

COURT OF APPEALS
DIVISION II

No. 38682-8-II

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THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF
WASHINGTON
BY *DM*

STATE OF WASHINGTON,

Respondent,

Vs.

STEPHEN SHORES,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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STATEMENT OF THE CASE

Except as otherwise cited and stated in the facts pertaining to the arguments below, Appellant's statement of the case is adequate for purposes of responding to this appeal.

ARGUMENT

I. THERE WAS NO CREDIBLE EVIDENCE TO SUPPORT AN INSTRUCTION ON SELF DEFENSE.

Shores argues that the trial court should have instructed the jury on self defense. Brief of Appellant 15. Shores did not request such an instruction, nor was there any credible evidence to support such an instruction. Shores also states in his brief that the trial court must instruct on the law of self defense "whether or not defense counsel requests such instructions"--but does not cite any authority for that proposition. Brief of Appellant 16. As further discussed below, Shores' argument is without merit.

"A claim of self-defense is available only if the defendant first offers credible evidence tending to prove that theory or defense."

State v. Haydel, 122 Wn.App. 365, 370, 95 P.3d 760

(2004)(emphasis added); State v. Gogolin, 45 Wn. App. 640, 643,

727 P.2d 683 (1986)(the trial court should give the instruction if

there is credible evidence supporting the defendant's claim); State

v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993)(defendant

bears initial burden of producing some evidence); State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

"A trial court determines whether there is sufficient evidence to instruct the jury on self-defense by reviewing the entire record in the light most favorable to the defendant with particular attention to those events immediately preceding and including the alleged criminal act." State v. Callahan, 87 Wn.App. 925, 933, 943 P.2d 676 (1997). Another component of a self-defense claim is that the defendant exercised no greater force than was reasonably necessary, State v. Hendrickson, 81 Wn.App. 397, 400, 914 P.2d 1194 (1996), and that the *defendant was not the aggressor*. State v. King, 24 Wn.App. 495, 501, 601 P.2d 982 (1979). In particular, RCW 9A.16.020 states, in pertinent part that: "The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases: . . . (3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary." RCW 9A.16.020 (emphasis added). The burden then shifts to the State to prove the

absence of self-defense beyond a reasonable doubt. State v. Walden, 131 Wn.2d 469, 932 P.2d 1237 (1997). Evidence of self-defense is evaluated under both subjective and objective standards. Id. at 474. To establish self-defense, a finding of actual danger is not necessary. Riley, supra. Evidence of self-defense must be assessed from the standpoint of the reasonably prudent person standing in the shoes of the defendant, knowing all the defendant knows and seeing all the defendant sees. Riley, 137 Wn.2d at 909. However, “mere words alone do not give rise to reasonable apprehension of . . . bodily harm.” Riley 137 Wn.2d at 912-913 (citing “[n]umerous courts [that] have held . . . that one may not use force in self-defense from verbal assaults”)(citations omitted). Again, it must be kept in mind that “in non-homicide cases, a defendant cannot use more force than necessary in self-defense.” State v. Prado, 144 Wn.App. 227, 245, 181 P.3d 901 (2008). Thus, the degree of force lawfully constituting self-defense is “limited to what a reasonably prudent person would find necessary under the conditions as they appeared to the defendant.” State v. Walden, 131 Wn.2d at 474.

In the present case, there was no request for an instruction on self-defense, nor was there any objection to the Court's

instructions to the jury. RP 180. Nor is it likely that had Shores requested such instruction, that the trial court would have granted it. That is because Shores failed to present any credible evidence that he acted in self-defense in the first place, and secondly, the force used by Shores was not reasonable or necessary. RCW 9A.16.020; State v. Hendrickson, supra; State v. King, supra.

The evidence presented in his case simply does not support a theory of self-defense. Here, the evidence showed that Shores was living at his girlfriend, Lorina Canel-Parker's (the victim's) house, during October of 2008. 2RP 33. On October 4, 2008, Shores was in the garage on the property when Parker asked him if he "was on drugs." Id. 36. Shores then got angry and "picked up the flat part of a crowbar that you'd change a tire with" and struck Parker on the back. Id. Shores then went to the house, picked up a fireplace poker and hit Parker across the shin with it, leaving a mark. Id., 36,37; Ex. 8. When Parker stood up, Shores put his hand over Parker's face and shoved her head back into a corner hutch, breaking the glass. Id. 37-39; Ex. 9 & 10.

On October 6, 2008, Shores was angry that Parker moved a tray table from where Shores had put it, telling Parker that he put the table there and she should not have moved it. 2RP 41. When

Parker went out to Shore's car to get the groceries from it, Shores followed her and told her to get out of his car, that he was leaving. 2RP 41, 42. Parker had two pairs of eyeglasses, and she "couldn't see without them." 2RP 35. When Shores told Parker to get out of his car, Parker told him to "hold on a second." 2RP 42. Shores then reached into the vehicle and slapped Parker across the face, knocking her glasses off. 2RP 42. Shores had a mark on her face from where Shores slapped her. Id. 46. Shores again told Parker to get out of his car, and Parker said, "[I]et me find my glasses first." 2RP 42. Shores replied, "I'll get your glasses for you," and he ran into the house and got Parker's other glasses. Id. But instead of handing the glasses to Parker, Shores threw the glasses up on the roof. Id. Shores then grabbed the water hose, turned it on full force, and sprayed Parker as she was still sitting in the driver's seat of his car. 2RP 42. Parker testified that she was terrified of having water in her face because when she was a baby she had her "face put down inside a bathtub." Id. Parker said that Shores knew about her fear of getting water in her face when he sprayed her with the hose. Id. 43.

Shores also got into the passenger seat and kicked and hit Parker in the side with his fist. Id. 44,45. After spraying Parker with

the hose, Shores told her, "I'll get you out of my car, you crazy fucking bitch," and Shores then grabbed a chain saw and "started it in the car with the chain saw running." 2RP 43. Parker was still in the driver's seat while Shores was in the passenger seat with the chain saw running. Id. Parker said that Shores "took the gas tank part of [the saw] and kept hitting [her] in the side with it." 2RP 44. As he was holding the chain saw in the vehicle, Shores said, "I'll cut you to fucking pieces." Id. Parker had marks on her side where Shores hit Parker with the "back side" of the chain saw. Id. 45. Parker got out of the vehicle and went into the house to take a shower, because she was "soaking wet." Id. 48. Parker had bruises in several places on her arms from Shores' assaulting her on October 4th and 6th. 2RP 47; Ex. 5-7. The pictures showing the bruises on her arms were taken by the responding deputy on October 7th, 2008. 2RP 47,48.

Parker did not call the police right after the incidents on the 4th and the 6th because some time after Parker told Shores that if he was on drugs he had to leave, Shores told her that if she called the police to make him leave, Parker would "go to jail for a felony assault." 2RP 49. After saying this, Shores then "punched himself in the face repeatedly until he had a black eye and a gash off his

left eye." Id. Parker said Shores did this so that if the police came, it showed that Shores was the injured party, not Parker, and that Parker would be the one charged with assault. 2RP 49. Parker said if she got an assault charge, she would lose her license and her job in the Medicare Unit at Morton General Hospital. Id. 32, 49. Parker said that was why she had not called the police right after the incidents on the October 4th and 6th. Id. 49. Parker said that on the 6th she had had one beer, but she was not drunk. Id. 51.

On October 7, 2009, Deputy Gallagher was dispatched to Lorina Parker's address in Glenoma, regarding an assault that had occurred earlier. 2RP 87 While there, Deputy Gallagher took pictures of Parker's injuries, and the damage to the corner hutch. 2RP 87-92. Deputy Gallagher said that Lorina Parker was visually shaken, and that she was trembling and crying while as she told him about the assaults. 2RP 93. Officers located Shores' chainsaw at an address in Glenoma, and confirmed that Exhibit 1 was a picture of that chainsaw. Shirlene Thrall saw Lorena Parker's glasses and cell phone in Shores' vehicle. 2RP 76.

Shores gave a tape-recorded statement to the police. 2RP 94, 95. In the taped statement, Shores at first told the deputy that he had gotten into an argument with Parker. 2RP 99. But then

Shores said that Parker "got in it [the argument] all by herself."
2RP 99. As to how the corner hutch's glass was broken, Shores said, "I--I--I--she said, 'I'm missing my keys,' and I thought she threw her keys at it, you know. And --but one broke and then the other one broke --you know, right after another." 2RP 106, 107. Then Shores said, "I--I think she hit it with her hand." 2RP 107. Shores said, "Friday or Saturday we got in a little scuffle too, you know. . . And that's --I don't know if that's the one the glass . . . I mean, we've been arguing." 2RP 108.

Shores told the deputy that Parker kept "arguing and arguing" so he "snuck around the back and started loading my car up" and that "I already had all my stuff packed." 2RP 109,110. When the deputy asked Shores how Parker lost her glasses, Shores said something about ". . . when you find out how she stole my car." 2RP 110. In Shores' version to the deputy, the incident regarding the car began at a different location with him driving. RP 113, 115. Shores said that he was getting ready to drive off and Parker grabbed onto the car and wouldn't let go so he couldn't drive--and that "[s]he does this in Mossyrock." 2RP 114. Shores said that Parker opened up the car door and grabbed his keys and then Parker was on top of him. 2RP 115. Shores said that Parker

was on top of him and that the alarm started going off in his car.

2RP 116. Shores said he went into the house to get Parker's spare glasses but Parker didn't want them and she wouldn't get out of the car so he could find her other glasses. 2RP 117. Shores said he grabbed the hose and squirted Parker because she refused to get out of the car. 2RP 117. Shores admitted he sprayed Parker as she sat in the car, and that Parker doesn't like water because "her mom tried to drown her when she was three" and "she is deathly afraid of water." 2RP 118. Shores said that he figured if he sprayed Parker with the hose that she would be "scared for her life" and would get out of the car. Id. Shores' explanation also became nonsensical:

SHORES: . . .she's in my car now. I got the keys and it's like she's revving up the engine trying to blow up the car and I'm like what do I do?

DEPUTY : You got the keys?

SHORES: I got the keys. She's in the passenger seat now. So - -

DEPUTY: And how's she revving up the engine?

SHORES: The car started. I was leaving. The keys come out while the car's running. . . . The car was still running with . . .

DEPUTY: Still running without the keys? Without the keys still in the ignition - -

SHORES: Yeah, the car's still running, with her honking the horn and me trying to leave - -

2RP 118, 119.

Shores continued, telling the deputy that he went into the house and got the chain saw because he figured he'd better take it with him. 2RP 121. Shores said that he started the chain saw inside the house and went to the car with it still running. Id. According to Shores, he jumped into the passenger seat with the saw on and said to Parker, "here you go. You want to use it on me? You want to - - you want to kill me so damn bad. I warmed it up for you." Id. Shores said, "I didn't threaten her with it. I was just - - I figured the gas smell would make her get out." 2RP 121, 122. Shores said that Parker finally got out of the car and started hitting him with both hands. 2RP 122. Shores said he was holding a "flashlight which has a stick on it" in his hand to "give me a little more reach" and that Parker was "backing him up" and trying to hurt him so, "that's how her chin got cut." 2RP 125. According to Shores, it was Parker who hit him with the fireplace poker. 2RP 127. Shores said he was trying to protect himself. 2RP 127. Shores told the deputy, "[t]he only thing I did is start a chain saw, cause she was running my car without permission." 2RP 129.

But, on the second day of trial, according to Deputy Gallagher, Shores told him that on October 4th, he hit Parker with a fire poker, a crowbar, and a flashlight with a stick on it and that Shores wanted "it turned into evidence." 2RP 135.

Shores' testimony at trial was erratic, inconsistent, and simply was not credible. Even after Shores had told the deputy on the second day of trial that he had hit the victim with the fire poker and the crow bar, during his actual testimony, Shores denied that he had hit Parker with the crowbar. 2RP 140. Then, Shores' version about what started the argument also changed between the time he gave his statement to the deputy and trial. At trial, Shores said that Parker came out to the garage "demanding what the hell I done [sic] last night" and that "[s]he thinks I was sleeping with the girl that blocked my car in." 2RP 140. Shores said that Parker "came out there with a crowbar demanding a drug test." 2RP 141. This time Shores denied that he hit Parker with the fire poker and that "[t]here was never no fireplace poker on the 4th even in any of our hands." 2RP 141, 142. Shores said that Parker never told him to leave but that he was trying to leave "every day" because "I get tired of her hurting me." 2RP 143. Shores said that Parker had given him "two black eyes." Id. Shores said, "I got hit with a

fireplace poker on the 1st and that's where that incident came from." Id. Shores also told another bizarre story:

[Parker] grabs onto my car. Then - -she's grabbed onto my car before. I drug her all the way to Mossyrock at a mile and a half all the way to her daughter-in-law's house. 'Get this girl off my car.' She held onto my mirror with me telling her, 'Get off my car.' I couldn't go nowhere. She held onto my car in Mossyrock for a half an hour, all down the main street, 2 miles an hour. "Get off my car." Finally I turned my car off, I locked it and I ran.

2RP 147 (emphasis added). Regarding Parker's eyeglasses, Shores said that when Parker would not take the spare pair he had fetched from the house, he "hung them up on the - - on the wind chime." 2RP 149. And, in yet another unbelievable explanation, Shores again said that Parker was trying to blow up his car by revving up the engine, and that she couldn't turn the engine off because Shores had the keys. 2RP 150. Then Shores said that his car would run even without a key in the ignition. Id.

As to the chain saw, at trial Shores admitted that the chain saw was running when he got into the passenger seat while Parker was in the driver's seat. 2RP 153. However, this time Shores said that once inside the car, he turned the chain saw off and set it on the floor. 2RP 153. He did not say this in his statement to the deputy. RP 128. Then, in another incredible statement, Shores

said that he asked Parker to hurt him with the chain saw, and that, "I sharpened the ax and tried to get her to hit me with that too." 2RP 155. And, Shores' admission that he inflicted injuries to his own face further shows Shores' irrational thought processes, and bizarre behavior in this case. Shores testified, "I hit myself after she hit me a whole bunch of times. . . . I was showing her she can't hurt me. I split my whole forehead open. 'Here, you want to hurt me? Watch. You can't hurt me. Leave me alone.'" 2RP 159(emphasis added). Despite Shores' earlier testimony that he went back into the house to get the chain saw before the chain saw incident, on cross he said that he had not gone back into the house to get the saw. 2RP 163. But then Shores flip-flopped again when he admitted on cross that he had started the chain saw inside the house. Id. Shores also said that Parker liked to hurt people but he had not left because he likes getting beat up. 2RP 165. Shores readily admitted at trial that when he sprayed the victim with the hose, that he "put like 30 gallons of water in my car, trying to get her out of it." RP 167.

What all of the above-stated facts show is that there was no "credible evidence" to support a self-defense theory in this case--even if Shores had requested one. As cited above, Shores'

testimony at trial, and his statements to the deputy were erratic, inconsistent, illogical, often fantastical, and contrary to common sense. In sum, Shores' version of the events was not believable. Because there was no credible evidence to support a self-defense instruction, the trial court did not err when it did not sua sponte provide one. Shores' argument to the contrary is not supported by the evidence or the law, and his convictions should be affirmed.

II. A UNANIMITY INSTRUCTION WAS NOT REQUIRED UNDER THESE FACTS BECAUSE THE STATE ELECTED A SPECIFIC ACT TO SUPPORT EACH COUNT OF ASSAULT.

Shores claims that the trial court erred when it did not give a unanimity instruction. This argument is not correct because under the facts presented here, a unanimity instruction was not required.

In criminal cases, jury verdicts must be unanimous as to the defendant's guilt of the crime charged. State v. Rivas, 97 Wn.App. 349, 351, 984 P.2d 432 (1999). A unanimity instruction is required--whether requested or not--when a jury could find from the evidence that the defendant committed a single charged offense on two or more distinct occasions. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). "[T]o ensure jury unanimity, the State must either elect the particular criminal act on which it will rely for conviction, or the trial court must instruct the jury that all members

must agree that the State proved the same underlying criminal act beyond a reasonable doubt." State v. Beasley, 126 Wn.App. 670, 682, 109 P.3d 849 (2005)(emphasis added), citing Petrich, 101 Wn.2d at 572. In other words, where the State has elected "the particular criminal act upon which it will rely for conviction," a unanimity instruction is not required. Kitchen, 110 Wn.2d at 411(emphasis added), citing Petrich, at 572. "A constitutional error occurs if the State fails to properly elect the criminal acts and the trial court fails to instruct the jury on unanimity." Beasley, 126 Wn.App. at 682(emphasis added), citing Kitchen, 110 Wn.2d at 411.

In the present case, the State properly elected and proved the specific criminal act forming the basis for each charge in the Information. CP 25-28. Therefore, a unanimity instruction was not required. Beasley, 126 Wn.App. at 682. The specific act alleged for each count of assault as charged in the Amended Information is briefly summarized as follows:

- **Count I-Assault in the Second Degree:**

On October 6, 2008, the Defendant assaulted another with a deadly weapon, to wit: a chain saw.

- **Count II-Assault in the Fourth Degree:**

On October 6, 2008, the Defendant assaulted another to wit: did strike another in the face with an open hand.

- **Count III-Assault in the Fourth Degree**

On October 6, 2008, the Defendant assaulted another to wit: did spray with water from a water hose.

- **Count IV-Assault in the Fourth Degree**

On October 6, 2008, the Defendant assaulted another to wit: did strike in the body with a closed fist.

- **Count VIII-Assault in the Third Degree**

On October 4, 2008, the Defendant with criminal negligence caused bodily harm to another by means of a weapon or other instrument or thing likely to produce bodily harm, to wit: a crowbar.

- **Count IX - Assault in the Third Degree [DV]**

On October 4, 2008, the Defendant with criminal negligence, caused bodily harm to another by means of a weapon or other instrument or thing likely to produce bodily harm, to wit: a fire poker.

- **Count X-Assault in the Fourth Degree [DV]**

On October 4, 2008, the Defendant assaulted another to wit: pushed head into glass hutch.

CP 25-28. This language in the charging document shows that the State in this case did "elect the particular criminal act upon which it will rely for conviction." Kitchen, 110 Wn.2d at 411. Next, we must move on to see if the State presented evidence at trial to prove

each specific act supporting each of the charged assaults, and it is also appropriate to look at the State's closing argument to see if the State argued that the evidence presented proved each distinct act supporting each charged assault. State v. Bland, 71 Wn.App. 345, 351-52, 860 P.2d 1046 (1993)(Charging document and State's closing argument may be considered as part of the analysis re: unanimity and whether the State proved each specific act forming the basis of each charge).

As to Count I, Assault in the Second Degree(chain saw), the evidence presented shows that while the victim was in the driver's seat of the vehicle, Shores got into the passenger seat with a running chain saw and "kept hitting her with the gas tank part of the saw," and said to the victim, "I'll get you out of my car, you crazy fucking bitch. . . "I'll cut you to fucking pieces." RP 43,44,45, 153,154, 178, Ex. 1,3,11-13. Deputy Gallagher testified at trial that on the morning of trial, Shores made a spontaneous statement to him, admitting that he "hit Ms. Parker with three items, it was a fire poker, a crowbar, and a flashlight with a stick on it." RP 135. In closing, the prosecutor explained, [t]he assault in the second degree is based on the fact that he used a deadly weapon. . . With a blade that's designed to cut big chunks out of trees, in this case

flesh. that's what he was threatening. That's a deadly weapon. That's capable of killing somebody." RP 199.

As to Count II, Assault in the Fourth Degree (face slap), the evidence showed that while the victim was in the driver's seat of the vehicle, Shores reached in and slapped her across the face, knocking her glasses off. RP 42,46, Ex.4. As to Count III, Assault in the Fourth Degree (sprayed with water hose), the evidence showed that while the victim was in the driver's seat of Shores' vehicle, Shores sprayed her in the face with a water hose, knowing that the victim was "terrified of water in [her] her face." RP 42, 117, 118, 151 As to Count IV, Assault in the Fourth Degree (hit with closed fist), the evidence showed that while the victim was in the driver's seat of the vehicle, Shores got into the passenger side and slugged her a couple of times. RP 44, 45. As to Count X, Assault in the Fourth Degree (glass hutch), the evidence showed that Shores shoved the victim's head back into the glass of a corner hutch, breaking the glass. RP 37-39, Ex. 9 & 10.37-39, Ex. 9 & 10.

Then, in closing, when explaining the just-mentioned Assault in the Fourth Degree charges, the State explained:

[w]e also have assault in the fourth degree. that's harmful or offensive touching. . . . In those cases he did a couple of other harmful and offensive things. . . .

he struck her in the face with his open hand, knocking her glasses off. That's an assault. . . .

He punched her while he was trying to get her out of the car. Well, punching somebody, that is an assault. that's offensive touching. . . .

He also sprayed the hose on her. Now, in this case he did this knowing that she didn't like water. And here she is in his own car and he's so angry he turns the hose on his own car. That's how out of control he was. That's how angry he was. . . .

Then you have the other assault where he took his hands . . . put his hands on her face, shoved her back into the glass, glass on the hutch, causing it to break.

RP 200, 201(emphasis added).

As to Count VIII, Assault in the Third Degree (with crowbar), the evidence showed that Shores picked up a crowbar and hit the victim across the back with it. RP 36, 135. As to Count IX, Assault in the Third Degree (with fire poker), the evidence showed that Shores picked up a fire poker and hit the victim in the leg with it, leaving a mark on her shin. RP 36,37, 135, Ex. 8. Then, in closing, the State addressed both of the Assault in the Third degree charges when it explained:

[a]ssault in the third degree alleges that somebody used an instrument or other weapon in a way that produces bodily injury. And that applies to two different charges in this case, the assault with the crowbar and the assault with the fire poker. . . . In this case he used the fire poker to cause physical pain or injury, caused a big bruise and gash on her leg when

he struck her with a fire poker. . . Also used the crowbar on her. And she said she had a thick sweatshirt on but she said it hurt. Didn't use full force, but using his full force he's capable of isn't required under the law. He just has to use the crowbar in a way that produces some type of pain or physical injury. She said it hurt. He hit her hard enough to make it hurt. That meets the element of assault in the third degree.

RP 199,200 (emphasis added).

What the above-set-out facts show is that in the Amended Information, the State expressly elected the specific act supporting each separate charge of assault. CP 25-28. Then, at trial, the State presented evidence proving each express act constituting each assault charged, through the testimony of the victim, together with admissions made by Shores to the deputy, including photographic evidence. Then, as previously set out above, in closing, the State summarized the facts proven for each distinct act supporting each charged count of assault. In sum, because the State in this case did elect and prove for each assault charged "the particular criminal act upon which it will rely for conviction," a unanimity instruction was not required in this case. Shores' argument to the contrary is not convincing, and his convictions should be affirmed.

III. THE DEADLY WEAPON ENHANCEMENT SHOULD BE AFFIRMED BECAUSE ANY INSTRUCTIONAL ERROR WAS HARMLESS.

Shores argues that the deadly weapon enhancement imposed must be vacated for instructional error. Brief of Appellant 22,23. Shores appears to be correct as to the lack of an instruction defining "deadly weapon" as it pertains to the sentencing enhancement in this case. However, any error should be deemed harmless.

The definition of a "deadly weapon" for purposes of proving an element of the crime is different than the definition used for purposes of proving the sentencing enhancement. Compare RCW 9.94A.602 (enhancement), and RCW 9A.04.110(6)(element of the crime). The only instruction defining "deadly weapon" submitted to the jury in this case is the definition describing a deadly weapon as an element of the crime of Assault in the Second Degree. Instruction 10, Supp. CP; RCW 9A.04.110(6). Under that instruction, "deadly weapon" is defined as being any weapon which under the circumstances in which it is used is "readily capable of causing death or substantial bodily harm." Supp. CP (Instruction 10). For purposes of the deadly weapon sentencing enhancement, however, "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." RCW 9.94A.602; WPIC 2.07; State v. Thompson, 88 Wn.2d 546, 549, 564 P.2d 323 (1977)(interpreting former RCW 9.95.040); State v. Cook, 69 Wn.App. 412, 417-418, 848 P.2d325(1993)(discussing WPIC 2.07 where a pocket knife was used as deadly weapon).

Despite the omission of the definition of "deadly weapon" as it pertains to the deadly weapon imposed here, however, any error should be deemed harmless. State v. Cook, 69 Wn.App. at 417-418(wrong definition of deadly weapon instruction (pocket knife) but reversal required only if the error was prejudicial). In the present case, the victim was in the driver's seat of a vehicle when Shores entered the passenger side of the vehicle while holding a running chain saw, in order to scare the victim out of the car. RP 43-45, 153, 178. The facts here show that the manner in which Shores threatened the victim with the running chain saw inside the vehicle was " likely to produce or may easily and readily produce death." RCW 9.94A.602; WPIC 2.07. Under these facts, any error in the instructions as to the sentencing enhancement was harmless, and the enhancement should accordingly be affirmed.

Shores also claims additional instructional error regarding the sentencing enhancement because there was no instruction defining the phrase "armed with a deadly weapon." However, where--as here-- the deadly weapon is actually used and displayed during the commission of the crime, no instruction defining "armed" is necessary. See e.g "Note on Use," WPIC 2.07. Moreover, there can be no dispute that in this case the chain saw used by Shores in Count I was "easily accessible and readily available for use, either for offensive or defensive purposes." State v. Willis, 153 Wn.2d 366, 103 P.3d 1213 (2005).

Shores also claims that the jury was not instructed as to the burden of proof or that they had to unanimously agree regarding the special verdict. This is not correct because the jury was so instructed in Instruction 30. That instruction states, in pertinent part, "[i]n order to answer the special verdict form 'yes', you must unanimously be satisfied beyond a reasonable doubt that 'yes' is the correct answer. If any one of you has a reasonable doubt as to the question, you must answer "no." Instruction 30, Supp. CP (emphasis added). The deadly weapon sentencing enhancement should be affirmed. However, should this Court decide that the lack the failure to instruct on the definition of "deadly weapon" as it

pertains to the enhancement was reversible error, this case should be remanded for resentencing without the enhancement.

IV. SHORES' OFFENDER SCORE WAS CORRECTLY CALCULATED BECAUSE SHORES AGREED THAT THE CRIMINAL HISTORY CONTAINED IN THE STIPULATION WAS CORRECT, AND EXPRESSLY AGREED THAT NONE OF THE STATED PRIOR CRIMINAL HISTORY "WASHED."

Shores claims that his offender score was miscalculated because his prior Class C felony convictions were included in the calculation and because the court did not find on the record that Shores' two out-of-state convictions were equivalent to Washington felonies. But Shores signed a stipulation as to his criminal history and that stipulation expressly states that his California convictions are comparable to Washington offenses and that none of the convictions "washed." Accordingly, Shores' argument is without merit.

"A sentencing court's calculation of an offender score is reviewed de novo." State v. Bergstrom, 162 Wn.2d 87, 92, 169 P.3d 816 (2007). "[I]llegal or erroneous sentences may be challenged for the first time on appeal." State v. Ford, 137 Wn.2d 472, 477 P.2d 452 (1999). "A sentencing court may rely on a stipulation or acknowledgment of prior convictions without further proof." In re Cadwallader, 155 Wn.2d 867, 874, 123 P.3d 456

(2005).P.2d 452 (1999). This includes a stipulation affirming the inclusion of prior out-of-state convictions. State v. Winings, 126 Wn.App. 75, 94, 107 P.3d 141 (2005)(sentencing court may also properly rely upon a stipulation or acknowledgment regarding out-of-state convictions.; citing, State v. Hunter, 116 Wn.App. 300, 301, 65 P.3d 371 (2003), *aff'd*, 152 Wn.2d 220, 95 P.3d 1225 (2004)(where the defendant agrees with the State's classifications of foreign convictions, the court may include those convictions in the offender score without further proof). However, "[w]aiver of a challenge to an allegedly invalid sentence 'can be found where the alleged error involves an agreement to facts, later disputed. . . ." Id., citing In re Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618(2002). Waiver may also be found where a defendant stipulates to incorrect facts. Goodwin, supra; State v. Ross, 152 Wn.2d 220, 226-227, 229-32, 95 P.3d 1225(2004)(Defendants waived any challenges regarding comparability of out-of-state convictions where defense counsel affirmatively acknowledged that said convictions were properly included as criminal history.) However, a defendant may not stipulate to a "legal conclusion" such as whether prior convictions "wash out" concerning his criminal history. Cadwallader, 155 Wn.2d at 875. The rules explaining how long

Class C felony convictions must be included as criminal history when computing an offender score are set out in RCW

9.94A.525(2)(c), which states, in pertinent part:

[C]lass C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

Id. (emphasis added). Thus, the time a defendant spends in confinement while serving his sentence on a felony conviction is excluded from the wash-out period. Id.

In the present case, Shores stipulated to the State's computation of his criminal history, including the prior convictions out of California, and including the express stipulation that none of the prior convictions listed in the stipulation "washed out." Supp. CP. Specifically, the Stipulation contains the following language:

The defendant also stipulates that the following convictions are equivalent to Washington State felony convictions of the class indicated, per RCW 9.94A.360(3)(Classifications of felony/misdemeanor, Class, and Type made under Washington Law): Burglary 1 (Santa Clara, CA-1989), Possession of Stolen Property (Santa Clara, CA-1983).

The defendant stipulates that the above criminal history and scoring are correct, producing an offender score as follows, including current offenses, and stipulates that the offender score is correct and that none of the convictions have "washed out."

Page 2 of Supp. CP(emphasis added). The Stipulation, signed by Shores and his attorney, also shows that on January 28, 2003, Shores was sentenced on seven Class C felony convictions (Lewis County, WA). Supp. CP. Unfortunately, however, the Stipulation submitted in this case does not include either the reason these 2003 convictions did not wash, nor does it state how long Shores spent in prison for those seven 2003 convictions. Again, pursuant to the Stipulation, Shores' and his counsel agreed that none of the convictions listed therein washed out. Supp. CP. Furthermore, at sentencing, Shores did not raise any objections regarding his criminal history. 12/15/08 RP 2-11. And, although Respondent knows now why none of the Class C convictions washed, there is nothing in this record to prove it (other than the Stipulation).

However, this Court's unpublished opinion in Shores' appeal of the seven 2003 convictions does contain information that explains why Shores' 2003 convictions did not wash. State v. Shores 2004 WL 958072, 1 (Div. 2, 2004) (unpublished).¹ There,

¹ Respondent is aware of the prohibition on citing unpublished cases. GR 14.1. However, there appears to be authority allowing citation to an unpublished decision "as evidence of the facts established in earlier proceedings in the same case or in a different case involving the same parties." State v. Nolan, 98 Wash.App. 75, 78, 988 P.2d 473, 476 (1999)(emphasis added), quoting In re Davis, 95 Wn.App. 917, 920 n.2, 977 P.2d 630 (1999)(discussing former RAP 10.4(h)), *review granted on other grounds, affirmed*, 142 Wash.2d 165, 12 P.3d 603(1999); State v. Acrey, 97 Wn.App. 784, 988 P.2d 17 (1999)("An unpublished Court of Appeals' decision may not be cited as precedential authority on a

this Court recited the facts of the sentence Shores received on the 2003 convictions. Id. Specifically, this Court noted that based upon an offender score of 7, the trial court sentenced Shores to 50 months in prison followed by 9 to 18 months of community custody for the seven 2003 Class C felony convictions. Id. Thus, the five-year wash out period would not begin to run until Shores completed his fifty-month sentence on those 2003 convictions, plus any time he was incarcerated pursuant to any community supervision violations committed after he was released for the 2003 convictions. RCW 9.94A.525(2)(c); State v. Blair, 57 Wn.App. 512, 515-16, 789 P.2d 104 (1990)(citing State v. Perencevic, 54 Wn.App. 585, 589, 774 P.2d 558 (1989)(confinement for violations of community supervision is confinement for a felony conviction that interrupts the wash-out period). Accordingly, because Shores' five-year wash-out period on the 2003 Class C felony convictions would not begin to run until after he completed his 50-month sentence on those convictions, those convictions did not wash, and were all properly included in Shores' criminal history. Furthermore, Shores expressly agreed that the California felony convictions listed in the Stipulation were properly included in his criminal history. Supp. CP.

point of law, but may be used as evidence of the facts established in earlier proceedings in the same case or in a different case involving the same parties").

Therefore, Shores' the criminal history listed on the Stipulation was properly included, and his offender score was correctly computed, and the resulting sentence imposed here should be affirmed.

V. SHORES HAS NOT SHOWN THAT HIS TRIAL COUNSEL WAS INEFFECTIVE OR THAT HIS COUNSEL HAD A "CONFLICT OF INTEREST ADVERSELY AFFECTING HIS PERFORMANCE," OR THAT THE TRIAL COURT "FAILED TO INQUIRE" AS TO WHY SHORES WAS UNHAPPY WITH HIS TRIAL COUNSEL'S PERFORMANCE.

Shores claims that his trial counsel was ineffective for failing to propose a self-defense instruction, and because his counsel had a "conflict of interest" affecting his performance. Shores further claims that the trial court failed to "inquire" when Shores began grousing about his trial counsel's performance. None of these claims have merit.

Claims for ineffective assistance of counsel are reviewed *de novo*. State v. Shaver, 116 Wn.App. 375, 382, 65 P.3d 688 (2003). A defendant demonstrates ineffective assistance of counsel by proving (1) that counsel's representation fell below an objective and reasonable standard; and (2) that counsel's errors were serious enough to deprive the defendant of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Jeffries, 105 Wn.2d 398, 418, 717 P.2d 722 (1986). When reviewing claims of ineffective assistance of counsel,

a reviewing court gives great deference to trial counsel's performance and begins the analysis with a strong presumption that counsel was effective. Strickland, 466 U.S.668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 337, 899 P.2d 1241 (1995). In order to prove ineffective assistance of counsel an appellant must show deficient performance resulting in prejudice. Strickland v. Washington, 466 U.S. 448, 687-289, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when, but for the deficient performance by counsel, there is a reasonable probability that the outcome would have been different. In the Matter of the Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). Thus, it is the defendant's burden to prove ineffective assistance of counsel. McFarland, 127 Wn.2d at 335.

Additionally, mere differences of opinion regarding trial strategy or tactics cannot support an ineffective assistance of counsel claim. Hendrickson, 129 Wn.2d at 77-78. Furthermore, Counsel does not render ineffective assistance by refusing to pursue strategies that reasonably appear unlikely to succeed. State v. McFarland, 127 Wn.2d at 334 n.2. Put differently, the defendant must show that there were no legitimate strategic or

tactical rationales for his trial counsel's conduct. State v. Hakimi, 124 Wn. App. 15, 22, 98 P.2d 809 (2004) citing McFarland, 127 Wn.2d at 336. Exceptional deference must be given when evaluating counsel's strategic decisions. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). "While it is easy in retrospect to find fault with tactics and strategies that failed to gain an acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error." State v. Renfro, 96 Wn.2d 902, 909, 639 P.2d 737, *cert. denied*, 459 U.S. 842 (1982). Finally-- and importantly-- as it relates to the instant case, a lawyer need not raise a defense claim not adequately supported by the facts. State v. King, 24 Wn.App. 495, 501, 601 P.2d 982 (1979)(counsel's failure to propose a self-defense instruction was not deficient representation where not warranted by the facts).

Failure to Request a Self-Defense Instruction

In the present case, as set out in detail in the discussion in section I above, regarding the lack of credible evidence presented here to support a claim of self defense, a self-defense instruction was not warranted here. Counsel does not render ineffective assistance by refusing to pursue strategies that reasonably appear

unlikely to succeed. State v. McFarland, 127 Wn.2d at 334 n.2. And failure to propose a self-defense instruction is not deficient representation where such an instruction is not warranted by the facts. King, supra. "[A]ppointed counsel, and not his client, is in charge of the choice of trial tactics and the theory of defense." United State v. Wadsworth, 830 F.3d 1500, 1509 (9th Cir. 1987), citing Henry v. Mississippi, 379 U.S. 443, 451, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965)(counsel's deliberate choice of strategy is binding on his client)). Accordingly, Shores has not met his burden to show his counsel's performance was defective on this basis, and his argument to the contrary is without merit. But Shores also claims that the trial court "failed to inquire" into Shores' requests for new counsel, and that his trial counsel was ineffective because a "conflict of interest adversely affected his attorney's performance." As addressed below, these claim also have no merit.

Shores' Dissatisfaction with his Counsel

The trial court's decision of whether an indigent's dissatisfaction with his court-appointed counsel warrants appointment of substitute counsel is reviewed for an abuse of discretion. State v. Young, 62 Wn.App. 895, 907, 803 P.2d 829 (1991). The primary purpose in providing assistance of counsel to

a criminal defendant is to ensure he receives a fair trial, not a *meaningful relationship with his lawyer*. In re Stenson, 142 Wn.2d 710,725, 16 P.3d 1 (2001), citing Wheat v. United States, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed. 140 (1988).

Shores claims that the trial court did not properly inquire into his reasons for wanting different counsel. However, this is not what the record shows. Instead, the record shows that with Shores present, his counsel explained in detail why Shores was unhappy with his performance, but that he and Shores had since apparently resolved the problem. 10/23/08 RP 2-4. The record also shows that Shores insisted on wearing jail clothes during the trial-- despite his attorney's correct advice to the contrary. 12/3/08 RP 3,4. The record further shows generalized obnoxious outbursts by Shores, in which he grouched about "wanting the evidence," and other unrealistic expectations as to what trial counsel should be doing for him. But the record here does not demonstrate that Shores was compelled to "undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict" which deprived him "of the effective assistance of any counsel whatsoever." Brief of Appellant 29 (citations omitted).

Specifically, on October 23, 2008, trial counsel himself brought the matter of Shores' dissatisfaction with him before the court and discussed in detail the reasons Shores was unhappy with his representation. See, e.g., 10/23/08 RP. Shores' complaints included his counsel's failure to submit him to a polygraph examination, and Shores' frustration that the victim was "not telling the truth." 10/23/08 RP 2,3. However, counsel then said that "in the meantime, Mr. Shores and I have spoken, and I think he wants me to remain as his attorney and just wants to know I'm going to help him. And I told him I will help him and do the best job I can for him. We're going to fight this charge and --you know, from the standpoint that we believe in his innocence." Id. 4. Trial counsel further stated that he dropped off a copy of the discovery at the jail, and advised Shores to "make a kite to the jail staff" so they would bring Shores out to read copies of the reports. 10/23/08 RP 4. Shores was present for this hearing when his counsel explained this situation, but Shores--who certainly has shown that he is capable of expressing himself--did not contradict counsel's assertions.

But Shores further claims that the trial court should have inquired further when he said, "my lawyer won't talk to me about

nothing" on the first day of trial. 12/3/08 RP 4. Shores also cites to the December 4th transcript of the trial proceeding when Shores said, "I have a lot of questions, sir, and I have a lot of evidence that ain't here and this guy won't get it for me." RP 23. But these remarks by Shores should be evaluated in the context of Shores' irrational demeanor when he made such remarks. After Shores said that "this guy won't get it for me," the court said, "Mr. Havarco, you need a minute with your client? To which Shores responded, "I'm tired of the minutes. I need the stuff." Id. The court then told Shores to talk to his counsel. RP 24. Shores said, ". . . Where is my evidence? It is against me. That's right. You already got that point made clear. That's why I'm in jail. Now, where is the evidence?" RP 24. The Court said, "that's what the trial is going to be about." Shores responded, "No. I want the evidence here in court." RP 24. The court told Shores that he needed to be quiet, and Shores said, "Really?. . . I have no rights. . . . Where is the evidence?" RP 25. Shores was again warned to stop his outbursts but Shores continued: "Hold on. Hold on. Where's my pictures? Give me --" RP 26. Shores went on, ". . . I asked people to have this lady arrested. She's not arrested. I'm the one arrested here, not both of us. This is a two-sided street here and only one side's

being seen. I want my evidence because this lady's going to jail when we're done." RP 26. The court again warned Shores to stop his outbursts, but Shores said, "Nobody's listening to me. It's me that they're not listening to. . . . Oh. Okay. Again, once again, be quiet." RP 27.

The trial court explained to Shores that it was the prosecutor who would decide whether charges were filed against the victim in this case, and that the court had no control over that decision and that his attorney had no control over that either. RP 28. Shores said, "I can't tell somebody to arrest the lady? My rights aren't worth a shit, huh? . . . You got that down, my rights ain't worth nothing. . . . I told him to get the shit and he ain't got it. that's what I do understand. Okay. Let's do it." RP 29, 30.

These facts show that defense counsel informed the trial court in detail about Shores' complaints well before trial. The facts also show that some of Shores' complaints about his counsel were unreasonable (Shores request to take a polygraph), that other concerns would have to be decided by the jury (that the victim was lying), that counsel did provide Shores with the police reports, that counsel advised Shores not to wear jail clothing at trial (but Shores did so anyway) and that Shores ultimately decided he wanted to

continue with the same counsel. These facts, viewed in the context of Shores' irrational outbursts and demands, do not support Shores' claim that the trial court erred when it did not inquire in detail about his complaints regarding his counsel. Shores' argument on this issue is not convincing, and this Court should agree.

Alleged Conflict of Interest

To prevail on an ineffective assistance of counsel claim based upon a conflict of interest, a defendant must show that there was an actual conflict of interest that adversely affected his lawyer's performance. State v. Dhaliwal, 140 Wn.2d 559, 573, 79 P.3d 432 (2003). However, a criminal defendant cannot simply allege a claim for ineffective assistance to create a conflict of interest. Young, 62 Wn.App. at 907. Nor does a defendant's mere allegation of ineffective assistance create an inherent conflict of interest requiring the appointment of substitute counsel. State v. Rosborough, 62 Wn.App. 341, 346, 814 P.2d 679 (1991); State v. Stark, 48 Wn.App. 245, 253, 738 P.2d 684 (1987). Indeed, "if a defendant could force the appointment of substitute counsel simply by expressing a desire to raise a claim of ineffective assistance of counsel, then the defendant could do so whenever he wished, for whatever reason." State v. Stark, 48 Wn.App. at 253, citing State v.

Sinclair, 46 Wn.App. 433, 436-37, 730 P.2d 742 (91986). As the Washington Supreme Court has observed,

[w]e note, with increasing concern, that it seems to be standard procedure for the accused to quarrel with court-appointed counsel, or to develop an undertone of studied antagonism and claimed distrust, or to be reluctant to aid or cooperate in preparation of a defense. This appears to be done in order to argue on appeal that the accused was . . . represented by incompetent counsel.

State v. Piche, 71 Wn.2d 583, 589, 430 P.2d 522 (1967)(quoting State v. Keller, 65 Wn.2d 907, 908, 400 P.2d 370 (1965).

Here, Shores claims that the "conflict of interest" on the part of his counsel "arose when Mr. Shores sought to fire Havarco and repeatedly complained about his performance. This conflict 'seems to have influenced' Havarco, causing him to lose interest in the details of Mr. Shores' case." Brief of Appellant 34. But there is absolutely no evidence that Shores' counsel "lost interest in the details of Shores' case." Nonetheless, Shores goes on to say that his attorney's "loss of interest" in his case was evidenced by his counsel's failure to propose instructions on self-defense, and failure to object to the lack of a unanimity instruction or alleged inadequacy of the "to convict" instructions. Id. The State begs to differ.

As explained in detail in previous sections of this brief, there was no credible evidence presented to support a claim of self defense here, nor was a unanimity instruction required because the State properly elected a specific act for each charge of assault. As pointed out in the cases cited in the prior sections above, the law does not require either a self-defense instruction or a unanimity instruction, given the facts presented here. Under these circumstances, Shores' trial counsel's actions were not the result of a "conflict of interest" due to Shores' complaints about counsel's performance, but were valid decisions based upon reasonable professional judgment. Shores protestations to the contrary now are frivolous. After all, "an indigent defendant does not have a constitutional right to compel appointed counsel" to pursue even "non-frivolous points requested by the client, if counsel as a matter of professional judgment, decides not to present those points." Jones v. Barnes, 463 U.S. 745, 751,754, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). And counsel certainly does not have to pursue frivolous ones. State v. McFarland, 127 Wn.2d at 334 n.2

Nor was trial counsel's failure to object to Shores' criminal history evidence that trial counsel had "lost interest" in Shores' case. Instead, as also explained in detail earlier in this brief, there

was no basis to object to the State's recitation of Shores' criminal history because none of Shores' prior seven Class C felony convictions "washed" because Shores received a fifty-month sentence for those convictions in 2008, and Shores' period of incarceration thus interrupted the wash-out period. *See, e.g., Section IV of this brief* (citing facts set out in this Court's unpublished opinion in Shores' appeal of his 2003 convictions to support the State's position that the 2003 convictions are properly counted in Shores' offender score in this case). Because Shores' counsel undoubtedly knew that Shores' convictions did not wash, it was proper for him to advise Shores to agree to the State's compilation of his criminal history. Accordingly, Shores' claims that his efforts to fire his trial counsel caused a "conflict of interest" which caused counsel to "lose interest in the details of Shores' case" is without merit. Shores' convictions should be affirmed.

CONCLUSION

Shores did not request a self-defense instruction. But even if he had, it is unlikely that it would have been granted, because there was no credible evidence presented at trial to support a claim of self defense. Rather than showing that Shores was acting in self defense, Shores' testimony and statements to police actually

corroborated much of the victim's story, including the fact that Shores intentionally inflicted injuries to his own face so that he could have the victim charged with assaulting him if she called the police. Furthermore, the force used by Shores was unreasonable under these circumstances.

Nor did Shores request a unanimity instruction. However, even if he had, it would not have been granted because such an instruction was not required here, because the State elected a specific act for each charge of assault. The lack of an additional instruction defining "deadly weapon" as it pertains to the sentencing enhancement was error, but it was harmless. Shores' criminal history was properly computed because Shores stipulated to it, and because in 2003 Shores received a 50-month sentence, which interrupted the wash-out period. Shores has not shown that his trial counsel was ineffective, or that his trial counsel had a "conflict of interest." Finally, the trial court did not err in its handling of Shores' complaints about his trial counsel. Accordingly, Shores' convictions and sentence should be affirmed.

On the other hand, should this Court decide there is not enough evidence in this record to support Shores' criminal history as set out in the Stipulation, this matter should be remanded for

resentencing so that the State can submit evidence proving that Shores' 2003 convictions did not wash due to his 50-month prison sentence on those convictions. And, if this Court decides that the error in the deadly weapon instruction is not harmless and requires reversal, this matter should be remanded for resentencing without the deadly weapon enhancement.

RESPECTFULLY SUBMITTED this 31st day of July, 2009.

MICHAEL GOLDEN
LEWIS COUNTY PROSECUTING ATTORNEY

by:


Lori Smith, WSBA 27961
Deputy Prosecuting Attorney

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,) NO. 38682-8-II
Respondent,)
vs.)
)
STEPHEN SHORES,)
Appellant.) DECLARATION OF
MAILING

I, LORI SMITH, Deputy Prosecutor for Lewis County,
Washington, declare under penalty of perjury of the laws of the
State of Washington that the following is true and correct: On this
31ST day of July, 2009, I severed a copy of the State's Response
Brief by depositing same in the United States Mail, postage pre-
paid, to the attorney(s) for Appellant at the name and address
indicated below:

Backlund & Mistry
203 – 4th Avenue East, Suite 404
Olympia, WA 98501-1189

09 AUG -14 PM 12:07
STATE OF WASHINGTON
BY
COURT OF APPEALS
DIVISION II

DATED this 31st day of July, 2008, at Chehalis, Washington:


Lori Smith, Deputy Prosecutor
WSBA No. 27961
Attorney for the Respondent
Signed at Chehalis, Washington