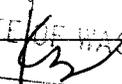


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DIVISION II

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STATE OF WASHINGTON
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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

AARON DUKES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kitty-Ann van Doorninck

No. 07-1-04441-0

BRIEF OF RESPONDENT

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

1. Did the trial court abuse its discretion in denying a motion for mistrial following a statement by a spectator after which the court gave a curative instruction to the jury?
2. Did defendant receive effective assistance of counsel when decisions were made with regard to trial strategy and tactics and defendant fails to show he was prejudiced by counsel's alleged errors?
3. Did defendant receive a fair trial when no cumulative error exists?
4. Whether the jury had sufficient evidence to convict defendant of assault in the second degree when two witnesses identified defendant as the perpetrator and the victim herself stated on more than one occasion that it was defendant who assaulted her?

B. STATEMENT OF THE CASE.

1. Procedure

On August 27, 2007, the Pierce County Prosecutor's Office charged AARON DEMITRIS DUKES, hereinafter "defendant," with one count of assault in the second degree. CP 1. The case proceeded to trial on January 10, 2008, in front of the Honorable Kitty-Ann van Doorninck.

RP (01/10/08) 3¹. A 3.5 hearing was held on January 16, 2008. RP (01/16/08) 7. The court ruled defendant's statements were admissible with the State's case in chief. RP (01/16/08) 13.

On January 16, 2008, defendant filed a motion for mistrial based on comments made by a spectator in the presence of the jury. CP 9-11. The court denied the motion. RP (01/16/08) 7. On January 17, 2008, the jury found the defendant guilty of assault in the second degree. RP (01/17/08) 7. A sentencing hearing was held January 25, 2008. RP (01/25/08) 3. Defendant had an offender score of five and a standard range of 22 to 29 months. RP (01/25/08) 3. Defendant was sentenced to 29 months of confinement and 18 to 36 months of community custody. CP 31-43. Defendant filed a timely notice of appeal. CP 118-131.

2. Facts

On August 25, 2007, at about three in the morning, Angela Williamson and her husband, Paul Williamson, were in their bedroom when they heard a woman yell "Stop. Help." outside. RP (01/15/08) 19. Ms. Williamson looked out a window and saw defendant beating a woman, later identified as Lawanda Wilson, on the head and throwing her

¹ The Verbatim Report of Proceedings is contained in 6 volumes, none of which are paginated consecutively. Citations to the pages of the record will be preceded by "RP([date of proceeding])." I.e., "RP(01/10/08) 1" refers to the first page of the proceedings of January 10, 2008.

to the ground. RP (01/15/08) 19. When Ms. Williamson yelled at him to stop, defendant said “Shut the f**k up, b***h.” RP (01/15/08) 19.

Mr. Williamson yelled out the window that they had just called 911 and after dragging Ms. Wilson by her hair and punching her in the face multiple times, defendant ran away. RP (01/15/08) 21, 34. The Williamson’s ran to Ms. Wilson and found her in the bushes covered in blood. RP (01/15/08) 23, 36. Ms. Williamson testified that she could not tell whether Ms. Wilson was white, black or Hispanic because she was covered in blood and had “holes in her face.” RP (01/15/08) 23.

Mr. Williamson was on the phone with 911 while trying to find and chase down defendant. RP (01/15/08) 36. He gave the operator a description of defendant and reported that Ms. Wilson was bleeding everywhere and had been thrown in the bushes. RP (01/15/08) 47-50. The police and an ambulance arrived a few minutes later. RP (01/15/08) 24. Ms. Wilson told paramedic Travis Smith that her boyfriend had hit her and had done it before. RP (01/15/08) 108, 113. An ambulance transported Ms. Wilson to St. Claire Hospital. RP (01/15/08) 110.

The Williamson’s described defendant to police as a medium built black male between 5’7 to 5’10 with a black fluffy hooded coat, black pants, a diamond earring in his right ear and curly hair. RP (01/15/08) 25, 30, 32, 39-40. The police took pictures of the area where Ms. Wilson’s personal items, including her purse and socks, were strewn in and around

puddles of blood. RP (01/15/08) 60-66. Photographs were also taken of Ms. Wilson's face showing lacerations on her cheeks, nose and hairline. RP (01/15/08) 60-66.

The police formed a containment area around the apartment complex and deployed a K9 unit to track defendant. RP (01/15/08) 66-67; RP (01/16/08) 28. The dog started at the initial spot of the incident and traveled south and west around the apartment complex. RP (01/16/08) 17. The police were notified defendant may be in his apartment and so Officer Martin, the dog handler, returned to the starting point. RP (01/16/08) 17. The dog ran east towards the apartment and the police found defendant's apartment door open. RP (01/16/08) 18-19.

Inside the apartment, the lights and television were on but no one was home. RP (01/16/08) 19. Officer Martin started the track again at the front door of the apartment and the dog went north around the corner of the building. RP (01/16/08) 19. The dog led officers to a vehicle in the parking lot of the building. RP (01/16/08) 20. Defendant was sitting in the driver's seat with the seat reclined. RP (01/16/08) 21, 30. After being ordered out of the car, defendant was handcuffed and put in the back of the police vehicle. RP (01/16/08) 31.

Officer Jason Catlett advised defendant of his rights and noticed defendant had blood all over the front of his shirt and a small amount on

his knuckle. RP (01/16/08) 32. When Officer Catlett asked defendant about the blood, defendant stated he had been slap boxing with some friends whose names he did not know. RP (01/16/08) 32. Detective Steven Parr interviewed defendant and received the same answers. RP (01/16/08) 38. Defendant angrily demanded to be taken to the hospital where Ms. Wilson was. RP (01/16/08) 39.

Paul and Angela Williamson were brought to the parking lot and asked to identify defendant in a field show up. RP (01/15/08) 69. Ms. Williamson stated she was almost positive defendant was the attacker and hid behind her husband out of fear. RP (01/15/08) 69. She mentioned she believed that defendant had changed his shirt and taken out his earring, but had the same jeans on and an officer told her there was a hole in his right ear. RP (01/15/08) 25-26, 30-31. Ms. Williamson said as soon as defendant started talking “[she] knew it was him.” RP (01/15/08) 25-26, 31. Mr. Williamson told the officers everything matched between the attacker and defendant although he thought the hairstyle was a bit different. RP (01/15/08) 69. Officers transported defendant to the Pierce County Jail. RP (01/15/08) 68, 70.

Detective Parr went to St. Clair Hospital to interview Ms. Wilson. RP (01/16/08) 39. During their 35 to 45 minute conversation, Ms. Wilson was bleeding constantly and had to wipe blood from various cuts on her

face and head every few seconds. RP (01/16/08) 39-40. Ms. Wilson asked Detective Parr two to three times whether defendant was really in custody. RP (01/16/08) 40. Detective Parr asked Ms. Wilson who had beat her and she said "My boyfriend, Aaron Dukes [defendant] did." RP (01/16/08) 50.

During trial Ms. Wilson testified that on August 24, 2007, after drinking a couple beers, she left the home she shared with defendant and went to a bowling alley with a friend. RP (01/15/08) 79-80. While at the bowling alley she drank some more and ran into a male friend who gave her his phone number. RP (1/15/07) 80-81, 88. Ms. Wilson testified she left the bowling alley around 1:45 a.m. and does not remember in very much detail anything after that until waking up in the hospital. RP (01/15/08) 81-83. When she woke up she had stitches on her face and was released and went to her mother's home. RP (01/15/08) 82-83.

At the beginning of the trial, the defense attorney expressed concern about a man in the courtroom, Shawn Garrett, who had previously threatened the defendant. RP (01/14/08) 3-8. At the end of Ms. Wilson's testimony, Mr. Garrett said in front of the jury "you don't have to be scared." RP (01/15/08) 92. The judge removed Mr. Garrett from the courtroom and gave a curative instruction to the jury. RP (01/15/08) 97.

Defendant testified that on August 24, 2007, around four or five p.m. he was hanging out at a friend's house playing video games and drinking. RP (01/16/08) 70-71. He left around nine p.m. and went home

with Ms. Wilson and another couple, Dazz, whose real name is unknown, and his girlfriend. RP (01/16/08) 32, 80-81. About midnight, Ms. Wilson left with the other woman to go to a bowling alley and defendant stayed at his apartment playing video games. RP (01/16/08) 72.

Defendant testified that Ms. Wilson and the other woman returned to the apartment around 2:30 a.m. and Dazz and his girlfriend left to go home. RP (01/16/08) 73. After seeing Ms. Wilson “acting funny,” defendant said he was leaving and without intending to actually leave, waited outside. RP (01/16/08) 74. Dazz returned, they had a conversation and defendant returned to his front door to find it locked. RP (01/16/08) 74. Defendant testified he continued his conversation with Dazz and a few minutes later returned to his front door to find it wide open. RP (01/16/08) 75. Defendant looked inside the apartment and did not see Ms. Wilson so he looked around the surrounding outside area. RP (01/16/08) 75.

During his testimony, defendant stated he returned to his home and got a phone call asking if he was Aaron Dukes. RP (01/16/08) 76. When he said yes the other party hung up. RP (01/16/08) 76. He received another call, answered it and they hung up again so defendant testified he went and sat in his car. RP (01/16/08) 76. The police arrived and placed him under arrest. RP (01/16/08) 76-77. During his testimony, defendant stated he did not have a pierced ear. RP (01/16/08) 77-78.

On cross examination, defendant said that although he did not know Dazz's real name, he knew the location of his home and could have told police this to investigate but did not. RP (01/16/08) 83-84. Defendant never told police he was slap boxing. RP (01/16/08) 85-86, 93. During re-direct testimony, defendant said he had been slap boxing earlier in the day around two or three p.m. and cut his hand on Smurf, a high school friend's, tooth. RP (01/16/08) 97. When he was arrested, defendant said the blood on his shirt came from a cut on his hand he wiped on his shirt while he was playing video games that evening. RP (01/16/08) 91-92. According to defendant, the cut on his hand continued to bleed until early the next morning or for about 12 to 13 hours. RP (01/16/08) 97-98.

Defendant presented a private investigator, Lee White, who checked for evidence of pierced ears on the defendant. RP (01/16/08) 99. In looking at defendant's ears the day before his testimony, Mr. White found no evidence of piercing or scarring from holes in defendant's ears. RP (01/16/08) 100-103.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING A MOTION FOR MISTRIAL FOLLOWING A STATEMENT BY A SPECTATOR WHEN THE COURT GAVE A CURATIVE INSTRUCTION TO THE JURY.

The grant or denial of a motion for a new trial is within the sound discretion of the trial court and will be reversed only for abuse of that discretion. *State v. Copeland*, 130 Wn.2d 244, 294, 922 P.2d 1304 (1996). A trial court abuses its discretion when the reason for its decision is manifestly unreasonable or based upon untenable grounds. *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 77, 684 P.2d 692 (1984).

The trial court should grant a mistrial only when the defendant has been so prejudiced that only a new trial can insure that the defendant will be tried fairly. *State v. Johnson*, 124 Wn.2d 57, 873 P.2d 514 (1994)(citing *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)(quoting *State v. Mak*, 105 Wn.2d 692, 701, 718 P.2d 407, *cert. denied*, 497 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986)). That is, a trial court's denial of a motion for mistrial will be overturned only "when no reasonable judge would have reached the same conclusion." *Johnson*, 124 Wn.2d at 76. "Only errors affecting the outcome of the trial will be deemed prejudicial." *Id.* In determining the effect of an irregular occurrence during trial the court is to "examine (1) its seriousness; (2)

whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it.” *Id.*

In the present case, at issue is a singular statement made by a spectator, Mr. Garrett, during his observation of Ms. Wilson’s testimony. At the end of Ms. Wilson’s testimony, Mr. Garrett said in the presence of the jury, “you don’t have to be scared.” RP (01/15/08) 92. The court called a recess, removed Mr. Garrett from the courtroom and discussed the statement outside the presence of the jury. RP (01/15/08) 92-97. The defendant moved for a mistrial and while reserving her ruling, the judge gave a curative instruction to the jury stating:

I apologize for the interruptions this afternoon. You are instructed to disregard any comments from the gallery. You are to only determine the facts in this case based on the evidence that is produced in court.

RP (01/15/08) 97.

The following morning, the court discussed the issue again and the motion for a mistrial was denied. RP (01/16/08) 5-7.

In the present case, the trial judge did not abuse her discretion by denying the motion for mistrial and giving a curative instruction. The decision to grant or deny a mistrial motion lies within the discretion of the court. *Copeland*, 130 Wn.2d at 294. Looking at the factors outlined in *Johnson* the trial court is required to consider, it is evident that the court did not err in its decision.

First, the seriousness of the statement is limited when viewed from the perspective of the jury. Having only heard that singular statement, the jury could reasonably believe that Mr. Garrett was simply offering support to an emotional witness.

Second, the statement was a single isolated incident with no other discussions concerning Mr. Garrett presented in front of the jury. The concerns brought by defendant about Mr. Garrett and his relationship to defendant were expressed outside the presence of the jury and as such, did not result in cumulative evidence.

Finally, the curative instruction given by the trial court correctly directed the jury to disregard the statement. By immediately calling a recess and making a curative instruction upon reconvening, the trial court drew little if any attention to the statement and moved on. Any other reasonable court would have done the same.

Furthermore, the trial court did not abuse its discretion in denying the motion for mistrial on the grounds of prejudicial courtroom security.² The court stated “for the record, there’s only been one security officer who’s been visible to the jurors.” RP (01/16/08) 7. The court addressed that at points there may have been up to three or four security officers in

² Appellant’s brief contains a sub issue of abuse of discretion regarding prejudicial courtroom security. Appellant’s Brief 11-13.

the room, but described the courtroom as having an alcove which blocks the jury's view of these officers. RP (01/16/08) 7.

Defendant's brief cites cases concerning the physical appearance of defendant and his right to a fair trial. This in no way relates to the presence of the security officers in the courtroom and the court's discretion to deny a motion based on such an issue. Because the officers were not visible to the jury, it was within the trial court's discretion and not an error to deny the motion for mistrial.

2. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL THROUGHOUT THE TRIAL PROCEEDINGS.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S.Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney's performance was deficient, and (2) that he or she was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Unless a defendant can show both prongs, "it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 686.

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to

claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (C.A. 9, 1995).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. ***State v. Ciskie***, 110 Wn.2d 263, 751 P.2d 1165 (1988). A presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena necessary witnesses. *Id.* An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. ***State v. Carpenter***, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within a wide range of professionally competent assistance. ***Strickland***, 466 U.S. at 489; ***United States v. Layton***, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 488 U.S. 948 (1988). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that defendant did not receive effective assistance of counsel. ***State v. Lord***, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). Defendant must therefore show, from the record, an absence of legitimate strategic reasons to support the challenged conduct. ***State v.***

McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). In determining whether trial counsel's performance was deficient, the actions of counsel are examined based on the entire record. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994).

a. Unsupported ineffective assistance of counsel claims.

Counsel makes several claims of deficient performance.

Appellant's Brief 18-21.³ All of these claims are made without any reference to legal authority. *See Cowiche Canyon Conservancy v. Bosley* 118 Wn.2d 801, 809, 828 P.2d 549 (1992)(a court need not consider an argument that is not supported by any reference to the record nor any citation to authority). Therefore, assuming without conceding that any of these were evidence of deficient performance, counsel fails to prove any prejudice resulted. Per the *Strickland* test described above, defendant is required to show that he was prejudiced by such a deficiency and that but for counsel's errors, the result of the trial would be different. *Strickland*, 466 U.S. at 688; *Thomas*, 109 Wn.2d at 226. If defendant fails to prove this, as has occurred in this case, the conviction is reliable. *Strickland*, 466 U.S. at 686. Furthermore, a number of defense counsel's decisions

³ The State is unsure of the issues presented by defense in this section and addressed the confusion in a motion to strike the appellant's brief filed on 07/18/08.

appear to be based on trial strategy. However, regardless of the contested deficiency of these claims, the evidence supporting a conviction is overwhelming. (See Argument Infra, Issue 4).

b. Defendant received effective assistance of counsel as the field show up identification was proper.

The defendant bears the burden of showing that an identification procedure was impermissibly suggestive. *State v. Linares*, 98 Wn. App. 397, 401, 989 P.2d 591 (1999)(citing *State v. Vaughn*, 101 Wn.2d 604, 682 P.2d 878 (1984)). When a defendant fails to show impermissible suggestiveness, the inquiry ends. *Vaughn*, 101 Wn.2d at 609-10. Only after the defendant first shows impermissible suggestiveness does the inquiry turn to whether the identification was nevertheless reliable. *Id.* 610-11. The court then reviews the totality of the circumstances to determine whether that suggestiveness created a substantial likelihood of irreparable misidentification. *State v. Taylor*, 50 Wn. App. 481, 485, 749 P.2d 181 (1988).

To determine reliability, the court must consider the following factors: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of his prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the

confrontation. *Manson v. Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977)(concluding that “reliability is the linchpin” for determining the admissibility of identification testimony).

Assuming without conceding that the identification in the present case was suggestive, the identification is still reliable based on the factors set forth in *Manson v. Brathwaite*. There is substantial evidence to support the reliability of the identification of defendant during the field show up.

After hearing noises outside, Angela Williamson looked out her bedroom window and saw defendant and Ms. Wilson in a physical altercation. RP (01/15/08) 18. Ms. Williamson yelled to defendant to stop hitting the woman and defendant responded by saying “shut the f**k up, b***c.” RP (01/15/08) 19. Mr. Williamson got up, looked out the window and yelled that he had just called 911 to defendant. RP (01/15/08) 35. Ms. Williamson ran out her front door and chased after defendant who was dragging Ms. Wilson by her hair down the street. RP (01/15/08) 21. Not only did Ms. Williamson view defendant long enough to witness multiple beatings by defendant to Ms. Wilson’s head, but Ms. Williamson also had a verbal exchange with defendant and proceeded to chase him away from the apartment complex.

In relation to the first and second factors, Ms. Williamson had an adequate opportunity to view defendant during this time. The

Williamsons' attention factors were also high because of the severity of the situation and desirability to discover what was happening. This had a focusing effect on the actions that occurred during the altercation although it was over a relatively short period of time, probably no more than a minute or so.

As to the third factor, the Williamsons' also accurately described defendant to police on more than one occasion. During the 911 call, Mr. Williamson described defendant as a medium built black male, around 25 years old, who was 5'9 to 5'10 wearing dark blue or black clothing. RP (01/15/08) 49. In his description to police before the identification, Mr. Williamson described defendant as being a medium built black male who was 5'9 to 5'10 and wearing a dark outfit. RP (01/15/08) 40.

Ms. Williamson described defendant to the police as wearing black pants, a black shirt, and a fluffy coat with short curly or afro hair sticking out of a hood and a diamond earring in his right ear. RP (01/15/08) 30-32. Evidence was presented at trial five months after the identification was made that defendant had never had pierced ears. RP (01/16/08) 99-103. But, the night of the identification, although defendant had no earring in, when Ms. Williamson asked an officer if there was a hole in defendant's right ear, the officer confirmed there was. RP (01/15/08) 26.

Relating to the fourth factor, the Williamsons made identifications of defendant with certainty based on defendant's physical appearance and voice. Although initially not sure if defendant was the attacker because he

had changed his shirt and removed his earring, after looking at him longer and hearing him speak, Ms. Williams “knew it was him.” RP (01/15/08) 25-26, 30. Officer Hall testified that it was only after Ms. Williams saw defendant and heard him speak, thereby recognizing him as the attacker that Ms. Williams immediately hid behind her husband out of fear. RP (01/15/08) 70. Concerning the fifth factor, the elapsed time between the actual incident and the identification by the Williamsons was only two hours. RP (01/15/08) 25. Based on the foregoing conclusions, the field show up identification was not impermissibly suggestive or prejudicial and defense counsel properly chose not to object.

3. DEFENDANT RECEIVED A FAIR TRIAL AS NO CUMULATIVE ERROR EXISTS.

The doctrine of cumulative error recognizes the reality that sometimes numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) (“although none of the errors discussed above alone mandate reversal....”). The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court’s weighing those errors. *State v. Russell*, 125

Wn.2d 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995).

In this case, for the reasons set forth in the preceding sections, defendant has failed to establish any error, much less an accumulation of it. No cumulative error occurred. Even if errors exist, the evidence against defendant is overwhelming and the errors are harmless.

4. THE JURY HAD SUFFICIENT EVIDENCE TO CONVICT DEFENDANT OF ASSAULT IN THE SECOND DEGREE.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the State met the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, challenging the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988)(*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*,

29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Salinas*, 119 Wn.2d 192; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. Credibility determinations are necessary because witness testimony can conflict; these determinations should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

[G]reat deference . . . is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)(citations omitted).

Therefore, if the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

Defendant alleges that the State failed to prove beyond a reasonable doubt the identity of the assailant. This argument lacks support as there is overwhelming evidence that it was the defendant who attacked Ms. Wilson. Two witnesses, the Williamsons, identified defendant two hours after the incident as the man they saw and heard assaulting Ms. Wilson. RP (01/15/08) 25-26, 31, 69. When the paramedics arrived, Ms. Wilson told paramedic Smith that her boyfriend had hit her and had done it before. RP (01.15.08) 108, 113. At the hospital, Ms. Wilson told Detective Parr it was her boyfriend, Aaron Dukes (defendant) who had assaulted her. RP (01/16/08) 50. At the time of his arrest, defendant had blood all over the front of his shirt and a small amount on his knuckle. RP (01/16/08) 32.

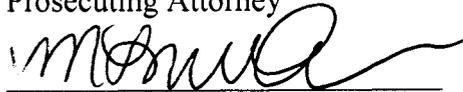
Furthermore, determinations regarding the credibility of witnesses made by the trier of fact should not be overturned. *See State v. Cord*, 103 Wn.2d 361, 693 P.2d 81 (1985). The jury, after hearing the testimony of the Williamsons, Ms. Wilson and the police officers determined it was defendant who assaulted Ms. Wilson. This determination should not be altered and the verdict should be upheld.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's convictions.

DATED: SEPTEMBER 22, 2008

GERALD A. HORNE
Pierce County
Prosecuting Attorney



MICHELLE LUNA-GREEN
Deputy Prosecuting Attorney
WSB # 27088

Chelsey McLean
Appellate Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

Date Signature

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DATED: SEPTEMBER 22, 2008

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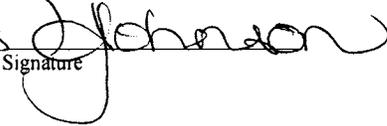


MICHELLE LUNA-GREEN
Deputy Prosecuting Attorney
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9/22/08 
Date Signature

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