 16, 2001, at approximately 4:00 a.m., Phillips went to her neighbor Constance Bauer's home. In a frightened voice, she told Bauer that her boyfriend was trying to kill her. Phillips wanted to call her mother, but Bauer convinced her to call the police.

Within minutes, Officer Jennifer Kramer responded to the call and took Phillips's statement. Phillips told Kramer that, earlier that evening, she and Harrison

**(Cite as: Not Reported in P.3d)**

had gotten into an argument and that he had (1) slammed her head on a cupboard; (2) tried to drown her in the bathtub; and (3) held a gun to her head and tried to stab her. Phillips stated that she had fled to the Bauer home fearing for her life. Later that morning, the police entered Phillips's and Harrison's residence and recovered the knife and firearm allegedly used in the attack. Phillips told Kramer that Harrison put the knife on the stove. Phillips also told Officer Kelly where the gun was located.

\*2 At trial, Phillips provided a different account of these events. She testified that she and Harrison had argued that day about his relationships with other women and that he had contracted and infected her with a sexually transmitted disease. Phillips testified that her mother told her to concoct the story told to the police. To explain the injuries Bauer and Kramer observed, Phillips claimed that she fell and hit her head on the bathtub. Phillips stated that she made the call to the police because she was angry with Harrison for his infidelity but that she was recanting her earlier statement because she did not want to send an innocent man to jail.

A jury convicted Harrison of one count of second degree assault and one count of fourth degree assault for the events occurring January 16, 2001. The trial court imposed a standard range sentence of 50 months, ordering that this second sentence be served consecutive to the first. We consolidated the appeals of both convictions.

## ANALYSIS

### Appeal of the November assaults

#### I. Exclusion of expert testimony

Harrison challenges the trial court's refusal to allow defense witness James Towne to offer opinion testimony on how Phillips's car was damaged. Generally, opinion testimony may be offered only by an expert. ER 701, 702. Lay witnesses may not offer opinions, but should only state facts of which they have personal knowledge. ER 701; see State v. Smith, 16 Wn.App. 300, 302, 555 P.2d 431 (1976), *review denied*, 88 Wn.2d 1014 (1977). Expert testimony

may be considered if it will assist the trier of fact in understanding the evidence or fact at issue. State v. Farr-Lenzini, 93 Wn.App. 453, 460, 970 P.2d 313 (1999). The decision to admit expert testimony is within the discretion of the trial court. State v. Stenson, 132 Wn.2d 668, 715, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998).

Harrison argues that the superior court improperly excluded Towne's opinion evidence because his opinion testimony would have been helpful to the jury. However, when the court asked, Towne said that he could not render an opinion on the totality of the accident, but that he could discuss evidence such as paint transfer, lack of paint transfer, transfer of bumper material, and scraping. Towne agreed that these were factual observations. Moreover, the court noted that because Phillips's testimony did not indicate the locations or speeds of the vehicles, there was no foundation on which an accident reconstruction expert, assuming Towne qualified as one, could base an opinion. With the witness's admission of his limited ability to render opinion testimony, the trial court did not abuse its discretion by requiring that Towne limit his testimony to factual observations.

#### II. Exclusion of the Accident Report

Citing State v. Baird, 83 Wn.App. 477, 922 P.2d 157 (1996), *review denied*, 131 Wn.2d 1012 (1997), Harrison argues that the trial court interfered with his right to present a defense by excluding his insurer's appraisal request containing facts of the accident as recounted by Phillips and the testimony of the damage appraiser to whom the report was made. As is commonly known, hearsay is not admissible unless the rules provide otherwise. ER 802; State v. Neal, 144 Wn.2d 600, 605, 30 P.3d 1255 (2001). But Harrison argued to the trial court that the report should have been admitted under a business record exception because it was created "in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission." RCW 5.45.020. The trial court's decision to admit or exclude evidence under this provision is reviewed for manifest abuse of discretion. State v. Alexander, 64 Wn.App. 147, 156,

822 P.2d 1250 (1992).

\*3 Here, the trial court refused to admit the insurer's appraisal request under the business records exception and excluded the damage appraiser's testimony as to the contents of the report. Harrison argues that the insurance adjuster's report was admissible to corroborate Phillips's testimony that the damage to her car occurred in an accident in January and not November, and that the evidence should have been admitted to show not that an accident occurred, but that a claim was made. But neither of these arguments alters the fact that the accident claim and the conversation with the insurance adjuster were unsubstantiated extrajudicial reports based on Phillips's report made by **Harrison's** insurer and were, therefore, double hearsay.

The adjuster's report includes **Harrison's** statements relayed to the adjuster by **Harrison's** insurer and is hearsay within hearsay. Therefore, to be admissible both **Harrison's** and the insurer's hearsay statements must fall under a recognized exception to the rule excluding hearsay. ER 805; State v. Rice, 120 Wn.2d 549, 564, 844 P.2d 416 (1993). The trial court found that the damage appraiser did not author or ordinarily keep the reports in question. The reports are prepared by the insurance company and then sent to the appraiser. Even if the appraiser's report were to be admitted as a business record, it contains hearsay statements of others and Harrison failed to establish the admissibility of those statements at trial.

Harrison did not lay a proper foundation to admit the appraiser's report as a business record and the trial court did not err by excluding the document as double hearsay.

### III. Denial of Mistrial

Harrison claims that his conviction should be reversed because of a remark by Phillips's mother during her testimony about a prior assault by Harrison on Phillips. Harrison did not move for a mistrial based on this remark, nor does his brief point to a motion for a mistrial. Instead Harrison cites two cases, State v. Wilburn, 51 Wn.App. 827, 832, 755 P.2d 842 (1988), and State v. Escalona, 49 Wn.App. 251, 253,

742 P.2d 190 (1987), in which convictions were reversed based on witness's references to prior criminal acts or convictions. But each of the cases cited involved trial court rulings on timely mistrial motions in which curative instructions were given, although in Escalona, counsel declined the court's offer of a curative instruction.

Whether a trial irregularity, such as an inadvertent remark, affected the jury's verdict requiring reversal of the verdict depends on several factors. See Escalona, 49 Wn.App. at 254. These factors are (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which a jury is presumed to follow. Escalona, 49 Wn.App. at 254. We review the trial court's decision whether or not to grant a mistrial based on the prejudice of statements under an abuse of discretion standard. State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983); Escalona, 49 Wn.App. at 254-55.

#### A. Seriousness of the irregularity

\*4 In Escalona, Division One reversed a conviction because of a witness's mention of prior convictions. 49 Wn.App. at 256. The reference to the defendant's prior conviction, coupled with weak evidence presented by the State, made the witness's remark in Escalona prejudicial. 49 Wn.App. at 256. Moreover, in Escalona, the logical relevance of the witness's statement that Escalona had a record and had stabbed someone before where Escalona was charged with assaulting the victim witness with a knife, was strong. 49 Wn.App. at 255-56. In this case, Harrison acknowledges that Phillips's mother's statements were "somewhat indirect." Having reviewed the record, we agree.

#### B. Cumulative of other evidence properly admitted

Phillips's mother's remark was not repetitive of other admitted evidence.

#### C. Curative instruction

Here, whether the trial court should have granted

Harrison a mistrial depends on whether the trial court's instruction to disregard the "somewhat indirect" remark cured its effect. To analyze this factor, we consider whether the remark was inherently prejudicial and likely to "impress itself upon the minds of the jurors." Escalona, 49 Wn.App. at 255 (quoting State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)). Phillips's mother remarked as follows:

Q You felt that way certainly when she got pregnant by **Melvin**, didn't you?

A No. November 10th I felt fear. I prayed. I stood there and I prayed. You don't touch nobody when they have a gun at somebody's head. I prayed. I prayed to the good Lord that he didn't pull the trigger. I never said he didn't provide for her; I never talked down to him.... Any time he talked about issue, **Melvin** came to me and talked to me about it. Not the first time he did that to my daughter.

Report of Proceedings (RP) (April 17, 2001) at 127. The trial court immediately struck the last statement and provided a curative instruction. Unlike the remark in Escalona, which explicitly referred to defendant's prior convictions, this remark did not reference any legal finding and was less likely to create a prejudicial effect impressing itself upon the jury's mind. The trial court did not abuse its discretion by deciding to give a curative instruction rather than sua sponte declaring a mistrial on this basis.

#### IV. Motion for mistrial

Harrison also argues that Tara Yardly's statement that Harrison was incarcerated for three or four months required the trial court to declare a mistrial. The exchange between the State and Yardly was as follows:

Q How many times have you seen the defendant face-to-face in the last three or four months?

A He has been incarcerated for the last three or four months; is that correct?

RP (April 18, 2001) at 297. The trial court immediately struck the answer and provided a curative oral instruction to the jury. But this time Harrison moved for a mistrial.

A trial court's decision to deny the defendant's motion for a mistrial will not be overturned unless there is a

"substantial likelihood" that the error affected the jury's verdict. State v. Rodriguez, 146 Wn.2d 260, 269-70, 45 P.3d 541 (2002) (citations omitted). When reviewing a motion for a mistrial we apply an abuse of discretion standard. Rodriguez, 146 Wn.2d at 269. Abuse of discretion is found when "no reasonable judge would have reached the same conclusion." Rodriguez, 146 Wn.2d at 269 (quoting State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)). A new trial is granted only when the defendant is so prejudiced that only a new trial will ensure that the defendant is tried fairly. Rodriguez, 146 Wn.2d at 270.

\*5 Applying these standards to the current case, the trial court did not abuse its discretion by denying Harrison's request for a mistrial. The cases on which Harrison relies involved defendants being forced to appear in court in shackles or jail clothes, or the State's use of a mug shot causing a loss of presumption of innocence. State v. Finch, 137 Wn.2d 792, 851-53, 975 P.2d 967 (trial court improperly shackled defendant throughout the entire trial despite no evidence he posed a threat to anyone besides his estranged wife or that he was an escape risk), *cert. denied*, 528 U.S. 922 (1999); State v. Hartzog, 96 Wn.2d 383, 398-99, 635 P.2d 694 (1981) (broad general policy of physically restraining defendants improper). These cases relate to the physical appearance of the defendant, whether in person or in photograph. Harrison failed to show that this incidental remark so tainted the jury as to rebut the jury's presumption of innocence, especially considering that the remark was not responsive to the question asked and in the nature of a question. The trial court did not abuse its discretion by denying Harrison's motion for a mistrial on this ground.

#### V. Prosecutorial misconduct

Harrison alleges that the prosecution committed misconduct in its closing argument. The portion of the closing argument at issue is as follows:

So what does this case all boil down to? I told you in opening, it's not unlike many cases. There are always competing stories, versions of events. Here the question is: Who do you believe? Simple as that. Do you believe Patricia Phillips? Or do you believe the de-

**(Cite as: Not Reported in P.3d)**

fense case? Do you believe Randella Phillips? Do you believe Tara Yardly?

RP (April 18, 2001) at 313. We analyze this issue in two contexts: (1) whether Harrison's failure to object to the remark precludes our review of the appeal and, if not, (2) whether the statement itself is so flagrant as to deprive Harrison of a fair trial.

#### A. Whether the Statement is Prosecutorial Misconduct

Harrison claims that the prosecutor's statement about believing either Phillips's mother or Phillips was prosecutorial misconduct. We review allegations of prosecutorial misconduct under an abuse of discretion standard. State v. Brett, 126 Wn.2d 136, 174, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996). To satisfy this standard, the defendant must prove that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. State v. Rivers, 96 Wn.App. 672, 675, 981 P.2d 16 (1999) (citations omitted). In a closing argument, a prosecuting attorney has wide latitude in drawing and expressing reasonable inferences from the evidence. State v. Harvey, 34 Wn.App. 737, 739, 664 P.2d 1281, review denied, 100 Wn.2d 1008 (1983). Otherwise improper remarks are not grounds for reversal where they are invited or provoked unless they go beyond the scope of an appropriate response. State v. La Porte, 58 Wn.2d 816, 822, 365 P.2d 24 (1961).

\*6 Harrison relies on State v. Fleming, 83 Wn.App. 209, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997), to support his proposition that the prosecutor's comment constituted misconduct. In Fleming, we reiterated the well-settled principle that prosecutorial misconduct occurs when a prosecutor argues that the jury can acquit only if the State's witnesses are lying or mistaken. 83 Wn.App. at 213 (citations omitted). Harrison argues that the prosecutor's argument in this case was similar to the prosecutor's closing argument in Fleming because it required that the jury must determine whether the State's witness or the defendant's witness is lying.

But in Fleming, the prosecutor misstated the law by

telling the jury that in order to acquit, the jury must find that the State's witnesses are lying or mistaken. 83 Wn.App. at 213. The prosecutor's argument at issue here was directed to determining the credibility of the witnesses, a prime function of the jury. Here, the prosecutor merely pointed out that the testimonies of Phillips's mother and Phillips are irreconcilable. But he did not suggest that the jury must find one witness is lying in order to acquit.

A prosecutor's closing argument may include inferences from the evidence, including inferences as to why the jury should believe one witness over the other. State v. Copeland, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996). In this case, the prosecutor used his statement to assess the credibility of Phillips, repeating her testimony to show that she did not remember significant details of an accident that allegedly occurred in January 2001. The prosecutor did not state that to acquit the jury must believe Phillips's mother is lying, nor did the prosecutor express his personal opinion of Phillips's testimony. The focus of the prosecutor's closing argument was on witness credibility, and not unduly prejudicial.

#### B. Harrison's Failure to Object

Harrison did not object to the prosecution's statements in closing argument. Failure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). A remark that is likely improper may still not cause reversal of a conviction if it does not result in severe prejudice that could not be neutralized by an admonition to the jury. See State v. Wheless, 103 Wn.App. 749, 758, 14 P.3d 184 (2000). Evaluating the remark's prejudicial effect by this standard, it is clear that a proper instruction to the jury would have neutralized any prejudice caused by the prosecutor's remarks. See Russell, 125 Wn.2d at 88. Harrison's failure to request such an instruction belies his claim that the remark was flagrant and ill intentioned. Russell, 125 Wn.2d at 89. Moreover, even an egregious remark does not warrant a mistrial unless there is deliberate appeal to

**(Cite as: Not Reported in P.3d)**

the jury's passion and prejudice or the remark raises fear and revulsion in the jury. Russell, 125 Wn.2d at 89. As noted above, the prosecutor was arguing legitimate inferences from Phillips's testimony. The comment was not designed to inflame the passions of the jury and was not unduly prejudicial. Therefore, Harrison's failure to object and provide the court with the opportunity to give the jury a curative instruction precludes him from benefiting from this issue on appeal.

#### VI. Cumulative Error

\*7 Harrison argues that even if the errors of the trial court are themselves nonreversible, the errors taken collectively require reversal of the conviction. Under the cumulative error doctrine, accumulation of nonreversible errors may combine to deny the defendant a fair trial. State v. Perrett, 86 Wn.App. 312, 322, 936 P.2d 426, review denied, 133 Wn.2d 1019 (1997). Harrison points to the errors asserted above and claims that they combined to enhance the prejudice against Harrison. But the cases cited by the Perrett court, as well as the defendant, had several errors which independently did not require reversal, but combined to deny a fair trial to the defendants. Because Harrison has failed to show error, the cumulative error doctrine does not apply. State v. Stevens, 58 Wn.App. 478, 498, 794 P.2d 38, review denied, 115 Wn.2d 1025 (1990) (Where no prejudicial error is shown to have occurred, cumulative error did not deprive the defendant of a fair trial.).

As noted above, the only errors were inadvertent remarks by Phillips's mother and Yardly. While the challenged remarks were improper, the trial court promptly struck them and instructed the jury to disregard the inadvertent statements. From our review of the record, it does not appear that there is an accumulation of error that warrants a new trial.

#### VII. Same Course of Conduct

Harrison claims that the trial court erred by considering the two acts of assault on November 10, 2000 (ramming with the car and threat to kill), as two separate crimes for the purpose of calculating his offender score. The standards for determining whether more than one offense constitutes the same criminal con-

duct are outlined in statute. RCW 9.94A.589.<sup>FN1</sup> Two or more offenses are the same crime, if the defendant (1) possesses the same criminal intent; (2) commits the crimes at the same time or place; and (3) the crimes involve the same victim. RCW 9.94A.589(1)(a). The absence of any of the above elements prevents a finding of "same criminal conduct." State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). The trial court's calculation of the offender score is an implicit determination as to whether certain offenses constitute the "same criminal conduct" and should not be disturbed unless there was an abuse of discretion. State v. Channon, 105 Wn.App. 869, 877, 20 P.3d 476, review denied, 144 Wn.2d 1017 (2001).

<sup>FN1</sup> Formerly 9.94A.400 (1999). See Laws of 2001, ch. 10, sec. 6.

It is not disputed that Phillips was the victim in both assaults. We determine whether the same criminal intent exists by viewing the crimes objectively as they were committed, not on the subjective intent of Harrison. State v. Hernandez, 95 Wn.App. 480, 484, 976 P.2d 165 (1999). If the intent required by the charges differs, then the offenses will be considered separate crimes. Hernandez, 95 Wn.App. at 484. If not, after objectively viewing the facts, then the offenses will be considered the same crime. Hernandez, 95 Wn.App. at 484. In this case, Harrison was charged with two counts of second degree assault for both assaults with both charges resulting in conviction.

\*8 That {Harrison} ... did unlawfully and feloniously, under circumstances not amounting to assault in the first degree, assault {Phillips} with a deadly weapon, to-wit: an automobile....

....

That {Harrison} ... did unlawfully and feloniously, under circumstances not amounting to assault in the first degree, assault {Phillips} with a deadly weapon, to-wit: a handgun.

Clerk's Papers (CP) (No. 27484-1-II) at 1.

We next determine whether the crimes were committed at the same time or place. Phillips's mother's testimony was that Harrison committed the assaults out-

side the house occupied by Phillips and Harrison, but the first occurred while Harrison was in his car; the second a short time later when Harrison entered Phillips's car without her permission. The assaults occurred in sequence separated by enough time for Harrison to choose to leave his car and enter Phillips's and threaten to kill her rather than driving away.

Courts have found that the "same time" requirement does not require that the crimes be committed literally at the same time. Channon, 105 Wn.App. at 877 n. 6, State v. Porter, 133 Wn.2d 177, 183, 942 P.2d 974 (1997). The court has recognized a "clear category" of cases where the "same criminal conduct" is when the same crime is committed against the same victim within a relatively short period of time. Porter, 133 Wn.2d at 181. Relying on the "furtherance test" Harrison argues that courts have considered "sequentially committed crimes" as one crime for the purpose of calculating the offender score. The furtherance test applies to two or more sequentially committed crimes and states that offenses should be considered the same crime if one of the crimes furthered the other. Porter, 133 Wn.2d at 183; Vike, 125 Wn.2d at 411. Sequentially committed crimes can be the "same criminal conduct" if the other two statutory elements are met. Porter, 133 Wn.2d at 183. Here, the assaults were committed sequentially but they fail to meet the furtherance test. The assaults are separate offenses; the first was an assault on Phillips's car with an intent to keep her from driving away; the second was a threat to shoot her made after Harrison forced his way into her car with an intent to intimidate her by expressly threatening to kill her. Harrison broke off the first assault-ramming Phillips's car with his-and then, instead of driving off or allowing her to drive off, he re-engaged and committed a second assault by forcing his way into her car and threatening her life. The trial court properly calculated the two assaults as separate crimes.

#### Appeal From January Assault

##### I. Excited Utterances

Harrison claims that the trial court erred when it admitted Phillips's statements to the police under the excited utterance exception to the hearsay rule. Under

ER 802, hearsay is inadmissible unless the rules provide an exception. Phillips's statement is admissible if the statement was an excited utterance, defined as "{a} statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." ER 803(a)(2). Determining whether a declarant is under the stress of an event is a highly factual determination with a preponderance of the evidence standard. State v. Ramires, 109 Wn.App. 749, 757-58, 37 P.3d 343, review denied, 146 Wn.2d 1022 (2002).

\*9 Harrison makes two arguments challenging the trial court's admission of Phillips's hearsay statement. The first is that Phillips could not have been under the stress of the event because Phillips maintains that the event never occurred. The second is that the trial court erred by admitting the statement without a pre-trial hearing that included Phillips's testimony. Neither argument is persuasive.

In determining whether Phillips's statements were admissible, the trial court relied on the testimony of Bauer and Kramer, who interviewed Phillips that night. Bauer testified that Phillips appeared frightened when she arrived at her residence at 4:00 a.m. Bauer further testified to Phillips saying that she was afraid and fleeing Harrison. Kramer testified that when she was talking with Phillips at around 4:40 a.m., Phillips was visibly shaking and had a "startled, frightened look" on her face. RP (May 7, 2001) at 10. The officer also testified that Phillips appeared to be crying and that tears were in her eyes. Phillips's composure and influence of a startling event is clearly evident from the record. In addition, the police entered Phillips's home a short while later and recovered the gun and knife Phillips described. They also photographed the bathtub filled with water. These corroborated the spontaneous account Phillips made of Harrison's assault to Bauer.

Even when a witness recants her statement, the trial court may admit hearsay statements if shown to be reliable by balancing the witness's credibility with the evidence of reliability and spontaneity. State v. Briscoeray, 95 Wn.App. 167, 173, 974 P.2d 912, review denied, 139 Wn.2d 1011 (1999). Three requirements must be satisfied for a hearsay statement to

**(Cite as: Not Reported in P.3d)**

qualify as an excited utterance. State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992). First, a startling event or condition must have occurred. Chapin, 118 Wn.2d at 686. Second, the statement must have been made while the declarant was under the stress of excitement caused by the event or condition. Chapin, 118 Wn.2d at 686. Third, the statement must relate to the startling event or condition. Chapin, 118 Wn.2d at 686. Phillips's statements to Bauer and Kramer satisfy these three requirements and the trial court did not abuse its discretion by admitting the statements made shortly after the events at issue. See State v. Strauss, 119 Wn.2d 401, 417, 832 P.2d 78 (1992).

Harrison's argument that Phillips had the opportunity to fabricate the story and that, by her own testimony, her statement to the police that night was fabricated is circular and unpersuasive. Once the court determined that Phillips's statements to Bauer and Kramer were admissible excited utterances, their credibility and weight was a decision for the jury.

Harrison's argument that the trial court must assess Phillips's credibility before admitting evidence of an excited utterance incorrectly depends on the witness's availability. ER 803(a)(2); Chapin, 118 Wn.2d at 686. The declarant's availability is not relevant to the admissibility of an excited utterance. ER 803(a)(2); Chapin, 118 Wn.2d at 686. Phillips's testimony in a pretrial hearing as Harrison requested would have been irrelevant. Phillips claimed she did not make the statements or that the statements were what her mother told her to fabricate. The trial court properly admitted testimony from both Bauer and Kramer regarding statements Phillips made to them on January 16, 2001, and determined that they were made while she was under the influence of a disturbing event she described at the time as Harrison's assault.

\*10 Harrison argues that the trial court erred when it admitted Phillips's mother's testimony regarding the November 10, 2000 assault on Phillips after Harrison's attorney asked Phillips whether Harrison had ever "laid a violent hand on her." Br. of Appellant at 25. Harrison claims that his attorneys corrected the prejudice after asking the question by narrowing the scope to include only the incident in question. Harrison argues that the State should have limited its ques-

tioning to cross examination of Phillips or objecting to the statement at the time it was made, and not bringing a new witness to testify as to the November 10, 2000 assault. But by asking Phillips whether Harrison ever "laid a violent hand on her," the defense opened the door to evidence of prior acts of violent assault by Harrison against Phillips. Otherwise inadmissible evidence may be presented if the opposing party opens the door and the evidence is relevant to the issues at trial. State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969); State v. Stockton, 91 Wn.App. 35, 40, 955 P.2d 805 (1998). A trial court's decision to admit evidence is reviewed for abuse of discretion. State v. Pirtle, 127 Wn.2d 628, 648, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996).

The question Harrison raises is whether, once opened, a party may close the door. We do not reach this issue because Harrison's attorney twice asked Phillips if Harrison had ever raised a violent hand against her. Each time Phillips answered, saying Harrison never raised a violent hand against her. Following a sidebar conference, Harrison's attorney attempted to narrow his question and the scope of her answer by saying that when he said "raised a violent hand," he was referring only to this incident.

The trial court properly allowed the State to introduce evidence to rebut Phillips's testimony that Harrison had never raised a violent hand against her by presenting Phillips's mother's testimony to show that Harrison had been violent toward Phillips on November 10, 2000, without mentioning the conviction. The trial court did not abuse its discretion.

## II. Sentencing

Harrison claims that the trial court improperly required that his sentence for the January 16 assault run consecutive to his prior assault conviction arising out of the November 10, 2000 incident.<sup>FN2</sup>

<sup>FN2</sup>. Harrison argues that this violates the proportionality goal of the Sentencing Reform Act (SRA) and cites State v. Whitaker, 112 Wn.2d 341, 771 P.2d 332 (1989), stating that the reasoning of that case supports the proposition that a current offense should

**(Cite as: Not Reported in P.3d)**

not count as a prior conviction. But Whittaker addressed a revocation situation in which the defendant's subsequent conviction existed at the time of the revocation but did not exist at the time of his original sentence. 112 Wn.2d at 344-47.

If Harrison was sentenced on each conviction on different days, the sentences would have been served concurrently unless the court ordered that they be served consecutively.

Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

\*11 RCW 9.94A.589(3) (emphasis added).

If Harrison was sentenced for two or more current offenses, where each is used to increase the offender score and standard range of the presumptive sentence, the sentences must be served concurrently unless the trial court finds sufficient aggravating factors to warrant imposing an exceptional sentence. RCW 9.94A.589; FN3—State v. Flake, 76 Wn.App. 174, 182, 883 P.2d 341 (1994).

FN3. RCW 9.94A.589(1)(a) states:

Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed

under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

Here, four crimes were charged, two stemming from the November 10, 2000 incident and two from the January 16, 2001 incident. Harrison was convicted of second degree assault on April 19, 2001, for the November 10, 2000 incident and sentenced on June 1, 2001. FN4 The incidents were not part of the same course of conduct. Because Harrison was sentenced on different days, the trial court would have had the discretion to impose consecutive sentences. In this situation, the first conviction would be included in the offender score of the second but the second conviction would not be included in the calculation of the offender score of the first.

FN4. Harrison was also convicted of second and fourth degree assault on May 18, 2001, stemming from the January 16, 2001 incident, and sentenced on August 17, 2001. But this conviction did not affect his offender score.

Here the court treated Harrison's conviction for the January 16 assault as a prior or current conviction under RCW 9.94A.525 FN5 and used it to increase Harrison's offender score and the length of his standard range on his November 10 assault.

FN5. RCW 9.94A.525 (formerly RCW 9.94A. 360 (1999); see Laws of 2001, ch. 10, sec. 6) states:

(1) A prior conviction is a conviction which exists before the date of sentencing for the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed "other current offenses" within the meaning of RCW 9.94A .589.

(Cite as: Not Reported in P.3d)

....

(9) If the present conviction is for a serious violent offense, count three points for prior adult and juvenile convictions for crimes in this category, two points for each prior adult and juvenile violent conviction (not already counted), one point for each prior adult non-violent felony conviction, and 1/2 point for each prior juvenile nonviolent felony conviction.

RCW 9.94A.525 appears to allow this alternating use of these convictions. When the sentences on both occur on the same date, the sentences shall be served concurrently unless the simultaneously sentencing court expressly orders that they be served consecutively. Although Harrison's sentencings, were not held on the same date, the State argued that the sentencing trial courts retained the discretion to expressly order Harrison to serve his sentences consecutively even though the first standard sentencing range had already been enhanced by using the second in calculating the offender score. But under RCW 9.94A.589, whenever a person is sentenced for two or more current offenses, consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535.<sup>FN6</sup> Thus, by scheduling separate sentencing dates, the exceptional sentence requirements of RCW 9.94A.535 were not triggered even though Harrison's offender score was increased by including the conviction in computing the offender score as it would have been during a simultaneous sentencing.

FN6. Formerly 9.94A.390 (1999). See Laws of 2001, ch. 10, sec. 6.

The State argues that a plain reading of the statute defines convictions on current but unsentenced offenses to be included as prior convictions in calculating the appellant's offender score. A "prior conviction" is defined as "a conviction which exists before the date of sentencing for the offense for which the offender score is being computed." RCW 9.94A.525(1). Current convictions are included in the computation of the offender score. RCW 9.94A.589(1)(a). But we note that including other current convictions triggers the provision precluding

imposition of consecutive sentence absent a finding of aggravating circumstances supporting an exceptional sentence. Therefore, according to this reading of the statute, the court properly included Harrison's May 18, 2001 conviction in computing the offender score but, because Harrison's standard range included additional time caused by including his conviction for the January assault, it improperly ordered that the sentences be served consecutively without first finding sufficient aggravating factors warranting the imposition of an exceptional sentence.

\*12 Harrison claims he was denied effective assistance of counsel at sentencing. Because we remand for resentencing, we do not reach this issue.

We affirm Harrison's convictions, but remand cause No. 27800-6-II (January assault) for resentencing. At resentencing the trial court must order that the sentence be served concurrently with that imposed in cause No. 27484-1-II (November assault) or hold a hearing to determine whether there are sufficient aggravating factors to warrant imposition of an exceptional sentence requiring that the sentences be served consecutively.

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.

We concur: ARMSTRONG, J., and HUNT, C.J.  
Wash.App. Div. 2, 2003.

State v. Harrison

Not Reported in P.3d, 118 Wash.App. 1022, 2003 WL 22022088 (Wash.App. Div. 2)

END OF DOCUMENT

APPENDIX D

Alliance ones attempt to  
collect on uncharged manslaughter

Telephone : 1-253-620-2222 / 1-800-456-8838  
October 5, 2007

Name : CARL WILLIAM CUNNINGHAM  
Account Number : 5262959 PIN : N/A  
Client Reference Number : 92-1-00443-9 S1  
Client : PIERCE COUNTY SUPERIOR COURT

To Whom It May Concern:

An amnesty is being offered by AllianceOne on your outstanding Judgment(s). Depending upon the status of your account and balance, you may qualify for a reduction in the balance owed.

This amnesty is being offered today through December 31, 2007.

Upon receipt of this letter, please contact AllianceOne immediately to discuss whether your account qualifies for any reduction.

For your added convenience and immediate credit, you may pay your account at any Western Union location. Please call for details.

**Your account representative is: RANDY CARLTON (253)620-7379 EXT 7379**

This communication is from a debt collector. This is an attempt to collect a debt, and any information obtained will be used for that purpose.

### ACCOUNT INFORMATION

Assigned Amount	Assigned Interest	Post Assigned Interest	Other Fees or Charges	Payments Received	TOTAL BALANCE DUE
\$ 1855.66	\$ 1168.95	\$ 0.00	\$ 0.00	\$ 0.00	\$ 5267.59

✂ Detach Bottom Portion And Return With Payment ✂



PO BOX 510267  
LIVONIA MI 48151-6267  
RETURN SERVICE REQUESTED

↑ Mail return address only; send no letters

S-CUAMFC10 L-LAMNESTY A-5262959 O-5262959  
PODHSK00911461 I11462

CARL WILLIAM CUNNINGHAM  
110 E SHORECREST DR  
SHELTON WA 98584-9540



To contact us regarding your account, call:  
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If you wish to pay by VISA or MasterCard  
fill in the information below and return.

Credit Card Number    Check One:  Visa     MasterCard

\_\_\_\_ - \_\_\_\_ - \_\_\_\_ - \_\_\_\_

Payment Amt: \$ \_\_\_\_\_ Exp. Date: \_\_\_\_ / \_\_\_\_ / \_\_\_\_ CVV #: \_\_\_\_\_

Card Holder Name \_\_\_\_\_ (Last 3 numbers on back of card)

Signature of Card Holder \_\_\_\_\_ Date \_\_\_\_\_

ALLIANCEONE RECEIVABLES MANAGEMENT INC.  
PO BOX 2449  
GIG HARBOR WA 98335-2449



↑ Please send all correspondence and make check  
or money order payable to the above address:

Account Number	Amount
5262959	\$ 5267.59

Daytime Phone # \_\_\_\_\_ Evening Phone # \_\_\_\_\_