

NO. 37752-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

STEVEN ONG,

Appellant.

APPEAL FROM THE SUPERIOR COURT OF
CLALLAM COUNTY, STATE OF WASHINGTON

The Honorable George L. Wood
Superior Court No. 05-1-00230-1

BRIEF OF RESPONDENT

DEBORAH KELLEY
Prosecuting Attorney

BRIAN PATRICK WENDT
Deputy Prosecuting Attorney
WSBA No. 40537

223 East 4th Street, Suite 11
Port Angeles, WA 98362-3015

FILED
COURT OF APPEALS
DIVISION II
09 APR 22 AM 10:29
STATE OF WASHINGTON
BY
DENISE

SERVICE

Ms. Jennifer M. Winkler
Nielsen, Broman & Koch, PLLC
1908 East Madison
Seattle, WA 98122

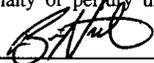
This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED April 22, 2009, Port Orchard, WA 
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

TABLE OF CONTENTS

I.	COUNTER-STATEMENT OF THE ISSUES	1
II.	STATEMENT OF THE CASE	1
	A. <u>Facts</u>	1
	B. <u>Procedural History</u>	6
III.	ARGUMENT	10
	A. <u>The trial court did not err when it admitted the Defendant’s 1995 convictions into evidence.</u>	10
	B. <u>The admission of the prior convictions was harmless error.</u>	13
	C. <u>Counsel was not ineffective when he elicited a response from a testifying officer that he had used the Defendant’s mug shot when he compiled a photomontage.</u>	19
	1. The question was legitimate because identity was still and issue	21
	2. The alleged error did not prejudice the Defendant.....	23
	D. <u>The trial court’s failure to include a knowledge element in the indecent liberties instruction was harmless.</u>	25
	1. The State did not have to prove indecent liberties	25
	2. The omission was harmless error.	26
	E. <u>The trial court did not comment on the evidence.</u>	27
	F. <u>The cumulative effect of the alleged errors did not deny the Defendant a fair trial.</u>	30

IV. CONCLUSION31

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>State v. Bergeron</u> 105 Wn.2d 1, 711 P.2d 1000 (1985)	25
<u>State v. Brown</u> 147 Wn.2d 330, 58 P.3d 889 (2002)	25, 26, 27
<u>State v. Burton</u> 101 Wn.2d 1, 676 P.2d 975 (1984)	12
<u>State v. Calegar</u> 133 Wn.2d 718, 947 P.2d 235 (1997)	11, 14
<u>State v. Eacret</u> 94 Wn. App 282, 971 P.2d 109 (1999)	23
<u>State v. Greiff</u> 141 Wn.2d 910, 10 P.3d 390 (2000)	30
<u>State v. Hendrickson</u> 129 Wn.2d 61, 917 P.2d 563 (1996)	20, 21, 23
<u>State v. Johnson</u> 90 Wn. App. 54, 950 P.2d 981 (1998)	30
<u>State v. O'Connor</u> 155 Wn.2d 335, 119 P.3d 806 (2005)	10
<u>State v. Ray</u> 116 Wn.2d 531, 806 P.2d 1220 (1991)	12, 15
<u>State v. Russell</u> 104 Wn. App. 422, 16 P.3d 664 (2001)	11, 12, 14, 15, 16, 17, 18

BRIEF OF RESPONDENT
37752-7-II

WASHINGTON CASES - CONTINUED

State v. Thomas
109 Wn.2d 222, 743 P.2d 816 (1997) 20, 21, 23

State v. Thomas
150 Wn.2d 821, 83 P.3d 970 (2004) 26, 27

Seattle v. Arensmeyer
6 Wn. App. 116, 491 P.2d 1305 (1971) 28, 29, 30

FEDERAL CASES

Neder v. United States
527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) 26, 27

Strickland v. Washington
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) 20, 21

United States v. Cathey
591 F.2d 268 (5th Cir. 1974) 12

United States v. Pettiford
238 F.R.D. 33 (D.D.C. 2006) 14

OTHER JURISDICTIONS

State v. Ihnot
575 N.W. 2d 581 (1998) 12

BRIEF OF RESPONDENT
37752-7-II

RULES, STATUTES, AND OTHERS

ER 609(a)(2) 11, 13

ER 609(b) 8, 11, 12, 13, 14, 15, 17

RCW 9.94A.570 10

RCW 9A.36.021(1)(e) 6, 25

RCW 9A.36.130(1)(a) 6

RCW 9A.44.100 26

RCW 9A.56.040 6

WPIC 1.02 30

WPIC 49.02 26

I. COUNTER-STATEMENT OF THE ISSUES

1. Whether the trial court erred when it admitted the Defendant's 1995 convictions into evidence.
2. Whether the admission of the Defendant's 1995 convictions was harmless error.
3. Whether the Defendant received effective assistance of counsel when his attorney asked a question that allowed a testifying officer to say he included the Defendant's mug shot in a photomontage.
4. Whether the trial court failure to include a "knowledge element" in the instruction on indecent liberties was harmless.
5. Whether the trial court commented on the evidence.
6. Whether the cumulative effect of the alleged errors denied the Defendant a fair trial.

II. STATEMENT OF THE FACTS

A. Facts

May 28, 2005, was a warm Saturday during the Memorial Day weekend. 4RP 86. Due to the nice weather, Jennifer Murphy (Murphy) and her 21 month old son decided to visit Railroad Bridge Park in Sequim, Washington, and enjoy the afternoon along the Dungeness River. 4RP 86.

Murphy and her son arrived at the park around 12:00 p.m. 4RP 87. As the two walked along the park trail, they met the Defendant, Steven Ong (Ong), alongside the railroad bridge. 4RP 89. The two exchange simple

pleasantries as they passed.¹ 4RP 90. Murphy and her son climbed down from the park's trail and found a sandy portion along the river. 4RP 91. Murphy folded her skirt to her knees and started to sunbathe, while she watched her son play nearby. 4RP 92.

Robert and Linda Speed, a couple visiting from Canada, were also in Railroad Bridge Park on May 28, 2005. 4RP 22. The couple was enjoying a bike ride and stopped at the railroad bridge around 12:00 p.m. 4RP 22. Mr. and Mrs. Speed saw Ong sitting on a picnic table near the railroad bridge. 4RP 23-26. According to the Speeds, Ong appeared agitated and was watching someone below him on the river. 4RP 24, 62. The couple decided to keep their distance, and like Murphy, left the park's trail so that Mrs. Speed could put her feet in the water. 4RP 22, 24, 40, 63.

A few minutes later, Mrs. Speed saw Ong cross a log and approach Murphy. 4RP 64-65, 73. Soon thereafter, the Speeds heard loud voices and a female voice screaming. 4RP 27, 65, 76. Concerned for their safety, the Speeds made their way back to the park trail. 4RP 29, 66-67. Back on the trail, Ong passed the Speeds, constantly looking over his shoulder as he headed toward the park entrance. 4RP 30, 73-74. The Speeds reported their

¹ Murphy did not wish to speak with Ong because something about him made her feel
BRIEF OF RESPONDENT
37752-7-II

observations to the police. 4RP 31, 68.

A park employee, Erwin Jones (Jones) responded to the Murphy's cries for help. 4RP 98-99. Jones found Murphy on the beach shaking and crying. 4RP 206-07. Jones led Murphy to the park's Audubon Center and called 911. 4RP 206-07. Jones noted that Murphy's clothes were disheveled as if she had been through a traumatic experience, and that the child refused to speak to anyone for an hour and a half. 4RP 207-08. Jones also noticed that she had red marks around her face and neck. 4RP 207, 219.

Murphy told the park employee and responding police officers what transpired along the river. 4RP 93-98. According to Murphy, Ong climbed down the steep side of the river bank, walked across the log, and approached her and her son. 4RP 92-93. Ong asked for a cigarette. 4RP 93. After Murphy gave Ong a cigarette, he knelt down in front of her. 4RP 93. Ong then asked if her cell phone worked and if it was a "track phone." 4RP 93. After Murphy answered the questions, Ong lifted-up Murphy's skirt and looked underneath. 4RP 94. Murphy ordered the man to stop, pushing his hand away. 4RP 94.

According to Murphy, Ong then lunged at her and climbed on top of her. 4RP 94-95. He covered her mouth and grabbed her throat. 4RP 94. While

uncomfortable. 4RP 164.

BRIEF OF RESPONDENT
37752-7-II

Murphy struggled against Ong, he groped her as he tried to remove her clothing. 4RP 95. Murphy screamed for help. 4RP 95. Ong immediately threatened to kill Murphy's child if she did not stop screaming. 4RP 95.

When Murphy continued to resist, Ong released her and went after her son, picking him off the ground by his neck. 4RP 95-96. In an effort to protect her child, Murphy began kicking and punching Ong. 4RP 96. Ong dropped the child and tackled Murphy. 4RP 97. Again, Ong managed to get on-top of Murphy and renewed his efforts to remove her clothes. 4RP 97. Murphy continued to scream. 4RP 97. Ong released Murphy, took her cell phone, and ran away across the log. 4RP 97-98.

After the attack, Ong arrived at the park's entrance. Ong headed straight to Ben Sanford (Sanford), who was working on his van in the parking lot. 5RP 65, Sanford noted that Ong approached him with a sense of urgency. 5RP 68. Ong asked Sanford for a ride, saying that he had gotten in a fight with his girlfriend and that she might have called the police. 5RP 67-68, 76. When Sanford said, "no," Ong left the park on foot. 5RP 70-71. A few seconds later, Sanford heard the sound of someone running through the bushes. 5RP 70-71, 90. When Sanford learned that an assault occurred in the park, he aided in the search for Ong. 5RP 73-74, 80. The immediate search

was unsuccessful, and Sanford returned to the Audubon Center where he too noticed that Murphy had red marks around her face and neck. 5RP 74-75

Murphy met with Detective Keegan (Keegan) in order to produce a composite sketch of her assailant. 4RP 152, 256. Murphy described Ong's physical appearance. 4RP 152, 155. After providing a description, Keegan showed her a photo array of six individuals who had appearances that matched the assailant's description. 4RP 152, 256. From these photos, Murphy was not able to identify her attacker. 4RP 153, 179, 256. Because Keegan needed to produce a sketch, he asked if Murphy could point to anyone who looked similar. 4RP 153, 179, 256. Murphy pointed out two photos, one of which was an old jail booking photo of Ong. 4RP 153, 179, 256; 5RP 29. Keegan distributed the resulting composite sketch to police. 4RP 154, 256-57.

A few hours later, about a half mile from the park, Daniel Tash (Tash) noticed a strange man looking around his property, which borders the Dungeness River. 5RP 128, 130. Tash called 911. 5RP 131. Tash and a responding officer walked around Tash's property and located Ong hiding in the brush. 5RP 132, 141, 160. Ong physical appearance matched the composite sketch of Murphy's assailant. 5RP 158.

The State charged Ong with (1) second degree assault with intent to commit a felony with sexual motivation²; (2) second degree assault of a child with intent to commit a felony³, and (3) third degree theft⁴. CP 99-101.

Murphy was present in the gallery when Ong first appeared in court three days later. 4RP 156. When Murphy saw Ong, she knew immediately that he was the man who attacked her. 4RP 156.

B. Procedural History

The present case experienced significant delays before Ong actually stood trial.⁵ CP 99-101, 4RP 1. Pursuant to agreed orders, the trial court granted sixteen motions to continue the trial date. See Exhibit A.⁶

² RCW 9A.36.021(1)(e) provides:

A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree... [w]ith intent to commit a felony, assaults another.”

³ RCW 9A.36.130(1)(a) provides:

A person eighteen years of age or older is guilty of the crime of assault of a child in the second degree if the child is under the age of thirteen and the person... [c]ommits the crime of assault in the second degree, as defined in RCW 9A.36.021 against a child.”

⁴ RCW 9A.56.040 provides:

A person is guilty of theft in the third degree if he or she commits theft of property or services which (a) does not exceed two hundred and fifty dollars in value.

⁵ Nearly three years lapsed between the date of the incident (May 28, 2005) and the date of trial (February 26-28, 2008).

⁶ The State submits additional exhibits for the Court’s review. The exhibits are included in BRIEF OF RESPONDENT 37752-7-II

The testimony in State v. Ong began February 26, 2008. 4RP 1. At trial, the State’s witnesses testified to the events described above. When defense counsel questioned Keegan about how he compiled the photomontage that he showed to Murphy, Keegan testified that that he took old “mug shots” from computerized jail records. 5RP 19. Because Keegan used the word “mug shot” the defense counsel requested a mistrial, arguing that the term “mug shot” informed the jury that Ong had previous trouble with the law. 5RP 19-20. The trial court denied the request, reasoning that defense counsel had opened the door to the detective’s response, and no prejudice resulted because it was “common knowledge” that police use the photographs in their records to create a photomontage. 5RP 22-23.

Prior to Ong’s testimony, the State requested that the trial court permit the prosecution to introduce Ong’s 1995 convictions for crimes of dishonesty: second degree burglary and taking a motor vehicle without permission.⁷ 3RP

the appendix.

⁷ In 1995, a jury convicted Ong of second degree burglary, taking a motor vehicle without permission, second degree kidnapping, and delivery of a controlled substance. The trial court originally sentenced Ong to 240 months on the delivery charge, 82 months for kidnapping, 43 months on the burglary, and 18 months on the motor vehicle charge. In 1997, Ong’s appeal was successful and this Court reversed his delivery conviction. The trial court filed a new judgment and sentence based on a reduced offender score: 68 months for kidnapping, 29 months for burglary, and 14 months for the motor vehicle charge. The Department of Corrections ultimately released Ong from its custody on March 30, 1999. Exhibits B and C.

46-49; 5RP 110. Defense counsel opposed the State's request, arguing the crimes were inadmissible under ER 609(b) because the convictions were more than ten years old. 5RP 112. The trial court allowed the two prior convictions under 609(b), reasoning the applicable ten years ran from the date on the 1999 judgment and sentence, which the trial court filed after Ong's successful appeal. 5RP 124. The trial court expressly found that the prior convictions were more probative than prejudicial. 5RP 179.

On February 27, 2008, Ong testified in his defense. At the start of his testimony, defense counsel asked if Ong had any previous criminal convictions. 5RP 180. Ong acknowledged that he had two convictions for "burglary and auto theft." 5RP 180. The parties never revisited the matter on direct or cross-examination.

Ong testified that he went to Railroad Bridge Park for the sole purpose of exploring the Dungeness River. 5RP 182. Ong admitted that he approached Murphy to ask for a cigarette. 5RP 183. Ong confessed that he did touch Murphy's knee without her permission and that she found the touch offensive. 5RP 187-88, 200-04. Ong claimed that the touch was not sexual and that no further contact occurred. 5RP 200, 225. Ong also admitted that he asked Sanford for a ride from the park because he had gotten into a fight with

a girl. 5RP 205. When Sanford refused to give him a ride, Ong testified that he decided to continue with his plan to hike along the Dungeness River. 5RP 206.

Before jury instructions, defense counsel objected to the trial court's definition of "indecent liberties." 6RP 7. The defense counsel requested that the trial court include a knowledge element in the definition. 6RP 7, 12-13. The trial court denied the request, reminding defense counsel that the State did not have to prove indecent liberties but only that Ong committed an assault with intent to commit a crime. 6RP 7-8. The trial court subsequently informed the jury that the predicate felony for the second degree assault against Murphy was indecent liberties. CP 69-71, 76.

During closing arguments, the trial court briefly interrupted defense counsel when he reviewed the Speeds' testimony. 6RP 32. The trial court reminded the jurors that they were the sole judges of the facts. 6RP 53.

The jury found Ong guilty of second degree assault with intent to commit a felony with sexual motivation against Murphy (count I), but guilty of only fourth degree assault against Murphy's son (count II). The jury acquitted Ong of third degree theft (count III). CP 51-55. The trial court subsequently sentenced Ong to imprisonment without the possibility of parole

under RCW 9.94A.570.⁸

III. ARGUMENT

A. The trial court did not err when it admitted the Defendant's 1995 convictions into evidence.

The interpretation of a court rule is a question of law that this Court reviews de novo. State v. O'Connor, 155 Wn.2d 335, 343, 119 P.3d 806 (2005). When appellate courts review the meaning of a court rule, they apply the same principles used to determine the meaning of a statute. Id. This Court construes court rules in accord with the intent of the drafting body. Id.

When a criminal defendant testifies in his defense, ER 609 allows evidence of prior convictions to impeach his or her credibility. The sole purpose of impeachment evidence is to enlighten the jury with respect to the defendant's credibility as a witness. State v. Calegar, 133 Wn.2d 718, 723, 947 P.2d 235 (1997).

ER 609(b) provides that evidence of a prior conviction is generally inadmissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from confinement, whichever is

⁸ RCW 9.94A.570 provides:

Notwithstanding the statutory maximum sentence or any other provision of this chapter, a persistent offender shall be sentenced to a term of total confinement for life without the possibility of release.

later. However, ER 609(b) does not state the date to which the time is measured, and the courts are divided on this issue. Tegland, Courtroom Handbook on Washington Evidence, Ch. 5 § 609.10 pg. 327 (2008-2009).

When a period of ten years has not lapsed, trial courts find that prior convictions involving crimes of dishonesty are automatically admissible under ER 609(a)(2). State v. Russell, 104 Wn. App. 422, 434, 16 P.3d 664 (2001).

1. The date of the charged offense is the appropriate endpoint for the 10-year period that determines whether a conviction is stale under ER 609(b)

Initially, this Court must determine what event marks the endpoint (the date to which time is measured) for the 10-year period under ER 609(b).

The State recognizes that this Court has held that the applicable measuring point is the date the defendant actually testifies. See State v. Russell, 104 Wn. App. 422, 432, 16 P.3d 664 (2001). However, in light of the fact that the Washington Supreme Court has not addressed this specific issue, and that public policy favors the date of the charged offense as the endpoint under the rule, the State respectfully requests that this Court reconsider its position in Russell.

As the Minnesota Supreme Court recognized in State v. Ihnot,⁹ “the problems with [using the trial date] are that a trial date can be manipulated through dilatory tactics to permit the ten years to run.” 575 N.W.2d 581, 585 (Minn. 1998). Furthermore, “if prior convictions lose their probative value for impeachment purposes because of ten years of ‘good behavior,’ that is the period we should measure – the period of unquestioned good behavior.” Id. (citing United States v. Cathey, 591 F.2d 268, 274 (5th Cir. 1979) (Fay, J., dissenting)). In light of these two public policy concerns, the Ihnot Court held that the most appropriate endpoint for the 10-year period that determines whether a conviction is stale is the date of the charged offense. Id.

The present case experienced a significant delay (nearly three years) before the matter proceeded to trial. Pursuant to agreed orders, the superior court continued the date of trial sixteen times. See Exhibit A. The record does not always reflect which party brought the original motion; however, it does show that defense counsel sought six motions to push back the trial date. See Exhibit A. The State does not presume that the Defense acted in bad faith because the State also required the continuances due to difficulty it

⁹ Because ER 609(b) is identical to the federal rule, this Court may look to the guidance of other jurisdictions that have adopted F.R.E 609(b). See State v. Burton, 101 Wn.2d 1, 6, 676 P.2d 975 (1984) *overruled on other grounds by State v. Ray*, 116 Wn.2d 531, 806 P.2d 1220 (1991).

experienced coordinating the appearance of two witnesses from Canada. The State highlights the numerous continuances to underscore the problems associated with trial courts using the date of trial/testimony as the endpoint for the 10-year period under ER 609(b) – that the dates can be manipulated and thereby deprive the State of a proper impeachment tool when credibility of a witness is true concern.

If this Court finds that the date of the incident is the appropriate date to mark the 10-year period under ER 609(b), then the trial court did not err when it admitted the prior convictions. Ong committed the present crimes subject to this appeal on May 28, 2005. Ong's auto theft sentence expired on March 30, 1996, and his burglary sentence expired on January 27, 1997. See Exhibits B, C. This Court should find that the prior convictions are automatically admissible under ER 609(a)(2).

B. The admission of the prior convictions was harmless error.

ER 609 governs the use of prior convictions to impeach a criminal defendant. The rule provides in relevant part:

A conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or the release of the witness from the confinement imposed for that conviction, whichever is the later date.

ER 609(b). Although the rule does not state the date to which the time is measured, the State recognizes that the current trend is toward the view that the end point is the date the defendant actually testifies at trial. Karl Tegland, *Courtroom Handbook on Washington Evidence*, Ch. 5, p. 327 (2008-2009). See also State v. Russell, 104 Wn. App. 422, 432, 16 P.3d 664 (2001).

Under the current trend, the State concedes that more than 10 years elapsed between the date of the Ong's release on his two prior convictions¹⁰ and the date he testified at trial.¹¹ As such, the two convictions were presumptively inadmissible under ER 609(b). However, this Court should find that the error was harmless.

1. The alleged error did not affect the verdict within any reasonable probability.

When an alleged error is merely evidential, it is harmless if it did not affect the outcome at trial. State v. Russell, 104 Wn. App. 422, 434, 16 P.3d 664 (2001). (citing State v. Calegar, 133 Wn.2d 718, 727, 947 P.2d 235 (1997); State v. Ray, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991)).

¹⁰ DOC did not physically release the Defendant from custody until October 30, 1999. However, the Defendant's concurrent sentences for second degree burglary and taking a motor vehicle without permission expired on January 27, 1997, and March 30, 1996. Exhibit B and C; See ER 609(b); United States v. Pettiford, 238 F.R.D. 33 (D.D.C. 2006).

¹¹ The Defendant testified on February 27, 2008. 5RP 179-250.

The appellate courts apply one of two tests when they review whether the admission of stale convictions was harmless. Russell, 104 Wn. App. at 434. The first approach asks whether the trial court would have admitted the evidence if it had conducted a proper probative/prejudicial balancing test on the record.¹² Id. If the answer is yes, then the erroneous failure to conduct the balancing test did not affect the outcome of the trial. Id.

Under the second approach, the appellate court assumes the lower court would not have admitted the evidence if the trial judge had performed the proper balancing test. Russell, 104 Wn. App. at 435, 438. The appellate courts evaluate whether the prior convictions affected the verdict “within reasonable probabilities.” Id. at 438. At the core of this inquiry is the strength of the other evidence. Id. The trial court’s error in admitting the prior convictions is harmless if it did not affect the final outcome at trial. Id. at 435.

In State v. Russell, this Court found the decision to admit stale convictions under ER 609(b) constituted harmless error under the second approach cited above. See State v. Russell, 104 Wn. App. 422, 439, 16 P.3d 664 (2001).

¹² The State recognizes that the trial court did not make specific findings on the record of the particular facts and circumstances it considered when it determined the probative value of the prior convictions outweighed their prejudicial impact. See Russell, 104 Wn. App. at 436-38.

In Russell, the State charged the Defendant with first degree arson. 104 Wn. App. at 426. The Defendant dated the victim for four years, living at her apartment off and on throughout the relationship. Id. A week before the alleged arson, the Defendant became angry when he suspected that the victim was involved in a romantic relationship with her neighbor. Id. at 427. On the night of the incident, the Defendant was dressed in a rose colored shirt and tan pants. Id. The Defendant located the victim and her neighbor at a local tavern, which was only seven minutes from the victim's apartment. Id. When the Defendant physically grabbed the victim, bouncers sprayed him with pepper spray. Id. Police received a 911 call at 7:49 p.m. and responded to the tavern by 7:54 p.m. Id. When police arrived at the tavern, the Defendant was gone. Id. Around 8:00 p.m., a tenant in the victim's apartment complex saw the Defendant, dressed in a pink shirt and tan slacks, go upstairs to the victim's apartment. Id. She heard a loud bang and watched the Defendant exit the building. Id. Minutes later, the tenant saw smoke billowing from the apartment. Id. The tenant called 911 and emergency personnel responded by 8:11 pm. Id. Around 9:00 p.m., the Defendant confided in a friend that he went to the victim's apartment and started the blaze. Id. at 428. The friend encouraged the Defendant to turn himself in, and the two drove to the police

station. Id.

At the Russell trial, the Defendant admitted that he had a confrontation with the victim earlier that evening. Id. at 430. However, he testified that after the confrontation he went to his place of business and took a shower for 30 minutes and changed clothes. Id. at 431. The Defendant claimed that he and his friend decided that he should surrender to the police due to the altercation at the bar, but not for any arson. Id. The Defendant testified that he was unaware of the arson, and that he never confessed that he set fire to the victim's apartment. Id. On cross examination, the State impeached the defendant with three prior convictions for crimes of dishonesty. Id. A jury convicted the Defendant, and the trial court sentenced him to life without parole under the Persistent Offender Accountability Act. Id.

With the Russell appeal, this Court determined that the trial court erred when it admitted the prior convictions because it failed to conduct the requisite probative-prejudicial balancing test under ER 609(b). Id. at 434 However, this Court still affirmed the conviction, finding the error harmless because the evidence overwhelmingly pointed to the Defendant's guilt; and with or without the prior convictions, any jury would have rejected his

proffered defense. Id. at 439.

The present case is analogous to Russell and requires the same result because the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. In Russell, the defendant testified that he had an altercation with the Defendant prior to the incident. 104 Wn. App. at 430. Similarly, Ong confessed that he approached Murphy, touched her without permission, and proceeded to argue with her. 5RP 183, 187-89. In Russell, a witness observed the Defendant approach the victim's apartment building immediately before seeing smoke billow from the unit, but the witness never saw the defendant start the blaze. 104 Wn. App. at 427. Similarly, while no witness actually observed Ong sexually assault Murphy or attack her son, several witnesses noticed that Ong was watching Murphy on the riverbank, saw Ong approach Murphy alongside the river, heard terrifying screams immediately after Ong drew near his victims, and observed Ong leaving the riverbank and exiting the park immediately after the cries for help. 4RP 23-26, 4RP 64-65, 73, 4RP 27, 65, 76, 4RP 30, 73-74, 5 RP 70-71, 5 RP 70-71, 90. In Russell, the defendant confided in a friend that he had an altercation with his ex-girlfriend and that he went to the victim's apartment and started the fire. 104 Wn. App. at 428. Similarly, Ong confessed to a gentleman in the

parking lot that he had a fight with a woman in the park and was afraid that she had called the police. 5RP 67-68, 76.

In addition to these similarities, witnesses also observed that Murphy's son was unusually quiet for a prolonged period of time; that Murphy's clothes were disheveled; that Murphy was crying and shaking uncontrollably; and that Murphy had red marks on her face and neck. 4RP 207-08; 4RP 207, 219, 5RP 74-75.

While Ong's credibility was impeached with a single passing reference to his prior convictions, the fact remains that the evidence of guilt was so overwhelming, that with or without the prior convictions, any jury would have rejected his claim that he only touched Murphy on the knee, cussed at her, and left her unharmed along the river. Accordingly, this Court should find that the trial court's error in admitting the prior convictions did not affect the outcome of the trial within any reasonable probability.

C. Counsel was not ineffective when he elicited a response from a testifying officer that he used the Defendant's old mug shot when he compiled a photomontage.

Criminal defendants have a constitutional right to the effective assistance of counsel. U.S. Const. amend VI; Wash. Const. art. I § 22 (amend. X); Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed.

2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). In Strickland, the United State Supreme Court established a two-part test for ineffective assistance of counsel. 466 U.S. at 687. If either part of this test is not satisfied, the inquiry goes no further, and the defendant is not entitled to relief. Hendrickson, 129 Wn.2d at 78; State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1997).

The first prong requires that the Defendant show deficient performance, *i.e.* that his or her counsel made errors so serious that he or she did not function as the counsel guaranteed by the Sixth Amendment. Strickland, 466 U.S. at 687. In this assessment, the appellate court will presume the defendant was properly represented. Hendrickson, 129 Wn.2d at 77. A defendant cannot prove deficient performance if counsel's actions are matters that go to trial strategy or are reasonable tactics. Id. at 77-78.

The second prong requires that the defendant show actual prejudice – “that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” Strickland, 466 U.S. at 687. A defendant only satisfies this prong when there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different. Hendrickson, 129 Wn.2d at 78; Thomas, 109 Wn.2d at 226.

This Court should find that Ong is not entitled to relief because he cannot satisfy the test for ineffective assistance of counsel. Most importantly, Ong cannot show, that but for his attorney's question and the elicited response about "mug shots," the result at trial would have been different.

1. The question was legitimate because identity was still an issue.

As noted above, the defendant must first demonstrate that defense counsel's representation was deficient. Hendrickson, 129 Wn.2d at 78. A defendant is not entitled to perfect counsel, to error-free representation, or to a defense of which no lawyer would doubt the wisdom. State v. Adams, 91 Wn.2d 86, 91, 586 P.2d 1168 (1978). The appellate courts only reverse on ineffective assistance grounds if the defendant shows there was no legitimate strategic or tactical rationale for his trial attorney's decision. Strickland, 466 U.S. at 689; McFarland, 127 Wn.2d at 336. The defendant bears the burden of showing the absence of a legitimate strategic decision. State v. Rainey, 107 Wn. App. 129, 135-36, 28 P.3d 10 (2001), *review denied* 145 Wn.2d 1028 (2002).

In the instant case, Ong's trial attorney examined Detective Keegan when the State sought to admit into evidence a photo array that Keegan produced, showed to Ms. Murphy, and used to develop a composite sketch of

Murphy's assailant. 5RP 18. Defense counsel questioned Keegan as to how he compiled the photographs. 5RP 19. Keegan responded he produced the array from old mug shots taken from computer jail records. 5RP 19. After receiving Keegan's response, defense counsel requested a mistrial. 5RP 19-20. The court denied the request. 5RP 23.

Ong claims that the question constitutes deficient representation because identity was not an issue because defense counsel's opening statements and examination of witnesses already revealed that Ong was in the park.¹³ Brief of Appellant at 33. Thus, Ong asserts there was no tactical reason to highlight the fact that he had previous encounters with the law. Brief of Appellant at 33. However, identity remained an issue until Ong actually took the stand, which did not occur until after Keegan testified.

Keegan testified that he met with Murphy to produce a sketch of her assailant, and that he showed her a photo array to aid the production of that sketch. 4RP 152,-53, 179, 256. Murphy pointed to two photographs, one of which was of Ong, as the individuals who most closely resembled her

¹³ The State notes that opening statements are not evidence. WPIC 1.02 provides:

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and exhibits.

assailant. 4RP 153, 179, 256, 5RP 29. Because the State still had to establish that Ong was Murphy's assailant, the prosecution sought to introduce the photo array into evidence. Thus, it was a proper for counsel to examine Keegan to ensure the photo array was not suggestive. See State v. Eacret, 94 Wn. App. 282, 283, 971 P.2d 109 (a suggestive montage is one that directs undue attention to a particular photo). The question was reasonable.

2. The alleged error did not prejudice the Defendant.

When a defendant claims ineffective assistance of counsel, he or she must show that there is a reasonable probability that, but for counsel's errors, the result at trial would have been different. Hendrickson, 129 Wn.2d at 78; Thomas, 109 Wn.2d at 226. If the Court finds that defense counsel's question on the photo array was unreasonable and constituted an error, then it should still affirm the Ong's conviction because the outcome at trial would have been the same with or without Keegan's response.

In the present case, the trial court stated that counsel opened the door to Keegan's answer involving a single reference to "mug shots." 5RP 21. When the trial court denied the request for a mistrial, it explained that the jury was not stupid, and that it was common knowledge that the police use

photographs that they have in their records to create a photomontage. 5RP 21
The trial court reasoned that the statement was not prejudicial because “[t]he jury’s got enough common sense and common knowledge of the situation that [police] go into their records and take out shots of people that they have in there records and they use them.” 5RP 22-23.

The trial court was correct. With or without Keegan’s passing reference to “mug shots,” the jury already understood that Ong had prior encounters with the law, seeing that Keegan was able to obtain an earlier photograph of Ong for the purpose of the montage. There was no prejudice.

Furthermore, counsel’s mistake was harmless given the weight of the evidence against Ong. Again, Ong admitted that he was in the park, that he inappropriately touched Murphy on the knee, and that he fought with Murphy. 5RP 183, 187-89. Witnesses observed Ong watching Murphy prior to the incident. 4RP 24, 62. Witnesses heard Murphy scream immediately after Ong approach her along the river. 4RP 28, 65, 76. Witnesses observed Ong fleeing the park immediately after Murphy’s cries for help. 4RP 30, 73-74, 5RP 70-71. Witnesses observed Murphy crying and shaking, with her clothes disheveled, and red marks on her face and neck. 4RP 207-08, 219. A witness testified that Ong asked him for a ride from the park because he was

afraid a woman had reported him to the police. 5RP 67-68. And police found Ong hiding in tall grass a half mile from the park. 5RP 132, 141, 160. In light of this evidence, defense counsel's question, and Keegan's response, did not have any impact on the final outcome at trial. This Court should affirm.

D. The trial court's failure to include a knowledge element in the indecent liberties definition was harmless.

1. The State did not have to prove indecent liberties.

Under RCW 9A.36.021(1)(e), a person is guilty of second degree assault when "with intent to commit a felony, assaults another." The statute does not require proof of intent to commit a particular felony. RCW 9A.36.021(1)(e). See State v. Bergeron, 105 Wn.2d 1, 711 P.2d 1000 (1985) (the particular crime that a burglar intended to commit inside a burglarized premises is not an element of burglary that must be included in the information or jury instructions).

In the present case, the State charged Ong with second degree assault, and not the specific crime of indecent liberties. Thus, this Court should find that the trial court was not under an obligation to instruct the jury of the requisite elements to prove the felony of indecent liberties. See RCW 9A.44.100; WPIC 49.02.

///

BRIEF OF RESPONDENT
37752-7-II

2. The omission was harmless.

An omission or misstatement of the law in a jury instruction that relieves the State of its burden to prove every element of the crime charged is erroneous. State v. Thomas, 150 Wn.2d 821, 844, 83 P.3d 870 (2004); State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). However, not every omission or misstatement relieves the State of its burden. Id. Appellate courts review erroneous jury instructions that omit an element of the charged offense, or misstates the law, under a harmless error analysis. Neder v. United States, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); Thomas, 150 Wn.2d at 844; Brown, 147 Wn.2d at 339.

The United States Supreme Court has said that “an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” Neder, 527 U.S. at 9 (emphasis added). The Neder test for determining the harmlessness of a constitutional error is “whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” Id. at 15. As applied to omissions or misstatements of elements in jury instructions, an error is harmless if that element is supported by uncontroverted evidence. Thomas, 150 Wn.2d at 845; Brown, 147 Wn.2d

at 341 (citing Neder, 527 U.S. at 18).

In the present case there is sufficient evidence to show that Ong knowingly touched Murphy for the purposes of sexual contact. Ong admitted that he touched Murphy on the knee and that Murphy found this touch to be offensive. 5RP 187-88, 200-04. According to Murphy, Ong physically lifted her skirt and looked underneath. 4RP 94. Ong lunged at Murphy and climbed on top of her. 4RP 94-95, 97. While Murphy struggled against Ong he groped her, trying to remove her clothing. 4RP 95, 97. Witness testimony corroborates the traumatic experience described by Murphy. Witnesses heard screams immediately after Ong approached Murphy; and that witnesses observed her disheveled, crying, shaking, and with red marks on her face and neck. 4RP 27, 65, 76; 4RP 206-08, 219. This Court should find that there is sufficient evidence to show the missing element, that Ong knowingly caused Murphy to have sexual contact with him by forcible contact. This Court must affirm.

E. The trial court did not comment on the evidence.

A trial judge may not convey “to the jury his or her personal attitudes toward the merits of the case.” Wash. Const. art. IV § 16. The purpose of this article is “to prevent the jury from being influenced by knowledge conveyed

to it by the court as the court's opinion of the evidence submitted." Seattle v. Arensmeyer, 6 Wn. App. 116, 120, 491 P.2d 1305 (1971)(quoting Heitfeld v. Benevolent & Protective Order of Keglers, 36 Wn.2d 685, 699, 220 P.2d 655, (1950)). A trial judge's comment on the evidence is not reversible error so long as the defendant was not prejudiced by the trial judge's statement. Arensmeyer, 6 Wn. App. at 121-22. (citing State v. Bogner, 62 Wn.2d 247, 382 P.2d 254 (1963)).

Ong relies on Arensmeyer, to support his claim that the trial judge made an improper comment on the evidence during closing arguments. This Court should find that Arensmeyer is factually distinct from the present case.

In Arensmeyer, the trial court interrupted defense counsel's interpretation of the evidence that favored the Defendant. 6 Wn. App. at 121. When defense counsel referred to police witnesses as "rookie cops," the trial court interceded:

Just a minute – that isn't the testimony. [The witnesses] both testified as to how long they were police officers, and they had actually been in the Academy at this occurrence, but they had been police officers before that. Now, don't give the impression they were just policemen that were put in the Academy. Each of them testified, and the evidence indicates how long they had been police officers. Proceed.

Id. at 120. The appellate court reversed the Defendant's conviction and

ordered a new trial, reasoning that the interruption was an effort to compel counsel to draw only the inferences that the judge believed to be logical. Id. at 21. Because the trial court sought to correct counsel’s recitation of the facts, the appellate court found the interruption to be a comment as to what the evidence actually meant. Id.

In the present case, the trial judge did not correct defense counsel’s interpretation, nor did he convey the meaning that the Defense or the jury should take from the evidence. During closing argument, the following exchange occurred:

Defense Counsel: Mrs. Speed’s testimony that yes, she heard screaming and she saw a man and a woman on the river bank, but he never touched anyone, he just left –

Court: Well, the jury’s going – folks again, you’re the sole judges of what the facts are so disregard any remarks that don’t conform to your finding of the facts.

6RP 53. The interruption was not an improper comment on the evidence. First, the statement that “[h]e never touched anyone,” was not supported by the testimony. Both Ong and Murphy testified that there was an improper and offensive touch. 4RP 94; 5RP187-88, 200-04. The trial court properly restricted the argument of counsel to the facts in evidence. See Arensmeyer, 6 Wn. App. at 121 (citing Sears v. Seattle Consol. St. Ry., 6 Wash 227, 233, 33

P. 389 (1893). Second, the trial judge merely recited the same language that the jury received in its instructions – that they are the sole judges of the facts. WPIC 1.02. The comment did not establish disputed facts, prove the State’s case, or bear on the credibility of the witnesses. This Court should find that the comment did not prejudice the defendant and that counsel still had latitude to make favorable inferences from the evidence. This Court should affirm.

F. The cumulative effect of the alleged errors did not deny the Defendant a fair trial.

The cumulative error doctrine applies when there have been several errors that individually do not justify reversal, but when combined denied the defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). The appellate courts will reverse a criminal defendant’s conviction when it appears reasonably probable that the cumulative effect of all the errors at trial materially affected the final outcome. State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998).

In the present case, the accumulation of errors, if any, did not materially affect the final outcome of the trial. The weight of the evidence is overwhelming and establishes the Defendant’s guilt. This court should affirm the conviction.

IV. CONCLUSION

Based on the foregoing, the State respectfully requests this Court to affirm the defendant's conviction and sentence.

Dated this 22nd day of April, 2009, in Port Angeles Washington.

DATED April 22, 2009.

Respectfully submitted,

DEBORAH KELLEY
Prosecuting Attorney



BRIAN PATRICK WENDT
WSBA No. 40537
Deputy Prosecuting Attorney

EXHIBIT A

SCANNED - 1

SUPERIOR COURT OF WASHINGTON
COUNTY OF CLALLAM

FILED
CLALLAM COUNTY
AUG 01 2005
MOLLIE LINGVALL, Clerk

THE STATE OF WASHINGTON,)
Plaintiff,)

v.)
Stemmy)
Defendant.)

NO. 05-1-270-1

ORDER CONTINUING TRIAL
(ORCTD)

THIS MATTER came before the court for consideration of a motion for continuance brought by plaintiff defendant the court. It is hereby

ORDERED that the trial, currently set for 8/1/05 is continued to 8/29/05 *upon agreement of the parties [CrR3.3(f)(1)] or is required in the administration of justice [CrR 3.3(f)(2)] for the following reason:

- plaintiff's counsel in trial; defense counsel in trial;
- witness unavailable; other _____

IT IS FURTHER ORDERED that the expiration date is 9-29-05 (not less than 30 days after new trial date).

DONE IN OPEN COURT this 1st day of August, 2005.

[Signature]
JUDGE

Approved

[Signature]
Deputy Prosecuting Attorney 37427

Approved

[Signature]
Attorney for Defendant

Approved

[Signature]
Defendant

18

SUPERIOR COURT OF WASHINGTON
COUNTY OF CLALLAM

FILED
CLALLAM COUNTY
AUG 29 2005
MOLLIE LINGVALL, Clerk
BY _____

THE STATE OF WASHINGTON,
Plaintiff,

Steinberg
Defendant.

NO. 05-1-8-7
230-1
240-8

ORDER CONTINUING TRIAL
(ORCTD)

THIS MATTER came before the court for consideration of a motion for continuance brought by plaintiff defendant the court. It is hereby

ORDERED that the trial, currently set for 8/29/05 is continued to 10/24/05 *upon agreement of the parties [CrR3.3(f)(1)] or is required in the administration of justice [CrR 3.3(f)(2)] for the following reason:

- plaintiff's counsel in trial; defense counsel in trial;
- witness unavailable; other _____

IT IS FURTHER ORDERED that the expiration date is 11/27/05 (not less than 30 days after new trial date).

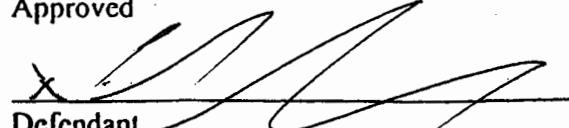
DONE IN OPEN COURT this 29 day of August, 2005


JUDGE
Approved

Approved

Deputy Prosecuting Attorney 34427

26/2/2005
Attorney for Defendant

Approved

Defendant

FILED
CLALLAM COUNTY
OCT 24 2005
BARBARA CHRISTENSEN, Clerk

SUPERIOR COURT OF WASHINGTON
COUNTY OF CLALLAM

THE STATE OF WASHINGTON,)
Plaintiff,)
)
v.)
STEVEN ONG)
Defendant.)

NO. 05-1-00230-1

ORDER CONTINUING TRIAL
(ORCTD)

THIS MATTER came before the court for consideration of a motion for continuance brought by plaintiff defendant the court. It is hereby

ORDERED that the trial, currently set for 10/24/05 is continued to 11/1/05 *upon agreement of the parties [CrR3.3(f)(1)] or is required in the administration of justice [CrR 3.3(f)(2)] for the following reason:

- plaintiff's counsel in trial; defense counsel in trial;
- witness unavailable; other _____

IT IS FURTHER ORDERED that the expiration date is 2/16/05 KW ~~10/24/05~~ ~~1/18/06~~
(not less than 30 days after new trial date).

DONE IN OPEN COURT this 24 day of Oct, 2005

[Signature]
JUDGE

Approved
[Signature]
Deputy Prosecuting Attorney
32927

Approved
[Signature] #6207
Attorney for Defendant

Approved
[Signature]
Defendant

SUPERIOR COURT OF WASHINGTON
COUNTY OF CLALLAM

FILED
CLALLAM COUNTY
JAN 17 2006
MOLLIE LINGVALL, Clerk
BY _____

THE STATE OF WASHINGTON,
Plaintiff,

v.
STEVEN ONG
Defendant.

NO. 05-1-00230-1

ORDER CONTINUING TRIAL
(ORCTD)

THIS MATTER came before the court for consideration of a motion for continuance brought by plaintiff defendant - the court. It is hereby

ORDERED that the trial, currently set for JAN 17, 2006 is continued to APRIL 10, 2006 upon agreement of the parties [CrR3.3(f)(1)] or is required in the administration of justice [CrR 3.3(f)(2)] for the following reason:

- plaintiff's counsel in trial; defense counsel in trial;
- witness unavailable; other _____

IT IS FURTHER ORDERED that the expiration date is May 10, 2006 (not less than 30 days after new trial date).

DONE IN OPEN COURT this 17 day of Jan, 2006

Approved

[Signature]
Deputy Prosecuting Attorney 33427

JUDGE

Approved

[Signature]
Attorney for Defendant #6709

Approved

Defendant

[Signature]

11

SUPERIOR COURT OF WASHINGTON
COUNTY OF CLALLAM

FILED
CLALLAM COUNTY
JUN 12 2006
BARBARA CHRISTENSEN, Clerk

THE STATE OF WASHINGTON,
Plaintiff,

Stein Ong
Defendant.

NO. 01-1-230-1

ORDER CONTINUING TRIAL
(ORCTD)

THIS MATTER came before the court for consideration of a motion for continuance brought by plaintiff defendant the court. It is hereby

ORDERED that the trial, currently set for 6/12/06 is continued to 8/7/06 upon agreement of the parties [CrR3.3(f)(1)] or is required in the administration of justice [CrR 3.3(f)(2)] for the following reason:

- plaintiff's counsel in trial; defense counsel in trial;
- witness unavailable; other _____

IT IS FURTHER ORDERED that the expiration date is 9/5/06
(not less than 30 days after new trial date).

DONE IN OPEN COURT this 12th day of June, 2006

[Signature]
JUDGE

Approved

[Signature]
Deputy Prosecuting Attorney 32627

Approved

[Signature]
Attorney for Defendant

Approved

[Signature]
Defendant

FILED
CLALLAM COUNTY
AUG 7 2006
BARBARA CHRISTENSEN, Clerk

SUPERIOR COURT OF WASHINGTON
COUNTY OF CLALLAM

THE STATE OF WASHINGTON,)
Plaintiff,)
)
)
v.)
STEVEN ONG,)
Defendant.)

NO. 05-1-00230-1
ORDER CONTINUING TRIAL
(ORCTD)

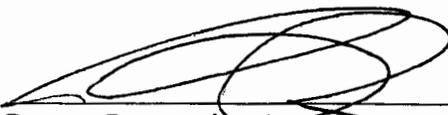
THIS MATTER came before the court for consideration of a motion for continuance brought by plaintiff defendant the court. It is hereby

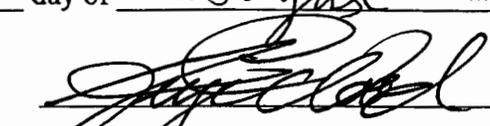
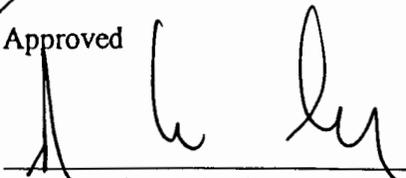
ORDERED that the trial, currently set for _____ is continued to Sept. 18, 2006 *upon agreement of the parties [CrR3.3(f)(1)] or is required in the administration of justice [CrR 3.3(f)(2)] for the following reason:

- plaintiff's counsel in trial; defense counsel in trial;
- witness unavailable; other _____

IT IS FURTHER ORDERED that the expiration date is 10/18/06
(not less than 30 days after new trial date).

DONE IN OPEN COURT this 7 day of August, 2006

Approved

Deputy Prosecuting Attorney 3472


JUDGE
Approved

Attorney for Defendant

Approved

Defendant

SUPERIOR COURT OF WASHINGTON
COUNTY OF CLALLAM

FILED
CLALLAM COUNTY
SEP 18 2006
BARBARA CHRISTENSEN, Clerk

THE STATE OF WASHINGTON,)
Plaintiff,)
)
)
Steven Ong)
Defendant.)

NO. 05-1-00230-1

ORDER CONTINUING TRIAL
(ORCTD)

THIS MATTER came before the court for consideration of a motion for continuance brought by plaintiff defendant the court. It is hereby

ORDERED that the trial, currently set for P/18/06 is continued to 11/23/06 *upon agreement of the parties [CrR3.3(f)(1)] or is required in the administration of justice [CrR 3.3(f)(2)] for the following reason:

- plaintiff's counsel in trial; defense counsel in trial;
- witness unavailable; other _____

IT IS FURTHER ORDERED that the expiration date is _____ (not less than 30 days after new trial date).

DONE IN OPEN COURT this 18 day of September, 2006

[Signature]
JUDGE

Approved
[Signature]
Deputy Prosecuting Attorney 8582

Approved
[Signature]
Attorney for Defendant

Approved
[Signature]
Defendant

SCANNED - 1

SUPERIOR COURT OF WASHINGTON
COUNTY OF CLALLAM

FILED
CLALLAM CO CLERK

2006 NOV 13 A 9:10

BARBARA CHRISTENSEN

THE STATE OF WASHINGTON,)
Plaintiff,)

v.)
STEVEN ONG)
Defendant.)

NO. 05-1-00230-1

ORDER CONTINUING TRIAL
(ORCTD)

THIS MATTER came before the court for consideration of a motion for continuance brought by plaintiff defendant the court. It is hereby

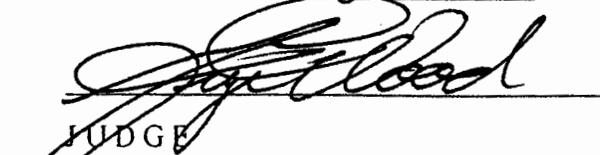
ORDERED that the trial, currently set for 11/13/06 is continued to JAN 8, 2007 *upon agreement of the parties [CrR3.3(f)(1)] or is

required in the administration of justice [CrR 3.3(f)(2)] for the following reason:

- plaintiff's counsel in trial; defense counsel in trial;
- witness unavailable; other _____

IT IS FURTHER ORDERED that the expiration date is Feb 7, 2007 (not less than 30 days after new trial date).

DONE IN OPEN COURT this 13th day of NOVEMBER, 2006



JUDGE

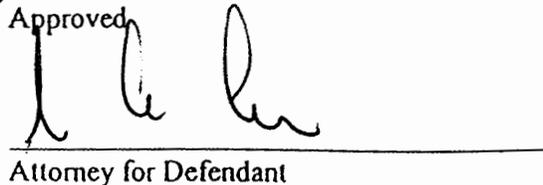
Approved



Deputy Prosecuting Attorney

33m27

Approved



Attorney for Defendant

Approved



Defendant

SUPERIOR COURT OF WASHINGTON
COUNTY OF CLALLAM

THE STATE OF WASHINGTON)

v. BARBARA CHRISTENSEN)
Steven Ong)
Defendant.)

FILED
CLALLAM CO CLERK
JAN - 8 AM 12

NO. 05-1-230-1

ORDER CONTINUING TRIAL
(ORCTD)

THIS MATTER came before the court for consideration of a motion for continuance brought by plaintiff defendant the court. It is hereby

ORDERED that the trial, currently set for 1/8/07 is continued to 4/2/07 *upon agreement of the parties [CrR3.3(f)(1)] or is

required in the administration of justice [CrR 3.3(f)(2)] for the following reason:
 plaintiff's counsel in trial; defense counsel in trial;
 witness unavailable; other _____

IT IS FURTHER ORDERED that the expiration date is 5/2/07
(not less than 30 days after new trial date).

DONE IN OPEN COURT this 8th day of January, 2007

Approved
[Signature]
Deputy Prosecuting Attorney 37427

[Signature]
JUDGE
Approved
[Signature]
Attorney for Defendant for KWA

Approved
[Signature]
Defendant

SUPERIOR COURT OF WASHINGTON
COUNTY OF CLALLAM

FILED
CLALLAM CO CLERK

THE STATE OF WASHINGTON,
Plaintiff,

2007 APR -2 A 10:12

BARBARA CHRISTENSEN
)
)
)
)

NO. 05-1-00230-1

STEVEN ONG
v.

Defendant.

ORDER CONTINUING TRIAL
(ORCTD)

THIS MATTER came before the court for consideration of a motion for continuance brought by plaintiff defendant the court. It is hereby.

ORDERED that the trial, currently set for APRIL 2, 2007 is continued to June 4 2007 *upon agreement of the parties [CrR3.3(f)(1)] or is required in the administration of justice [CrR 3.3(f)(2)] for the following reason:

- plaintiff's counsel in trial; defense counsel in trial;
- witness unavailable; other _____

IT IS FURTHER ORDERED that the expiration date is 7/4/07
(not less than 30 days after new trial date).

DONE IN OPEN COURT this 2nd day of April, 2007

[Signature]
JUDGE

Approved
[Signature]
Deputy Prosecuting Attorney
33427

Approved
[Signature] #670
Attorney for Defendant

Approved
[Signature]
Defendant

m

SUPERIOR COURT OF WASHINGTON
COUNTY OF CLALLAM

FILED
CLALLAM CO CLERK

THE STATE OF WASHINGTON,
Plaintiff,

2007 JUN -4 A 9 58

BARBARA CHRISTENSEN

v.
STEVEN ONB
Defendant.

NO. 05-1-230-1

ORDER CONTINUING TRIAL
(ORCTD)

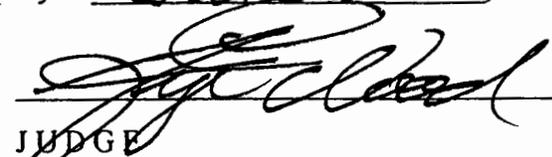
THIS MATTER came before the court for consideration of a motion for continuance brought by plaintiff defendant the court. It is hereby

ORDERED that the trial, currently set for June 4, 2007 is continued to July 16, 2007 *upon agreement of the parties [CrR3.3(f)(1)] or is required in the administration of justice [CrR 3.3(f)(2)] for the following reason:

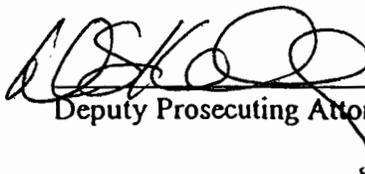
- plaintiff's counsel in trial; defense counsel in trial;
- witness unavailable; other _____

IT IS FURTHER ORDERED that the expiration date is Aug 15, 2007
(not less than 30 days after new trial date).

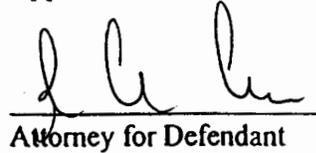
DONE IN OPEN COURT this 4th day of June, 2007


JUDGE

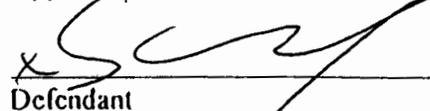
Approved


Deputy Prosecuting Attorney 8582

Approved

 #6207
Attorney for Defendant

Approved


Defendant

81

SCANNED - 1

SUPERIOR COURT OF WASHINGTON
COUNTY OF CLALLAM

FILED
CLALLAM CO CLERK

2007 JUL 16 A 9:53

BARBARA CHRISTENSEN

THE STATE OF WASHINGTON,)
Plaintiff,)

Steven O'Neil
Defendant)

NO. 05-1-00230-1

ORDER CONTINUING TRIAL
(ORCTD)

THIS MATTER came before the court for consideration of a motion for continuance brought by plaintiff defendant the court. It is hereby

ORDERED that the trial, currently set for 7/15/07 is continued to 8/10/07 *upon agreement of the parties [CrR3.3(f)(1)] or is required in the administration of justice [CrR 3.3(f)(2)] for the following reason:

- plaintiff's counsel in trial; defense counsel in trial;
- witness unavailable; other Plus Negotiations

IT IS FURTHER ORDERED that the expiration date is 10/10/07 (not less than 30 days after new trial date).

DONE IN OPEN COURT this 16 day of July, 2007

[Signature]
JUDGE

Approved
[Signature]

Deputy Prosecuting Attorney
33927

Approved
[Signature]
Attorney for Defendant

Approved
[Signature]
Defendant

86

SUPERIOR COURT OF WASHINGTON
COUNTY OF CLALLAM

FILED
CLALLAM CO CLERK

THE STATE OF WASHINGTON,)
Plaintiff,)
)
Steven Ong)
Defendant.)

2007 SEP 10 A 10:47
BARBARA CHRISTENSEN
NO. 05-1-230-1
ORDER CONTINUING TRIAL
(ORCTD)

THIS MATTER came before the court for consideration of a motion for continuance brought by plaintiff defendant the court. It is hereby

ORDERED that the trial, currently set for 5/14/07 is continued to 10/15/07 *upon agreement of the parties [CrR3.3(f)(1)] or is

required in the administration of justice [CrR 3.3(f)(2)] for the following reason:
 plaintiff's counsel in trial; defense counsel in trial;
 witness unavailable; other _____

IT IS FURTHER ORDERED that the expiration date is 11/14/07 (not less than 30 days after new trial date).

DONE IN OPEN COURT this 10th day of Sept, 2007

Approved
[Signature]
Deputy Prosecuting Attorney [Signature]

[Signature]
JUDGE

Approved
[Signature]
Attorney for Defendant

Approved
[Signature]
Defendant

FILED
CLALLAM CO CLERK
2007 OCT 15 A 10:03

SUPERIOR COURT OF WASHINGTON
COUNTY OF CLALLAM

THE STATE OF WASHINGTON,
Plaintiff,

BARBARA CHRISTENSEN

Steven Ong
v.
Steven Ong
Defendant

NO. 05-1-00230-1

ORDER CONTINUING TRIAL
(ORCTD)

THIS MATTER came before the court for consideration of a motion for continuance brought by plaintiff defendant the court. It is hereby

ORDERED that the trial, currently set for 10/15/07 is continued to 12/03/07 *upon agreement of the parties [CrR3.3(f)(1)] or is required in the administration of justice [CrR 3.3(f)(2)] for the following reason:

plaintiff's counsel in trial; defense counsel in trial;

witness unavailable; other A counsel

ill today, state witness unavailable

IT IS FURTHER ORDERED that the expiration date is 01/02/08
(not less than 30 days after new trial date).

DONE IN OPEN COURT this 15th day of Oct, 2007

[Signature]
JUDGE

Approved
[Signature]
Deputy Prosecuting Attorney
35 Nov 07

Approved
[Signature]
Attorney for Defendant
29966

Approved
[Signature]
Defendant

SUPERIOR COURT OF WASHINGTON
COUNTY OF CLALLAM

FILED
CLALLAM CO CLERK

2007 DEC -3 A 10:07

THE STATE OF WASHINGTON,
Plaintiff,

) BARBARA CHRISTENSEN
)
)
)
)
)
)

v.
Steve Ong
Defendant.

NO. 05-1-232-1

ORDER CONTINUING TRIAL
(ORCTD)

THIS MATTER came before the court for consideration of a motion for continuance brought by plaintiff defendant the court. It is hereby

ORDERED that the trial, currently set for 12/3/07 is continued to 2/25/08 *upon agreement of the parties [CrR3.3(f)(1)] or is required in the administration of justice [CrR 3.3(f)(2)] for the following reason:

plaintiff's counsel in trial; defense counsel in trial;

witness unavailable;

other new defense

counsel, previous counsel left office for health reasons

IT IS FURTHER ORDERED that the expiration date is 3/26/08
(not less than 30 days after new trial date).

DONE IN OPEN COURT this 3rd day of Dec, 2007

Approved
[Signature]
Deputy Prosecuting Attorney [Signature]

[Signature]
JUDGE

Approved

[Signature]
Attorney for Defendant

Approved

[Signature]
Defendant

76
llm

EXHIBIT B

SCANNED - 9

FILED
OCT 29 1999
CLALLAM CO. CLERK

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

STATE OF WASHINGTON,) NO. 95-1-00089-3
 Plaintiff,) *95-9-6116*
 vs.) AMENDED JUDGMENT AND SENTENCE
 STEVEN EUGENE ONG) (JS)
 Defendant.) [XX] Prison
) [] Jail One Year or Less
) [] First Time Offender
) [] Special Sexual Offender Sentencing Alternative
) [] Special Drug Offender Sentencing Alternative

SID: 13529655
 If no SID, use DOB: / /

CCSO 95-02601/
 SPD 95-00878

I. HEARING

1.1 A resentencing hearing was held and the Defendant, the Defendant's lawyer and the (Deputy) Prosecuting Attorney were present.

II. FINDINGS

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

2.1 CURRENT OFFENSE(s): The Defendant was found guilty on June 8, 1995 by [] plea [XX] jury-verdict [] bench trial of:

COUNT	CRIME	RCW	CRIME DATE
<i>A</i> I	KIDNAPPING IN THE SECOND DEGREE, a Class B felony #00654	9A.40.030	03/14/1995
III	BURGLARY IN THE SECOND DEGREE, a Class B felony #02312	9A.52.030	03/14/1995
<i>X</i> IV	TAKING A MOTOR VEHICLE WITHOUT OWNER'S PERMISSION, a Class C felony #02724	9A.56.070	03/14/1995

as charged in the Information.

- [] A special verdict/finding for use of firearm was returned on Count(s) _____ RCW 9.94A.125, .310(3)
- [] A special verdict/finding for use of deadly weapon other than a firearm was returned on Count(s) _____ RCW 9.94A.125, .310(4)
- [] A special verdict/finding of sexual motivation was returned on Count(s) _____ RCW 9.94A.127
- [] A special verdict/finding for Violation of the Uniform Controlled Substances Act was returned on Count(s) _____ RCW 69.50.401 and RCW 69.50.435, taking place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of, a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.

RCW II was overturned by appellate court,

JUDGMENT AND SENTENCE (JS) (Felony)
(RCW 9.94A.110, .120)
(WPF CR 84.0400 (8/1999)) Page 1 of 9

CLALLAM COUNTY
PROSECUTING ATTORNEY
Clallam County Courthouse
223 East 4th Street
P.O. Box 863
Port Angeles, WA 98362-0149
(360) 417-2301

- 1 [] The Defendant was convicted of vehicular homicide which was proximately caused by a person driving a vehicle while under the influence of intoxicating liquor or drug or by operation of a vehicle in a reckless manner and is therefore a violent offense. RCW 9.94A.030
- 2 [XX] The case involves kidnapping in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40. RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130
- 3 [] The court finds that the offender has a chemical dependency that has contributed to the offense(s). RCW 9.94A._____
- 4 [] The offense in Count(s) _____ was committed in a county jail or state correctional facility. RCW 9.94A.310(4).
- 5 [] A special verdict/finding determining aggravating circumstances was returned on Count(s) _____, as follows: _____ RCW 10.95.020
- 6 [] Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.400): _____
- 7 [] Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): _____
- 8
- 9
- 10

2.2 CRIMINAL HISTORY (RCW 9.94A.360):

	CRIME	DATE OF SENTENCE	SENT. COURT County & State	DATE OF CRIME	A adult or J juvenile	CRIME TYPE *
13	1 Delivery of a Controlled Substance	10/05/87	Kitsap/WA 86-1-00331-1	02/02/86	A	NV
14	2 Attempted Delivery of a Controlled Substance	03/08/88	Snohomish/WA 87-1-00566-1	01/14/87	A	NV
15	3 Possession of a Controlled Substance	12/18/91	Douglas/WA 90CR2860FE	___/___/91	A	NV
16	4 Assault-2	07/31/92	Clallam/WA 92-1-00118-6	06/24/92	A	
17	5 Unlawful Imprisonment	07/31/92	Clallam/WA 92-1-00118-6	06/24/92	A	NV

* Violent (V), Serious Violent (SV), Sex Offense (Sex).

- 18 [] Additional criminal history is attached in Appendix 2.2.
- 19 [] The Defendant committed a current offense while on community placement (adds one point to score). RCW 9.94A.360
- 20 [] The Court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.360): _____
- 21 [] The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61-.520:): _____
- 22

2.3 SENTENCING DATA:

COU NT	OFFENDER SCORE	SERIOUS-NESS LEVEL	STANDARD RANGE (not including enhancements)	Plus Enhancements *	TOTAL STANDARD RANGE (include s enhancements)	MAXIMUM TERM
24 # 1	7	II	51-68 months		51-68 months	10 Years
25 # 3	6	III	22-29 months		22-29 months	10 Years

JUDGMENT AND SENTENCE (JS) (Felony)
 (RCW 9.94A.110, .120)
 (WPF CR 84.0400 (8/1999))

Page 2 of 9

Count 2 overturned by appellate court

CLALLAM COUNTY
 PROSECUTING ATTORNEY
 Clallam County Courthouse
 223 East 4th Street
 P.O. Box 863
 Port Angeles, WA 98362-0149
 (360) 417-2301

4	6	12-14 months	12-14 months	5 Years
---	---	--------------	--------------	---------

TOTAL ENHANCEMENTS to be served consecutively (RCW 9.94A.310(3)(e) and (4)(e)) _____ months

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

Additional current offense sentencing data is attached in Appendix 2.3.

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

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The Court has considered the total amount owing, the Defendant's past, present and future ability to pay legal financial obligations, including the Defendant's financial resources and the likelihood that the Defendant's status will change. The court finds that the Defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.142.

The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A-.142): _____

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

III. JUDGMENT

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

3.2 The Court DISMISSES Count(s) _____

The Defendant is found NOT GUILTY of Count(s) _____

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court: (Name and address - address may be withheld and provided confidentially to Clerk's Office)

JASS Code			
RTN solely / RJN joint & several	\$ _____	Restitution to:	
	\$ _____	Restitution to:	
	\$ _____	Restitution to:	
	\$ _____	Restitution to:	

PCV Victim assessment (\$500.00 for felony and gross misdemeanor; \$250.00 for misdemeanor) RCW 7.68.035

Court costs, including: RCW 9.94A.030, 9.94A.120, 10.01.160, 10.46.190

Criminal filing fee	\$ <u>110.00</u>	CRC
Witness costs	\$ _____	WFR
Sheriff's service fees	\$ _____	SFR

JUDGMENT AND SENTENCE (JS) (Felony) (RCW 9.94A.110, .120) (WPF CR 84.0400 (8/1999))

CLALLAM COUNTY PROSECUTING ATTORNEY
Clallam County Courthouse
223 East 4th Street
P.O. Box 863
Port Angeles, WA 98362-0149
(360) 417-2301

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Jury costs \$ JFR

Other \$

PUB	\$	Fees for court appointed attorney	RCW 9.94A.030
WRF	\$	Court appointed defense expert and other defense costs	RCW 9.94A.030
FCM	\$	Fine RCW 9A.20.021, [] VUCSA additional deferred due to indigency	RCW 69.50.430
LDI	\$	Drug enforcement fund of _____	RCW 9.94A.030
CLF	\$	Crime lab fee [] deferred due to indigency	RCW 43.43.690
EXT	\$	Extradition costs	RCW 9.94A.120
	\$	Emergency response costs (Vehicular Assault, Vehicular Homicide only, \$1,000 maximum)	RCW 38.52.430
	\$	Other costs for: _____ i.e., Interpreter costs (CIS) Evaluations--court ordered (EVA) Investigator services (INS) Lab/blood test (BBS) Meth lab clean-up (MTH) Drug Court Program (DCT)	
	\$	TOTAL	RCW 9.94A.145

[] The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution and LFO order may be entered. RCW 9.94A.142. A restitution LFO hearing: [] shall be set by the prosecutor [] is scheduled for _____, 19__.

[] RESTITUTION. Schedule attached - Appendix 4.1.

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

R/N	NAME of other defendant	Cause Number	(victim name)	(Amount-\$)
	_____	_____	_____	\$ _____
	_____	_____	_____	\$ _____
	_____	_____	_____	\$ _____

[X] The Department of Corrections may immediately issue a Notice of Payroll Deduction. RCW 9.94A.200010

All payments shall be made in accordance with the policies of the clerk and on a schedule established by the Department of Corrections, commencing immediately, unless the Court specifically sets forth the rate here: Not less than \$ _____ per month commencing _____, 19__.

[] In addition to the other costs imposed herein, the Court finds that the Defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the statutory rate. RCW 9.94A.145

[X] The Defendant shall pay the costs of services to collect unpaid legal financial obligations. RCW 36.18.190

[] The financial obligations imposed in this judgment shall bear interest from the date of the Judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the Defendant may be added to the total legal financial obligations. RCW 10.73

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

[X] DNA TESTING. The Defendant shall have a blood sample drawn for purposes of DNA identification analysis and the Defendant shall fully cooperate in the testing. The appropriate agency, the county or

JUDGMENT AND SENTENCE (JS) (Felony)
(RCW 9.94A.110, .120)
(WPF CR 84.0400 (8/1999))

CLALLAM COUNTY
PROSECUTING ATTORNEY
Clallam County Courthouse
223 East 4th Street
P.O. Box 863
Port Angeles, WA 98362-0149
(360) 417-2301

Department of Corrections, shall be responsible for obtaining the sample prior to the Defendant's release from confinement. RCW 43.43.754

4.3 The Defendant shall not have contact with 10/13/87 CHRISTINA SIMPSON (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for TEN years (not to exceed the maximum statutory sentence).
[] Domestic Violence Protection Order / Anti-Harassment Order attached as Appendix 4.3.

THIS PROVISION APPLIES TO DEPOSITIONS VDAE

4.4 OTHER: _____

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

4.5 CONFINEMENT OVER ONE YEAR. The Defendant is sentenced as follows:

(a) CONFINEMENT. RCW 9.94A.400. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections:

68 months on Count I + months enhancement
~~months on Count II + months enhancement~~
89 months on Count III + months enhancement
14 months on Count IV + months enhancement
~~months on Count V + months enhancement~~
Total enhancements: months

overruled by appellate court

Actual number of months of total confinement ordered is
(Add mandatory firearm and deadly weapons enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm or other deadly weapon as set forth above at Section 2.3, and except for the following counts which shall be served consecutively:

The sentence herein shall run consecutively with the sentence in cause number(s)

but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.400

Confinement shall commence immediately unless otherwise set forth here:

(b) The Defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.120. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court:

since 3/17/95

4.6 COMMUNITY PLACEMENT [] COMMUNITY CUSTODY is ordered

na on Counts for months or for the period of earned release pursuant to RCW 9.94A.150(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A.120(9) for community placement offenses -- serious violent offense, second degree assault, any crime against a person with a deadly weapon finding, Chapter 69.50 or 69.52 RCW offense. Community custody follows a term for a sex offense -- RCW 9.94A.120(10). Use Paragraph 4.7 to impose community custody following work ethic camp.]

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

[] The Defendant shall not consume any alcohol.

[] Defendant shall have no contact with:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Defendant shall remain within outside of a specified geographical boundary, to-wit:

The Defendant shall participate in the following crime-related treatment or counseling services:

The Defendant shall comply with the following crime-related prohibitions:

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

4.7 **WORK ETHIC CAMP.** RCW 9.94A.137, RCW 72.09.410. The Court finds that Defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the Defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the Defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the Defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

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

4.9 **OTHER:**

V. NOTICES AND SIGNATURES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- 5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090
- 5.2 **LENGTH OF SUPERVISION.** 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, whichever is longer, to assure payment of all legal financial obligations. RCW 9.94A.145. The State can secure an extension of the court's jurisdiction to collect legal financial obligations. RCW 9.94A.
- 5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.200010. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.200030
- 5.4 **RESTITUTION HEARING.**
 Defendant waives any right to be present at any restitution hearing (sign initials): _____
- 5.5 Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. RCW 9.94A.200
- 5.6 **FIREARMS.** You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the Defendant's driver's license, identicard, or comparable identification, to the Department of Licensing along with the date of conviction or commitment). RCW 9.41.040, 9.41.047

Cross off if not applicable:

~~5.7 **SEX AND KIDNAPPING OFFENDER REGISTRATION.** RCW 9A.44.130, 10A1.200.~~

5.8 **OTHER.** *Defendant must register, and was notified at this sentencing hearing. Defendant acknowledged that he had received notice that he must register by DOC as*

DONE IN OPEN COURT and in the presence of Defendant this date: *October 27th, 1999. well.*

[Signature]
GEORGE L. WOOD, JUDGE

Presented by:
CHRISTOPHER O. SHEA
Prosecuting Attorney
[Signature]

LAUREN M. ERICKSON WBA #19395
Deputy Prosecuting Attorney

Copy received, approved for entry
notice of presentation waived:
[Signature] 14919
BASNICK WBA # _____
Attorney for Defendant

/els

[Signature]
Steven Eugene Ong Defendant

JUDGMENT AND SENTENCE (JS) (Felony)
(RCW 9.94A.110, .120)
(WPF CR 84.0400 (8/1999)) Page 8 of 9

CLALLAM COUNTY
PROSECUTING ATTORNEY
Clallam County Courthouse
223 East 4th Street
P.O. Box 863
Port Angeles, WA 98362-0149
(360) 417-2301

CAUSE NUMBER of this case: 95-1-00089-3
State of Washington v. Steven Eugene Ong

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

WITNESS MY HAND AND SEAL of the
said Superior Court affixed this date: Oct 29, 1999
Clerk of said County and State, by: [Signature], Deputy Clerk

ID sticker if any

IDENTIFICATION OF DEFENDANT

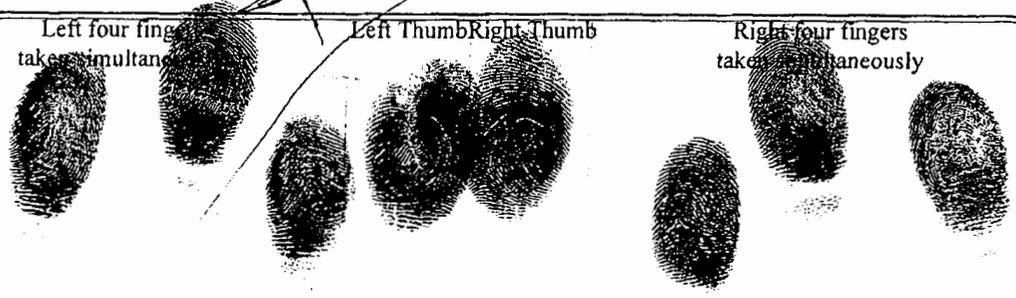
If no SID, take fingerprint card for State

SID No.	<u>13529655</u>	Date of Birth	<u>07/03/68</u>
FBI No.	<u>589038HA4</u>	Date of Arrest	
DOL No. (for traffic convictions)		Local ID No. (pick one):	<input checked="" type="checkbox"/> WA0050000 (CCSO) <input type="checkbox"/> WA0050100 (PAPD) <input type="checkbox"/> WA0050200 (Forks PD) <input checked="" type="checkbox"/> WA0050300 (Sequim PD) <input type="checkbox"/> WA WSP8000 (WSP)
SSN No.	<u>569-17-7533</u>	OCA	<u>99-</u>
PCN No.		Other	
Alias name, SSN, DOB:			
LKA:			

Race:	Ethnicity:	Sex:
<input type="checkbox"/> Asian/Pacific Islander	<input type="checkbox"/> Black/African-American	<input checked="" type="checkbox"/> Male
<input checked="" type="checkbox"/> Caucasian	<input type="checkbox"/> Native American	<input type="checkbox"/> Female
<input type="checkbox"/> Other:		

FINGERPRINTS I ATTEST that I saw the same Defendant who appeared in Court on this document affix his or her fingerprints and signature thereto. [Signature]
Clerk of the Court: [Signature], Deputy Clerk. Dated: 10/29, 1999.

DEFENDANT'S SIGNATURE:



JUDGMENT AND SENTENCE (JS) (Felony)
(RCW 9.94A.110, .120)
(WPF CR 84.0400 (8/1999)) Page 9 of 9

CLALLAM COUNTY
PROSECUTING ATTORNEY
Clallam County Courthouse
223 East 4th Street
P.O. Box 863
Port Angeles, WA 98362-0149
(360) 417-2301

EXHIBIT C

Original
Sentence

DOC: 931441
NAME: ONG, Steven
CSE/COUNT 95-1-00089-3 - Burglary 2

Step 1: Enter Sentence from J&S

a	Enter Years	0	
b	Enter Months	43	
c	Enter Days		
	= Sentence in Days	1308	days

STEP 1 For Enhancement:

a	Enter Time Start Date	0/0/00	
b	Enter Enhancement Length (in days)	0	ERT%
c	(-) Cause Credits	0	0.00
d	(-) Good Time on Credits (if ERT%>0)	0	
e	Net Days	0	
f	Earned Release Credit Total	0	
j	(-) Potential Earned Time	0	
k	(+) Earned Time Not Earned		
g	(-) Potential Good Time	0	
h	(+) Lost Good Time		
g	(+) Out Time Total	0	
h	Enhancement Expiration Date	#VALUE!	
i	Days Remaining to serve to Enhancement Expiration	#VALUE!	

STEP 2 For Mandatory:

a	Enter Time Start Date	0/0/00	
b	Enter Mandatory Length (in days)	0	ERT%
c	(-) Cause Credits	0	0.15
d	(-) Good Time on Credits (if ERT%>0)	0	
e	Net Days	0	
f	Earned Release Credit Total	0	
j	(-) Potential Earned Time	0	
k	(+) Earned Time Not Earned	0	
g	(-) Potential Good Time	0	
h	(+) Lost Good Time	0	
g	(+) Out Time Total	0	
h	Mandatory Expiration Date	#VALUE!	
i	Days Remaining to serve to Mandatory Expiration	#VALUE!	

STEP 3 For Base:

a	Enter Time Start Date	8/2/1995	
b	Enter Base Length (in days)	1308	ERT%
c	(-) Cause Credits	135	33.3%
d	(-) Good Time on Credits (if ERT% > 0)	42	
e	Net Days	1131	
f	Earned Release Credit Total	377	
j	(-) Potential Earned Time	126	
k	(+) Earned Time Not Earned	0	
g	(-) Potential Good Time	251	
h	(+) Lost Good Time	45	
g	(+) Out Time Total	0	
h	Base Expiration Date	10/9/1997	
i	Days Remaining to serve to Base Expiration	-4141	

DATE : 2/9/2009

SIGNATURE

Original Sentence

DOC: 931441
NAME: ONG, Steven
CSE/COUNT 95-1-00089-3 - TAMVWOP

Step 1: Enter Sentence from J&S

a Enter Years 0
b Enter Months 18
c Enter Days
= Sentence in Days 548 days

STEP 1 For Enhancement:

a Enter Time Start Date 0/0/00
b Enter Enhancement Length (in days) 0 ERT%
c (-) Cause Credits 0 0.00
d (-) Good Time on Credits (if ERT%>0) 0
e Net Days 0
f Earned Release Credit Total 0
j (-) Potential Earned Time 0
k (+) Earned Time Not Earned
g (-) Potential Good Time 0
h (+) Lost Good Time
g (+) Out Time Total 0
h Enhancement Expiration Date #VALUE!
i Days Remaining to serve to Enhancement Expiration #VALUE!

STEP 2 For Mandatory:

a Enter Time Start Date 0/0/00
b Enter Mandatory Length (in days) 0 ERT%
c (-) Cause Credits 0 0.15
d (-) Good Time on Credits (if ERT%>0) 0
e Net Days 0
f Earned Release Credit Total 0
j (-) Potential Earned Time 0
k (+) Earned Time Not Earned 0
g (-) Potential Good Time 0
h (+) Lost Good Time 0
g (+) Out Time Total 0
h Mandatory Expiration Date #VALUE!
i Days Remaining to serve to Mandatory Expiration #VALUE!

STEP 3 For Base:

a Enter Time Start Date 8/2/1995
b Enter Base Length (in days) 548 ERT%
c (-) Cause Credits 135 33.3%
d (-) Good Time on Credits (if ERT% > 0) 42
e Net Days 371
f Earned Release Credit Total 124
j (-) Potential Earned Time 41
k (+) Earned Time Not Earned 0
g (-) Potential Good Time 82
h (+) Lost Good Time 45
g (+) Out Time Total 0
h Base Expiration Date 5/20/1996
i Days Remaining to serve to Base Expiration -4648
DATE 2/9/2009

SIGNATURE

DOC: 931441
 NAME: ONG, Steven
 CSE/COUNT 95-1-00089-3 Burglary 2 RE-SENTENCE

Step 1: Enter Sentence from J&S
 a Enter Years 0
 b Enter Months 29
 c Enter Days
 = Sentence in Days 882 days

STEP 1 For Enhancement:
 a Enter Time Start Date 0/0/00
 b Enter Enhancement Length (in days) 0 ERT%
 c (-) Cause Credits 0 0.00
 d (-) Good Time on Credits (if ERT%>0) 0
 e Net Days 0
 f Earned Release Credit Total 0
 j (-) Potential Earned Time 0
 k (+) Earned Time Not Earned
 g (-) Potential Good Time 0
 h (+) Lost Good Time
 g (+) Out Time Total 0
 h Enhancement Expiration Date #VALUE!
 i Days Remaining to serve to Enhancement Expiration #VALUE!

STEP 2 For Mandatory:
 a Enter Time Start Date 0/0/00
 b Enter Mandatory Length (in days) 0 ERT%
 c (-) Cause Credits 0 0.15
 d (-) Good Time on Credits (if ERT%>0) 0
 e Net Days 0
 f Earned Release Credit Total 0
 j (-) Potential Earned Time 0
 k (+) Earned Time Not Earned 0
 g (-) Potential Good Time 0
 h (+) Lost Good Time 0
 g (+) Out Time Total 0
 h Mandatory Expiration Date #VALUE!
 i Days Remaining to serve to Mandatory Expiration #VALUE!

STEP 3 For Base:
 a Enter Time Start Date 10/29/1999
 b Enter Base Length (in days) 882 ERT%
 c (-) Cause Credits 1684 33.3%
 d (-) Good Time on Credits (if ERT% > 0) 771
 e Net Days -1573
 f Earned Release Credit Total -524
 j (-) Potential Earned Time -175
 k (+) Earned Time Not Earned 0
 g (-) Potential Good Time -349
 h (+) Lost Good Time 45
 g (+) Out Time Total
 h Base Expiration Date 1/27/1997
 i Days Remaining to serve to Base Expiration -4396

DATE 2/9/2009

SIGNATURE

DOC: 931441
 NAME: ONG, Steven
 CSE/COUNT 95-1-00089-3 TAMWOP RE-SENTENCE

Step 1: Enter Sentence from J&S
 a Enter Years 0
 b Enter Months 14
 c Enter Days
 = Sentence in Days 426 days

STEP 1 For Enhancement:
 a Enter Time Start Date 0/0/00
 b Enter Enhancement Length (in days) 0 ERT%
 c (-) Cause Credits 0 0.00
 d (-) Good Time on Credits (if ERT%>0) 0
 e Net Days 0
 f Earned Release Credit Total 0
 j (-) Potential Earned Time 0
 k (+) Earned Time Not Earned
 g (-) Potential Good Time 0
 h (+) Lost Good Time
 g (+) Out Time Total 0
 h Enhancement Expiration Date #VALUE!
 i Days Remaining to serve to Enhancement Expiration #VALUE!

STEP 2 For Mandatory:
 a Enter Time Start Date 0/0/00
 b Enter Mandatory Length (in days) 0 ERT%
 c (-) Cause Credits 0 0.15
 d (-) Good Time on Credits (if ERT%>0) 0
 e Net Days 0
 f Earned Release Credit Total 0
 j (-) Potential Earned Time 0
 k (+) Earned Time Not Earned 0
 g (-) Potential Good Time 0
 h (+) Lost Good Time 0
 g (+) Out Time Total 0
 h Mandatory Expiration Date #VALUE!
 i Days Remaining to serve to Mandatory Expiration #VALUE!

STEP 3 For Base:
 a Enter Time Start Date 10/29/1999
 b Enter Base Length (in days) 426 ERT%
 c (-) Cause Credits 1684 33.3%
 d (-) Good Time on Credits (if ERT% > 0) 771
 e Net Days -2029
 f Earned Release Credit Total -676
 j (-) Potential Earned Time -225
 k (+) Earned Time Not Earned 0
 g (-) Potential Good Time -451
 h (+) Lost Good Time -45
 g (+) Out Time Total
 h Base Expiration Date 3/30/1996
 i Days Remaining to serve to Base Expiration -4699

DATE 2/9/2009

SIGNATURE

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

STATE OF WASHINGTON,
Respondent,
vs.
STEVEN EUGENE ONG,
Appellant.

NO. 37752-7-II

AFFIDAVIT OF SERVICE BY MAIL

STATE OF WASHINGTON)
: ss.
County of Clallam)

The undersigned, being first duly sworn, on oath deposes and says:

That the affiant is a citizen of the United States and over the age of eighteen years; on the 22nd day of April, 2009, the affiant, Brian Wendt, Deputy Prosecuting Attorney filed the original and a copy of the *Brief of Respondent* in person to the Court of Appeals, Division II, and on the 22nd day of April, 2009, deposited in the mail of the United States of America a properly stamped and addressed envelope containing a copy of the *Brief of Respondent*, addressed as follows:

(FILED IN PERSON)
MR. DAVID C. PONZOHA, CLERK
COURT OF APPEALS, DIVISION II
950 BROADWAY, SUITE 300
TACOMA, WA 98402-4454

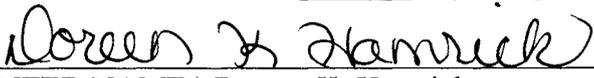
(MAILED)
STEVEN ONG
DOC#931441
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVE
WALLA WALLA, WA 99368

(MAILED)
JENNIFER M. WINKLER
NIELSEN, BROMAN & KOCH, PLLC
1908 EAST MADISON
SEATTLE, WA 981122


BRIAN WENDT

FILED
COURT OF APPEALS
DIVISION II
09 APR 22 AM 10:29
STATE OF WASHINGTON
DEPUTY
B

SUBSCRIBED AND SWORN TO before me this 22nd day of April, 2009


(PRINTED NAME:) Doreen K. Hamrick
NOTARY PUBLIC in and for the State of Washington
Residing at Port Angeles, Washington
My commission expires: 03/30/2010