FILED
COURT OF APPEALS
DIVISION II
08 NOV -4 AM 11:55
STATE OF WASHINGTON
BY
DEPUTY

NO. 37389-1-II

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

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 OCT 31 PM 4:09

STATE OF WASHINGTON,

Respondent,

v.

GORDON HAMMOCK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR LEWIS COUNTY

The Honorable Nelson Hunt, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to prove that appellant possessed a firearm for the Unlawful Possession of a Firearm charge.

2. Because the State did not prove possession of a firearm, the deadly weapon sentencing enhancement must be vacated.

3. Evidence appellant previously had been convicted of a crime, was recently released from prison, was under Department of Corrections supervision, and was well known to police violated his right to a fair trial.

4. The trial court erred when it denied appellant's motion for mistrial based on admission of this evidence.

Issues Pertaining to Assignments of Error

1. The term "firearm" is defined by statute. In appellant's case, the State argued that a bolt from a bicycle was a firearm. It does not, however, meet the statutory definition. Given the absence of evidence appellant possessed a firearm, should this Court vacate his conviction for Unlawful Possession of a Firearm?

2. Prior to trial, the defense moved to dismiss the charge of Unlawful Possession of a Firearm under State v. Knapstad[1] because the State could not show the bolt was a firearm. The motion was denied,

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[1] State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986).

allowing the State to proceed with the charge and resulting in jurors learning that appellant had a previous conviction for a "serious offense," an element of the charge. Where, as a matter of law, the bolt was not a firearm, did the trial court err in denying the defense motion to dismiss?

3. The State charged appellant with a deadly weapon sentencing enhancement and encouraged jurors to base the enhancement on a finding that the bolt was a firearm. Because the bolt is not a firearm, should this Court vacate the sentencing enhancement?

4. Three witnesses revealed that appellant had served prison time in the past, was only recently released, was under Department of Corrections supervision, and was well known to law enforcement because police had "dealt with" appellant before. This evidence improperly focused jurors on appellant's propensity to commit crime, thereby by making it more likely jurors would convict him on the current charges. Did the trial court err when it denied appellant's motion for mistrial?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Lewis County Prosecutor's Office charged Gordon Hammock with five criminal offenses: (count 1) Murder in the First Degree; (count 2) Unlawful Possession of a Firearm; (count 3) Possession of a Controlled

Substance; (count 4) Attempted Intimidating a Witness; and (count 5) Unlawful Use of Drug Paraphernalia. CP 162-164.

A jury convicted Hammock on all five counts and answered "yes" on a special verdict form asking whether he had been armed with a deadly weapon in count 1. CP 73, 76, 79-80, 86-87. The court imposed a standard range 596-month sentence, including 48 months for the deadly weapon enhancement, and Hammock timely filed his Notice of Appeal. CP 5, 8, 11.

2. Substantive Facts

a. Facts pertaining to the offenses

Gordon Hammock has struggled with drug addiction most of his life. 9RP[2] 95. As a child, Hammock's primary caregiver was his abusive and alcoholic father. 9RP 110, 117. Moreover, Hammock suffered from ADHD and learning disabilities, which required his participation in special education programs. From the time he was about 12 years old, he began self-medicating with drugs. He dropped out of school at age 16. 9RP 102-03.

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[2] This brief refers to the verbatim report of proceedings as follows: 1RP - 4/16/07; 2RP - 8/24/07; 3RP - 10/12/07; 4RP - 1/25/07; 5RP - 2/4/08; 6RP - 2/7/08; 7RP - 2/8/08; 8RP - 2/11/08 (a.m.); 9RP - 2/11/08 (p.m.); 10RP - 2/12/08; 11RP - 2/13/08; 12RP - 2/14/08; 13RP - 2/15/08; 14RP - 2/19/08; 15RP - 2/20/08; 16RP - 2/21/08; 17RP - 2/22/08; 18RP - 2/27/08.

In the two to three-year period preceding the charges in this case, Hammock and his mother -- Faye -- had grown close. 9RP 110-11. During that period, Faye observed that her son's drug addiction was quite serious. He would sometimes stay awake for five days at a time, followed by several days of sleep. 9RP 96.

In January 2007, however, Faye believed her son was doing better. 9RP 96. Hammock and his girlfriend, Melissa McKee, were living in Faye's Centralia home. 9RP 17, 21; 13RP 5. McKee had recently confirmed she was pregnant. Hammock fixed up one of the bedrooms, including creating a double bed for the couple from two single beds, and made the room nice for McKee. 9RP 97-98.

Unfortunately, however, during the several days leading up to January 24, 2007, it was obvious to Faye that her son was using methamphetamine. So was McKee, who also had struggled with long-term addiction. 9RP 97-98; 13RP 10; 14RP 111.

On Monday, January 22, 2007, William Ford called Hammock and asked if he wanted to "hang out." It had been several months since McKee had seen Ford. Hammock and Ford were friends. McKee and Ford had been friends in the past, but their relationship had soured. McKee and

Hammock picked up Ford in downtown Centralia around 10:00 p.m. in McKee's car. 13RP 6-8,10, 34-35.

McKee and Hammock were already high on methamphetamine, which they had been using throughout the day, but they went back to Faye's home and, along with Ford, used more. They were also using "whip-its," which involve the inhalation of nitrous oxide from small canisters, resulting in a 30-second rush. 13RP 8-17, 31-32. Methamphetamine increases libido, and the three engaged in sexual activities together. 13RP 11, 17.

Hammock had already been awake for a few days prior to January 22, possibly since January 19, and he continued to stay awake through January 23. 13RP 18-19. The morning of January 23, Ford and Hammock wanted more meth. 13RP 19. By 8:00 a.m., someone had dropped off an additional supply, and the two men used it. 13RP 21. Everyone was getting along well. 13RP 26.

That afternoon, Ford and Hammock accompanied McKee as she drove to work at an Olympia restaurant. 13RP 26-27. Ford and Hammock purchased some pornography and more whip-its and were waiting for McKee when she got off work at 1:30 a.m. on the morning of the 24th. 13RP 27-31. On their way to downtown Centralia to purchase more drugs,

an officer with the Centralia Police Department stopped them for an infraction (a light out) and issued McKee a citation. 13RP 32-33.

On the way back to Faye Hammock's house, around 2:30 a.m., the three purchased more methamphetamine. 13RP 35-36. Back at the house, they each injected two to three times and once again had sex together. 13RP 38-39. Eventually, however, a conflict arose. 13RP 39-40.

While all three were on the bed, Hammock perceived what he interpreted as "a look" passing between McKee and Ford. 13RP 41; 14RP 119. Hammock said "what was that" and asked Ford "do you know something?" 13RP 42; 14RP 119. Ford responded, "I don't know, but I wouldn't trust her." 13RP 42; 14RP 119. This angered McKee, who responded, "don't try it," meaning Ford should not say anything that would result in Hammock believing she was involved in some kind of deception. 13RP 41; 14RP 120. But this interaction only served to make the two look more suspicious. 13RP 44.

Hammock said Ford and McKee were both at fault and decided each should lose a toenail. He grabbed one of McKee's nails with a pair of needle nosed pliers, but then changed his mind and said the best way to resolve this "dispute" was for he and Ford to go outside and fight like men. 13RP 44-46; 14RP 122-23. Hammock told Ford that either they would

fight or Ford would have to leave the house and never come back. 13RP 52.

The two went outside and exchanged punches in the middle of the street near the front yard. 13RP 52-53. The commotion attracted Faye' attention and, believing it was still the middle of the night, she walked outside and yelled at everyone to leave. 9RP 25-26; 13RP 52, 56.

In fact, it was now 7:00 a.m., and another individual -- Kevin Baudry -- pulled into the driveway during the fray. 6RP 96; 9RP 26-27; 13RP 55. Hammock had called Baudry that morning and asked him to come over because Hammock needed a ride somewhere. In the past, Hammock had asked Baudry for a ride when he wanted to buy drugs. 6RP 95-97. Despite Faye's demand that everyone leave, Hammock, McKee, Ford, and Baudry went inside the house. 13RP 56.

There was still enough residual methamphetamine for Baudry to inject "a big hit." 13RP 57-58. McKee would later recall that everyone in the room was now "very high." 15RP 21. Although everyone was functioning at a certain level, nothing was normal. There was not a lot of coherent conversation. McKee couldn't speak in complete sentences. Everyone was talking but no one was listening. There was no rational

thought. McKee was "out of her mind high" and so were Hammock and Ford. 13RP 59; 15RP 19-22.

Hammock had now been awake for several days longer than McKee, and sleep deprivation plus methamphetamine can cause hallucinations. 14RP 112-13. Although Hammock never specifically mentioned hallucinations, he "was on a different level" because he had been doing drugs longer and was more sleep deprived. 14RP 113; 15RP 9. He was acting strangely. Not only was his threatened removal of toe nails odd, when everyone went inside the house after the fistfight, Hammock made McKee enter through the window even though she lived there. 15RP 10, 20-21.

On the surface, it appeared to McKee that the situation leading to the fistfight had resolved itself. No one was saying anything negative to anyone else. But she still sensed tension in the room. 13RP 59.

Lying on the bed was a part removed from a BMX bicycle. Specifically, it was a one-piece threaded stem bolt with a hexagonal head on one end and a hole down the center.[3] 11RP 131; 15RP 67. Ford picked it up and handed it to Hammock, who placed it back on the bed.

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[3] A photo of the bolt is attached to this brief as an appendix.

This happened again. And the third time it happened, Hammock handed the bolt to McKee. 13RP 70.

According to McKee -- who traded her testimony for a plea deal ensuring she would only be convicted of attempted murder and serve as little as 8 years -- when Hammock handed her the stem bolt, he said something to the effect of "why don't you just shoot this motherfucker?" 13RP 60-62; 14RP 95; 15RP 57.

Previously, McKee had seen Hammock fire a round through the bolt and into the ground by placing the round inside the bolt and striking it with a hammer. But at the time, the bolt had "other pieces attached," and Hammock may have once tried to rig some type of trigger mechanism. 13RP 61-62. McKee tried to place a round into the bolt but was unsuccessful. Hammock then placed the round inside the bolt on the side with the hexagonal nut. 13RP 62.

McKee did not interpret Hammock's comment about shooting Ford as a directive, but she wanted to show him she was loyal and would do what he said. Moreover, she believed this was all a joke; she did not think it would fire and thought it was meant to merely scare Ford a little bit. 13RP 63; 14RP 156. She does not believe Hammock thought she would

actually do it and does not believe Hammock intended that Ford get shot. 13RP 71.

With the bolt in one hand and a ball peen hammer in the other -- which she may have picked up on her own -- McKee approached Ford, who was sitting on the bed. 13RP 62, 67-69. When she pointed the bolt at Ford's head, he "kind of jerked back," and McKee said, "what's the matter, are you scared?" 13RP 64, 71; 14RP 9.

McKee held the bolt up to Ford's head, swung lightly at the end of the bolt with the hammer, and missed. 13RP 67-68. Without pausing, she pulled her arm back and began to swing again. Before she completed the second swing, she heard Hammock say "no," but it was too late. 13RP 68. McKee heard a "pop" and Ford fell to the floor between the bed and the wall. 13RP 62-63, 69, 75.

Ford asked what happened. McKee wondered the same thing. She did not think she had shot him. There was little blood and Ford was still talking. 13RP 72. Initially, Hammock and Baudry apparently did not think so, either. Both were trying to reassure McKee and Ford. 13RP 72, 74. But Ford had been shot. A .22 caliber slug had entered just above and behind Ford's right ear, passed through the lower right posterior of his brain, and lodged in the lower left posterior region. 10RP 104-07; 13RP

75. This injury may have been lethal even with medical attention, but it was certainly lethal without attention. 10RP 107.

McKee left the room to determine if Faye heard the shot. She had not. She was sitting in the living room watching television and seemingly unaware that anything had happened. 13RP 74. McKee returned to the bedroom and as she entered, she heard Baudry yelling something to the effect of "no, don't, stop, you're going to kill him" and saw Hammock with a hammer in his hand and a wild look in his eyes. 13RP 76-78. Whereas Ford had been sitting against the wall when McKee left the room, he was now lying on the floor next to the wall. 13RP 78-80.

Ford was still coherent, but he was speaking less and his voice was weaker. 13RP 81, 85. At some point, according to McKee -- either right after the shot or after she returned to the room -- Baudry offered to take Ford to the hospital, but Hammock said it was too late for that. 13RP 84.

Hammock and Baudry left the room for a period while McKee stayed with Ford. 13RP 86-87. When the two men returned, McKee gave Ford some Percocet for his pain. 13RP 88. According to McKee, Hammock said she was facing 14 years in prison for shooting Ford. 13RP 89.

Eventually, Hammock told McKee to perform oral sex on Baudry, thereby making it less likely he would report what had happened. 13RP 92. All three were engaging in sex when Faye banged on the bedroom door and said Baudry had to leave. Baudry got dressed and left the house. 13RP 93-97. Faye also left the house. 13RP 98-99.

Ford was still speaking, but his voice was now much weaker. 13RP 97. According to McKee, Hammock thought he heard a noise by the front of the house and had her cover Ford with some blankets and a pillow. 13RP 100, 103-04. He retrieved a large iron tool with a handle on one end and a rectangular head on the other. 13RP 100-03. Hammock then hit Ford in the head two or three times with the object. 13RP 105-06. Describing Hammock, McKee testified, "He was crazy. I had never seen anything like -- I'd never seen him like that. He was transformed, he wasn't the same guy that I had known. We had been together four years, I'd never seen anything like that." 13RP 108.

Ford's eyes were now glassy and unfocused. Hammock told McKee to look at Ford, asked her if she thought he was still alive, and commented "this guy is trying to live." 13RP 109-110. There was a lot of blood on the walls and carpet. 13RP 100. Hammock put a plastic bag over Ford's

head and Ford tried to remove it. 13RP 111-12. Hammock then struck Ford in the head once or twice more and Ford was dead. 13RP 114.

According to McKee, Hammock placed Ford's body on the bed, wiped it down with oven cleaner, and tied him up with rope. 14RP 15-17, 23. The two of them put large plastic bags over the body and, using a handcart, placed the body behind a shed in the back yard. 14RP 17-18, 21-22. They spent the rest of the day cleaning the bedroom and placing items that could not be adequately cleaned into garbage bags so that they could be disposed of in various dumpsters. 14RP 23-27. They also tore out carpet and part of the floor, which were stained with blood. 14RP 40-43.

The following day, January 25, McKee attended a previously scheduled CPS hearing.[4] She and Hammock also did more methamphetamine and purchased a shovel, gloves, and flashlights. 14RP 36-51. They drove around looking for a place to bury Ford's body, but could not find a suitable spot. It was now 2:00 or 3:00 a.m. on January 26. 14RP 51-52. Eventually, they decided to wait until daylight and dispose of the body near property owned by McKee's father. 14RP 52-53.

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[4] McKee has four children. Hammock is the father of two. 13RP 4.

Around 8:00 a.m., they put Ford's body in the trunk of McKee's car and drove to the property. 14RP 55, 63-64. Ultimately, they decided to bury Ford across the street from her father's property near an abandoned house. 14RP 72. They removed the body from the trunk, dragged it a distance into the woods, but then abandoned their attempt because the body was too difficult to move. They covered the body with a piece of sheet metal and left it there, intending to return later and finish the job. 14RP 72-74.

Meanwhile, Baudry had contacted police. The previous evening (January 25), accompanied by a friend, he went to the Centralia Police Department and spoke with detectives. 6RP 30-31. Baudry was upset, pacing, and talking to himself. 6RP 31. Baudry told them he had witnessed a violent crime at the Hammock residence. He only knew the victim as "Will or Willy." 6RP 33-34. But he told them Hammock and McKee were involved and it happened at Faye Hammock's home. 6RP 34-37. He explained that everyone involved had been "really high" and "to the moon." 11RP 64.

Based on individuals known to associate with Hammock, police produced a montage that included a photo of Willy Kizzar. Baudry mistakenly identified Kizzar as the victim. 6RP 37-38.

Detectives questioned Baudry's credibility and decided they needed corroboration before seeking a warrant. 6RP 42. They decided to use a ruse. Kizzar had warrants for his arrest. With copies of those warrants and Kizzar's photo in hand, a detective stopped by Faye Hammock's home on the afternoon of January 26. 6RP 46. He spoke to Faye and indicated he was looking for Kizzar regarding the warrants. 6RP 46. Faye recognized Kizzar and said he had moved to California. 6RP 46-47.

The detective then mentioned that neighbors had complained about some fighting at her house. Faye indicated there had been a fight and named those involved. When she mentioned Willy Ford, however, she mistakenly called him Willy Smith. But police felt they had confirmed at least part of Baudry's story. 6RP 48. Police also confirmed that Kizzar was now living in California and prepared to seek a warrant to search Hammock's bedroom. 6RP 49, 51.

According to McKee, when she and Hammock returned from disposing of the body, Faye told them police had come by looking for Willy Kizzar. But McKee knew they were looking for Ford. She and Hammock continued their efforts to clean the bedroom and remove anything that had been permanently stained. 14RP 80-84.

That night, the two used additional methamphetamine and cleaned some more in the morning. It was now Saturday, January 27. 14RP 85-87. McKee worked that evening, went home, and slept. 14RP 87-89. She awoke to find that Hammock had removed the bathroom door from its hinges. He had a hammer in his hand as if he were ready to strike something and told her he was worried about things hiding behind mirrors and coming through walls. 14RP 89-90.

McKee worked on Sunday, January 28, while Hammock stayed home and finally slept. 14RP 90-91. On Monday, January 29, McKee attended another visit with her children. 14RP 92. She arrived back home around 12:30 p.m. Police arrived shortly thereafter with a warrant to search the bedroom and arrested both of them. 6RP 51, 60; 14RP 92-93.

Police obtained a second warrant -- covering the rest of the house -- the following day. 6RP 93. Officers gathered items from the interior and exterior of the house they believed were linked to Ford's death and subsequent efforts to clean the bedroom and dispose of evidence. 7RP 36-60; 8RP 13-25, 33-57; 10RP 31-49, 60-78; 11RP 8-12, 60-61, 76-79, 83-120. Police also determined the victim's true name with William Ford. 7RP 63.

On February 1, 2007, an anonymous tipster contacted Lewis County Crime Stoppers and provided information leading police to Ford's body. 10RP 16-17. His body was wrapped in three large trash bags and bound with rope. There were visible injuries -- some of them defensive -- to his arms, hands, head, and neck. 10RP 90-91, 100. There was also electrical cord, which matched cord found in Hammock's bedroom, wrapped around Ford's neck. 10RP 91, 94-95, 121; 12RP 31-35.

An autopsy revealed that in addition to the .22 slug lodged in Ford's brain, he suffered other significant injuries, including multiple fractures to his skull typical of bludgeoning with an object such as a hammer or crowbar. 10RP 91-121. Ford likely died from three injuries: the bullet wound to his brain, blunt impacts to his head, and -- although experts disagreed on this issue -- ligature strangulation from the cord around his neck. 10RP 121-129. One expert believed the ligature was applied postmortem. 10RP 147-49. McKee testified she did not know when the cord was placed around Ford's neck. 14RP 14.

Not surprisingly, the autopsy also revealed high levels of illegal substances in Ford's body -- ecstasy, marijuana, and oxycodone (Percocet) at a higher than normal therapeutic level. 10RP 129. He also had "quite a high level" of methamphetamine in his system. 10RP 129-130.

More specifically, the level of methamphetamine in Ford's system was measured at 7.943. 10RP 136. Levels at 1/50 that amount are sufficient to cause irrational or violent behavior in some individuals. 10RP 136. Levels at 1/10 that amount are sufficient for the average user to get high. 10RP 136. And even people who measure at less than 1.0 sometimes die from methamphetamine-related causes. 10RP 136.

In addition to McKee, the prosecution also called Baudry to testify regarding events in the bedroom. 6RP 94. Baudry -- whose street name is "Kip" -- has a criminal history and is a self-described "bad person." 6RP 31, 166. His version of events was not always consistent and varied depending on when and to whom he was speaking. 6RP 61-64, 122-124, 177-79; 7RP 29-30.

At trial, Baudry generally downplayed his own level of incapacitation from the methamphetamine and the incapacities of others on the day Ford died. Whereas he initially told police that everyone in the bedroom was "really high" and "to the moon," he testified that the methamphetamine he injected "really didn't affect me that much," Hammock "was acting fairly normally," and everyone was just "buzzed." 6RP 118, 128-29; 7RP 2, 23; 11RP 64.

Regarding the bolt, Baudry testified he did not hear Hammock say anything to McKee before McKee walked over to Ford and tapped on the bolt with a hammer. 6RP 131-140; 7RP 18. Baudry's perception at that time was that Hammock was just sitting in the corner and "didn't know what was going down." 7RP 17. Baudry claimed that after the shot, McKee said, "I'll bet you're sorry now." 7RP 17. Baudry testified that he wanted to leave right away, but Gordon told him to settle down and that he could not go. 6RP 136-37.

Within 15 to 20 minutes, according to Baudry, Hammock picked up a hammer, jumped over the bed, and starting hitting Ford. 6RP 145. Baudry testified that he was able to stop Hammock after three or four blows, but Ford complained that he thought his arm had been broken. 6RP 145-150. To Baudry, it appeared that Hammock was in "a rage," "like a maniac," "out of his mind," and his eyes were "crazy." 6RP 149; 7RP 19. Baudry testified that he offered to take Ford to the hospital, but Hammock responded that it was "too late." 6RP 148.

Baudry testified that over the course of the next few hours, Hammock gave him a beer, gave him a tour of the house and yard, and tried to calm him down. Baudry also spent about 90 minutes of this period talking to Faye out in a main area of the home. 6RP 152-159. Baudry

testified that when he and Hammock returned to the bedroom, he did not want to have sex with McKee, but believed if he just engaged in the activities, maybe he could leave. According to Baudry, he only participated to make the others think that everything was fine and left when Faye interrupted. 6RP 159-64.

Baudry testified that after he arrived home, he called Hammock to reassure him that everything was okay. The next day, however, he told a friend what had happened. The friend encouraged him to go to police, and he eventually did. 6RP 164-67.

The charges in counts 3 and 5 (Possession of a Controlled Substance and Unlawful Use of Drug Paraphernalia) were based on methamphetamine and a baggie police found in Hammock's bedroom. 8RP 14; 12RP 20-23; 17RP 15-16, 21-22. The charge in count 4 (Attempted Intimidating a Witness) was based on a letter allegedly written by Hammock discouraging Baudry from testifying to the story he provided police. 11RP 161-64, 189-207; 17RP 16-21.

b. The alleged "firearm"

Whether the BMX stem bolt qualified as a "firearm" was an important issue at Hammock's trial. The charge in count 2 -- Unlawful Possession of a Firearm -- was based on the bicycle bolt. CP 163.

Moreover, because one element of this charge is a prior conviction for a "serious offense," the charge meant jurors would learn that Hammock had such a conviction. CP 163; 15RP 62. In addition, the charge of Murder in the First Degree included a deadly weapon enhancement, which the prosecution encouraged jurors to find based on the bicycle part qualifying as a firearm. CP 162; 17RP 9. This added four years to Hammock's sentence. CP 8.

Prior to trial, defense counsel moved to dismiss count 2 under State v. Knapstad because the bicycle bolt could not qualify as a firearm under Washington law. CP 262-277. Attached to the motion was a report prepared by firearms expert Marty Hayes, who examined the bolt and concluded it did not meet the definition of firearm for several reasons: (1) it did not fall within any category of firearm found in Washington law (e.g., pistol, rifle, shotgun, machine gun); (2) it was not capable of firing a projectile without the use of some additional device; (3) it could not be "loaded" as that term is defined under Washington law; and (4) bicycle components, including this bolt, are not regulated as firearms under federal law. CP 266-68. The motion was denied. 4RP 2-7.

At trial, Brenda Lawrence testified regarding the bolt. Lawrence is a forensic scientist in the firearm and tool mark section of the Washington

State Patrol Crime Lab. 11RP 125. She attempted to fire a .22 caliber round in the manner McKee had described. 11RP 132-34. Lawrence first tried to fire the round by placing it in the end with the hexagonal head, but was unsuccessful because the head interfered with her ability to strike the primer with a hammer. 11RP 134-35. By placing the round in the non-hex end of the bicycle bolt, however, she was able to detonate the primer, causing the round to travel through the bolt and out the other end. 11RP 135.

When the round fired, however, the cartridge case expanded and became stuck in the bolt. 11RP 135, 139. Unlike a manufactured firearm, the bolt had no ejection mechanism. 11RP 159. Therefore, to remove the casing, Lawrence had to place a stick down the center of the bolt from the hex side and hammer the stick until the casing dislodged from the other end. 11RP 135, 139.

Moreover, a firearm barrel is perfectly straight, designed so that a round will fit snugly inside, and "rifled," meaning it is given lands and grooves to assure stability when the slug exits the barrel. 11RP 141-44. In contrast, the hole down the center of the bolt was slightly off center, the .22 round fit loosely inside the bolt, and the bolt's interior was smooth. As a consequence, any slug fired through the bolt became deformed.

Lawrence testified that unlike a manufactured firearm, it would be possible to fire 100 rounds through the bolt and never find two slugs that looked the same as they exited this bicycle part. 11RP 132, 141-45. In other words, there was no way to conduct reproducible test fires. 11RP 146.

Lawrence testified that in addition to the absence of an extractor or ejector and the absence of rifling, the bolt was also missing a chamber, a cylinder, a trigger, a hammer, a clip, an action, a magazine, and a striker or firing pin. The reason it did not have these firearm components, Lawrence conceded, was quite simple: it is a bolt. 11RP 158-59. Moreover, firing a round through the center of the bolt required use of an additional and separate device -- a hammer. 11RP 160.

Marty Hayes agreed. Hayes owns and operates the Firearms Academy of Seattle, where he teaches the lawful use of firearms to approximately 500 individuals a year. 15RP 63. Hayes is a certified law enforcement instructor, and has worked with firearms on a daily basis for 30 years. 15RP 64-65. Like Lawrence, he testified that the bolt did not have a chamber, a clip, a trigger, a firing mechanism of any kind, a hammer, or a striker or firing pin. 15RP 68.

In response to questioning by the prosecutor, Hayes testified that a "zip gun" is an improvised handgun that has been assembled and is

capable of being loaded and firing a round. 15RP 70. While cautioning that he had never personally handled or seen a zip gun, it was his opinion the bicycle bolt could be, at most, a component of such a device. 15RP 70. He would liken it to the barrel were this a completed device. 15RP 77.

During closing argument, the prosecutor asked jurors to find Hammock guilty of Unlawful Possession of a Firearm based on his possession of the bicycle bolt. 17RP 14-15. The prosecutor also argued that because the bolt was a firearm, it satisfied the definition of "deadly weapon" for purposes of the deadly weapon enhancement on the murder charge. 17RP 9.

c. Evidence of Hammock's criminal history

Before Kevin Baudry took the stand, defense counsel voiced concern that he was a "loose cannon" and might share Hammock's criminal history with jurors. 6RP 11-13. The trial deputy indicated he had no intention of exploring that history with Baudry and would speak to him before he took the stand to avoid any inappropriate information. 6RP 13.

Unfortunately, however, that discussion did not prevent Baudry from tainting Hammock's trial. During direct examination, the prosecutor asked

Baudry if he knew why Hammock had been upset with Ford. Baudry answered:

> Because when Gordon was in the joint [Ford] had some sort of relationship with [Gordon's] girlfriend and he confessed it to Gordon and they were arguing about the situation.

6RP 106 (emphasis added).

Outside the jury's presence, defense counsel moved for a mistrial. 6RP 107. The court denied the motion, reasoning that jurors were necessarily going to hear that Hammock had criminal history because of the "serious offense" element of Unlawful Possession of a Firearm. Moreover, the court sensed "no large reaction" from jurors. 6RP 108. But the court warned that another similar revelation might warrant a mistrial. 6RP 109. Defense counsel preferred the court not try to mitigate the damage with a jury instruction, fearing it would only focus more attention on the comment. 6RP 109-110.

While Baudry managed to avoid any further discussion of Hammock's history, other witnesses did not.

Centralia Police Officer Phillip Reynolds -- the officer that cited McKee for the traffic infraction -- was questioned by defense counsel on how he identified the two passengers in McKee's car as Ford and Hammock. Reynolds confirmed that he ran Ford's name and date of birth

through the police computer and the information and physical description on file matched Ford. 12RP 48. Defense counsel then asked Reynolds whether he did the same for Hammock. Although this question merely called for a yes or no answer, Reynolds responded, "I had dealt with Mr. Hammock before, so I was familiar with him on a first name basis." 12RP 48.

A third damaging revelation occurred during McKee's testimony. Before she testified, the prosecutor informed defense counsel and the court that he had made it clear she could not mention Hammock's prior criminal history. 13RP 2-3. Yet, on direct examination, while discussing what she and Hammock did the day after Ford's death, McKee mentioned it anyway. Her testimony that she attended a CPS hearing at the courthouse led to the following exchange:

> Q: Did Mr. Hammock come with you to the courthouse?
>
> A: He was supposed to check in with the Department of Corrections for the first time, so he accompanied me here and walked across the street to Department of Corrections to check in.

14RP 43.

At the next break, defense counsel once again moved for a mistrial, but this time the motion was based on the cumulative impact of all three

references. 14RP 66-67. Counsel argued that McKee's testimony not only reemphasized Hammock's criminal history, it told them that he had only recently been released from prison because he was checking in "for the first time." Moreover, Hammock was so well known to law enforcement, Officer Reynolds found it unnecessary to ask him for identification. 14RP 68-69. As before, however, the court noted that jurors would hear about Hammock's "serious offense" for the firearm charge, found no prejudice, and denied the motion. 14RP 70.

Hammock now appeals.

C. ARGUMENT

1. THE BICYCLE BOLT IS NOT A FIREARM.

In all criminal prosecutions, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed.

2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

Hammock was charged in count 2 with Unlawful Possession of a Firearm in the First Degree. CP 163. This required the State to prove Hammock had in his possession or control "any firearm after having previously been convicted . . . in this state or elsewhere of any serious offense as defined in this chapter." RCW 9.41.040(1)(a). The State argued the bolt was a firearm. 17RP 14-15. This is incorrect. The bolt does not meet the statutory definition of that term.

Statutory interpretation is a question of law this Court reviews de novo. State v. Lilyblad, 163 Wn.2d 1, 5, 177 P.3d 686 (2008). In construing a statute, this Court looks to the Legislature's intent. Plain language requires no construction. But to the extent a statute is ambiguous in its requirements, the rule of lenity requires resolution of that ambiguity in the defendant's favor. State v. Carter, 138 Wn. App. 350, 356-57, 157 P.3d 420 (2008).

"Firearm" means "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(1); CP 112. The Legislature has not defined the words "weapon" or "device." Therefore, it is appropriate to look to the

applicable dictionary definitions to determine the words' plain and ordinary meanings. Am. Legion Post No. 32 v. Walla Walla, 116 Wn.2d 1, 6, 802 P.2d 784 (1991); see also Carter, 138 Wn. App. at 357 (looking to Webster's Dictionary for undefined terms in firearm case).

The word "weapon" is a singular noun meaning "an instrument of offensive or defensive combat: something to fight with: something . . . used in destroying, defeating, or physically injuring an enemy . . . ." Webster's Third New Int'l Dictionary 2589 (1993). The bolt is not a weapon. It is not an instrument for combat and it is not something to fight with. Rather, it is a bicycle part that permits the fork on a BMX bicycle to operate properly, presumably so that a rider can properly steer the bicycle. Moreover, even if it were a "weapon," it is not capable by itself of firing a projectile with an explosive. 11RP 60.

The word "device" is also a singular noun and means "something that is formed or formulated by design and usu. with consideration of possible alternatives, experiment, and testing . . . ; a piece of equipment or a mechanism designed to serve a special purpose or perform a special function . . . ." Webster's Third Int'l Dictionary 618 (1993). The bolt is not a device because, by itself, it is not capable of

firing anything. And while it is designed for a special purpose, that purpose is the construction and proper operation of a bicycle.

In addition to the language in RCW 9.41.010(1), other subsections of this statute also support a finding the Legislature never intended to treat a bolt as a firearm. See Lieutenants Ass'n v. Sandberg, 88 Wn. App. 652, 658, 946 P.2d 404 (1997), review denied, 135 Wn.2d 1005 (1998) (interpretation involves "construing statutory language in the context of the statute as a whole, rather than looking at the phrase at issue in isolation.").

Within RCW 9.41.010, the Legislature has provided several examples of items that meet the definition of firearm: pistol, rifle, short-barreled rifle, shotgun, short-barreled shotgun, machine gun, and antique firearm. See RCW 9.41.010(2)-(8). Pistols require a barrel and are designed to be fired with one hand. Rifles must have a trigger and are designed for firing from the shoulder. Shotguns must have a barrel, a trigger, and are designed for use with a shotgun shell. Machine guns must have a trigger, an ammunition reservoir, and be capable of firing five or more shots per second. And, finally, antique firearms must have been manufactured before 1898 and cannot use modern ammunition. See RCW 9.41.010(2)-(8). The bicycle bolt does

not satisfy any of these requirements. It falls outside every example of a firearm the Legislature provided.

The next subsection, RCW 9.41.010(9), addresses the loading of firearms. A device need not be loaded to constitute a firearm. State v. Berrier, 110 Wn. App. 639, 645, 41 P.3d 1198 (2002). But the bicycle bolt is *incapable* of being loaded as the Legislature has defined that term. "Loaded" means:

> (a) There is a cartridge in the chamber of the firearm;
>
> (b) Cartridges are in a clip that is locked in place in the firearm;
>
> (c) There is a cartridge in the cylinder of the firearm, if the firearm is a revolver;
>
> (d) There is a cartridge in the tube or magazine that is inserted in the action; or
>
> (e) There is a ball in the barrel and the firearm is capped or primed if the firearm is a muzzle loader.

RCW 9.41.010(9)(a)-(e). Because the bicycle bolt has no chamber, clip, cylinder, action, or barrel, it cannot meet any of these requirements. It simply cannot be loaded as that term is defined for firearms, adding further support to the conclusion the Legislature did not intend to treat a bolt as a firearm.

The next subsection of the statute -- RCW 9.41.010(10) -- addresses firearm dealers and defines "dealer" as "a person engaged in the business of selling firearms at wholesale or retail who has, or is required to have, a federal firearms license under 18 U.S.C. Sec. 923(a)." That federal statute employs the federal definition of "firearm," which is more expansive than Washington's:

> The term "firearm" means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

18 U.S.C. § 921(a)(3).

Yet, even under this definition, bicycle stem bolts are not regulated as firearms. CP 268. Therefore, those selling these bolts are not required to have a federal firearms license and do not qualify as a firearm "dealer" under RCW 9.41.010(10). CP 268. Were it otherwise, every bicycle shop in Washington would be required to have a federal firearms license; so would every toy store selling bicycles.

In summary, every provision found in RCW 9.41.010 is consistent with Legislative intent excluding bicycle bolts (or similar items of hardware) from the definition of firearm.

Case law interpreting RCW 9.41.010 is only minimally helpful because all Washington cases appear to address firearms in the traditional sense; i.e., items manufactured to be firearms. But some decisions do provide additional support for Hammock's claim that a bolt is not a firearm.

For example, this Court has held that the Legislature intended an inoperable firearm to qualify under RCW 9.41.010(1) because police will not know whether it is operational based on its appearance, thereby causing them to react and possibly resulting in a deadly situation. Moreover, even in its inoperable form, it can still be used to intimidate, frighten, or control people. Berrier, 110 Wn. App. at 645; State v. Faust, 93 Wn. App. 373, 380-81, 967 P.2d 1284 (1999). These concerns simply do not exist when an individual is seen holding a bicycle stem bolt. Neither the public nor the police will react to this piece of bicycle hardware in the same fashion they will react to a gun.

Moreover, in State v. Carter, this Court recently distinguished the situation in which a gun is inoperable but the defendant possesses all necessary components (allowing it to become operational in short order) from the situation where a gun is missing a key component. While the

former qualifies as a "firearm" under RCW 9.41.010, the latter does not. Carter, 138 Wn. App. at 358-360 (no ammunition supply device).

Hammock's bolt contained none of the components typically found in a firearm. It had no extractor, ejector, chamber, cylinder, trigger, hammer, clip, action, magazine, striker, or firing mechanism of any kind. This is not surprising since the item was merely a bolt. 11RP 158-59; 15RP 68. If one missing component disqualifies an object as a firearm, an object that includes none of the components traditionally found on firearms certainly falls outside the definition.

Because the State failed to prove that Hammock possessed a firearm for count 2, his conviction for Unlawful Possession of a Firearm must be reversed and dismissed with prejudice. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (dismissal with prejudice only appropriate remedy).

In addition, this Court must vacate the jury's deadly weapon finding on the murder charge in count 1. Jurors were told that if they found Hammock guilty of murder, they should determine whether the State had proved beyond a reasonable doubt that he was armed with a deadly weapon during commission of that crime. CP 143-44.

Jurors were also provided a definition of "deadly weapon":

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

CP 144 (emphasis added). Not only were jurors instructed they could rely on a firearm to find that Hammock was armed with a deadly weapon, the deputy prosecutor actually encouraged them to make a deadly weapon finding based on the bolt's status as a firearm. See 17RP 9.

It is impossible to know whether jurors followed the prosecutor's recommendation on this point or instead relied on use of the metal object to hit Ford in the head. The special verdict form did not ask jurors to specify. Instead, it simply asked, "Was the defendant, Gordon Robert Hammock, armed with, or in possession of a deadly weapon at the time of the commission of the crime of Murder in the First Degree?" CP 86.

Where, as here, it is not apparent whether jurors based their verdict on proper grounds or improper grounds, the rule of lenity

applies and the ambiguous verdict must be resolved in the defendant's favor. State v. Kier, ___ Wn.2d ___, 2008 Wash. LEXIS 1030 at *17-21 (filed 10/9/08); State v. DeRyke, 110 Wn. App. 815, 824, 41 P.3d 1225 (2002), aff'd on other grounds, 149 Wn.2d 906 (2003). Because jurors may have based their "deadly weapon" finding on a mistaken belief the bolt was a firearm, the enhancement must be stricken.

2. EVIDENCE THAT HAMMOCK HAD PREVIOUSLY SERVED PRISON TIME, WAS ONLY RECENTLY RELEASED, WAS UNDER DEPARTMENT OF CORRECTIONS SUPERVISION, AND WAS WELL KNOWN TO POLICE DENIED HIM A FAIR TRIAL.

Hammock had the misfortune of experiencing not one, not two, but three trial irregularities -- three circumstances where witnesses provided nonresponsive answers and alerted jurors to his criminal past.

As noted above, the first occurred when Baudry told jurors that Hammock was "in the joint." 6RP 106. The second occurred when Centralia Police Officer Phillip Reynolds told jurors he did not need to run Hammock's name through his computer because he had "dealt with Mr. Hammock before [and] was familiar with him on a first name basis." 12RP 48. And the third occurred when McKee testified that the day after Ford's death, Hammock "was supposed to check in with the Department of Corrections for the first time[.]" 14RP 43.

In determining whether a trial irregularity requires a mistrial, this Court examines (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether a curative instruction was given capable of curing the irregularity. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994); State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). Denial of a motion for mistrial is reviewed for an abuse of discretion. Johnson, 124 Wn.2d at 76. An examination of the above criteria reveals an abuse of discretion here.

First, these errors were very serious. Recognizing the inherent prejudice that would result from jurors learning about Hammock's criminal history, the parties attempted to keep this information from jurors by instructing witnesses not to mention it. 6RP 13; 13RP 2-3.

But they did mention it. From Baudry, jurors knew Hammock had served prison time. From Officer Reynolds, jurors knew that Hammock was so well known to law enforcement -- they had "dealt with him before" -- there was no need to confirm his identity with the computer. And from McKee, jurors learned that Hammock had not been out long, since this was his first meeting with the Department of Corrections. It also told them that whatever the crime he had commit-

ted, it was serious enough that he was monitored by DOC while in the community.

Evidence relating to a defendant's prior criminal conduct is particularly unfair as such evidence impermissibly shifts "the jury's attention to the defendant's propensity for criminality, the forbidden inference . . . ." State v. Perrett, 86 Wn. App. 312, 320, 936 P.2d 426 (quoting State v. Bowen, 48 Wn. App. 187, 196, 738 P.2d 316 (1987)), review denied, 133 Wn.2d 1019 (1997); see also State v. Hardy, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997) (Prior conviction evidence is "very prejudicial, as it may lead the jury to believe the defendant has a propensity to commit crimes.").

Indeed, it is now well accepted, by scholars and courts, that the probability of conviction increases dramatically once the jury becomes aware of prior crimes or convictions. See Hardy, 133 Wn.2d at 710-711. And this was the effect in Hammock's case. It shifted jurors' attention to his propensity to commit crime and away from the evidence and relevant issues in this case.

Looking at the second factor -- whether the evidence was cumulative -- this evidence *was* cumulative, but only cumulative of other improper evidence. In rejecting defense counsel's motions for

mistrial, the court focused on the fact jurors were going to hear that Hammock had a prior conviction for a "serious offense" since that was an element of the firearm charge in count 2. See 6RP 108 ("They're going to be advised, and as I understand it, Mr. Hammock is stipulating to the fact he's been convicted of a serious offense. So it wouldn't surprise anyone that he's done time for that."); 14RP 70 ("I am going to deny the motion. I can't possibly see the prejudice here given that there is, at some point there is going to be a stipulation entered that he has a conviction for a serious offense or a serious felony.").

The difficulty with this is that jurors should never have heard about Hammock's conviction for a serious offense. Defense counsel moved to dismiss count 2 under State v. Knapstad, which authorizes a pretrial dismissal where the undisputed facts are legally insufficient to support a finding of guilt. Knapstad, 107 Wn.2d at 351-53. And because the bicycle bolt could not be a firearm as a matter of law, defense counsel's motion should have been granted.

Defense counsel stipulated to the prior serious offense, but only after denial of his Knapstad motion. 15RP 62. Had the motion been granted, as it should have been, there would have been no mention of that conviction. Rather than *mitigating* the harm from the three wit-

nesses (as the trial court found), evidence that Hammock also had a conviction for a serious offense *exacerbated* that harm. The critical point is this: the three references to Hammock's history were not cumulative of any properly admitted evidence.

Third, there was no curative instruction. But some errors simply cannot be fixed with an instruction. See State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996); State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988); Escalona, 49 Wn. App. at 255-56. One reference might have gone unnoticed or been cured by an instruction, but not three. Jurors would have been unable to put the evidence out of their minds.

In the absence of these serious irregularities, Hammock had a viable defense to the murder charge. To convict him of murder, the State had to prove:

> (1) That on or about the 24th day of January 2007, the defendant assaulted William Ford;
>
> (2) That the defendant acted with intent to cause the death of William Ford;
>
> (3) That the intent to cause the death was premeditated;
>
> (4) That William Ford died as a result of defendant's acts; and

(5) That the acts occurred in Lewis County, Washington.

CP 99.

Under this "to convict" instruction, the State was required to prove intentional assault, premeditation, and an intent to cause death. Hammock's trial defense was that because of his heavy, prolonged drug use and significant sleep deprivation, he did not have the requisite intents for this crime. 17RP 26-33. Instruction 39 told jurors, "evidence of intoxication may be considered in determining whether the defendant acted with premeditation, intent, or recklessness." CP 134.

Without the trial irregularities, Hammock had an opportunity to convince jurors the State had not proved its case in this regard. By the time Ford was killed on January 24, 2007, Hammock had already been awake as long as five straight days. 12RP 18-19. He repeatedly injected methamphetamine during this period, including two to three injections in the hours immediately preceding Ford's death. 13RP 35-39.

Hammock and Ford had been together since January 22. 13RP 6-7. Therefore, jurors could have reasonably concluded the level of methamphetamine in Ford's system accurately reflected Hammock's level of impairment. As previously discussed, Ford registered a 7.943.

This is 50 times more than necessary to cause irrational or violent behavior, 10 times more than necessary for the average user to get high, and almost 8 times higher than amounts known to cause death. 10RP 136.

Not surprisingly, those present with Hammock used terms like "really high," "very high," "to the moon," "out of [his] mind high," and "on a different level." 11RP 64; 15RP 9, 21-22. Hammock's odd behavior immediately before Ford's death bears this out. Beyond the fact he was encouraging his pregnant girlfriend to have sex with another man, Hammock threatened to remove others' toenails and even made McKee enter the house through the window despite the fact she lived there. 15RP 10, 20-21.

But any chance jurors would conclude that Hammock's drug use and sleep deprivation had interfered with his ability to form the various intents for the murder charge dissipated once jurors learned of his criminal history. That evidence distracted jurors from the relevant issues at hand and focused their attention on Hammock's criminal history and obvious propensity to commit crime. It made it far more likely jurors would reject his defense and vote for conviction; not only for murder, but on all the charges.

The trial court erred when it denied Hammock's motion for mistrial following the third trial irregularity. Cumulatively, the improper evidence denied Hammock a fair trial.

D. CONCLUSION

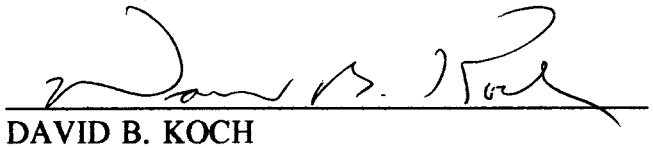
The evidence is insufficient to support Hammock's conviction for Unlawful Possession of a Firearm because he did not possess a firearm under Washington law. For this same reason, his sentence on the deadly weapon enhancement must be vacated.

Moreover, Hammock's remaining convictions must be reversed and the matter remanded for a new trial. The serious and recurring trial irregularities, which portrayed Hammock as a dangerous and experienced criminal, denied him a fair trial.

DATED this 31st day of October, 2008.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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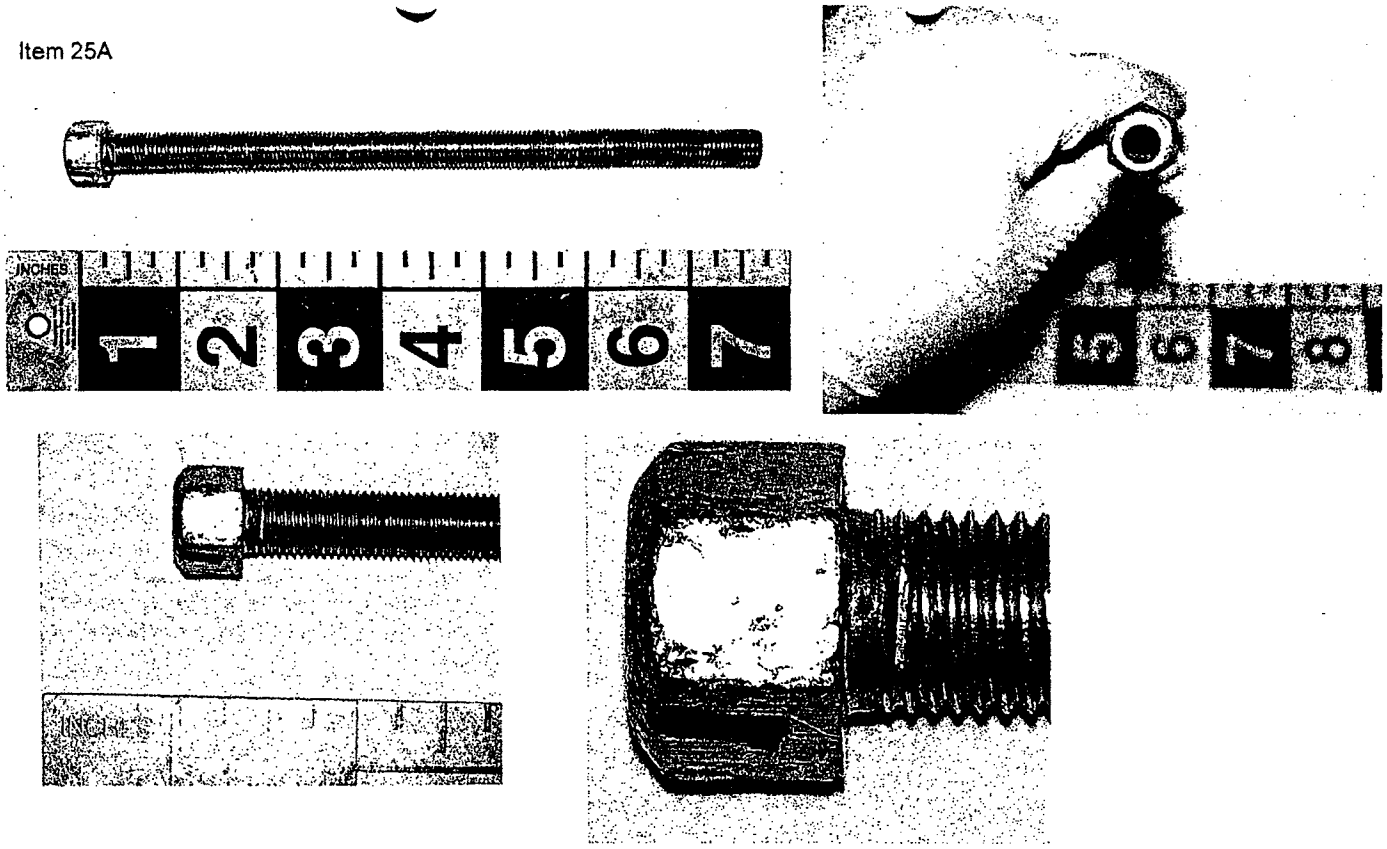
APPENDIX

Item 25A



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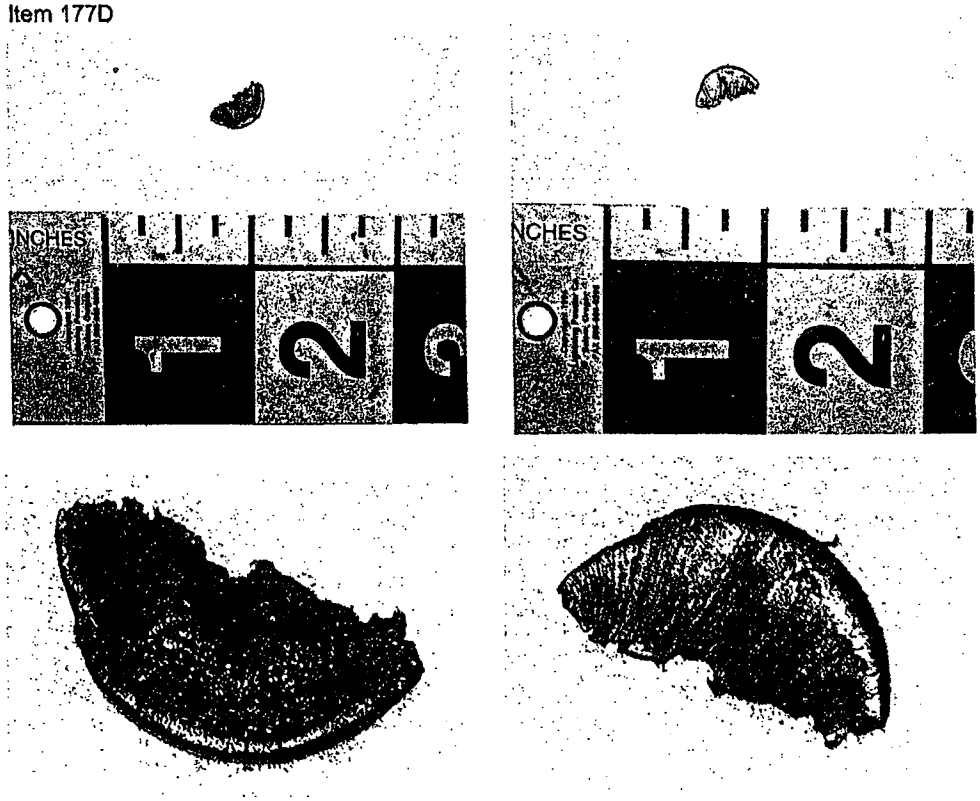
Item 177D



1402-1

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

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 37389-1-II
	)	
GORDON HAMMOCK,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF OCTOBER 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JASON RICHARDS
LEWIS COUNTY PROSECUTOR'S OFFICE
345 W. MAIN STREET
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[X] GORDON HAMMOCK
DOC NO. 749127
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
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FILED
COURT OF APPEALS DIV II
STATE OF WASHINGTON
2008 OCT 31 PM 1:09

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF OCTOBER 2008.

x Patrick Mayovsky