

40169-0

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

IN RE PERSONAL RESTRAINT PETITION OF:

ROBERT RICHARD RUDNER,

PETITIONER.

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PERSONAL RESTRAINT PETITION

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A. STATUS OF PETITIONER

Robert Richard Rudner, Jr. (hereinafter “Rudner”) challenges his 2004 Pierce County convictions for Assault in the First Degree with a Firearm; Assault in the Second Degree with a Firearm; Burglary in the First Degree with a Firearm; Robbery in the First Degree with a Firearm; Unlawful Possession of a Firearm; Possession of a Stolen Firearm; Residential Burglary; and VUCSA (04-1-03874-1). Rudner is in custody serving a 456-month (38 years) sentence.

This is his first Personal Restraint Petition.

B. FACTS

1. Procedural History

Mr. Rudner was charged by an Information filed on August 9, 2004, with crimes alleged to have occurred days earlier—on August 1st and 6th. His trial began approximately a year and a half later in January 2006. In the interim, Mr. Rudner was represented by three different lawyers, as a result of his first two lawyers withdrawing from the case.

Rudner was tried by a jury, which returned guilty verdicts on February 22, 2006. Rudner was sentenced on June 2, 2006.

Rudner appealed. On March 4, 2008, this Court reversed Rudner’s count II conviction and remanded for imposition of a second-degree assault

conviction and for resentencing. The Washington Supreme Court denied review on November 5, 2008.

Following this Court's remand order and mandate, Rudner returned to the trial court where he was resentenced on January 2, 2009. At that time, the trial court entered a conviction for Assault 2° on Count II and re-sentenced Rudner to 456 months (in contrast to the previously imposed 573-month sentence). That sentence involved 240 months for the base crimes and an additional 216 months of "flat" time for the multiple firearm elements. *See Judgment and Sentence* attached as Appendix A. Rudner did not appeal from his resentencing.

This petition timely follows. *See In re PRP of Skylstad*, 160 Wn.2d 944, 162 P.3d 413 (2007).

2. Facts

In the direct appeal decision, this Court described the trial testimony as follows:

On August 6, 2004, Desmond Berry asked Autumn Arnestad to help him rob his acquaintance, Brian Faranda, by taking the keys to Faranda's Ford Mustang. That night, Arnestad entered Faranda's home through the sliding glass door on the second floor balcony. Arnestad then let Berry and Rudner in through the front door. Faranda and his girlfriend, Kimberly Riley, were sleeping on the couch. Arnestad had in her possession a .9 millimeter Beretta that she stole earlier that day, which she gave to Rudner along with clips loaded with ammunition. Rudner pointed the gun at Riley and asked for the keys to Faranda's Mustang. Meanwhile, Arnestad ordered Faranda to get on his knees, putting his hands behind his head as she went through his pockets. Rudner turned the gun to Faranda's head and aggressively repeated his demand for the keys to the Mustang.

Riley saw Rudner pull the trigger on the gun while aiming it at Faranda's head. Faranda, who is familiar with guns, heard a "click" that sounded like either an "accidental trigger pull or a de-cock mechanism." 6 RP at 597. Riley screamed that she and Faranda would not get killed without a fight, and jumped on Arnestad. Faranda tried to get the gun away from Rudner, but Rudner hit him in the face with it, and "kept swinging, swinging away with the pistol." 6 RP at 603. Arnestad stole Riley's purse and fled, while Faranda was able to subdue Rudner. As a result of the altercations, Riley sustained a gash on her eye while Faranda suffered a broken nose and received two stitches in his eye and six on his forehead.

In addition to the incident described herein, the State presented evidence at trial that Rudner committed three other burglaries, including a theft where he left behind a backpack containing marijuana, methamphetamine, ammunition and a cell phone bill in his name.

See Direct Appeal Opinion attached as Appendix B.

In reversing one of the two first-degree assault convictions, this Court noted, "there is no evidence that Rudner intended to inflict great bodily harm upon Riley. Although the pistol was pointed at her, Rudner voiced no threats of death or great bodily harm, did not pull the trigger while pointing the gun at her, and did not place her in an execution kneeling position like Faranda. And though Arnestad assaulted Riley with her hands while wearing rings, this alone does not evidence an intent to inflict great bodily harm. Thus, there was insufficient evidence to convict Rudner of first degree assault against Riley."

In contrast, this Court noted: "The jury heard *undisputed* testimony that Rudner entered Faranda's home uninvited, in order to steal the keys to

Faranda's car. Rudner pointed the gun at Riley and demanded the keys to Faranda's Mustang. Arnestad admitted on the stand that when Faranda refused to comply with the same demand, she and Rudner forced Faranda to his knees, and held a gun to his head. Riley saw Rudner pull the trigger while aiming the gun at Faranda's head.”

In fact, Rudner has always disputed that key fact—whether he pulled the trigger. However, the fact was “undisputed” because Rudner did not testify. Rudner did not testify, as his declaration attached to this petition attests, because he was given misinformation about the use of his prior convictions for impeachment. But for that misinformation, Mr. Rudner would have testified and the key fact would have been disputed—the subject of a credibility determination.

Because this PRP does not seek to challenge most of the above-cited facts (the one exception is the claim that Rudner pulled the trigger while holding the gun to Faranda’s head), Rudner sets forth additional facts as they are relevant to the particular claims advanced herein.

C. ARGUMENT

CLAIMS RELATED TO “FIREARM ENHANCEMENTS”

Mr. Rudner’s sentence was increased by at least 216 months for the use of one firearm during one criminal episode. The following claims relate to the use of multiple enhancements for the same conduct.

1. Convicting and Sentencing Rudner for First and Second Degree Assault and First Degree Burglary, All Crimes That Required Proof of a Firearm as an Element of the Crime, While Armed With a Firearm Violated Double Jeopardy and Equal Protection.

The State charged Mr. Rudner with two counts of Assault in the First Degree and one count of Burglary in the First Degree. *See Second Amended Information* attached as Appendix C. In both assault counts, the State alleged that Rudner assaulted another *with a firearm* pursuant to RCW 9A.36.011(1)(a). When this Court reversed Count II because the evidence was insufficient to prove intent to inflict great bodily harm, it directed the trial court to impose a judgment of conviction for the lesser crime of second-degree assault, also involving a firearm. In addition, for each count the State alleged that Rudner was armed with a “firearm,” invoking various provisions of the SRA.

Likewise, in Count III, the State charged first-degree burglary under the theory that Rudner intended to commit a crime while “armed with a handgun.” Once again, the State additionally alleged—for a second time in one count—that Rudner was “armed with a firearm, to wit: a handgun.” *See RCW 9A.52.020(1)(a).*

As a result, the use of a firearm constituted two elements for one crime—for Counts I-III. This violates double jeopardy. This issue is

currently pending in the Washington Supreme Court. *See e.g.*, No. 82111-9, *State v. Kelley*; No. 82226-3, *State v. Aguirre* (Whether double jeopardy principles were violated in a second degree assault prosecution when the defendant's use of a firearm was both an element of the charge and the basis for imposing a firearm sentence enhancement).

In 1995, Initiative 159 entitled "Hard Time for Armed Crime" was submitted to the Legislature, which enacted it without amendment. Laws of 1995, ch. 129; *State v. Broadaway*, 133 Wn.2d 118, 124, 942 P.2d 363 (1997); WASHINGTON SENTENCING GUIDELINES COMM'N, ADULT FELONY SENTENCING app. F at F-1 (1996). The purpose of the initiative was to increase sentences for armed crime. *Broadaway*, 133 Wn.2d at 128.

Subsequent caselaw has explained that the purpose of the statute is to "punish armed offenders more harshly to discourage the use of firearms, *except* when the possession or use of a firearm is a necessary element of the underlying crime itself." *State v. Pedro*, 148 Wash. App. 932, 946, 201 P.3d 398 (2009) (*quoting State v. Berrier*, 110 Wash. App. 639, 650, 41 P.3d 1198 (2002)) (internal quotations omitted and emphasis added).

The Washington Sentencing Guidelines Manual has always provided:

Initiative 159, enacted in 1995, made the deadly weapon enhancement applicable to nearly all felonies, doubled that enhancement for subsequent offenses, and created a separate,

more severe enhancement where the weapon was a firearm. *State v. Workman*, 90 Wn.2d 433 (1978), prohibits “double counting” an element of an offense for the purpose of proving the existence of the crime and using it to enhance the sentence, without specific Legislative intent to so allow. Consistent with *Workman*, neither the firearm enhancement nor the ‘other deadly weapon’ enhancement applies to specified crimes *where the use of a firearm is an element of the offense* (listed in RCW 9.94A.310(3)(f) and (4)(f)). These sentence enhancements apply to crimes committed on and after July 23, 1995.

II-62 (1996) (emphasis added). *See also* Sentencing Guidelines Manual (2008).

The clear distinction between crimes exempt and non-exempt crimes is, as the *Berrier* court articulated: all of the exempt crimes involve use or possession of a firearm as a necessary element of the charged “underlying” crime. 110 Wash.App. at 650. Persons committing the exempt crimes, where an enhancement does not apply, already receive sentences specifically for use or possession of a firearm—the use or possession is a necessary element of the exempt crimes. While the same is true when an exempt crime constitutes a necessary predicate to a more serious crime, the statute is ambiguous about whether the exemption applies in that situation. Thus, we need to apply rules of statutory construction.

The basic rules of statutory construction apply with equal force to legislation by the people through the initiative process. *Senate Republican Campaign Comm. v. Public Disclosure Comm'n*, 133 Wn.2d 229, 241 n. 7, 943 P.2d 1358 (1997); *Thorne*, 129 Wn.2d 736, 762-63, 921 P.2d 514

(1996).

The rule of lenity is a rule of statutory construction which applies to penal statutes. The rule applies to the SRA and operates to resolve statutory ambiguities, absent clear legislative intent to the contrary, in favor of a criminal defendant. *In re Sietz*, 124 Wn.2d 645, 652, 880 P.2d 34 (1994); *State v. Roberts*, 117 Wn.2d 576, 586, 817 P.2d 855 (1991); *see also State v. Lively*, 130 Wn.2d 1, 14, 921 P.2d 1035 (1996); *State v. Gore*, 101 Wn.2d 481, 486, 681 P.2d 227 (1984).

Washington courts have repeatedly looked to the explanations of the Sentencing Guidelines Commission when interpreting the SRA. *See e.g.*, *State v. Ha'mim*, 132 Wn.2d 834, 844, 940 P.2d 633 (1997); *In re Long*, 117 Wn.2d 292, 301, 815 P.2d 257 (1991). For example, the Washington Supreme Court held in *Post Sentencing Rev. of Charles*, 135 Wn.2d 239, 250-51, 955 P.2d 798 (1998), the statute was ambiguous about whether firearm enhancements must run consecutively to each other when the underlying crimes and sentences run concurrently. The Court specifically relied on the comments of the Sentencing Guidelines Commission to support the conclusion that the statute was ambiguous. And, because there was no clear legislative intent on the point, the Court then applied the rule of lenity and held that firearm enhancements run concurrently when the base sentences run concurrently. *Id.* at 254. *Charles* provides compelling support for Rudner's argument herein.

“[T]he Legislature is presumed to know the existing state of the case law in those areas in which it is legislating and a statute will not be construed in derogation of the common law unless the Legislature has clearly expressed its intention to vary it.” *Price v. Kitsap Transit*, 125 Wn.2d 456, 463, 886 P.2d 556 (1994). Here, the existing state of the case law, referred to by the Guidelines Commission, required clear legislative intent to permit “double counting.”

Finally, there is no legislative history (attached as Appendix D) that suggests the drafters of the Initiative intended any outcome different than the one advanced by Rudner in this petition.

Interpreting the statute to permit a firearm or deadly weapon enhancement in these three instances violates equal protection. For example, in *Barrier* the court started with the proposition that the purpose of exempting certain crimes from the firearm sentence enhancements in former RCW 9.94A.310(3)(f) (1998) is that the possession or use of a firearm is a necessary element of the underlying crime itself. Because that purpose applies equally to the crimes at issue in this case as it does to any listed as exempt, there is no reasonable way to distinguish the exemption in one case, but not the other. Legislative oversight does not excuse a violation of the equal protection clause. *See also In re Bratz*, 101 Wash.App. 662, 669-70, 5 P.3d 759 (2000). As a result, the *Barrier* court

vacated that portion of the sentence on the unlawful possession of a short-barreled shotgun conviction and remand for resentencing, holding:

The purpose of exempting certain crimes from the firearm sentence enhancements in former RCW 9.94A.310(3)(f) (2000) appears to be that the possession or use of a firearm is a necessary element of the underlying crime itself. But, this purpose applies equally to the possession of a short-barreled shotgun as it does to possession of a machine gun: possession is a necessary element of the underlying crime in both cases.

110 Wn. App. at 650.

Indeed, given the equal protection violation, the doctrine of “constitutional avoidance” requires construction of the statute in favor of Rudner. *See State ex rel. Faulk v. CSG Job Ctr.*, 117 Wn.2d 493, 500, 816 P.2d 725 (1991). *See also In re Williams*, 121 Wn.2d 655, 665, 853 P.2d 444 (1993) (“It is a general rule that statutes are construed to avoid constitutional difficulties when such construction is consistent with the purposes of the statute.”).

Because the statute is ambiguous; fails to express a clear intent to “overrule” existing common law, and would violate equal protection if construed against Rudner’s position, this Court should grant this petition and remand for sentencing without the enhancement. As the *Berrier* court held:

Because the enhancement is unconstitutional as applied, we vacate that portion of the sentence on the unlawful possession of a short-barreled shotgun conviction and remand for resentencing.

110 Wn. App. at 651.

Likewise, this Court should reverse and remand, directing the trial court to vacate the firearm enhancement portions of Mr. Rudner's sentences for Counts I, II, and III.

2. Convicting and Sentencing Mr. Rudner for Two Counts of Assault and One Count of Robbery Alleged to be Committed Against the Two Assault Victims, Violates Double Jeopardy, Merger, and the Same Criminal Conduct Rule.

The State charged Rudner with assaulting two individuals. The State also charged Rudner with robbing both victims, alleging that Rudner assaulted the victims with a firearm in order to obtain property.

Within constitutional limits, legislatures have the exclusive power to define crimes and punishments. *State v. Rivera*, 85 Wn.App. 296, 298, 932 P.2d 701 (1997); *Calle*, 125 Wn.2d at 776, 888 P.2d 155. The term "merger" is a doctrine of statutory interpretation. Reviewing courts apply the doctrine to determine whether the legislature intended to impose multiple punishments for a single act that violates several statutory provisions. *State v. Vladovic*, 99 Wn.2d 413, 419 n. 2, 662 P.2d 853 (1983). If, in order to prove a particular degree of a crime, the State must prove the elements of that crime and also that the defendant committed an act that is defined as a separate crime elsewhere in the criminal statutes, the

second crime merges with the first. *Vladovic*, 99 Wn.2d at 420-21; *State v. Parmelee*, 108 Wn.App. 702, 711, 32 P.3d 1029 (2001).

In *State v. Zumwalt*, 119 Wn.App. 126, 82 P.3d 672 (2003), the Court of Appeals held that robbery and assault merged. “Thus, the State could not have convicted Mr. Zumwalt for first degree robbery without proving the assault. And the only facts that elevated simple robbery to first degree robbery are the same facts underlying the separate assault charge.” 119 Wn.App. at 132.

Double jeopardy is implicated regardless of whether sentences are imposed to run concurrently. *In re Pers. Restraint of Davis*, 142 Wn.2d 165, 171, 12 P.3d 603 (2000); see *State v. Adel*, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). The punitive aspects of multiple convictions—stigma and impeachment value—go beyond the loss of freedom. *Ball v. United States*, 470 U.S. 856, 864-65, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985)).

Rudner’s conviction on the robbery charge must be set aside.

If this Court determines that Rudner’s robbery and assault convictions violate the same criminal conduct rule, but do not merge (a position not espoused by Rudner), then the robbery should not count as criminal history and no sentence should be imposed on that count.

3. The State Sought and Rudner’s Jury Returned “Deadly Weapon,” Rather than “Firearm” Verdicts. However, Rudner was Improperly Sentenced for Firearm Enhancements.

The State successfully sought to have Mr. Rudner’s jury return a “deadly weapon” verdict. However, after obtaining deadly weapon verdicts, it then sought to sentence Mr. Rudner for firearm enhancements. Because the State submitted only “deadly weapon” verdicts, it must live with the result it sought from the jury.

Instruction No. 44 instructed jurors to consider the “special verdict” forms for various crimes, if jurors convicted. Instruction No. 45 provided that, in order to answer affirmatively, jurors must find that Rudner or an accomplice was “armed with a deadly weapon.” The instruction made seven references to a deadly weapon. In contrast, it made only one reference to a firearm, when it told jurors: “A firearm *is* a deadly weapon.” (emphasis added).

Reversal is required. *State v. Recuenco (Recuenco III)*, 163 Wn.2d 428, 180 P.3d 1276 (2008); *In re Personal Restraint of Delgado*, 149 Wn.App. 223, 204 P.3d 936 (2009); *In re PRP of Scott*, 149 Wn.App. 213, 216, 202 P.3d 985 (2009).

As this Court explained in *Scott*: “Here, the jury was instructed on deadly weapon sentencing enhancements and returned special verdicts finding that Scott was “armed with a deadly weapon” when he committed

the crimes. Scott's judgment and sentence misstates the jury's special verdict by (1) stating that the jury found that Scott was armed with a firearm (rather than a deadly weapon) when he committed the crimes and (2) imposing firearm enhancements without a jury or judicial finding that Scott was armed with a firearm.” 149 Wn.App. at 221-22. “Accordingly, we vacate Scott's judgment and sentence and remand to the trial court with directions that it correct the erroneous firearm enhancements. The resentencing court shall impose the deadly weapon enhancements that the jury's special verdicts authorized and strike the firearm enhancements the trial court erroneously imposed.” *Id.* at 222.

In this case, the State charged Rudner in an Information with enhancements that could be legally construed as either firearm or deadly weapon enhancements. However, the State made an election to submit the case to the jury with only deadly weapon enhancements. Instruction No. 45 is unmistakable: it repeatedly asks whether Rudner was armed with a deadly weapon. It defines the element of a deadly weapon—not a firearm.

As a result, it was improper and violated Rudner's right to a jury trial when the State sought and the Court imposed firearm enhancements after the jury returned deadly weapon verdicts.

4. If this Court Concludes that Rudner’s Jury Returned Firearm Verdicts, Then the Instructions Were Deficient Because They Directed a Verdict, Constituted a Comment on the Evidence; and Failed To Require Proof of Operability. Alternatively, Mr. Rudner was Denied Effective Assistance of Counsel When Counsel Failed to Object to the Instructions.

Instruction No. 45 asked jurors whether Rudner was armed with a deadly weapon and then told jurors that a firearm *is* a deadly weapon.

Although the instructions required proof of a nexus between the crime and the deadly weapon, it did not require the State to prove operability. An earlier instruction (No. 14) defined a firearm as a weapon from which a projectile may be fired, but did not specify whether operability was required at the time of the crime. The “enhancement” element was not included in any “to convict” instruction. There was no separate “to convict” instruction for the enhancement.

As a result of these multiple deficiencies, Rudner is entitled to reversal of all of the firearm enhancements.

Article 4, section 16 of the Washington Constitution provides: “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” The section is intended “to prevent the jury from being influenced by knowledge conveyed to it by the trial judge as to his opinion of the evidence submitted,” and it “forbids only those words or actions which have the effect of conveying to the jury a personal opinion of the trial judge regarding the credibility, weight or sufficiency of

some evidence introduced at the trial.” *State v. Jacobsen*, 78 Wn.2d 491, 495, 477 P.2d 1 (1970) (citations omitted). An impermissible comment conveys to the jury a judge's personal attitudes toward the merits of a case or permits the jury to infer from what the judge said or did not say that he or she believed or disbelieved the testimony in question. *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1988).

A party is required to object to an erroneous instruction in order to afford the trial court the opportunity to correct the error. CrR 6.15(c); *State v. Scott*, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988). Failing to object to an instruction may bar review. *Scott*, 110 Wn.2d at 686. But a party may raise a manifest error of constitutional magnitude for the first time on appeal. RAP 2.5(a)(3).

This Court reviews the adequacy of a challenged “to convict” jury instruction *de novo*. *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005)

The Supreme Court has previously held that a reviewing court may not rely on other instructions to supply an element missing from the “to convict” instruction. *Mills*, 154 Wn.2d at 7. Instead, the “to convict” instruction must contain all elements essential to the conviction. *Mills*, 154 Wn.2d at 7. This is because the jury has a right to regard the to-convict instruction as a complete statement of the law and should not be required to search other instructions in order to add elements necessary for conviction. *Mills*, 154 Wn.2d at 8. Elements may appear in other

instructions, however, and while a reviewing court may not import those elements to cure the omission of an element from a “to convict” instruction, automatic reversal is required only where the trial court failed to instruct the jury on all elements of the charged crime. *State v. DeRyke*, 149 Wn.2d 906, 911-12, 73 P.3d 1000 (2003). Where, instead, the essential elements appear in a definitional instruction, the alleged failure of the “to convict” instruction to include an element is subject to harmless error analysis. *DeRyke*, 149 Wn.2d at 912 (citing *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002)).

In this case, not only was the firearm enhancement not included in the to-convict instruction, there was no separate to-convict instruction and several of the elements of the firearm enhancement were not defined at any place in the instructions.

In addition, the firearm element requires more than proof that the weapon was designed to fire a projectile (as the instruction required), but instead requires proof of operability. *See State v. Pam*, 98 Wn.2d 748, 754-55, 659 P.2d 454 (1983), *overruled in part on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988).

Because the instructions did not require anything close to legally sufficient evidence in order for the jury to convict and because there were multiple elements which were not included in the instructions, reversal is required. *See Sullivan v. Louisiana*, 508 U.S. 275 (1993).

EXTRA-RECORD CLAIMS

5. Rudner was Denied His Sixth Amendment Right to Effective Assistance of Counsel When Counsel Gave Him Misleading Advice Concerning the Scope of the Admissibility of His Prior Convictions if He Testified; Where Rudner Would Have Testified, But For Counsel's Misinformation; and Where Rudner's Testimony, If Accepted by Jurors, Would Have Raised a Reasonable Doubt Regarding the First-Degree Assault Conviction.

From shortly after the time he was charged, Mr. Rudner wanted to testify. Mr. Rudner was willing to admit that he committed several crimes, including robbery, burglary, and assault. *See Declaration of Rudner.* However, he did not pull the trigger of a gun—as was alleged. Rudner was guilty of committing several serious crimes, but not the two most serious offenses.

Mr. Rudner did not testify. The reason he decided not to testify is simple: counsel told Rudner that if he testified his jury would be permitted to hear about all of his prior convictions. As a result, Rudner believed that the prosecution would be able to list the names of his prior crimes, as well as to reveal the facts of those crimes. Trial counsel advised Mr. Rudner not to testify. Rudner followed that advice. However, only because he was mistakenly informed about the scope of ER 609 impeachment. But for that bad advice, Rudner would have testified.

In this claim, Rudner does not challenge counsel's advice not to testify—that advice was well within the range of competence. Instead, he

limits his challenge to counsel's legal advice about the scope of impeachment.

The now-familiar standard for assessing whether counsel's representation was so ineffective that it amounted to a violation of the Sixth Amendment was announced by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, a claimant must demonstrate that "counsel's representation fell below an objective standard of reasonableness," outside of "the range of legitimate decisions regarding how best to represent a criminal defendant." *Id.* at 688-89. Second, a claimant must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

The right to testify is one of a handful of rights that the Supreme Court has identified as being personal to the accused, and thus not susceptible to being waived by counsel on the defendant's behalf. *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). As the Eleventh Circuit stated in a comprehensive *en banc* opinion, criminal defendants at trial "possess essentially two categories of constitutional rights: those which are waivable by defense counsel on the defendant's behalf, and those which are considered 'fundamental' and personal to the defendant, waivable only by the defendant." *United States v. Teague*, 953

F.2d 1525, 1531 (11th Cir.1992) (en banc). Included in the former category are matters that "primarily involve trial strategy and tactics," such as "what evidence should be introduced, what stipulations should be made, what objections should be raised, and what pre-trial motions should be filed." *Id.*

Included in the latter category of decisions "personal" to the defendant are, for instance, the decisions whether to enter a guilty plea, *see Boykin v. Alabama*, 395 U.S. 238, 242-44, 89 S.Ct. 1709, 1711-12, 23 L.Ed.2d 274 (1969), whether to waive a jury trial, *see Adams v. United States ex rel. McCann*, 317 U.S. 269, 275, 63 S.Ct. 236, 240, 87 L.Ed. 268 (1942), and whether to pursue an appeal, *see Fay v. Noia*, 372 U.S. 391, 438-40, 83 S.Ct. 822, 848-49, 9 L.Ed.2d 837 (1963). Every circuit that has considered this question has placed the defendant's right to testify in the "personal rights" category--*i.e.*, waivable only by the defendant himself regardless of tactical considerations. *See, e.g., United States v. Pennycooke*, 65 F.3d 9, 10-11 (3d Cir.1995); *United States v. McMeans*, 927 F.2d 162, 163 (4th Cir.1991); *Jordan v. Hargett*, 34 F.3d 310, 312 (5th Cir.1994), *vacated without consideration of this point*, 53 F.3d 94 (5th Cir.1995) (en banc); *Rogers-Bey v. Lane*, 896 F.2d 279, 283 (7th Cir.1990); *United States v. Bernloehr*, 833 F.2d 749, 751 (8th Cir.1987); *United States v. Joelson*, 7 F.3d 174, 177 (9th Cir.1993); *Teague*, 953 F.2d at 1532 (11th Cir.); *United States v. Ortiz*, 82 F.3d 1066, 1070 (D.C.Cir.1996). The model rules and

ABA standards are in accord. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) & cmts. (1995)("In a criminal case, the lawyer shall abide by the client's decision ... whether the client will testify."); ABA STANDARD FOR CRIMINAL JUSTICE, 4-5.2(a)(iv)(3d ed.1993)("whether to testify in his or her own behalf" is a decision "to be made by the accused after full consultation with counsel").

As a result, counsel has a "primary responsibility for advising the defendant of his right to testify or not to testify, the strategic implications of each choice, and that it is ultimately for the defendant himself to decide." *United States v. Teague*, 953 at 1533; *Strickland*, 466 U.S. at 688-89. Such advice is critical because a defendant cannot be found to have relinquished a constitutional right unless the waiver is made intelligently, voluntarily, and knowingly. *See Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938); *Foster v. Delo*, 11 F.3d 1451, 1457 (8th Cir.1993); *Lema*, 987 F.2d at 52-53. whether defendant was provided with sufficient information to make a "meaningful" waiver, the inquiry must focus on "the competence and soundness of defense counsel's tactical advice." *Lema*, 987 F.2d at 53.

Where a defendant has acceded to counsel's advice but counsel was later found to have misinformed defendants with respect to the consequences of taking the stand, courts have found ineffective assistance of counsel. *See, e.g., Foster v. Delo*, 11 F.3d 1451, 1457 (8th Cir. 1993) (holding that counsel "impeded an informed decision whether to waive or

invoke a fundamental constitutional guarantee” where counsel misinformed defendant of the risks and failed to inform defendant of the benefits of testifying at the penalty phase of a capital murder trial); *Blackburn v. Foltz*, 828 F.2d 1177, 1182 (6th Cir.1987), *cert. denied*, 485 U.S. 970, 108 S.Ct. 1247, 99 L.Ed.2d 445 (1988) (holding that defendant was deprived of meaningful opportunity to decide whether to testify where counsel misinformed defendant about the Government's use of prior convictions if defendant took the stand); *United States v. Poe*, 352 F.2d 639 (D.C.Cir.1965) (holding that defendant was deprived of a fair trial where he waived his right to testify based on counsel's misinformation that the Government could use inadmissible statements to impeach his testimony).

In this case, Rudner mistakenly believed that his entire record was admissible—without any meaningful limitations. That was incorrect.

Evidence Rule (ER) 609 provides that evidence of a prior criminal conviction is admissible for the purpose of attacking a witness's credibility, but not for showing propensity. When evidence of prior crimes is admitted under ER 609(a) for the purpose of impeaching the credibility of a witness, an instruction should be given that the conviction is admissible only on the issue of the witness's credibility. *State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988). For that reason, excluding evidence of the nature of the prior offense may lessen any potential prejudicial impact and such an approach has been allowed with ER 609(a)(2) evidence, see *State v. Rivers*, 129

Wn.2d 697, 704, 921 P.2d 495 (1996) (citing *State v. Gomez*, 75 Wn.App. 648, 655, 880 P.2d 65 (1994)).

If Rudner had testified, the State would have undoubtedly been permitted to introduce some, but not all of his prior convictions. Those convictions would have been admissible only for impeachment. And, none of the facts (and in the case of the prior burglary—not even the name of the crime) would have been admissible. If Rudner had known the true score, he would have chosen to testify.

“The testimony of a criminal defendant at his own trial is unique and inherently significant. The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.” *Nichols v. Butler*, 953 F.2d 1550, 1553 (11th Cir.1992) (quoting *Green v. United States*, 365 U.S. 301, 304, 81 S.Ct. 653, 655, 5 L.Ed.2d 670 (1961)).

Rudner had a right to speak for himself, a right denied by the misinformation of his counsel. As a result, Rudner was prejudiced because that he would not chosen to exercise this fundamental right but for the misadvice. Rudner contends that the proper measure of prejudice is the loss of his fundamental right to testify.

The proper test of prejudice, where counsel fails to inform a defendant of a substantive or procedural right, is whether there is a reasonable probability that but for the deficient performance, defendant

would have exercised his right to testify. This is consistent with the prejudice rule in other situations (pleading guilty or filing an appeal, for example) where the defendant rather than his attorney controls the exercise of the right. *See, e.g., Peguero v. United States*, 526 U.S. 23, 119 S. Ct. 961, 143 L.Ed.2d 18 (1999) (defendant not prejudiced by court's failure to advise him of his appeal rights, where he had full knowledge of his right to appeal and chose not to do so); *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L.Ed.2d 203 (1985) (to show prejudice from counsel's allegedly deficient advice regarding the consequences of pleading guilty, defendant must show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial"); *Rodriguez v. United States*, 395 U.S. 327, 330, 89 S. Ct. 1715, 23 L.Ed.2d 340 (1969) (where counsel failed to file a notice of appeal despite defendant's instruction, defendant, by instructing counsel to perfect an appeal, objectively indicated his intent to appeal and was entitled to a new appeal without any further showing. Because "[t]hose whose right to an appeal has been frustrated should be treated exactly like any other appellant[t]," we rejected any requirement that the would-be appellant "specify the points he would raise were his right to appeal reinstated."); *Roe v. Flores-Ortego*, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) (prejudice shown where, but for counsel's deficient failure to consult with the defendant about appealing, defendant would have timely appealed.).

Mr. Rudner recognizes that the Washington Supreme Court applied a different prejudice standard in *State v. Robinson*, 138 Wn.2d 753, 982 P.2d 590 (1999). In that case, the Court required Robinson to prove both that he would have testified and that his testimony was reasonably likely to have led to a different verdict. 138 Wn.2d at 769. Such a demanding standard is impossible to square with clearly established federal law as reflected in the United States Supreme Court cases set out above, analyzing counsel's failure to advise the defendant of other rights which only the defendant can assert.

However, even if *Robinson* represents a reasonable application of *Strickland*, Mr. Rudner has satisfied its more stringent prejudice standard. Rudner would have offered his own testimony denying that he ever pulled the gun's trigger. If this Court views that testimony as true, as it must for purposes of deciding whether Rudner is entitled to an evidentiary hearing on this claim, he clearly satisfies the threshold set by RAP 16.11.

Thus, this claim should be remanded for a reference hearing.

6. Trial Counsel was Ineffective For Completely Failing to Explain to Mr. Rudner the Total Sentence He Faced at Trial and To Engage in Plea Bargaining.

Prior to sentencing, Mr. Rudner did not know how much time he was facing. He had no idea what plea offers the State had or was willing to make. He had no frame of reference because counsel did not provide one.

So, he went to trial. However, he would not have done so if counsel had performed competently.

As mentioned previously, in a criminal prosecution, the federal and State constitutions guarantee the right of an accused to the assistance of counsel. U.S. Const. amend VI; Wash. Const. art. I, sec. 22. Ineffective assistance violates the right to counsel. *In re Personal Restraint Petition of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

To establish ineffective assistance of counsel, Rudner must show that counsel's performance was deficient and that the deficiency resulted in prejudice. *Strickland*, 466 U.S. at 687; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Under the prejudice prong, a defendant normally “must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. But “when the defendant can establish that counsel was not merely incompetent but inert, prejudice will be presumed.” *Childress v. Johnson*, 103 F.3d 1221, 1228 (5th Cir.1997). Such a “constructive denial of counsel” may arise from absence of counsel from the courtroom, conflicts of interest between defense counsel and the defendant, and failure of counsel to subject the State's case to meaningful adversarial testing. *Childress*, 103 F.3d at 1228.

In this case, it arises because counsel did not was “inert” with respect to plea bargaining.

In a plea bargaining context, effective assistance of counsel requires that counsel “actually and substantially” assist his client in deciding whether to plead guilty. *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984) (quoting *State v. Cameron*, 30 Wn.App. 229, 232, 633 P.2d 901 (1981)). The lawyer's obligation extends beyond merely relaying the plea offer to the client; the lawyer must provide the client ‘with sufficient information to make an informed decision on whether or not to plead guilty.’ *In re Personal Restraint of McCready*, 100 Wn.App. 259, 263, 996 P.2d 658 (2000). “Failure to advise [a defendant] of the available options and possible consequences [during plea bargaining] constitutes ineffective assistance of counsel.” *McCready*, 100 Wn.App. at 263-64.

When ineffective assistance of counsel has deprived a defendant of a plea bargain, a court may choose to vacate the conviction and return the parties to the plea bargaining stage. *See United States v. Gordon*, 156 F.3d 376, 381-82 (2d Cir.1998). A court may also order the government to reinstate its original plea offer to the defendant or release the defendant within a reasonable amount of time. *See Nunes*, 350 F.3d at 1056-57 (9th Cir.2003). In deciding the proper remedy, a court must consider the unique

facts and circumstances of the particular case. *See Morrison*, 449 U.S. at 364.

7. Trial Counsel was Ineffective for Agreeing that Mr. Rudner's All of His Prior Juvenile Convictions Counted as Separate Criminal History.

Trial counsel stipulated that Mr. Rudner's prior juvenile convictions each counted as separate criminal history. Mr. Rudner was convicted and sentenced on TMVWOP and Burglary on one date—December 16, 1992. To the best of his recollection, he received concurrent sentences. He was convicted and sentenced on Theft and Vehicle Prowl, crimes that constitute “same criminal conduct” on March 2, 1994. Finally, he was sentenced to concurrent time for theft and possession of a firearm on January 11, 1995.

RCW 9.94A.525(5)(a)(i) provides in pertinent part: “The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently *or prior juvenile offenses for which sentences were served consecutively*, whether those offenses shall be counted as one offense or as separate offenses using the “same criminal conduct” analysis found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used.” Thus, prior juvenile convictions that constitute “same criminal conduct” or where the sentences were served concurrently count as one offense for purposes of scoring.

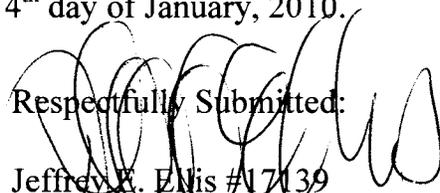
In this case, the trial court undertook no analysis of how to properly score Rudner's three sets of juvenile convictions entered on the same day. As Rudner's declaration provides, to the best of his recollection he received concurrent sentences in each of those three groups of two convictions. In addition, the theft and the vehicle prowler were the result of the same conduct. Thus, Rudner's offender score should have been 1.5 points (rounded up to 2) lower.

Because no contested hearing took place at sentencing, the remedy is to remand for resentencing.

D. CONCLUSION AND PRAYER FOR RELIEF

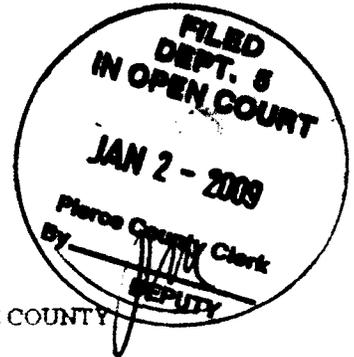
Based on the above, this Court should reverse and remand this case for either (1) a new trial; (2) an evidentiary hearing; or (3) a new sentencing hearing.

DATED this 4th day of January, 2010.

Respectfully Submitted:

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APPENDIX A



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 04-1-03874-1

JAN 02 2009

vs.

ROBERT RICHARD RUDNER, JR

Defendant.

JUDGMENT AND SENTENCE (FJS)

- Prison [] RCW 9.94A.712 Prison Confinement
- [] Jail One Year or Less
- [] First-Time Offender
- [] Special Sexual Offender Sentencing Alternative
- [] Special Drug Offender Sentencing Alternative
- [] Breaking The Cycle (BTC)
- [] Clerk's Action Required, para 4.5 (SDOSA), 4.7 and 4.8 (SSOSA) 4.15.2, 5.3, 5.6 and 5.8

SID: WA16146653
DOB: 05/10/77

I. HEARING

1.1 A sentencing 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 by [] plea jury-verdict [] bench trial of:

2/22/06

COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO.
I	ASSAULT IN THE FIRST DEGREE (E23)	9A.36.011(1)(a) 9.94A.310/9.94A.510 9.94A.370/9.94A.530 9.94.010	FASE	08/06/04	04-219-0171
II	ASSAULT IN THE SECOND DEGREE (E28)	9A.36.021(1)(c) 9.94A.310/9.94A.510 9.94A.370/9.94A.530	FASE	08/06/04	04-219-0171
III	BURGLARY IN THE FIRST DEGREE (G1)	9A.52.020(1)(a) 9.41.010 9.94A.310/9.94A.510 9.94A.370/9.94A.530	FASE	08/06/04	04-219-0171

06-9-06503-5

COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO.
IV	ROBBERY IN THE FIRST DEGREE (AAA1)	9A.56.200(1)(a)(i) 9.94A.310/9.94A.510 9.94A.370/9.94A.530 9.41.010	FASE	08/06/04	04-219-0171
V	UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE (GGG66)	9.41.040(1)(e)	NONE	08/06/04	04-219-0171
VI	POSSESSION OF A STOLEN FIREARM (BBB12)	9A.56.140(1) 9A.56.310(1)	NONE	08/06/04	04-219-0171
IX	RESIDENTIAL BURGLARY (B12)	9A.52.025	NONE	08/01/04	04-219-0171
X	UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE (J73M); Methamphetamine, Schedule II	69.50.4013	NONE	08/01/04	04-219-0171

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Horn, See RCW 46.61.520, (JP) Juvenile present, (SM) Sexual Motivation, (SCF) Sexual Conduct with a Child for a Fee. See RCW 9.94A.533(8). (If the crime is a drug offense, include the type of drug in the second column.)

as charged in the JURY VERDICT Information

- Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J ADULT JUV	TYPE OF CRIME
1	TMVWOP	10/23/91	VENTURA, CA		JUV	NV
2	BURG 2	12/16/92	CLALLAM CO, WA	09/07/92	JUV	NV
3	TMVWOP	12/16/92	CLALLAM CO, WA	11/01/92	JUV	NV
4	THEFT 2	03/02/94	CLALLAM CO, WA	07/30/93	JUV	NV
5	VEH FROWL 1	03/02/94	CLALLAM CO, WA	07/30/93	JUV	NV
6	UPOF	01/11/95	CLALLAM CO, WA	12/19/94	JUV	NV
7	THEFT OF FA	01/11/95	CLALLAM CO, WA	12/29/94	JUV	NV
8	UPOF	06/25/96	CLALLAM CO, WA	02/29/96	ADULT	NV
9	ESCAPE 1	11/22/96	CLALLAM CO, WA	09/13/96	ADULT	NV
10	ATT ELUDE	04/19/99	KITSAP CO, WA	01/28/98	ADULT	NV
11	FORGERY	05/25/00	CLALLAM CO, WA	01/14/00	ADULT	NV
12	MAL MISCH 2	02/29/02	CLALLAM CO, WA	12/28/01	ADULT	NV
13	ATT ELUDE	CURRENT	PIERCE CO, WA	01/17/04	ADULT	NV
14	UIPOF 2	CURRENT	PIERCE CO, WA	01/17/04	ADULT	NV

[] The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancement)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancement)	MAXIMUM TERM
I	9+	XII	240-318 MOS	60 MOS - FASE	300-378 MOS	LIFE
II	9+	IV	63-84 MOS	36 MOS - FASE	99-120 MOS	10 YRS \$20,000
III	9+	VII	87-116 MOS	60 MOS - FASE	147-176 MOS	LIFE
IV	9+	IX	129-171 MOS	60 MOS - FASE	189-231 MOS	LIFE
V	9+	VII	87-116 MOS	NONE	87-116 MOS	10 YRS \$20,000
VI	9+	V	72-96 MOS	NONE	72-96 MOS	10 YRS \$20,000
IX	9+	IV	63-84 MOS	NONE	63-84 MOS	10 YRS \$20,000
X	9+	I	12+ - 24 MOS	NONE	12+ - 24 MOS	5 YRS \$10,000

2.4 [] EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence:

[] within [] below the standard range for Count(s) _____

[] above the standard range for Count(s) _____

[] The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

[] Aggravating factors were [] stipulated by the defendant, [] found by the court after the defendant waived jury trial, [] found by jury by special interrogatory.

Findings of fact and conclusions of law are attached in Appendix 2.4. [] Jury's special interrogatory is attached. 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 defend'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.753.

[] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

[] The following extraordinary circumstances exist that make payment of nonmandatory legal financial obligations inappropriate:

04-1-03874-1

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.

3.2 [] The court DISMISSES Counts _____ [] The defendant is found NOT GUILTY of Counts _____

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court: (Pierce County Clerk, 930 Tacoma Ave #110, Tacoma WA 98402)

JASS CODE

RTN/RJN

\$ SEE COMPARTS ORDER

Restitution to: _____

\$

Restitution to: _____

(Name and Address--address may be withheld and provided confidentially to Clerk's Office).

PCV

\$ 500.00 Crime Victim assessment

DNA

\$ 100.00 DNA Database Fee

PUB

\$ 1500 Court-Appointed Attorney Fees and Defense Costs

FRC

\$ 110,200.00 Criminal Filing Fee

FCM

\$ _____ Fine

OTHER LEGAL FINANCIAL OBLIGATIONS (specify below)

\$

Other Costs for: _____

\$

Other Costs for: _____

\$ 2210 TOTAL (excluding restitution) *AP*

[] The above total does not include all restitution which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing.

[] shall be set by the prosecutor.

[] is scheduled for _____

X RESTITUTION. Order Attached *previously entered*

[] The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

[X] All payments shall be made in accordance with the policies of the clerk, commencing immediately, unless the court specifically sets forth the rate herein: Not less than \$ _____ per month commencing _____ RCW 9.94.760. If the court does not set the rate herein, the defendant shall report to the clerk's office within 24 hours of the entry of the judgment and sentence to set up a payment plan.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b)

[] COSTS OF INCARCERATION. In addition to other costs imposed herein, the court finds that the defendant has or is likely to have the means to pay the costs of incarceration, and the defendant is ordered to pay such costs at the statutory rate. RCW 10.01.160.

COLLECTION COSTS The defendant shall pay the costs of services to collect unpaid legal financial obligations per contract or statute. RCW 36.18.190, 9.94A.780 and 19.16.500.

INTEREST 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

COSTS ON APPEAL An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW. 10.73.160.

4.1b ELECTRONIC MONITORING REIMBURSEMENT. The defendant is ordered to reimburse _____ (name of electronic monitoring agency) at _____ for the cost of pretrial electronic monitoring in the amount of \$ _____.

4.2 [X] DNA TESTING. The defendant shall have a blood/biological sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

[] 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.

4.3 NO CONTACT
The defendant shall not have contact with B. FRANCO (1/27/74) (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for LIFE years (not to exceed the maximum statutory sentence). *JDA. OWEN, G. GAFFIN (1/28/09)*

[] Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed with this Judgment and Sentence.

4.4 OTHER:

4.4a BOND IS HEREBY EXONERATED

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

(a) CONFINEMENT. RCW 9.94A 589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

<u>240</u> months on Count	<u>I</u>	<u>116</u> months on Count	<u>V</u>
<u>84</u> months on Count	<u>II</u>	<u>96</u> months on Count	<u>VI</u>
<u>116</u> months on Count	<u>III</u>	<u>84</u> months on Count	<u>IX</u>
<u>171</u> months on Count	<u>IV</u>	<u>24</u> months on Count	<u>X</u>

A special finding/verdict having been entered as indicated in Section 2.1, the defendant is sentenced to the following additional term of total confinement in the custody of the Department of Corrections:

<u>60</u> months on Count No	<u>I</u>	<u>60</u> months on Count No	<u>IV</u>
<u>36</u> months on Count No	<u>II</u>	_____ months on Count No	_____
<u>60</u> months on Count No	<u>III</u>	_____ months on Count No	_____

Sentence enhancements in Counts I, II, III, IV shall run
 concurrent consecutive to each other.
 Sentence enhancements in Counts _____ shall be served
 flat time subject to earned good time credit

Actual number of months of total confinement ordered is: 240 mos + 216 mos enhanced = 456 mos

(Add mandatory firearm, deadly weapons, and sexual motivation enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

The confinement time on Count(s) _____ contain(s) a mandatory minimum term of _____

CONSECUTIVE/CONCURRENT SENTENCES. RCW 9.94A 589. All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm, other deadly weapon, sexual motivation, VUCSA in a protected zone, or manufacture of methamphetamine with juvenile present 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 to all felony sentences in other cause numbers imposed prior to the commission of the crime(s) being sentenced. The sentence herein shall run concurrently with felony sentences in other cause numbers imposed after the commission of the crime(s) being sentenced except for the following cause numbers: RCW 9.94A 589: _____

Confinement shall commence immediately unless otherwise set forth here: _____

(c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. 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.

1,642 days
APR 27 2009
JAIL

4.6 [] COMMUNITY PLACEMENT (pre 7/1/00 offenses) is ordered as follows:

Count I for 18 months,

Count II for _____ months,

Count III for _____ months,

Count IV for _____ months,

Count V for _____ months,

Count VI for _____ months,

Count IX for _____ months,

Count X for _____ months

COMMUNITY CUSTODY is ordered as follows:

Count I for a range from: 24 to 48 Months,

Count II for a range from: 18 to 36 Months,

Count III for a range from: 18 to 36 Months,

Count IV for a range from: 18 to 36 Months,

Count V for a range from: Ø to _____ Months,

Count VI for a range from: Ø to _____ Months,

Count IX for a range from: Ø to _____ Months,

Count X for a range from: 12 to 24 Months,

or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A.700 and .705 for community placement offenses which include serious violent offenses, second degree assault, any crime against a person with a deadly weapon finding and chapter 69.50 or 69.52 RCW offense not sentenced under RCW 9.94A.660 committed before July 1, 2000. See RCW 9.94A.715 for community custody range offenses, which include sex offenses not sentenced under RCW 9.94A.712 and violent offenses committed on or after July 1, 2000. Community custody follows a term for a sex offense -- RCW 9.94A. Use paragraph 4.7 to impose community custody following work ethic camp.]

On or after July 1, 2003, DOC shall supervise the defendant if DOC classifies the defendant in the A or B risk categories, or, DOC classifies the defendant in the C or D risk categories and at least one of the following apply:

a) the defendant committed a current or prior:		
i) Sex offense	ii) Violent offense	iii) Crime against a person (RCW 9.94A.411)
iv) Domestic violence offense (RCW 10.99.020)		v) Residential burglary offense
vi) Offense for manufacture, delivery or possession with intent to deliver methamphetamine including its salts, isomers, and salts of isomers,		
vii) Offense for delivery of a controlled substance to a minor, or attempt, solicitation or conspiracy (vi, vii)		
b) the conditions of community placement or community custody include chemical dependency treatment.		
c) the defendant is subject to supervision under the interstate compact agreement, RCW 9.94A.745.		

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 DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while in community custody; (6) pay supervision fees as determined by DOC; (7) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC, and (8) for sex offenses, submit to electronic monitoring if imposed by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders not sentenced under RCW 9.94A.712 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: BRIAN FARAWAY, K. RUBY, J. ADAMS, G. GRIFFIN

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

Defendant shall not reside in a community protection zone (within 880 feet of the facilities or grounds of a public or private school). (RCW 9.94A.030(8))

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

The defendant shall undergo an evaluation for treatment for domestic violence substance abuse mental health anger management and fully comply with all recommended treatment.

The defendant shall comply with the following crime-related prohibitions: _____

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

For sentences imposed under RCW 9.94A.712, other conditions, including electronic monitoring, may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than seven working days.

PROVIDED: That under no circumstances shall the total term of confinement plus the term of community custody actually served exceed the statutory maximum for each offense.

4.7 WORK ETHIC CAMP. RCW 9.94A.690, RCW 72.09.410. The court finds that the 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: _____

V. NOTICES AND SIGNATURES

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. For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505. The clerk of the court is authorized to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

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 or the clerk of the court 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.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 RESTITUTION HEARING.
[] Defendant waives any right to be present at any restitution hearing (sign initials): _____

5.5 CRIMINAL ENFORCEMENT AND CIVIL COLLECTION. Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. Per section 2.5 of this document, legal financial obligations are collectible by civil means. RCW 9.94A.634.

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.

57 SEX AND KIDNAPPING OFFENDER REGISTRATION. RCW 9A.44.130, 10.01.200.

N/A

58 [] The court finds that Count _____ is a felony in the commission of which a motor vehicle was used. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke the defendant's driver's license. RCW 46.20.285.

59 If the defendant is or becomes subject to court-ordered mental health or chemical dependency treatment, the defendant must notify DOC and the defendant's treatment information must be shared with DOC for the duration of the defendant's incarceration and supervision. RCW 9.94A.562.

5.10 OTHER: _____

DONE in Open Court and in the presence of the defendant this date: 1/2/09

JUDGE

Print name

Vicki L Hogan
VICKI L. HOGAN

[Signature]

Deputy Prosecuting Attorney

Print name:

WSB #

[Signature]
16708

Attorney for Defendant

Print name:

WSB #

[Signature]
5726

[Signature]

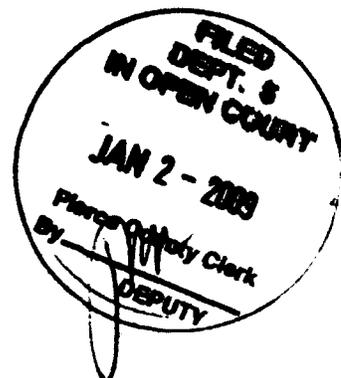
Defendant

Print name:

Robert Rudman

VOTING RIGHTS STATEMENT: RCW 10.64.140. I acknowledge that my right to vote has been lost due to felony convictions. If I am registered to vote, my voter registration will be cancelled. My right to vote may be restored by: a) A certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) A court order issued by the sentencing court restoring the right, RCW 9.92.066; c) A final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) A certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 92A.84.660.

Defendant's signature: Robert Rudman



APPENDIX B

Not Reported in P.3d, 143 Wash.App. 1026, 2008 WL 570439 (Wash.App. Div. 2)
 (Cite as: 2008 WL 570439 (Wash.App. Div. 2))

NOTE: UNPUBLISHED OPINION, SEE RCWA
 2.06.040

Court of Appeals of Washington,
 Division 2.
 STATE of Washington, Respondent,
 v.
 Robert Richard RUDNER Jr., Appellant.
 No. 34958-2-II.

March 4, 2008.

UNPUBLISHED OPINION

BRIDGEWATER, P.J.

*1 Robert Richard Rudner Jr. appeals his convictions for two counts of first degree assault. We hold that there was sufficient evidence to prove he intended to inflict great bodily harm against Brian Faranda by placing him in an execution kneeling position, pointing a gun at his head, and pulling the trigger. But the evidence is insufficient to prove that he had the intent to inflict great bodily harm against Kimberly Riley merely by pointing the gun at her without threats of death, firing the gun, or placing her in an execution kneeling position. We hold also that there was no need for a unanimity instruction. Thus, we affirm the conviction for first degree assault involving Faranda (count I). We vacate the conviction for first degree assault against Riley (count II), but direct the entry of a judgment of guilt for second degree assault against Riley. We remand for resentencing.

I. Facts ^{FN1}

^{FN1} In addition to the incident described herein, the State presented evidence at trial that Rudner committed three other burglaries, including a theft where he left behind a backpack containing marijuana, methamphetamine, ammunition and a cell phone bill in his name. Rudner does not challenge this evidence.

On August 6, 2004, Desmond Berry ^{FN2} asked Autumn Arnestad to help him rob his acquaintance,

Brian Faranda, by taking the keys to Faranda's Ford Mustang.^{FN3} That night, Arnestad entered Faranda's home through the sliding glass door on the second floor balcony. Arnestad then let Berry and Rudner in through the front door. Faranda and his girlfriend, Kimberly Riley, were sleeping on the couch. Arnestad had in her possession a .9 millimeter Beretta that she stole earlier that day, which she gave to Rudner along with clips loaded with ammunition. Rudner pointed the gun at Riley and asked for the keys to Faranda's Mustang. Meanwhile, Arnestad ordered Faranda to get on his knees, putting his hands behind his head as she went through his pockets. Rudner turned the gun to Faranda's head and aggressively repeated his demand for the keys to the Mustang.

^{FN2} Though it appears that Desmond Berry's involvement is undisputed, Berry was not charged with this crime, nor did he appear as a witness at Rudner's trial.

^{FN3} Faranda did not actually own a Ford Mustang. Berry mistook Faranda's Thunderbird for a Mustang.

Riley saw Rudner pull the trigger on the gun while aiming it at Faranda's head. Faranda, who is familiar with guns, heard a "click" that sounded like either an "accidental trigger pull or a de-cock mechanism." 6 RP at 597. Riley screamed that she and Faranda would not get killed without a fight, and jumped on Arnestad. Faranda tried to get the gun away from Rudner, but Rudner hit him in the face with it, and "kept swinging, swinging away with the pistol." 6 RP at 603. Arnestad stole Riley's purse and fled, while Faranda was able to subdue Rudner. As a result of the altercations, Riley sustained a gash on her eye while Faranda suffered a broken nose and received two stitches in his eye and six on his forehead.

At trial, the court instructed the jury that it could find **Rudner** guilty of first degree assault if it determined that he intended to inflict great bodily harm upon both Faranda and Riley beyond a reasonable doubt.^{FN4} **Rudner** did not object to the instruction. The jury found **Rudner** guilty on all charges, and concluded he was armed with a firearm during the commission of the two counts of first degree assault.

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(Cite as: 2008 WL 570439 (Wash.App. Div. 2))

The court sentenced **Rudner** to 573 months.

review denied, 114 Wn.2d 1002 (1990).

FN4. **Rudner** does not dispute any other jury instructions on appeal.

FN5. RCW 9A.36.011 provides: “(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm: (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death.” RCW 9A.04.110(4)(c) defines “[g]reat bodily harm” as “bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ.”

Analysis

I. Sufficiency of Evidence

*2 **Rudner** argues that there was insufficient evidence at trial to convict him of first degree assault of either Faranda or Riley. The State maintains that the prosecution presented sufficient evidence of all elements of both first degree assaults to the jury, including intent to inflict great bodily harm.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Salinas, 119 Wn.2d at 201. Circumstantial and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn.App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

The prosecution must prove intent to inflict great bodily harm in order to establish first degree assault. RCW 9A.36.011.^{FN5} The trier of fact ascertains “intent” by determining whether a person acts with the “objective or purpose to accomplish a result which constitutes a crime.” RCW 9A.08.010(1)(a). The trier of fact should also look to “all the circumstances of the case, including not only the manner and act of inflicting the wound, but also the nature of the prior relationship and any previous threats” to determine intent. State v. Ferreira, 69 Wn.App. 465, 468-69, 850 P.2d 541 (1993) (quoting State v. Woo Won Choi, 55 Wn.App. 895, 906, 781 P.2d 505 (1989),

Here, if we construe all evidence presented at trial in favor of the State, the evidence was sufficient for the jury to find that **Rudner** intended to inflict great bodily harm upon Faranda. The jury heard undisputed testimony that **Rudner** entered Faranda’s home uninvited, in order to steal the keys to Faranda’s car. **Rudner** pointed the gun at Riley and demanded the keys to Faranda’s Mustang. Arnestad admitted on the stand that when Faranda refused to comply with the same demand, she and **Rudner** forced Faranda to his knees, and held a gun to his head.^{FN6} Riley saw **Rudner** pull the trigger while aiming the gun at Faranda’s head.

FN6. The jury also found **Rudner** liable for Arnestad’s actions against Faranda and Riley as an accomplice. **Rudner** does not challenge this finding or the jury instruction on accomplice liability.

Because credibility issues are left to the trier of fact and are not subject to review, contradictory evidence is of no moment if there is sufficient evidence supporting the jury’s verdict. Considering all the circumstances of the case, the trier of fact had sufficient evidence to find Rudner intended to inflict serious bodily harm on Faranda, either on his own or as an accomplice to Arnestad.

*3 But there is no evidence that Rudner intended to inflict great bodily harm upon Riley. Although the pistol was pointed at her, Rudner voiced no threats of death or great bodily harm, did not pull the trigger

Not Reported in P.3d, 143 Wash.App. 1026, 2008 WL 570439 (Wash.App. Div. 2)
(Cite as: 2008 WL 570439 (Wash.App. Div. 2))

while pointing the gun at her, and did not place her in an execution kneeling position like Faranda. And though Arnestad assaulted Riley with her hands while wearing rings, this alone does not evidence an intent to inflict great bodily harm. Thus, there was insufficient evidence to convict Rudner of first degree assault against Riley. But, there was sufficient evidence to convict him of second degree assault under RCW 9A.36.021(1)(c) because he assaulted Riley with a deadly weapon.^{FN7} The court instructed the jury as to second degree assault as a lesser included offense. We can direct the entry of a verdict if there is sufficient evidence of a lesser included or inferior degree crime. See *State v. Gamble*, 118 Wn.App. 332, 336 n. 4, 72 P.3d 1139 (2003, *aff'd in part, rev'd in part*, 154 Wn.2d 457, 114 P.3d 646 (2005)).

^{FN7}. RCW 9A.36.021(1) 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 ... (c) Assaults another with a deadly weapon.”

II. Unanimity Instruction

Rudner argues the trial court deprived him of his right to a unanimous jury verdict on his first degree assault charges by presenting evidence of five potential assaults,^{FN8} where a reasonable juror could have doubts about at least one assault rising to the level of first degree. The State contends that a unanimity instruction was unnecessary because the multiple criminal acts presented at trial were part of a continuing course of conduct. The State is correct.

^{FN8}. Rudner maintains the five separate alleged assaults are: (1) Rudner pulling the trigger on the gun while pointed at Faranda; (2) Rudner hitting Faranda in the face with the gun; (3) Rudner pointing the gun at Riley; (4) Rudner's accomplice liability for Arnestad hitting Riley; and (5) Rudner vicariously assaulting Riley by pointing the gun at Faranda. See *State v. Wilson*, 125 Wn.2d 212, 218-19, 883 P.2d 320 (1994).

The right to a unanimous verdict is a fundamental right derived from the constitutional right to a jury trial.^{FN9} *State v. Gooden*, 51 Wn.App. 615, 617, 754 P.2d 1000 (1988) (citing *State v. Handyside*, 42 Wn.App. 412, 415, 711 P.2d 379 (1985)), *review*

denied, 111 Wn.2d 1012 (1988). An appellate court reviews alleged errors in jury instructions de novo, in the context of the instructions as a whole. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007) (citing *State v. Brett*, 126 Wn.2d 136, 171, 892 P.2d 29 (1995), 516 U.S. 1121 (1996), *cert. denied*, 516 U.S. 1121 (1996)).

^{FN9}. Rudner did not propose a unanimity instruction at trial, but we may consider this argument for the first time on appeal because it is of constitutional magnitude. *State v. Russell*, 101 Wn.2d 349, 354, 678 P.2d 332 (1984); *Camarillo*, 115 Wn.2d at 63.

A jury may convict a defendant only if it unanimously finds he committed the criminal act with which he is charged. *State v. Love*, 80 Wn.App. 357, 360, 908 P.2d 395 (citing *State v. King*, 75 Wn.App. 899, 902, 878 P.2d 466 (1994), *review denied*, 125 Wn.2d 1021 (1995)), *review denied*, 129 Wn.2d 1016 (1996). Where the State charges only one criminal act but presents evidence of many potentially criminal events, a unanimity instruction is required because “there is a danger that a conviction may not be based on a unanimous jury finding that the defendant committed any given single criminal act.” *Love*, 80 Wn.App. at 360-61 (citing *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988)).

If the multiple criminal acts presented constitute one continuing course of conduct, neither an election nor unanimity instruction is required. *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). To determine whether multiple criminal acts amount to a continuing course of conduct, courts look to whether the acts were committed as part of an ongoing “enterprise with a single objective.” *Gooden*, 51 Wn.App. at 619-20. The determination must be “evaluated in a commonsense manner.” *Handran*, 113 Wn.2d at 17 (citing *State v. Petrich*, 101 Wn.2d 566, 571, 683 P.2d 173 (1984)).

*4 In *Handran*, 113 Wn.2d 11, the defendant asserted he was deprived of a unanimous jury verdict because there was no specific unanimity instruction where the State presented evidence of many crimes, but charged him with only one count of first degree burglary. *Handran*, 113 Wn.2d at 12. Our Supreme Court affirmed the conviction, holding that because the events occurred “in one place during a short period of

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time between the same aggressor and victim ... a commonsense evaluation of these facts ... [reveals] a continuing course of conduct to secure sexual relations with his ex-wife." Handran, 113 Wn.2d at 17. Washington courts have also held that multiple acts comprised a continuing course of conduct where several assaults over a two-hour period led to a fatal injury, as well as where several criminal acts over one-and-a-half weeks were committed for the common objective of promoting prostitution. State v. Crane, 116 Wn.2d 315, 330, 804 P.2d 10, cert. denied, 501 U.S. 1237 (1991); Gooden, 51 Wn.App. at 620.

Rudner's argument fails because under a commonsense evaluation of the facts, the multiple assaults presented at trial constituted a continuing course of conduct. Though the State presented evidence of five potential assaults at trial, the multiple assaults were committed in one room within a span of about 30 minutes, by the same aggressors toward the same victims. Rudner committed the assaults within a short time period in order to further one objective, to deprive Faranda of his keys and property. Furthermore, under these circumstances it would seem irrational to conclude that each of the five assaults within a 30-minute period was an independent crime, with its own intent and purpose. Because **Rudner's** multiple assaults were part of a continuous course of conduct, a unanimity instruction was not required and the court did not violate **Rudner's** right to a unanimous jury verdict.

We affirm the conviction of first degree assault involving Faranda (count I); we vacate the conviction for first degree assault involving Riley (count II), but we direct the court to enter a guilty verdict for second degree assault involving Riley (count II) and we remand for resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

I concur: PENOYAR, J.
HUNT, J. (dissenting).

I respectfully dissent from the majority's holding that the State did not present sufficient evidence to support Rudner's conviction for first degree assault. The jury heard evidence that Rudner (1) entered Faranda's home unlawfully, (2) pointed a gun at Riley while

demanding the keys to the car, and (3) pulled the trigger while holding the gun to Faranda's head. Riley testified that she attacked Arnestad in self-defense because she believed **Rudner** intended to kill both her (Riley) and Faranda. The absence of a verbal threat by **Rudner** directed specifically to Riley does not show that **Rudner** lacked the requisite intent to kill or to inflict great bodily harm on Riley. Nor does this lack of an express separate threat to Riley undercut the jury's believing Riley's testimony ^{FN10} that **Rudner** intended to kill her in addition to Faranda, whom **Rudner** threatened directly.

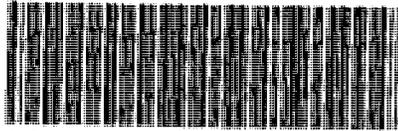
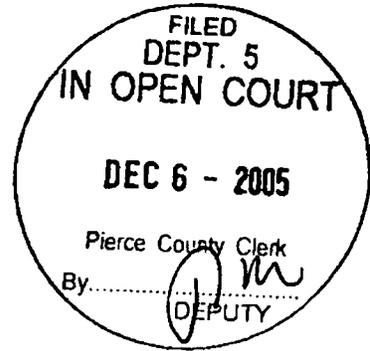
FN10. The jury's unanimous verdict finding **Rudner** guilty of first degree assault demonstrates that that it believed Riley's testimony.

*5 It is well settled that a fact-finder's determinations of witness credibility are not subject to our review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Because the evidence supports the jury's determination that Rudner intended to kill or to inflict great bodily harm on Riley, as well as Faranda, I would affirm Rudner's conviction for first degree assault of Riley.

Wash.App. Div. 2,2008.
State v. Rudner
Not Reported in P.3d, 143 Wash.App. 1026, 2008 WL 570439 (Wash.App. Div. 2)

END OF DOCUMENT

APPENDIX C



04-1-03874-1 24165249 AMINF2 12-07-05

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 04-1-03874-1

vs.

ROBERT RICHARD RUDNER, JR,

SECOND AMENDED INFORMATION

Defendant.

DOB: 5/10/1977
PCN#: 538187216

SEX : MALE
SID#: 16146653

RACE: BLACK
DOL#: WA RUDNERR230KS

COUNT I

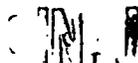
I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse ROBERT RICHARD RUDNER, JR of the crime of ASSAULT IN THE FIRST DEGREE, committed as follows:

That ROBERT RICHARD RUDNER, JR, in the State of Washington, on or about the 6th day of August, 2004, did unlawfully and feloniously, with intent to inflict great bodily harm, intentionally assault B. Faranda with a firearm or deadly weapon or by any force or means likely to produce great bodily harm or death, contrary to RCW 9A.36.011(1)(a), and in the commission thereof the defendant, or an accomplice, was armed with a firearm, to-wit: a handgun, that being a firearm as defined in RCW 9.41.010, and invoking the provisions of RCW 9.94A.310/9.94A.510, and adding additional time to the presumptive sentence as provided in RCW 9.94A.370/9.94A.530, and against the peace and dignity of the State of Washington.

COUNT II

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse ROBERT RICHARD RUDNER, JR of the crime of ASSAULT IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan,

SECOND AMENDED INFORMATION- 1



Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402-2171
Main Office (253) 798-7400

1 and/or so closely connected in respect to time, place and occasion that it would be difficult to separate
2 proof of one charge from proof of the others, committed as follows:

3 That ROBERT RICHARD RUDNER, JR, in the State of Washington, on or about the 6th day of
4 August, 2004, did unlawfully and feloniously, with intent to inflict great bodily harm, intentionally
5 assault K. Riley with a firearm or deadly weapon or by any force or means likely to produce great bodily
6 harm or death, contrary to RCW 9A.36.011(1)(a), and in the commission thereof the defendant, or an
7 accomplice, was armed with a firearm, to-wit: a handgun, that being a firearm as defined in RCW
8 9.41.010, and invoking the provisions of RCW 9.94A.310/9.94A.510, and adding additional time to the
9 presumptive sentence as provided in RCW 9.94A.370/9.94A.530, and against the peace and dignity of the
10 State of Washington.

11 COUNT III

12 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
13 authority of the State of Washington, do accuse ROBERT RICHARD RUDNER, JR of the crime of
14 BURGLARY IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based
15 on the same conduct or on a series of acts connected together or constituting parts of a single scheme or
16 plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to
17 separate proof of one charge from proof of the others, committed as follows:

18 That ROBERT RICHARD RUDNER, JR, in the State of Washington, on or about the 6th day of
19 August, 2004, did unlawfully and feloniously, with intent to commit a crime against a person or property
20 therein, enter or remain unlawfully in a building, located at 2313 S 96th St, and in entering or while in
21 such building or in immediate flight therefrom, the defendant or another participant in the crime was
22 armed with a handgun, a deadly weapon, contrary to RCW 9A.52.020(1)(a), and in the commission
23 thereof the defendant, or an accomplice, was armed with a firearm, to-wit: a handgun, that being a firearm
24 as defined in RCW 9.41.010, and invoking the provisions of RCW 9.94A.310/9.94A.510, and adding
additional time to the presumptive sentence as provided in RCW 9.94A.370/9.94A.530, and against the
peace and dignity of the State of Washington.

19 COUNT IV

20 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
21 authority of the State of Washington, do accuse ROBERT RICHARD RUDNER, JR of the crime of
22 ROBBERY IN THE FIRST DEGREE, a crime of the same or similar character, and/or a crime based on
23 the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan,
24 and/or so closely connected in respect to time, place and occasion that it would be difficult to separate
proof of one charge from proof of the others, committed as follows:

That ROBERT RICHARD RUDNER, JR, in the State of Washington, on or about the 6th day of
August, 2004, did unlawfully and feloniously take personal property belonging to another with intent to

SECOND AMENDED INFORMATION- 2

1 steal from the person or in the presence of B. Faranda and/or K. Riley, the owner thereof or a person
 2 having dominion and control over said property, against such person's will by use or threatened use of
 3 immediate force, violence, or fear of injury to B. Faranda and/or K. Riley, said force or fear being used to
 4 obtain or retain possession of the property or to prevent or overcome resistance to the taking, and in the
 5 commission thereof, or in immediate flight therefrom, the defendant was armed with a deadly weapon, to-
 6 wit: a handgun, contrary to RCW 9A.56.190 and 9A.56.200(1)(a)(i), and in the commission thereof the
 7 defendant, or an accomplice, was armed with a firearm, to-wit: a handgun, that being a firearm as defined
 8 in RCW 9.41.010, and invoking the provisions of RCW 9.94A.310/9.94A.510, and adding additional time
 9 to the presumptive sentence as provided in RCW 9.94A.370/9.94A.530, and against the peace and dignity
 10 of the State of Washington.

11 COUNT V

12 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
 13 authority of the State of Washington, do accuse ROBERT RICHARD RUDNER, JR of the crime of
 14 UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE, a crime of the same or similar
 15 character, and/or a crime based on the same conduct or on a series of acts connected together or
 16 constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and
 17 occasion that it would be difficult to separate proof of one charge from proof of the others, committed as
 18 follows:

19 That ROBERT RICHARD RUDNER, JR, in the State of Washington, on or about the 6th day of
 20 August, 2004, did unlawfully, feloniously, and knowingly own, have in his possession, or under his
 21 control a firearm, he having been previously convicted in the State of Washington or elsewhere of a
 22 serious offense, as defined in RCW 9.41.010(12), contrary to RCW 9.41.040(1)(a), and against the peace
 23 and dignity of the State of Washington.

24 COUNT VI

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
 authority of the State of Washington, do accuse ROBERT RICHARD RUDNER, JR of the crime of
 POSSESSION OF A STOLEN FIREARM, a crime of the same or similar character, and/or a crime based
 on the same conduct or on a series of acts connected together or constituting parts of a single scheme or
 plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to
 separate proof of one charge from proof of the others, committed as follows:

That ROBERT RICHARD RUDNER, JR, in the State of Washington, on or about the 6th day of
 August, 2004, did unlawfully, feloniously, and knowingly receive, retain, possess, conceal, or dispose of
 a stolen firearm, to-wit: a 9 mm handgun, belonging to Jefferson Oakes, knowing the same to be stolen,
 with intent to appropriate to the use of any person other than the true owner or person entitled thereto,

1 contrary to RCW 9A.56.140(1) and 9A.56.310(1), and against the peace and dignity of the State of
2 Washington.

COUNT VII

3 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
4 authority of the State of Washington, do accuse ROBERT RICHARD RUDNER, JR of the crime of
5 RESIDENTIAL BURGLARY, a crime of the same or similar character, and/or a crime based on the same
6 conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or
7 so closely connected in respect to time, place and occasion that it would be difficult to separate proof of
8 one charge from proof of the others, committed as follows:

9 That ROBERT RICHARD RUDNER, JR, in the State of Washington, on or about the 1st day of
10 August, 2004, did unlawfully and feloniously, with intent to commit a crime against a person or property
11 therein, enter or remain unlawfully in the dwelling of Jefferson and Angela Oakes, located at 13312 147th
12 St E., Puyallup, WA, contrary to RCW 9A.52.025, and against the peace and dignity of the State of
13 Washington.

COUNT VIII

14 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
15 authority of the State of Washington, do accuse ROBERT RICHARD RUDNER, JR of the crime of
16 THEFT OF A FIREARM, a crime of the same or similar character, and/or a crime based on the same
17 conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or
18 so closely connected in respect to time, place and occasion that it would be difficult to separate proof of
19 one charge from proof of the others, committed as follows:

20 That ROBERT RICHARD RUDNER, JR, in the State of Washington, on or about the 1st day of
21 August, 2004, did unlawfully, feloniously, and wrongfully obtain or exert unauthorized control over a
22 firearm, to-wit: a 9 mm handgun, belonging to Jefferson Oakes, with intent to deprive said owner of such
23 property, contrary to RCW 9A.56.020 and 9A.56.300(1)(a), and against the peace and dignity of the State
24 of Washington.

COUNT IX

And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
authority of the State of Washington, do accuse ROBERT RICHARD RUDNER, JR of the crime of
RESIDENTIAL BURGLARY, a crime of the same or similar character, and/or a crime based on the same
conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or
so closely connected in respect to time, place and occasion that it would be difficult to separate proof of
one charge from proof of the others, committed as follows:

That ROBERT RICHARD RUDNER, JR, in the State of Washington, on or about the 1st day of
August, 2004, did unlawfully and feloniously, with intent to commit a crime against a person or property

1 therein, enter or remain unlawfully in the dwelling of Gregory Griffin, contrary to RCW 9A.52.025, and
2 against the peace and dignity of the State of Washington.

COUNT X

3 And I, GERALD A. HORNE, Prosecuting Attorney for Pierce County, in the name and by the
4 authority of the State of Washington, do accuse ROBERT RICHARD RUDNER, JR of the crime of
5 UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE, a crime of the same or similar
6 character, and/or a crime based on the same conduct or on a series of acts connected together or
7 constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and
8 occasion that it would be difficult to separate proof of one charge from proof of the others, committed as
9 follows:

10 That ROBERT RICHARD RUDNER, JR, in the State of Washington, on or about the 1st day of
11 August, 2004, did unlawfully and feloniously, possess a controlled substance, to-wit: Methamphetamine,
12 classified under Schedule II of the Uniform Controlled Substances Act, contrary to RCW 69.50.4013, and
13 against the peace and dignity of the State of Washington.

14 DATED this 6th day of December, 2005.

15 TACOMA POLICE DEPARTMENT
16 WA02703

GERALD A. HORNE
Pierce County Prosecuting Attorney

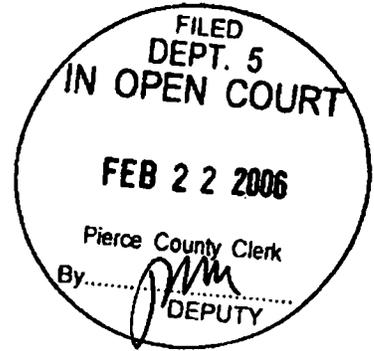
17 mms

18 By: 
19 GREGORY L GREER
20 Deputy Prosecuting Attorney
21 WSB#: 22936

APPENDIX D



04-1-03874-1 25005398 CTINJY 02-23-06



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 04-1-03874-1

vs.

ROBERT RICHARD RUDNER JR.,
Defendant.

COURT'S INSTRUCTIONS TO THE JURY

DATED this 21 day of February, 2006.

Vicki L Hogan
JUDGE

INSTRUCTION NO. 13

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

INSTRUCTION NO. 14

To convict the defendant of the crime of assault in the first degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about 6th day of August, 2004, the defendant or an accomplice assaulted Brian Faranda;

(2) That the assault was committed with a firearm or by a force or means likely to produce great bodily harm or death;

(3) That the defendant or an accomplice acted with intent to inflict great bodily harm; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 15

To convict the defendant of the crime of assault in the first degree as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about 6th day of August, 2004, the defendant or an accomplice assaulted

Kimberly Riley;

(2) That the assault was committed with a firearm or by a force or means likely to produce great bodily harm or death;

(3) That the defendant or an accomplice acted with intent to inflict great bodily harm; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 29

To convict the defendant of the crime of robbery in the first degree as charged in Count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 6th day of August, 2004 the defendant or an accomplice unlawfully took personal property, not belonging to the defendant, from the person or in the presence of another;
- (2) That the defendant or an accomplice intended to commit theft of the property;
- (3) That the taking was against the person's will by the defendant's or an accomplice's use or threatened use of immediate force, violence or fear of injury to that person or to the person or property of another;
- (4) That the force or fear was used by the defendant or an accomplice to obtain or retain possession of the property or to prevent or overcome resistance to the taking;
- (5) That in the commission of these acts or in immediate flight therefrom the defendant or an accomplice was armed with a deadly weapon or displayed what appeared to be a firearm or other deadly weapon or inflicted bodily injury; and
- (6) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

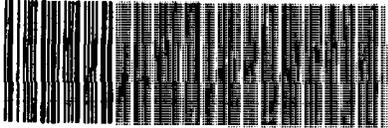
On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 45

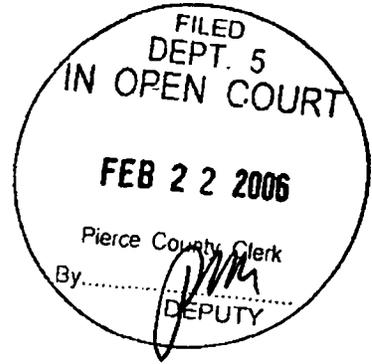
For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime in Counts I and/or II and/or III, and/or IV. The State must also prove beyond a reasonable doubt that there is a connection between the deadly weapon and the defendant or an accomplice, and between the deadly weapon and the crime.

A person is armed with a deadly weapon if, at the time of the commission of the crime, the deadly weapon is easily accessible for offensive or defensive purposes. If one participant in a crime is armed with a deadly weapon all accomplices are deemed to be so armed, even if only one deadly weapon is involved.

A firearm is a deadly weapon.



04-1-03874-1 25005583 SVRD 02-23-06



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs.
ROBERT RICHARD RUDNER JR.,
Defendant.

CAUSE NO. 04-1-03874-1
SPECIAL VERDICT FORM (Count I)

We, the jury, return a special verdict by answering as follows:

Was the defendant Robert Richard Rudner Jr. armed with a firearm at the time of the commission of the crime in Count I?

ANSWER: YES (Yes or No):

[Signature]
PRESIDING JUROR
MARK D. LEWIS



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs.
ROBERT RICHARD RUDNER JR.,
Defendant.

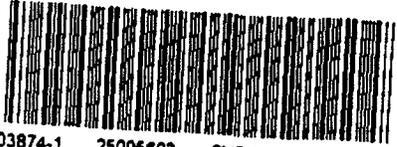
CAUSE NO. 04-1-03874-1
SPECIAL VERDICT FORM (Count II)

We, the jury, return a special verdict by answering as follows:

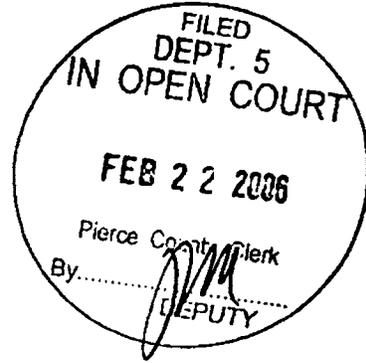
Was the defendant Robert Richard Rudner Jr. armed with a firearm at the time of the commission of the crime in Count II?

ANSWER: YES (Yes or No).

Mark D. Lewis
PRESIDING JUROR
Mark D. Lewis



04-1-03874-1 25005803 SVRD 02-23-08



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,
vs.
ROBERT RICHARD RUDNER JR.,
Defendant.

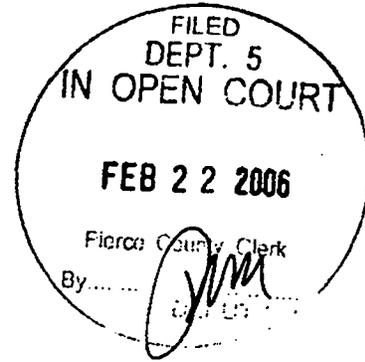
CAUSE NO. 04-1-03874-1
SPECIAL VERDICT FORM (Count III)

We, the jury, return a special verdict by answering as follows:

Was the defendant Robert Richard Rudner Jr. armed with a firearm at the time of the commission of the crime in Count III?

ANSWER: YES (Yes or No).

Mark D Lewis
PRESIDING JUROR
(MARK D) Lewis



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

ROBERT RICHARD RUDNER JR.,

Defendant.

CAUSE NO. 04-1-03874-1

SPECIAL VERDICT FORM (Count IV)

We, the jury, return a special verdict by answering as follows:

Was the defendant Robert Richard Rudner Jr. armed with a firearm at the time of the commission of the crime in Count IV?

ANSWER: YES (Yes or No).

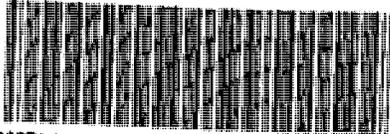
[Signature]
PRESIDING JUROR
MARK D LEWIS

APPENDIX E

FILED
IN COUNTY CLERK'S OFFICE

A.M. JUN 02 2006 P.M.

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY _____ DEPUTY



04-1-03874-1 25583389 STPPR 06-08-06

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 04-1-03874-1

vs.

ROBERT RICHARD RUDNER, JR,

Defendant.

STIPULATION ON PRIOR RECORD
AND OFFENDER SCORE
(Plea of Guilty)

JUN 02 2006

Upon the entry of a plea of guilty in the above cause number, charge ASSAULT IN THE FIRST DEGREE; ASSAULT IN THE FIRST DEGREE; BURGLARY IN THE FIRST DEGREE; ROBBERY IN THE FIRST DEGREE; UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE; POSSESSION OF A STOLEN FIREARM; RESIDENTIAL BURGLARY; UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE, the defendant ROBERT RICHARD RUDNER, JR, hereby stipulates that the following prior convictions are his complete criminal history, are correct and that he is the person named in the convictions:

WASHINGTON STATE CONVICTIONS

Crime	Date of Sentence	Jurisdiction	Date of Crime	Adult/ Juvenile	Crime Type	Class	Score	Felony or Misdemeanor
BURG 2	12/16/92	Clallam Co.	09/07/92	Juv	NV	C	.5	Felony
TMVWOP	12/16/92	Clallam Co.	11/01/92	Juv	NV	C	.5	Felony
THEFT 2	03/02/94	Clallam Co.	07/30/93	Juv	NV	C	.5	Felony
VEH PROWL 1	03/02/94	Clallam Co.	07/30/93	Juv	NV	C	.5	Felony
UPOF	01/11/95	Clallam Co.	12/19/94	Juv	NV	C	.5	Felony
THEFT OF F/A	01/11/95	Clallam Co.	12/19/94	Juv	NV	C	.5	Felony
UPOF	06/25/96	Clallam	02/29/96	A	NV	C	1	Felony

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946 County-City Building
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

04-1-03874-1

		Co.						
ESCAPE 1	11/22/96	Clallam Co.	09/13/96	A	NV	C	1	Felony
ATT ELUDE	04/19/99	Kitsap Co.	01/28/98	A	NV	C	1	Felony
FORGERY	05/25/00	Clallam Co.	01/14/00	A	NV	C	1	Felony
MAL MISCH 2	02/19/02	Clallam Co.	12/28/01	A	NV	C	1	Felony
ATT ELUDE	Current	Pierce Co.	01/17/04	A	NV	C	1	Felony
UPOF 2	Current	Pierce co.	01/17/04	A	NV	C	1	Felony

Concurrent conviction scoring: 10

CONVICTIONS FROM OTHER JURISDICTIONS

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)/9.94A.525 (Classifications of felony/misdemeanor, Class, and Type made under Washington Law):

Crime	Date of Sentence	Jurisdiction	Date of Crime	Adult/ Juvenile	Crime Type	Class	Score	Felony or Misdemeanor
TMVWOP	10/23/91	Ventura, CA		Juv	NV	C	.5	Felony

Concurrent conviction scoring: .5

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:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancement)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancement)	MAXIMUM TERM
I	9+	XII	240-318 MOS.	60 MOS.	300-378 MOS.	LIFE
II	9+	XII	93-123 MOS.	60 MOS.	153-183 MOS.	LIFE
III	9+	VII	87-116 MOS.	60 MOS.	147-176 MOS.	LIFE
IV	9+	IX	129-171 MOS.	60 MOS.	189-231 MOS.	LIFE
V	9+	VII	87-116 MOS.	NONE	87-116 MOS.	10 YRS.
VI	9+	V	72-96 MOS.	NONE	72-96 MOS.	10 YRS.
IX	9+	IV	63-84 MOS.	NONE	63-84 MOS/	10 YRS.
X	9+	I	12+-24 MOS.	NONE	12+-24 MOS.	5 YRS.

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

The defendant further stipulates:

- Pursuant to *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), defendant may have a right to have factors that affect the determination of criminal history and offender score be determined by a jury beyond a reasonable doubt. Defendant waives any such right to a jury determination of these factors and asks this court to sentence according to the stipulated offender score set forth above.

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Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

- 2) That if any additional criminal history is discovered, the State of Washington may resentence the defendant using the corrected offender score without affecting the validity of the plea of guilty,
- 3) That if the defendant pled guilty to an information which was amended as a result of plea negotiation, and if the plea of guilty is set aside due to the motion of the defendant, the State of Washington is permitted to refile and prosecute any charge(s) dismissed, reduced or withheld from filing by that negotiation, and speedy trial rules shall not be a bar to such later prosecution;
- 4) That none of the above criminal history convictions have "washed out" under RCW 9.94A.360(3)/9.94A.525 unless specifically so indicated.

If sentenced within the standard range, the defendant further waives any right to appeal or seek redress via any collateral attack based upon the above stated criminal history and/or offender score calculation.

Stipulated to this on the 2nd day of June, 2006.



 GREGORY L GREER
 Deputy Prosecuting Attorney
 WSB # 22936



 ROBERT RICHARD RUDNER, JR



 EPHRAIM W BENJAMIN
 WSB # 23616

kls

APPENDIX F

DECLARATION OF ROBERT RUDNER

I, Robert Rudner declare:

1. I am the Petitioner in this PRP. I am making this declaration to the best of my ability and memory.
2. During the course of my case, I was represented by three attorneys—all three appointed.
3. I don't recall the name of the first attorney. He had an office in Seattle. During the short time he represented me, he came to see me two or three times. We did not discuss much. He told me what I was charged with. We discussed my prior record. That was about it. I am not quite sure why he dropped off my case. Maybe he did not like driving from Seattle.
4. Next, Jay Berneberg was appointed to represent me. Although Mr. Berneberg represented me for probably over a year, he only saw me around three times. These meetings were usually short.
5. Although I gave him a list of potential witnesses, I don't know if he ever contacted any of those people. He certainly never told me about any investigation that he was conducting. No private investigator ever came to see me. Mostly, he simply told me what the State's witnesses had said.
6. At no point, did Mr. Berneberg ever tell me about any plea offer made by the State. He did not explain how much time I was facing. He did not explain how the multiple firearm enhancements are calculated under the SRA. Likewise, we never discussed making any plea offers to the State.
7. About two weeks prior to the time that my trial was scheduled to start, Mr. Berneberg had a heart attack.
8. I was willing to wait for Mr. Berneberg to recover, but instead was appointed a new attorney—Ephraim Benjamin. As a result, my trial date was pushed off for several months.
9. I do not recall Mr. Benjamin coming to see me in jail. As a result, we never discussed the facts of the case; the witnesses that I thought might help; what penalties I faced; what plea offer the State had made; or what plea

bargain I was willing to accept. Indeed, I had no idea what plea offers were reasonable—because I had no idea what I faced in terms of time.

10. I am sure that Mr. Benjamin knew I contested the claim that I pointed a gun and pulled the trigger.

11. When I arrived in court to start my trial—one of the first times that I saw my new attorney face to face—Mr. Benjamin asked me if I was willing to take 10 or 15 years. I did not know how to answer because I had no frame of reference. So, I told him that I was not guilty of pulling a trigger.

12. At no point during my case did any attorney tell me how much time I was facing, whether and what plea offers were made, and/or what plea offers I was willing to accept. If I had known how much time I was facing, I absolutely would have been willing to plea bargain.

13. I am guilty of most of what I was accused of doing and deserve punishment. I know how plea bargaining works. However, none of my three attorneys ever even began a conversation with me about settlement.

14. I did not testify at my trial.

15. I wanted to.

16. Prior to making that decision, my attorney had a short conversation with me about my testimony. He told me that if I testified the prosecutor would be permitted to ask and the jury would hear all about all of my prior crimes. He told me that this would do me much more harm than good.

17. As a result, I believed that the jury would be able to hear all of the facts of my prior crimes and that they could use this evidence to conclude that I committed the charged crimes because I was a criminal.

18. If I had known that there were limits on the State's ability to introduce evidence related to my prior crimes, I would have testified.

19. Frankly, if I had known how much time I was facing, especially on the two first-degree assault charges, I would have testified.

20. As I indicated earlier, I have always asserted that I did not pull the trigger.

21. If I testified, I would have told the jury that I committed a number of crimes that I was charged with, but that I did not ever intend to commit serious bodily harm or worse. I went to do a robbery. I was willing to use force and the threat of force to accomplish the robbery. However, I was not willing and did not hold a gun to anyone's head and pull the trigger. In fact, the gun did not even have a clip in it when I had it.

22. After I was convicted, my attorney told me to sign a stipulation to my criminal history if it was accurate. However, he never asked me if any of my juvenile convictions were served concurrently or whether they were the result of one of multiple crimes.

23. To the best of my memory, I was given concurrent sentences for the Burglary and TMVWOP convictions in Clallam County in 1992; when I was sentenced for Theft and Vehicle Prowl in 1994; and when I was sentenced for Unlawful Possession of a Firearm and Theft of a Firearm in 1995.

24. In fact, the latter two groups of convictions were the result of one crime.

25. I sincerely regret my actions and the harm that I caused. I know that I deserve to be in prison for what I have done. However, I feel like I went to trial without understanding the total amount of time I would receive if convicted; without being told if the State made a plea offer or what plea offer I was willing to accept—in short, without even beginning the plea bargaining process; and without any defense investigation or any meaningful discussion about whether I should testify. Instead, I was convinced not to testify based on what I know now was incorrect information about the State's ability to impeach with my prior convictions.

26. In short, if I had been given effective assistance of counsel I would have likely reached a plea bargain with the State. If not, I absolutely would have testified.

I, Robert Rudner, declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

12/28/2009
Date and Place

Robert Rudner
Robert Rudner

#7394341

Coyote Ridge Corrections
Center
PO Box 769
Connell WA 99326

VERIFICATION BY PETITIONER

I, Robert Rudner, verify under penalty of perjury that the attached PRP is true and correct and is filed on my behalf.

12/28/2009
Date and Place

Coyote Ridge Corrections
Center
PO Box 769
Connell WA 99326

Robert Rudner
Robert Rudner

739434