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STATE OF WASHINGTON

NO. 41505-4-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DANIEL RAYMOND LONGAN,

Appellant.

RESPONSE TO PERSONAL RESTRAINT PETITION

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I. ANSWER TO PETITION

The restraint of the petitioner Daniel Raymond Longan is lawful.

II. AUTHORITY FOR RESTRAINT OF PETITIONER

Longan is being restrained pursuant to the judgment and sentence entered on July 2, 2008, in Cowlitz County Superior Court cause #07-1-00431-6 (conformed copy included pursuant to RAP 16.9). CP 181. See also Appendix A.

III. RECORD OF OTHER PROCEEDINGS

Pursuant to RAP 9.8(c), the State filed a motion in this matter to transmit the verbatim reports of proceedings, clerks papers, and any exhibits from Longan's direct appeal to this court for consideration as needed in Longan's personal restraint petition (PRP) proceeding. Also, because the answer to Longan's allegations requires reference to records of other proceeding as well, certified copies of relevant parts of the record in those proceedings are attached as appendices pursuant to RAP 16.9. See Appendices F - G.

IV. MATERIAL FACTS

The State disputes the facts as described by Longan in his petition, opening brief and supplemental brief.

A. Procedural history

The State charged Longan with three counts of first-degree assault, one count of taking a motor vehicle without permission and one count of attempting to elude a pursuing police vehicle. CP 47-49. Each offense was alleged to have occurred while Longan or an accomplice was armed with a firearm. *Id.* The trial court denied a *Knapstad*¹ motion that argued the State could not make a prima facie case that Longan was guilty of the first-degree assaults through accomplice liability. CP 11-15; 2RP² 3-11.

At trial, the trial court denied Longan's motion for a judgment of

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¹ *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986) (court shall grant defendant's motion to dismiss if undisputed facts do not establish a prima facie case of guilt).

² "2RP" refers to the verbatim report of proceedings on December 11, 2007.

acquittal at the end of the State's case-in-chief. 4RP³ 70-84. The jury found Longan guilty as charged and also found that Longan or an accomplice was armed with a firearm at the time of each offense. CP 129-149. The trial court imposed standard range sentences plus the firearm enhancements for a total of 480 months in prison. CP 181.

Longan filed a timely notice of appeal. CP 191. The Court of Appeals affirmed the judgment and sentence. See Appendix B. Longan filed a motion to reconsider the Court of Appeals decision, which was denied. See Appendix C. Longan filed a petition for discretionary review by the Supreme Court, which was also denied. See Appendix D. The Court of issued a mandate on April 14, 2010. See Appendix E. The State files this response to Longan's personal restraint petition which was filed within the one year period generally allowed for collateral attacks under RCW 10.73.090.

B. EVIDENCE PRESENTED TO THE JURY

Longview Police Officer Michael Berndt was on routine patrol in his squad car at around 3:30 a.m. when he noticed a green Honda in a

³ "4RP" refers to the verbatim report of proceedings on June 24, 2008.

high-crime area that usually has little traffic at that time of night. 3RP⁴ 47-49, 94. As Officer Berndt approached the Honda from the oncoming direction, the Honda made a quick turn off the street into a narrow gravel alley, without signaling. 3RP 50-51. Officer Berndt turned into the alley, behind the Honda. 3RP 51. The Honda accelerated to approximately 50 miles per hour. *Id.* When the Honda approached the cross street, it did not signal or stop and turned onto the cross street. *Id.* Officer Berndt continued to follow the Honda and activated his overhead lights. 3RP 52. The Honda did not stop or slow down in reaction to the lights. 3RP 52-53.

The Honda then ran a red light and turned onto another street with Officer Berndt in pursuit. 3RP 53. The Honda's speed reached 60 miles per hour in a 30-mile-per-hour zone. 3RP 54. Officer Berndt activated his siren, to which the Honda showed no reaction. 3RP 54-55. The Honda then ran another red light. 3RP 54, 109.

Still at 60 miles per hour, the Honda then ran a third red light and turned onto another street into a densely populated residential area. 3RP

⁴ "3RP" refers to the verbatim report of proceedings on June 23, 2008 (other than jury selection).

55-56, 61-62. As they approached 23rd Avenue, Officer Berndt saw the Honda's passenger (later identified as Heather Van Hooser) extend her arm from the window. 3RP 56. Officer Berndt was following the Honda at a distance of about three to four car lengths. 3RP 57.

The Honda then turned right onto 21st Avenue. *Id.* As the Honda turned onto 21st Avenue, Van Hooser fired three gunshots at Officer Berndt. 3RP 57-60, 111. When the Honda made this right-hand turn, Van Hooser was "at a better angle" to Officer Berndt than during the previous portions of the pursuit. 3RP 59-60. As Van Hooser shot at Officer Berndt, the driver of the Honda (later identified as Longan) showed no hesitation in his driving. 3RP 60, 94, 113. Officer Berndt alerted dispatch that shots had been fired and continued to pursue the Honda. 3RP 60, 63.

The pursuit continued at high speeds through the streets of the neighborhood. 3RP 63. The Honda fishtailed while making some of the turns. 3RP 63-64, 113. The Honda turned hard from Cypress Street onto 20th Avenue, and at that time, Officer Berndt saw Van Hooser lean out of the passenger-side window far enough that he could see her shoulder area ("further than I think someone would feel comfortable going at that speed

hanging out the window”) and watched as Van Hooser fired two more shots at him and Longview Police Officer Kevin Sawyer, who had joined in the pursuit. 3RP 64-66, 114-15; 4RP 8. At this point, Officer Berndt’s patrol car and the Honda were again at an angle to each other but were now closer to each other than at the location of the prior shots. 3RP 66-67. Officer Sawyer described seeing Van Hooser “hanging out the passenger side window”. 2RP 115. Again, there was no hesitation shown by the Honda. 3RP 116.

The Honda continued down the street at approximately 60 miles per hour in a 30-mile-per-hour zone, running five stop signs. 3RP 67-68, 116. Officer Berndt and Sawyer followed, with Officer Sawyer now turning on his siren and overhead lights. 3RP 69, 116. Eventually, the pursuit continued over the Lewis and Clark Bridge into the State of Oregon. 3RP 70-71, 117; 4RP 34, 57. Longan drove over the bridge at 70 miles per hour, driving into the on-coming lane of traffic. 3RP 70-71, 118; 4RP 18. Once on the Oregon side of the river, the Honda turned to take the loop to Highway 30 and was again at a better angle toward Officer Berndt, and at the apex of the turn, Van Hooser fired another round at the pursuing officers. 3RP 71-73, 118-19; 4RP 19-20. From

Officer Sawyer's vantage point, he could see Van Hooser "hanging out the passenger-side window... way out the window." 3RP 118. Again, there was no hesitation shown by the Honda. 3RP 119.

The pursuit continued approximately 26 miles into Oregon and reached speeds of 90 miles per hour. 3RP 74, 76, 120; 4RP 21, 89. Longan weaved in and out of the on-coming lanes. 3RP 76. Eventually, the Honda drove over spike strips laid across the road by a St. Helens police officer. 3RP 78, 121; 4RP 35, 39-44, 48, 58. The Honda continued to elude the officers, driving at 60 miles per hour, throwing off sparks due to the shredded tire. *Id.* The Honda eventually caught fire and came to a stop after striking a curb while failing to negotiate a turn. 3RP 79, 122; 4RP 22, 35, 49, 58.

Longan got out of the Honda from the driver's seat and took off running. 3RP 81-82, 122-23, 4RP 36, 49, 59. Van Hooser got out on the passenger side and also ran. 3RP 81-82, 91, 122-23; 4RP 23, 36, 49, 59. The officers chased after Longan and eventually cornered him in a fenced-in area. 3RP 90-92, 124. Several times, Officer Sawyer ordered Longan to stop and show his hands. 3RP 124. Longan refused to do so. 3RP 124. Longan continued toward the fence and then turned back toward the

officers. *Id.* Officer Sawyer tased Longan who then yelled and fell into the fence. 3RP 92-93, 125. Longan refused to take his hands out of his pockets and continued to struggle with Officer Sawyer. 3RP 93, 126. Officer Sawyer tased Longan again. 3RP 93, 126.

When Longan was finally taken into custody, the officers discovered that he was wearing a bulletproof vest. 3RP 98; 4RP 6, 45, 50. Van Hooser was also captured by the officers. 3RP 96; 4RP 23-24, 37, 60. The officers found a bullet crease in the Honda's side panel. 3RP 94-96, 127, 4RP 50-51, 60-61. The officers also discovered that the Honda had been stolen that night from Argentino Cifuentes. 3RP 132-33; 4RP 5.

V. ARGUMENT

A petitioner may request relief through a PRP when he is under an unlawful restraint. RAP 16.4(a) - (c). Our Supreme Court has limited collateral relief available through a PRP “ ‘because it undermines the principles of finality of litigation, degrades the prominence of trial, and sometimes deprives society of the right to punish admitted offenders.’ ” *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 670, 101 P.3d 1 (2004)

(quoting *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 329, 823 P.2d 492 (1992)). A personal restraint petitioner must prove either (1) a constitutional error that results in actual and substantial prejudice or (2) a non-constitutional error that “constitutes a fundamental defect which inherently results in a complete miscarriage of justice.” *Davis*, 152 Wn.2d at 672, 101 P.3d 1 (quoting *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990)). The petitioner must prove any such error by a preponderance of the evidence. *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004).

A. OPEN COURTS ISSUE

Longan claims the court violated his right to a public trial by holding a discussion with a juror outside the open courtroom without first applying the five-part balancing test in *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

1. Longan previously raised this issue on direct review.

In PRPs, the appellate courts ordinarily will not review issues previously raised and resolved on direct review. In order to renew an

issue rejected on its merits on appeal, the petitioner must show the ends of justice would be served by reexamining the issue. *In re Personal Restraint Petition of Vandervlugt*, 120 Wn.2d 427, 432, 842 P.2d 950 (1992); *In re Personal Restraint Petition of Taylor*, 105 Wn.2d 683, 688, 717 P.2d 755 (1986). This burden can be met by showing an intervening change in the law “ ‘or some other justification for having failed to raise a crucial point or argument in the prior application.’ ” *Taylor*, 105 Wn.2d at 688, 717 P.2d 755 (quoting *Sanders v. United States*, 373 U.S. 1, 16, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963)); see *Vandervlugt*, 120 Wn.2d at 432, 842 P.2d 950. A collateral attack by PRP on a criminal conviction and sentence should not simply be a reiteration of issues finally resolved at trial and on direct review, but rather should raise new points of fact and law that were not or could not have been raised in the principal action, to the prejudice of the defendant. *In re Personal Restraint of Gentry*, 137 Wn.2d 378, 388-89, 972 P.2d 1250 (1999).

Longan raised the *Bone-Club* issue on direct appeal, and the Court of Appeals rejected his argument on the merits, finding that there was no courtroom closure. See Appendix B. However, Longan does not point to any intervening change in the law or any other justification for having

failed to raise a crucial point or argument in his direct appeal. Because he has not met his burden of showing that the ends of justice would be served by reexamining this issue, it should not be reviewed again as part of his PRP.

2. There was no courtroom closure.

Just after voir dire was completed and just before the attorneys made their peremptory challenges, the trial judge called the attorneys and one juror into the hallway. The two-minute hallway conference with the juror was held on the record and was as follows:

JUDGE: I was looking at that again, and I – I don't think this is a problem; all right? Hang on just a moment, until [defense counsel] comes out. Okay, I just wanted to ask you about the medical situation, preferably without a whole lot of people hearing.

JUROR: Yes, I appreciate that. It's kind of complicated. First, I have [inaudible] and I just – and that's a blood disease, by the way, okay? So – which causes me to have – to need phlebotomies, that type of things. But now I have a secondary condition, and for some reason, I'm having to go the bathroom. Like this morning, I thought I would be late because I was in the bathroom a lot. And, so, that's – that was my concern, that I wouldn't even be here on times [sic]. So, that – if I were on the [inaudible] the jury –

JUDGE: We take a break every hour and a half, or so, and if – I always tell the jury if anybody wants a break raise your hand and we'll take one, I'm not gonna ask you why.

JUROR: Oh.

JUDGE: Would that be sufficient for you, do you think?

JUROR: If I could do that – I can – that ad they have on tv for a while, that’s kind of me, you know, right now.

JUDGE: Yeah, so you think that’ll be sufficient for you?

JUROR: Yes, but then like – what happens if I’m late, like this morning? See, I just – I could’ve been late.

JUDGE: Yeah, okay.

JUROR: Now, I’m fine now, it just seems like I just have that – that one time in the morning, and, so that was – but I’m just fine to be [inaudible] here if you don’t want me having to do that.

JUDGE: Okay. All right. Thank you ma’am.

JUROR: Sure. Thank you.

7RP⁵ 107-110.

Judicial proceedings, including the jury selection process, are presumptively open to the public. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004). The defendant is guaranteed a right to a public trial by both article I, section 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution.

⁵ “7RP” refers to the verbatim report of proceedings on June 23, 2008 (jury selection).

State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

The court may close a portion of a trial, including jury selection, to the public if the court openly engages in the five-part balancing test stated in *Bone-Club*. The five factors are: (1) the proponent of closure must make a showing of compelling need, (2) any person present when the motion is made must be given an opportunity to object, (3) the means of curtailing open access must be the least restrictive means available for protecting the threatened interests, (4) the court must weigh the competing interests of the public and of the closure, and (5) the order must be no broader in application or duration than necessary. *Bone-Club*, 128 Wn.2d at 258–59, 906 P.2d 325. A court errs when it closes jury selection without first applying the *Bone-Club* test. *State v. Strobe*, 167 Wn.2d 222, 228, 217 P.3d 310 (2009) (quoting *Brightman*, 155 Wn.2d at 515-16, 122 P.3d 150).

On direct appeal, the reviewing court held that Longan’s open courts issue was meritless because there was no courtroom closure since the discussion with the juror occurred in a public hallway. See Appendix B. It is the State’s position that the discussion in the public hallway was also not a closure because of the subject matter of the discussion.

A defendant's constitutional right to a public trial applies to the evidentiary phases of the trial and to other “ ‘adversary proceedings.’ ” *State v. Sadler*, 147 Wn.App. 97, 114, 193 P.3d 1108 (2008) (quoting *State v. Rivera*, 108 Wn.2d 645, 652, 32 P.3d 292 (2001)). Because the right to a public trial is linked to the defendant's constitutional right to be present during all critical phases, the defendant has the right to an open court whenever evidence is taken and during suppression hearings, voir dire, and the jury selection process. *Rivera*, 108 Wn.App. at 653, 32 P.3d 292. However, “[a] defendant does not ... have a right to a public hearing on purely ministerial or legal issues that do not require the resolution of disputed facts.” *Sadler*, 147 Wn.App. at 114, 193 P.3d 1108; *see Rivera*, 108 Wn.App. at 653, 32 P.3d 292.

RCW 2.36.100(1) provides that the trial court may excuse jurors “upon a showing of undue hardship, extreme inconvenience, public necessity, or any reason deemed sufficient by the court for a period of time the court deems necessary.” See Appendix H. As applied to the venire selection process, this statute grants the trial court “broad discretion in excusing jurors.” *State v. Rice*, 120 Wn.2d 549, 562, 844 P.2d 416 (1993). If the selection process substantially complied with the jury

selection statutes, the defendant must show prejudice; if there is a material departure from the statutes, prejudice is presumed. *See State v. Tingdale*, 117 Wn.2d 595, 600–02, 817 P.2d 850 (1991).

Consistent with RCW 2.36.100, GR 28(b)(1) authorizes a judge to “delegate to court staff and county clerks their authority to disqualify, postpone, or excuse a potential juror from jury service.” See Appendix I. A judge “may not delegate decision-making authority over any grounds for peremptory challenges or challenges for cause.” GR 28(b)(3). However, GR 28(c)(1) provides that “[p]ostponement of service for personal or work-related inconvenience should be liberally granted when requested in a timely manner.”

Aside from the public trial claim, Longan does not argue that the trial court's selection process failed to comport with the jury selection statutes and court rule. Additionally, he cites no case from Washington or elsewhere that holds public trial rights are implicated when juror hardship discussions are held outside the open courtroom apart from individual juror voir dire which is focused on qualifications to serve as a fair and impartial juror.

In Longan's case, the proceedings each day including voir dire were in an open courtroom. The court's resolution of a hardship request outside the open courtroom in the public hallway was not an adversary proceeding and did not concern the juror's qualifications to serve impartially. The discussions pertained solely to a hardship matter governed by the court's discretion and did not involve resolution of disputed facts. The discussion was most akin to the court's discussion of legal matters in chambers or during a sidebar, the substance to which the defendant and members of the public have traditionally not been privy. *Cf. In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 483–84, 965 P.2d 593 (1998) (defendant's presence not required for in-chambers discussion of jury sequestration, wording of jury instructions, and ministerial matters); *Lord*, 123 Wn.2d at 306, 868 P.2d 835 (defendant's presence not required for in-chambers or bench conferences between court and counsel on legal matters); *State v. Sublett*, 156 Wn.App. 160, 181–82, 231 P.3d 231 (public trial right inapplicable to court's conference with counsel regarding jury's purely legal question submitted during deliberations), *review granted*, 170 Wn.2d 1016 (2010); *State v. Bremer*, 98 Wn.App. 832, 834–35, 991 P.2d

118 (2000) (defendant had no right to be present during in-chambers conference for legal inquiry about jury instruction).

There was no courtroom closure implicating Longan's public trial rights. The *Bone-Club* factors therefore do not apply. Therefore, Longan does not meet his burden of proving error.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude. *State v. Greiff*, 141 Wn.2d 910, 924, 10 P.3d 390 (2000). In order to establish that counsel was ineffective, a defendant must show that counsel's conduct was deficient and that the deficient performance resulted in prejudice. *State v. Brockob*, 159 Wn.2d 311, 344-45, 150 P.3d 59 (2006); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (adopting test in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). To show deficient representation, the defendant must show

that it fell below an objective standard of reasonableness based on all the circumstances. *McFarland*, 127 Wn.2d at 334-35, 899 P.2d 1251.

The defendant must overcome a strong presumption that counsel's performance was not deficient. *Reichenbach*, 153 Wn.2d at 130, 101 P.3d 80. In assessing performance, "the court must make every effort to eliminate the distorting effects of hindsight." *Rice*, 118 Wn.2d at 888, 828 P.2d 1086. In evaluating ineffectiveness claims, courts must be highly deferential to counsel's decisions. A strategic or tactical decision is not a basis for finding error. *Strickland*, 466 U.S. at 689–691, 104 S.Ct. 2052. Prejudice is established if the defendant shows that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different. *Reichenbach*, 153 Wn.2d at 130, 101 P.3d 80.

Longan claims that his trial counsel was ineffective for the following reasons:

1. Trial counsel failed to offer as exhibits photos of bullet holes in the car Longan was driving during the incident,
2. Trial counsel failed to retain and present medical records showing the reason Longan was wearing the bullet proof vest at the time of the incident was that Longan had previously been stabbed,

3. Trial counsel did not allow Longan to testify, and
4. Trial counsel failed to contact or investigate defense witnesses.

These specific claims of deficiency are addressed *infra*.

1. Longan claims trial counsel failed to offer as exhibits photos of bullet holes in the car Longan was driving during the incident.

The evidence of any failure to offer certain photos as exhibits that Longan points to in support of his claim of ineffective assistance of counsel is outside the appellate record; therefore, Longan is required to show that he has competent, admissible evidence to support this argument. *State v. Brennan*, 117 Wn.App. 797, 802, 72 P.3d 182 (2003). Longan has not done so and thus cannot succeed on this claim.

Additionally, a reviewing court need not address whether counsel's performance was deficient if it can first say that the defendant was not prejudiced. *Rice*, 118 Wn.2d at 889, 828 P.2d 1086 (citing *Strickland*, 466 U.S. at 697, 104 S.Ct. 2052). No evidentiary hearing is required in a collateral proceeding if the defendant fails to allege facts establishing the kind of prejudice necessary to satisfy the *Strickland* test. *Rice*, 118 Wn.2d at 889, 828 P.2d 1086 (citing *Hill v. Lockhart*, 474 U.S. 52, 60, 106

S.Ct. 366, 371, 88 L.Ed.2d 203 (1985)). An examination of the record and materials that Longan has presented on the photo issue leads to the conclusion that Longan has not presented sufficient facts or evidence to establish a prima facie case of ineffective assistance under the *Strickland* test regarding photos he claims were not offered by his attorney at trial.

Longan fails to meet his burden of proving constitutional error that results in actual and substantial prejudice by a preponderance of the evidence.

2. Longan claims trial counsel failed to retain and present medical records showing the reason Longan was wearing the bullet proof vest at the time of the incident was that Longan had previously been stabbed.

Again, Longan fails to show that he has competent, admissible evidence to support his argument that there is in existence medical records supporting his claim that he was wearing the bullet proof vest due to a prior stabbing. Longan has not done so and thus cannot succeed on this claim.

Additionally, Longan again fails to allege facts establishing the kind of prejudice necessary to satisfy the *Strickland* test. Because there is no competent, admissible evidence to support his argument regarding

the photos, and because he cannot establish prejudice, he cannot establish a prima facie case of ineffective assistance. Longan fails to meet his burden of proving constitutional error that results in actual and substantial prejudice by a preponderance of the evidence.

3. Longan claims trial counsel did not allow Longan to testify.

Longan asserts that his trial counsel did not allow him to testify at his trial. In support of this claim, Longan provided two affidavits, one from himself and one from Patricia Bird-Hoffman. In his affidavit, Longan states “I expressed on several occasions to Mr. Ladouceur I would like to testify on my own behalf and wasn’t allowed to do so. When he rested his case I was afraid to speak up on my own to express this....” PRP Appendix F. In her affidavit, Bird-Hoffman states “I witnessed on the second day of Mr. Longan’s trial, Mr. Longan himself ask Mr. Ladouceur if he could testify in his own behalf. Mr. Longan made his request at one of the breaks during the day the court takes. Mr. Ladouceur assured him that he would have the opportunity to do so.” PRP Appendix C.

A criminal defendant has a constitutional right to testify in his own behalf. *Rock v. Arkansas*, 583 U.S. 44, 49, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987). It is the responsibility of trial counsel to advise the defendant whether or not to testify. *In re Lord*, 123 Wn.2d 296, 317, 868 P.2d 835, *cert. denied*, 513 U.S. 849, 115 S.Ct. 146, 130 L.Ed.2d 86 (1994). However, it is the defendant, not trial counsel, who has the authority to decide whether or not to testify. *State v. Thomas*, 128 Wn.2d 553, 558, 910 P.2d 475 (1996). Any waiver of the right to testify must be knowing. *Id.* at 559. A knowing waiver of the right to testify may be assumed from the defendant's conduct. *Id.* Specifically, the "conduct of not taking the stand may be interpreted as a valid waiver of the right to testify." *Id.*

After trial, a defendant who did not verbalize to the trial court his wish to testify may assert a claim that his attorney prevented him from testifying. *Id.* at 561. However, the defendant "must produce more than a bare assertion that the right [to testify] was violated; the defendant must present substantial, factual evidence in order to merit an evidentiary hearing or other action." *Id.* See *Underwood v. Clark*, 939 F.2d 473, 476 (7th Cir. 1991) (rejecting a claim in which a defendant failed to produce more than "a bare, unsubstantiated, thoroughly self-serving, and

none too plausible statement that his lawyer (in violation of professional standards) forbade him to take the stand”).

In Longan’s case, Longan merely asserts that his right to testify was violated without providing any factual evidence to support the assertion. Longan was present during jury selection when his attorney questioned jurors about whether they would hold it against a defendant if he did not testify in his own defense at trial 7RP 95 – 101. Longan was also present when his attorney stated that he did not know whether Longan was going to take the stand and testify. 7RP 100. Longan was also present when the defense rested without calling Longan to the stand. 4RP 89. Finally, Longan was present when the court inquired whether the defense was asking for the jury instruction regarding the defendant not testifying. 4RP 90. There is no indication at any time that Longan attempted to assert his right to testify or that he disagreed with the statements his attorney made in court.

Longan does not provide any evidence to support his claim that he was prevented from testifying other than (1) a bare, unsubstantiated, thoroughly self-serving, implausible statement that his attorney (in violation of professional standards) did not allow him to take the stand and

(2) a statement from Bird-Hoffman that she observed Longan ask his attorney if he could testify and that she observed his attorney tell him he would have the opportunity to testify. Without substantial, factual evidence, Longan cannot overcome the strong presumption that counsel was effective and that Longan himself waived his right to testify. Therefore, no evidentiary hearing is required in response to his claim. Longan fails to meet his burden of proving constitutional error that results in actual and substantial prejudice by a preponderance of the evidence.

4. Longan claims trial counsel failed to contact or investigate defense witnesses.

Generally, an attorney's decision to call a witness to testify is “a matter of legitimate trial tactics,” which “will not support a claim of ineffective assistance of counsel.” *State v. Byrd*, 30 Wn.App. 794, 799, 638 P.2d 601 (1981). However, a petitioner can overcome this presumption by demonstrating that counsel failed to adequately investigate or prepare for trial. *Id.* at 789.

If the evidence that trial counsel failed to adequately investigate or prepare for trial is based on the knowledge of others, the petitioner must present their affidavits or other corroborative evidence. *Rice*, 118 Wn.2d

at 886, 828 P.2d 1086. The affidavits must contain matters to which the affiants may competently testify. *Id.* The petitioner must show that the “factual allegations are based on more than speculation, conjecture, or inadmissible hearsay.” *Id.*

According to their affidavits, the potential defense witnesses would have testified to their belief that Longan is a person of good character, their belief regarding why Longan purchased the bullet proof vest, and their belief that Longan was afraid of being hurt. PRP Appendices B – E.

None of this evidence would have been admissible at trial through these witnesses. Regarding the affiants’ belief of Longan’s good character, evidence of a defendant’s character is not admissible for the purposes of proving action in conformity therewith on a particular occasion, except evidence of a pertinent trait of character offered by the defendant. ER 404(a); see Appendix J. Another exception is that the State may offer character evidence against a defendant to rebut his claim of good character. ER 404(a). While the State believes the evidence of Longan’s good character was inadmissible at trial, had the affiants been allowed to so testify, the State would have offered evidence to rebut their assertions. Specifically, the State would have offered evidence of

Longan's criminal history, including convictions for drug delivery, forgery, drug possession, unlawful possession of a firearm, attempting to elude, driving while suspended, other weapons violations and felon in possession of body armor. See Prosecutor's Statement of Defendant's Criminal History, Appendix F. It was a legitimate trial tactic for the defense attorney to not interview these witnesses regarding Longan's claimed good character and to not call them to the stand to testify regarding good character at trial. As such, Longan cannot show that his counsel's performance was deficient.

The affiants' proposed testimony regarding their belief of why Longan bought the bullet proof vest and of Longan's fear of injury would likewise not have been admissible at trial. The affiants have no personal knowledge of Longan's state of mind at time of the eluding and shooting at the officers. Knowledge that they claim to have regarding the reason for the purchase of the vest and Longan's fear was surely gained from prior statements of memory or belief by Longan, which are inadmissible under ER 803(a)(3); see Appendix K. As such, Longan cannot show that his counsel's performance was deficient. Logan has not met his burden of

establishing that trial counsel's performance was deficient based on a claimed failure to contact or investigate four potential defense witnesses.

Finally, a reviewing court need not address whether counsel's performance was deficient if it can first say that the defendant was not prejudiced. *Strickland*, 466 U.S. at 697, 104 S.Ct. 2052. No evidentiary hearing is required in a collateral proceeding if the defendant fails to allege facts establishing the kind of prejudice necessary to satisfy the *Strickland* test. *Hill*, 474 U.S. at 60, 106 S.Ct. 366. A thorough examination of the record and the materials Longan has presented reflects that Longan has not presented sufficient facts or evidence to establish a prima facie case of ineffective assistance under the *Strickland* test. Longan fails to meet his burden of proving constitutional error that results in actual and substantial prejudice by a preponderance of the evidence.

C. PROSECUTORIAL MISCONDUCT

Longan claims that the prosecutor in his case committed prosecutorial misconduct by failing to offer him a plea arrangement similar to that offered to his accomplice. Specifically, Longan alleges the prosecutor failed to negotiate with Longan's attorney and that he was

treated unfairly because he is a male. To obtain a reversal of a criminal conviction on the ground of prosecutorial misconduct, the defendant must show the impropriety of that conduct and its prejudicial effect. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

1. Longan claims the State improperly refused to negotiate with his attorney.

Longan first claims that the prosecutor refused to negotiate with Longan's attorney. However, the documents Longan provided with his petition belie that claim. PRP Appendix H consists of two emails from the prosecutor to Longan's attorney. In the first, the prosecutor says she is open to negotiation toward a resolution in the case. PRP Appendix I consists of an email from the prosecutor to the defense attorney in which the prosecutor references the plea offer that she provided the defense attorney and discusses the possibility of including potential federal charges and charges from another county in the offer. PRP Appendix J includes the written offer extended to Longan. The offer would have resulted in a recommendation for a 29-year prison sentence, rather than the 40-year sentence Longan received after trial. As such, the evidence provided by Longan does not support his own claim.

Even if Longan's evidence showed that the prosecutor refused to negotiate with Longan's attorney, a criminal defendant has no constitutional right to a plea bargain. *Weatherford v. Bursey*, 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977); *State v. Robtoy*, 98 Wn.2d 30, 45, 653 P.2d 284 (1982); *State v. Wheeler*, 95 Wn.2d 799, 804, 631 P.2d 376 (1981). Longan fails to meet his burden of proving error.

2. Longan claims that he was treated unfairly because he is a male.

Longan claims he was discriminated against because he is a male. Equal protection requires the government to treat persons similarly situated the same. *In re Pers. Restraint of Knapp*, 102 Wn.2d 466, 473, 687 P.2d 1145 (1984). Longan argues that his situation is similar to his accomplice's. He maintains he should have received a 15-year offer rather than the 29-year offer extended by the prosecutor. However, Longan and his accomplice were not similarly situated. As a comparison of Longan's judgment and sentence and his accomplice's judgment and sentence reflects, she had no prior felony convictions, whereas Longan had four prior felony convictions that counted toward his offender score. See Appendix A and G. Because Longan is not similarly situated to a

defendant who has no prior felony convictions, his equal protection argument fails. Likewise, Longan's role in the charged crimes was different than his accomplice's, so they were not similarly situated.

Even if Longan and his accomplice were similarly situated, Longan cannot show that the prosecutor was improperly motivated. Improper motivation for prosecution means a selection deliberately based on "an unjustifiable standard such as race, religion, or other arbitrary classification." *State v. Judge*, 100 Wn.2d 706, 713, 675 P.2d 219 (1984). The State agrees that prosecution based on a defendant's gender would be improper. However, Longan fails to show any evidence of unlawful discrimination. Bare assertions and conclusory allegations are not sufficient to command judicial consideration in a personal restraint proceeding. *In re Webster*, 74 Wn.App. 832, 833, 875 P.2d 1244 (1994). Where the record does not provide any facts or evidence on which to decide the issue and the petition instead relies solely on conclusory allegations, the court should decline to determine the validity of petition. *Cook*, 114 Wn.2d at 813-14, 792 P.2d 506.

There is no showing of misconduct here. Nothing in the record or in the documentation provided by Longan supports his allegations

regarding lack of plea negotiations or gender-based bias. Longan's speculation that the prosecutor was motivated by gender bias, without more, does not amount to a valid equal protection claim. Given the absence of evidence supporting the prosecutorial misconduct claim, Longan's argument must fail. Longan fails to meet his burden of proving constitutional error that results in actual and substantial prejudice by a preponderance of the evidence.

D. UNANIMITY IN FIREARM ENHANCEMENTS

Longan argues that the trial court erred in instructing the jury that it must be unanimous in its finding for the special verdict of whether Longan or his accomplice was armed with a firearm at the time of the offense. The challenged instruction directed the jury as follows:

You will be furnished with additional special verdict forms. Fill in the blanks with the answer "yes" or "no" according to the decisions you reach. In order to answer any question on the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no."

When all of you have so agreed, fill in the special verdict forms to express your decisions. The presiding juror will sign them and notify the bailiff, who will conduct you into court to declare your special verdicts.

CP 126.

In support of his argument, Longan cites *State vs. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010). In *Bashaw*, our state's Supreme Court held that requiring unanimity for a "no" answer to a special verdict regarding a sentencing enhancement violated a common law right recognized in *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003). *Bashaw*, 169 Wn.2d at 147, 234 P.3d 195.

In *Goldberg*, an aggravated murder case, the jury was instructed that it should return a "yes" special verdict on the aggravating factor only if it was unanimous, and it should answer "no" if it had a reasonable doubt about the finding, just as Longan's jury was instructed. *Goldberg*, 149 Wn.2d at 893, 72 P.3d 1083. The jury initially returned a guilty verdict and answered "no" on the special form for the aggravating factor alleged. *Id.* at 891. When the jury was polled, it was determined that only some of the jurors had voted "no" on the special verdict instruction. *Id.* The judge proceeded as if the jury was deadlocked and instructed it to continue deliberating to see whether unanimity could be reached. *Id.* The next day, after more deliberations, the jury returned a unanimous finding that the State had proved the aggravating factor. *Id.* at 891-92. The Supreme

Court held that the jury's non-unanimous judgment should have been accepted and that it was error to order continued deliberations. *Id.* at 894.

Subsequently, in *Bashaw*, the jury was instructed that it needed to be unanimous to answer the special verdict either “yes” or “no” by an instruction that stated “Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.” *Bashaw*, 169 Wn.2d at 139, 234 P.3d 195. Our Supreme Court concluded that the instruction requiring unanimity for a “no” answer to a special verdict was an incorrect statement of the law and was error. Longan’s jury was not given such an instruction.

1. The trial court properly instructed the jury.

Unlike in *Bashaw*, the trial court in Longan’s case properly instructed the jury regarding the special verdicts. The instruction given in Longan’s case was identical to that given in *Goldberg*. It required unanimity only to answer “yes.” By contrast, it does not state a requirement to be unanimous to answer “no.” *Goldberg* did not find this

instruction erroneous. *Goldberg*, 149 Wn.2d at 893-94, 72 P.3d 1083.⁶

Rather, the error in *Goldberg* was that the trial court did not accept the non-unanimous special verdict and sent the jury back to deliberate until they reached a unanimous special verdict. Likewise, *Bashaw* did not find the type of instruction used in Longan's case erroneous. Rather, the error in *Bashaw* was that the trial court instructed the jury that all twelve of them had to be unanimous in its special verdict finding because it was a criminal case.⁷ Longan's jury was not given that instruction. 4RP 95-112, 164-166; CP 97-126.

Additionally, there was little chance that the jury was confused regarding the lack of unanimity requirement for a "no" answer to the special verdict questions as opposed to the requirement for unanimity for the general verdicts. The concluding instruction for the general verdicts stated that "Because this is a criminal case, each of you must agree for

⁶ A split panel of Division One has held that this type of instruction is in error as not properly informing the jury of the applicable law. *State v. Campbell*, -- Wn.App. --, 260 P.3d 235 (2011). That court found that the trial court abused its discretion by not issuing clarifying instruction with regard to jury's deliberative responsibilities with respect to special verdicts on sentence enhancement allegations, where the jury specifically asked whether it must be unanimous in order to return a "no" answer on special verdicts.

⁷ Division One also found an instruction stating "since this is a criminal case, all 12 of you must agree" to be error, as it mirrored the instruction in *Bashaw*. *State v. Morgan*, -- Wn.App. --, 261 P.3d 167 (2011).

you to return your verdict.” CP 122-23. The jury returned verdicts of guilty and only then were given separate instructions regarding the special verdicts for the firearm enhancements. 4RP 164-66; CP 124-26. The procedure used in Longan’s case, distinguishing between the general verdicts where unanimous decisions were required and special verdicts where a unanimous verdict was only required for a “yes” answer, would cause an average juror reasonably to infer that the rules relating to the special verdict were different.

Read as a whole, the jury instructions imply that to answer “no” to the special verdict the jury need not be unanimous. This would have been manifestly apparent to an average juror. It was manifest to the jury in *Goldberg* when the jury initially answered “no” since they were not unanimous, and it was manifest to Longan’s jury when it answered “yes.” This instruction was not erroneous.

2. Longan cannot raise the issue for the first time on appeal.

Even if this court finds that the instruction was erroneous, Longan waived the issue on appeal by failing to object to the instruction at the trial level. 4RP 76. There is a split between Divisions One and Three of the

Court of Appeals regarding whether this type of claimed instructional error affects a constitutional right and may, therefore, be raised for the first time on appeal. *See State v. Ryan*, 160 Wn.App. 944, 948–49, 252 P.3d 895 (2011) (Division I holding the instructional error is constitutional), *review granted*, 172 Wn.2d 1004, 258 P.3d 676 (2011); *State v. Nunez*, 160 Wn.App. 150, 158–63, 248 P.3d 103 (2011) (Division III holding the instructional error is not constitutional), *review granted*, 172 Wn.2d 1004, 258 P.3d 676 (2011) (consolidated with *Ryan*).⁸ Review is still pending at the Supreme Court. It is the State’s position that the *Nunez* court is correct, and Longan has waived the issue by not objecting at the trial level.

3. Any error in the instructions was harmless.

Even if this court finds that the special verdict instruction given was error and that Longan can raise the issue at this stage in the process, any error was harmless. In *Bashaw*, our Supreme Court implied that the error was not constitutional but then applied a constitutional harmless

⁸ Division Three consistently followed the ruling in *Nunez*, finding in several cases that the defendant waived the right to challenge the instruction by failing to raise it at the trial court level. *See State v. Rodriguez*, – Wn.App. –, 259 P.3d 1145 (2011); *State v. Bea*, 162 Wn.App. 570, 254 P.3d 958 (2011); *State v. Turnispeed*, 162 Wn.App. 60, 255 P.3d 843 (2011).

error analysis. *Bashaw*, 169 Wn.2d at 146 n.7, 147, 234 P.3d 195. The error is therefore harmless if the State proves beyond a reasonable doubt that the jury verdict would have been the same absent the error. *Id.* at 147.

The special verdict required the jury to determine whether Longan committed his crimes while he or his accomplice was armed with a firearm. Because the jury had already unanimously determined in its general verdicts that Longan committed first degree assault by intending to inflict great bodily injury and assaulting the officers with a firearm, there is no doubt that, absent the instructional error, the jury would have still found that Longan committed his offenses while he or his accomplice were armed with a firearm.

As argued above, the instruction for the special verdicts was distinct in its language from the unanimity requirement of the general verdict instructions. It expressly required unanimity for “yes” and did not require unanimity for “no.” It told the jury if it had a reasonable doubt it should return a “no” verdict. Unlike *Bashaw*, it did not prescribe an erroneous deliberative process.

The underlying first-degree assaults included the element of the use of a firearm. CP 47-49. The jury returned a unanimous verdict. The special verdict was unanimous “yes”. There is no indication that the jury was confused or that they were initially deadlocked. Nothing establishes a basis for reasonable doubt. Longan may argue that the jury might not have unanimously answered “yes” if the trial court had specifically instructed them that “not unanimous” was an option. However, this is speculation and insufficient to show prejudice. *See State v. Pineda-Pineda*, 154 Wn.App. 653, 226 P.3d 164, 171 (2010) (noting that “any confusion about a negative verdict [is] purely hypothetical”). The State has met its burden to show any error was harmless beyond a reasonable doubt. The facts in Longan’s case do not resemble those in *Goldberg* because the polling of the jury in Longan’s case indicated that it was unanimous in its answers of “yes” on the special verdict forms. 4RP 170-74.

E. CUMULATIVE ERROR

The cumulative error doctrine does not apply here because there is no error to cumulate. *State v. Johnson*, 113 Wn.App. 482, 494, 54 P.3d

155 (2002), *review denied*, 149 Wn.2d 1010 (2003). Even if this court finds that there was error, Longan has not shown that he suffered from several errors at trial that together actually and substantially prejudiced him and, thus, cumulative error does not form a basis for relief. *In re Davis*, 151 Wn.App. 331, 338, 211 P.3d 1055, 1059, 211 P.3d 1055 (2009); *see also State v. Hodges*, 118 Wn.App. 668, 673-74, 77 P.3d 375 (2003), *review denied*, 151 Wn.2d 1031, 94 P.3d 960 (2004).

VI. CONCLUSION

For the reasons stated above, Longan's personal restraint petition should be denied.

Respectfully submitted this 28th day of October, 2011.

SUSAN I. BAUR
Prosecuting Attorney

By:

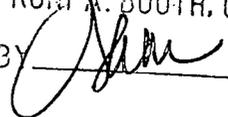


MICHELLE L. SHAFFER
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Chief Criminal Deputy Prosecuting Attorney
Representing Respondent

FILED
SUPERIOR COURT

2008 JUL -2 P 4: 01

COWLITZ COUNTY
RONI A. BOOTH, CLERK

BY 

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

DANIEL RAYMOND LONGAN,

Defendant.

No. 07-1-00431-6

Felony Judgment and Sentence (FJS)

Prison RCW 9.94A.712 Prison Confinement

Jail One Year or Less RCW 9.94A.712 Prison Confinement

First-Time Offender

Special Sexual Offender Sentencing Alternative

Special Drug Offender Sentencing Alternative

Clerk's Action Required, para 4.5 (DOS), 4.7 and 4.8 (SSOSA) 4.15.2, 5.3, 5.6 and 5.8

SID: WA19986739

If no SID, use DOB: 11/03/79

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I. Hearing

1.1 The court conducted a sentencing hearing this date JULY **Z**, 2008; the defendant, DANIEL R. LONGAN, the defendant's lawyer, TOM LADOUCEUR and the (deputy) prosecuting attorney were present.

II. Findings

There being no reason why judgment should not be pronounced, in accordance with the proceedings in this case, the court **Finds:**

2.1 **Current Offenses:** The defendant is guilty of the following offenses, based upon guilty plea jury-verdict bench trial: ON JUNE 24, 2008.

Count	Crime	RCW	Date of Crime
I	ASSAULT, FIRST DEGREE W/FA ENHANCEMENT	09.36.011(1)(a) 9.94A.602 9.94A.533(3)	03/20/07
II	ASSAULT, FIRST DEGREE W/FA ENHANCEMENT	09.36.011(1)(a) 9.94A.602 9.94A.533(3)	03/20/07
III	ASSAULT, FIRST DEGREE W/FA ENHANCEMENT	09.36.011(1)(a) 9.94A.602 9.94A.533(3)	03/20/07
IV	TAKING A MOTOR VEHICLE WITHOUT PERMISSION 2° W/FA ENHANCEMENT	9A.56.075(1) 9.94A.602 9.94A.533(3)	03/20/07
V	ATTEMPTING TO ELUDE PURSUING POLICE VEHICLE W/FA ENHANCEMENT	46.61.024(1) 9.94A.602 9.94A.533(3)	03/20/07

(If the crime is a drug offense, include the type of drug in the second column.)

Additional current offenses are attached in Appendix 2.1.

Felony Judgment and Sentence (FJS) (Prison)
(RCW 9.94A.500, 9.94A.505)(WPF CR 84.0400 (7/2007))

Page 1 of

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- The **burglary** in Count _____ involved a theft or intended theft.
The jury returned a special verdict or the court made a special finding with regard to the following:
- The defendant is a sex offender subject to indeterminate sentencing under **RCW 9.94A.712**.
 - The defendant engaged, agreed, offered, attempted, solicited another, or conspired to engage a victim of child rape or child molestation in sexual conduct in return for a fee in the commission of the offense in Count _____. RCW 9.94A.533(9).
 - The offense was predatory as to Count _____. RCW 9.94A.836.
 - The victim was under 15 years of age at the time of the offense in Count _____ RCW 9.94A.837.
 - The victim was developmentally disabled, mentally disordered, or a frail elder or vulnerable adult at the time of the offense in Count _____. RCW 9.94A.838, 9A.44.010.
 - The defendant acted with **sexual motivation** in committing the offense in Count _____. RCW 9.94A.835.
 - This case involves **kidnapping** in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.
 - The defendant used a **firearm** in the commission of the offense in Counts **I - V**. RCW 9.94A.602, 9.94A.533.
 - The defendant used a **deadly weapon other than a firearm** in committing the offense in Count _____. RCW 9.94A.602, 9.94A.533.
 - Count _____, **Violation of the Uniform Controlled Substances Act (VUCSA)**, RCW 69.50.401 and RCW 69.50.435, took place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.
 - The defendant committed a crime involving the manufacture of methamphetamine, including its salts, isomers, and salts of isomers, **when a juvenile was present in or upon the premises of manufacture** in Count _____. RCW 9.94A.605, RCW 69.50.401, RCW 69.50.440.
 - The defendant committed **vehicular homicide** **vehicular assault** proximately caused by driving a vehicle while under the influence of intoxicating liquor or drug or by operating a vehicle in a reckless manner. The offense is, therefore, deemed a violent offense. RCW 9.94A.030.
 - The defendant has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.
 - The crime(s) charged in Count _____ involve(s) **domestic violence**. RCW 10.99.020.
 - The offense in Count _____ was committed in a **county jail or state correctional facility**. RCW 9.94A.533(5).
 - Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589): **COUNTS I AND II - ASSAULT 1° W/FA ENHANCEMENT**
 - 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	SOLICIT V.U.C.S.A. - DEL.	07/27/01	KING, WA	03/06/01	A	
2	FORGERY	07/02/01	KING, WA	04/10/01	A	
3	V.U.C.S.A. - POSS	11/26/03	CLARK, WA	10/05/03	A	
4	U.P.F.A. 2°	04/27/05	CLARK, WA	03/03/05	A	

- Additional criminal history is attached in Appendix 2.2.
- The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.
- The following prior offenses require that the defendant be sentenced as a **Persistent Offender** (RCW 9.94A.570):
- The following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):
- The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

2.3 Sentencing Data:

Count No.	Offender Score	Seriousness Level	Standard Range (not including enhancements)	Plus Enhancements*	Total Standard Range (including enhancements)	Maximum Term
I	6	XII	162 - 216 MOS	(F) 60 MOS	222 - 276 MOS	LIFE
II	6	XII	162 - 216 MOS	(F) 60 MOS	222 - 276 MOS	LIFE
III	0	XII	93 - 123 MOS	(F) 60 MOS	153 - 183 MOS	LIFE
IV	7	I	14 - 18 MOS	(F) 18 MOS	32 - 36 MOS	5 YEARS
V	7	I	14 - 18 MOS	(F) 18 MOS	32 - 36 MOS	5 YEARS

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, see RCW 46.61.520, (JP) Juvenile present, (SM) Sexual motivation, RCW 9.94A.533(8), (SCF) Sexual conduct with a child for a fee, RCW 9.94A.533(9).

- Additional current offense sentencing data is attached in Appendix 2.3.

For violent offenses, most serious offenses, or armed offenders, recommended **sentencing agreements or plea agreements** are attached as follows: N/A.

2.4 Exceptional Sentence. The court finds substantial and compelling reasons that 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 defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial

resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

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

III. Judgment

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

3.2 The defendant is found NOT GUILTY of Counts _____.

The court DISMISSES Counts _____.

IV. Sentence and Order

It is Ordered:

4.1a The defendant shall pay to the clerk of this court:

JASS CODE

RTN/RJN	\$ <u>150.00</u>	Restitution to: _____ (Name and Address—address may be withheld and provided confidentially to Clerk of the Court's office.)	
PCV	\$ <u>500.00</u>	Victim assessment	RCW 7.68.035
	\$ _____	Domestic Violence assessment up to \$100	RCW 10.99.080
CRC	\$ <u>1145.00</u>	Court costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190	
		Criminal filing fee \$ <u>200.00</u>	FRC
		Witness costs \$ _____	WFR
		Sheriff service fees \$ <u>545.00</u>	SFR/SFS/SFW/WRF
		Jury demand fee \$ <u>250.00</u>	JFR
		Extradition costs \$ _____	EXT
		Incarceration fee \$ <u>150.00</u>	JLR
PUB	\$ <u>738.00</u>	Fees for court appointed attorney	RCW 9.94A.760
WFR	\$ _____	Court appointed defense expert and other defense costs	RCW 9.94A.760
FCM/MTH	\$ _____	Fine RCW 9A.20.021; <input type="checkbox"/> VUCSA chapter 69.50 RCW, <input type="checkbox"/> VUCSA additional fine deferred due to indigency RCW 69.50.430	
CDF/LDI/PCD NTF/SAD/SDI	\$ _____	Drug enforcement fund of Cowlitz County Prosecutor	RCW 9.94A.760
MTH	\$ _____	Meth/Amphetamine Clean-up fine \$3000.	RCW 69.50.440, 69.50.401(a)(1)(ii).
CLF	\$ _____	Crime lab fee <input type="checkbox"/> suspended due to indigency	RCW 43.43.690
	\$ _____	Felony DNA collection fee <input type="checkbox"/> not imposed due to hardship	RCW 43.43.7541
RTN/RJN	\$ _____	Emergency response costs (for incidents resulting in emergency response and conviction of driving, flying or boating under the influence, vehicular assault under the influence, or vehicular homicide under the influence, \$1000 max.)RCW 38.52.430	
	\$ _____	Urinalysis cost	
	\$ _____	Other costs for: _____	
	\$ <u>2533.00</u>	Total	RCW 9.94A.760

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

[] shall be set by the prosecutor.

[] is scheduled for _____

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

	<u>Name of other defendant</u>	<u>Cause Number</u>	<u>(Amount-\$)</u>
RJN	<u>HEATHER LEE VANHOOSER</u>	<u>07-1-00430-8</u>	<u>(IF CONVICTED)</u>

[] 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 of the court and on a schedule established by the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$ 50.00 per month commencing _____ RCW 9.94A.760.

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).

[] The court finds that the defendant has the means to pay, in addition to the other costs imposed herein, for the cost of incarceration and the defendant is ordered to pay such costs at the rate of \$50 per day, unless another rate is specified here: _____. (JLR) RCW 9.94A.760.

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

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 **DNA Testing.** The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

[] **HIV Testing.** The defendant shall submit to HIV testing. RCW 70.24.340.

4.3 **No Contact:** The defendant shall not have contact with _____ (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for _____ years (not to exceed the maximum statutory sentence).

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

The defendant shall not use, own or possess any **firearm** or ammunition while under the supervision of the Department of Corrections. RCW 9.94A.120.

[] The firearm, to wit: _____ is forfeited to Longview Police Department, a law enforcement agency.

4.4 **Other:** _____

4.5 **Confinement Over One Year.** The court sentences the defendant to total confinement as follows: _____

Felony Judgment and Sentence (FJS) (Prison)
(RCW 9.94A.500, 9.94A.505)(WPF CR 84.0400 (7/2007))

Page 5 of _____

(a) **Confinement.** RCW 9.94A.589. A term of total confinement in the custody of the Department of Corrections (DOC):

231 months on Count I 32 months on Count IV
231 months on Count II 32 months on Count V
153 months on Count III _____ months on Count _____

- The confinement time on Count(s) _____ contain(s) a mandatory minimum term of _____.
- The confinement time on Counts I, II & III includes 60 months on each count as enhancement for [X] firearm and Counts IV & V includes 18 months on each count as enhancement for [X] firearm deadly weapon sexual motivation VUCSA in a protected zone
 manufacture of methamphetamine with juvenile present sexual conduct with a child for a fee.

Actual number of months of total confinement ordered is: 480 months

All counts shall be served concurrently, except for the portion of those counts for which there is an enhancement as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: I & III

The sentence herein shall run consecutively with the sentence in cause number(s) _____
but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.589.

Confinement shall commence immediately unless otherwise set forth here: Defendant shall receive credit for time served from January 31, 2008,

(b) **Confinement.** RCW 9.94A.712 (Sex Offenses only): The court orders the following term of confinement in the custody of the DOC:

Count _____ minimum term _____ maximum term _____
Count _____ minimum term _____ maximum term _____

(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 jail shall compute time served unless the credit for time served prior to sentencing is specifically set forth here by the court: _____

4.6 **Community Placement or Community Custody.** The court orders community placement or community custody as follows:

Community Placement: Count _____ for _____ months;
Count _____ for _____ months; Count _____ for _____ months.

Community Custody for count(s) _____, sentenced under RCW 9.94A.712, for any period of time the defendant is released from total confinement before the expiration of the maximum sentence.

Community Custody:
Counts I, II & III for a range from 24 to 48 months;
Count _____ for a range from _____ to _____ months;
Count _____ for a range from _____ to _____ 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 offenses 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. 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 as required by DOC to confirm compliance with the orders of the court; (8) for sex offenses, submit to electronic monitoring if imposed by DOC; and (9) abide by any additional conditions imposed by DOC under RCW 9.94A.720. 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.

The defendant shall have no contact with: _____.

The defendant shall remain within outside of a specified geographical boundary, to wit: _____.

The defendant shall not reside within 880 feet of the facilities or grounds of a public or private school (community protection zone). 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: _____.

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.

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. 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.** If you wish to petition or move 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, you must do so 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.** If you committed your offense prior to July 1, 2000, you 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. If you committed your offense on or after July 1, 2000, the court shall retain jurisdiction over you, for the purpose of your compliance with payment of the legal financial obligations, until you have completely satisfied your obligation, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). **You are required to contact the Cowlitz County Collections Deputy, 312 SW First Avenue, Kelso, WA 98626 (360) 414-5532 with any change in address and employment or as directed. Failure to make the required payments or advise of any change in circumstances is a violation of the sentence imposed by the Court and may result in the issuance of a warrant and a penalty of up to 60 days in jail.** The clerk of the court has authority to collect unpaid legal financial obligations at any time while you remain under the jurisdiction of the court for purposes of your legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).
- This crime involves a Rape of a Child in which the victim became pregnant. The defendant shall remain under the court's jurisdiction until the defendant has satisfied support obligations under the superior court or administrative order, up to a maximum of twenty-five years following defendant's release from total confinement or twenty-five years subsequent to the entry of the Judgment and Sentence, whichever period is longer.
- 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 (DOC) 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.760 may be taken without further notice. RCW 9.94A.7606.
- 5.4 Restitution Hearing.**
 I waive any right to be present at any restitution hearing (sign initials): _____.
- 5.5 Community Custody Violation.**
(a) If you are subject to a first or second violation hearing and DOC finds that you committed the violation, you may receive as a sanction up to 60 days of confinement per violation. RCW 9.94A.634.
(b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.737(2).
- 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 clerk of the court shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

Cross off or delete if not applicable:

5.7 Sex and Kidnapping Offender Registration, RCW 9A.44.130, 10.01.200.

1. General Applicability and Requirements: Because this crime involves a sex offense or kidnapping offense involving a minor as defined in RCW 9A.44.130, you are required to register with the sheriff of the county of the state of Washington where you reside. If you are not a resident of Washington but you are a student in Washington or you are employed in Washington or you carry on a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register

immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.

2. Offenders Who Leave the State and Return: If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within three business days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry on a vocation in Washington, or attend school in Washington, you must register within three business days after starting school in this state or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections.

3. Change of Residence Within State and Leaving the State: If you change your residence within a county, you must send signed written notice of your change of residence to the sheriff within 72 hours of moving. If you change your residence to a new county within this state, you must send signed written notice of your change of residence to the sheriff of your new county of residence at least 14 days before moving and register with that sheriff within 24 hours of moving. You must also give signed written notice of your change of address to the sheriff of the county where last registered within 10 days of moving. If you move out of Washington State, you must send written notice within 10 days of moving to the county sheriff with whom you last registered in Washington State.

4. Additional Requirements Upon Moving to Another State: If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph with the new state within 10 days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. You must also send written notice within 10 days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.

5. Notification Requirement When Enrolling in or Employed by a Public or Private Institution of Higher Education or Common School (K-12): If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier. If you become employed at a public or private institution of higher education, you are required to notify the sheriff for the county of your residence of your employment by the institution within 10 days of accepting employment or by the first business day after beginning to work at the institution, whichever is earlier. If your enrollment or employment at a public or private institution of higher education is terminated, you are required to notify the sheriff for the county of your residence of your termination of enrollment or employment within 10 days of such termination. If you attend, or plan to attend, a public or private school regulated under Title 28A RCW or chapter 72.40 RCW, you are required to notify the sheriff of the county of your residence of your intent to attend the school. You must notify the sheriff within 10 days of enrolling or 10 days prior to arriving at the school to attend classes, whichever is earlier. The sheriff shall promptly notify the principal of the school.

6. Registration by a Person Who Does Not Have a Fixed Residence: Even if you do not have a fixed residence, you are required to register. Registration must occur within 24 hours of release in the county where you are being supervised if you do not have a residence at the time of your release from custody. Within 48 hours excluding weekends and holidays, after losing your fixed residence, you must send signed written notice to the sheriff of the county where you last registered. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county. You must also report weekly in person to the sheriff of the county where you are registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. You may be required to provide a list the locations where you have stayed during the last seven days. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

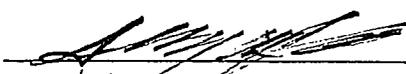
7. Reporting Requirements for Persons Who Are Risk Level II or III: If you have a fixed residence

and you are designated as a risk level II or III, you must report, in person, every 90 days to the sheriff of the county where you are registered. Reporting shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. If you comply with the 90-day reporting requirement with no violations for at least five years in the community, you may petition the superior court to be relieved of the duty to report every 90 days.

8. Application for a Name Change: If you apply for a name change, you must submit a copy of the application to the county sheriff of the county of your residence and to the state patrol not fewer than five days before the entry of an order granting the name change. If you receive an order changing your name, you must submit a copy of the order to the county sheriff of the county of your residence and to the state patrol within five days of the entry of the order. RCW 9A.44.130(7).

- 5.8 Counts I-V is a felony in the commission of which you used a motor vehicle. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke your driver's license. RCW 46.20.285.
- 5.9 If you are or become subject to court-ordered mental health or chemical dependency treatment, you must notify DOC and you must release your treatment information to DOC for the duration of your incarceration and supervision. RCW 9.94A.562.
- 5.10 IF AN APPEAL IS PROPERLY FILED AND APPEAL BOND POSTED, THE DEFENDANT WILL REPORT TO THE DEPARTMENT OF CORRECTIONS, WHO WILL MONITOR THE DEFENDANT DURING THE PENDENCY OF THE APPEAL, SUBJECT TO ANY CONDITIONS IMPOSED BY DOC AND/OR INCULDED IN THIS JUDGMENT & SENTENCE AND SPECIFICALLY NOT STAYED BY THE COURT.**
- 5.11 Other: _____

Done in Open Court and in the presence of the defendant this date: JULY 2, 2008.

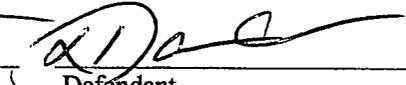

Judge/Print Name: STEPHEN M. WARNING



(Deputy) Prosecuting Attorney
WSBA No. 29869
Print Name: MICHELLE
SHAFFER


Attorney for Defendant
WSBA No. 19963

Print Name: TOM LADOUCEUR


Defendant

Print Name: DANIEL RAYMOND
LONGAN

Voting Rights Statement: I acknowledge that my right to vote has been lost due to felony conviction. 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.

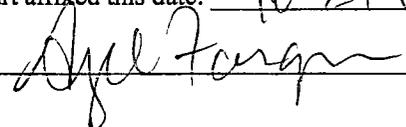
Defendant's signature: 

I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the _____ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

Interpreter signature/Print name: _____

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

Witness my hand and seal of the said Superior Court affixed this date: 10-27-11

Clerk of the Court of said county and state, by: , Deputy Clerk

Identification of the Defendant

SID No. WA19986739

Date of Birth: 11/03/79

(If no SID take fingerprint card for State Patrol)

FBI No. 756385NB8

Local ID No. 80696

PCN No. _____

Other _____

Alias name, DOB: _____

Race:

Ethnicity:

Sex:

Asian/Pacific Islander

Black/African-American

Caucasian

Hispanic

Male

Native American

Other: _____

Non-Hispanic

Female

Fingerprints: I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto.

Clerk of the Court, Deputy Clerk, _____

Sergey Kpriel

Dated: _____

7/2/08

The defendant's signature: _____

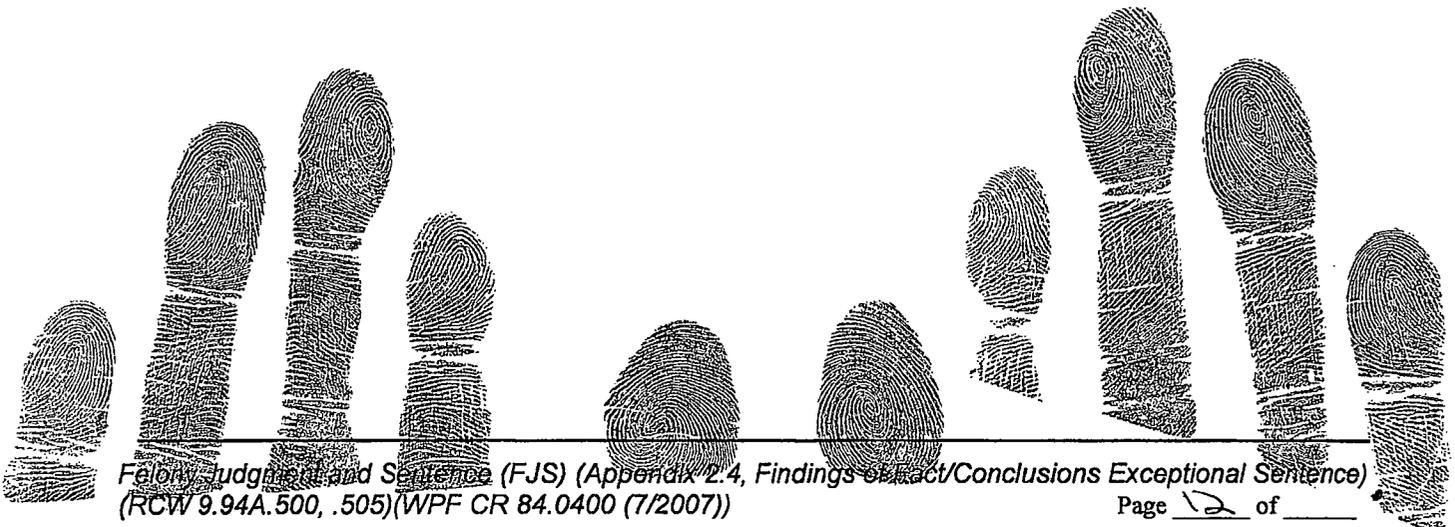
[Signature]

Left four fingers taken simultaneously

Left
Thumb

Right
Thumb

Right four fingers taken simultaneously



09 AUG 25 AM 10:24

STATE OF WASHINGTON

BY _____

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

No. 37942-2-II

Respondent,

v.

DANIEL RAYMOND LONGAN,

UNPUBLISHED OPINION

Appellant.

HOUGHTON, J. — Daniel Longan appeals his convictions for three counts of first degree assault with firearm enhancements, arguing that the State failed to present sufficient evidence to convict him.¹ In a statement of additional grounds (SAG),² he raises 12 additional claims. We affirm.³

FACTS

At about 3:30 A.M. on March 20, 2007, in a high crime area of Longview, Officer Michael Berndt saw a green Honda turn quickly into an alley without signaling. Berndt followed the vehicle into the alley. The vehicle accelerated to 50 mph and turned onto 32nd Avenue without signaling. Berndt activated his overhead lights and pursued the vehicle. Continuing to

¹ Longan does not appeal from his two other convictions for taking a motor vehicle without permission and attempting to elude a pursuing police vehicle, both with firearm enhancements.

² RAP 10.10.

³ A commissioner of this court initially considered Longan's appeal as a motion on the merits under RAP 18.14 but later transferred it to a panel of judges.

speed, the vehicle made a turn onto Washington Way without signaling. As the vehicle reached 60 mph, Berndt activated his siren. As the vehicle turned onto Nichols Boulevard, Brandt saw the passenger's arm out the window. After the vehicle turned onto 21st Avenue, Brandt saw three muzzle flashes in his direction from the passenger window and heard three loud bangs. He notified dispatch that shots were fired at him and continued his pursuit. After the vehicle turned onto Cypress Street and back onto 20th Avenue, Brandt saw two more muzzle flashes at him from the passenger window and heard two more loud bangs.

Officer Kevin Sawyer joined in the pursuit. The vehicle crossed the Lewis and Clark Bridge into Oregon. After the vehicle turned onto Highway 30, Brandt and Sawyer saw another muzzle flash and heard another loud bang come from the passenger window of the Honda. The vehicle continued to speed between 70 and 90 mph on Highway 30 until it hit spike strips and crashed. The officers arrested the vehicle's driver, Longan, and passenger, Heather Van Hooser, after they attempted to flee.

The State charged Longan with three counts of first degree assault, all with firearm enhancements. A jury found Longan guilty on all three counts.

ANALYSIS

SUFFICIENCY OF THE EVIDENCE

Longan argues that the State failed to present sufficient evidence that he was an accomplice to Van Hooser's assaults on Brandt and Sawyer. Sufficient evidence supports a conviction if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the State. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). An appellant claiming insufficiency of the

evidence “admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Thomas*, at 874 (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

To prove accomplice liability for first degree assault, the State had to prove that Longan “[w]ith knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it.” RCW 9A.08.020(3)(a). Longan argues that the State presented no evidence that he knew Van Hooser was going to fire at the officers. *State v. Luna*, 71 Wn. App. 755, 759, 862 P.2d 620 (1993); *State v. Robinson*, 73 Wn. App. 851, 855, 872 P.2d 43 (1994). He argues the State presented no evidence that he solicited, commanded, encouraged or requested that Van Hooser fire at the officers. And he argues that the State presented no evidence he aided or agreed to aid Van Hooser in firing at the officers. Therefore, he contends, the State did not present sufficient evidence that he was an accomplice to Van Hooser’s assaults.

Considering the evidence in the light most favorable to the State, Longan drove a stolen car at high speed to evade pursuing police vehicles. He ignored the officers’ lights and sirens. Before each instance of Van Hooser shooting at the officers, Longan made hard turns, which reduced the angle between his vehicle and the police cars, making it easier for Van Hooser to fire at the officers. A rational trier of fact could find that Longan’s hard turns were knowing actions intended to aid Van Hooser in firing at the officers. Thus, the State presented sufficient evidence that Longan was an accomplice to Van Hooser’s three first degree assaults, and his argument fails.

SAG ISSUES

Longan raises 12 issues in his SAG. First, he argues that his trial counsel was ineffective because he did not request lesser-included instructions for second degree assault. *State v. Fernandez-Medina*, 141 Wn.2d 448, 456-57, 6 P.3d 1150 (2000). To demonstrate ineffective assistance of counsel, a defendant must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Horton*, 116 Wn. App. 909, 912, 68 P.3d 1145 (2003). To demonstrate prejudice, Longan must show a reasonable probability trial outcome would have differed. *Strickland*, 466 U.S. at 694; *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). If a defendant fails to establish either element, we need not address the other element. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004).

Longan does not show deficient performance by his trial counsel. A defendant is entitled to a lesser-included instruction "if the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater." *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997). Longan does not show how the evidence would have permitted a jury to rationally find that he was guilty of second degree assault but innocent of first degree assault. He does not show that he was entitled to lesser-included instructions and, therefore, does not show deficient performance by his trial counsel.

Second, Longan argues that his trial counsel's performance was deficient because he did not challenge the following prospective jurors for cause:

Juror A, because he had been the victim of a car prowl and because he thought a defendant should testify if he did not commit the crime charged;^[4]

Juror B, because she said she had summed up the case during voir dire;^[5]

Jurors C and D, because Juror C is a long time acquaintance of Juror D, whose brother-in-law is a Longview police officer; and

Juror E, who said he would have difficulty being fair in a drug case.

None of these jurors met the standards for challenges for cause contained in RCW 4.44.160 and .170. Longan's trial counsel's performance was not deficient in not challenging them for cause.

Third, Longan argues his trial counsel's performance was deficient because he did not sufficiently cross-examine the following witnesses: Argentino Cifuentes, Anna Hauser, Tory Shelton, Jeremy Johnson, Nolan Borders, Joseph Hogue, Michael Watts, Timothy Deisher, Shawn Close, Matt Headley and Mark Langlois. Cifuentes was the owner of the stolen Honda that Longan was driving. Hauser and Officer Johnson testified to hearing three gun shots. Officers Shelton, Borders, Hogue, Watts, Close and Headley testified about the pursuit and stop of the vehicle. Officers Deisher and Langlois testified about follow-up investigations of the vehicle and the route of the pursuit. Longan does not show what effect more extensive cross-examination would have had. Longan's trial counsel's decision to not more extensively cross-examine these witnesses was not deficient performance.

Fourth, Longan argues that the three assaults were part of the "same criminal conduct." He is mistaken. For crimes to be part of the "same criminal conduct," they must have been "committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a).

⁴ Juror A continued by stating that he would not hold it against the defendant if he did not testify.

⁵ Juror B said she would "definitely go with the evidence" if it was different from how she had summed up the case "in her mind." Excerpt Verbatim Report of Proceedings at 79-80.

The three assaults took place at different times; in different places; and in the case of the third assault, involved another victim. The crimes are not parts of the same criminal conduct.

Fifth, Longan argues that the trial court erred in failing to excuse Jurors A, B, C, D, and E, for the reasons stated above. But, as stated above, none of those jurors met the standard for being excused for cause. The trial court did not err.

Sixth, Longan argues that the trial court erred in admitting a key ring with shaved keys, potential burglar's tools, found in his vehicle after the crash. He also argues that the trial court erred in allowing an officer to testify that he wore a bulletproof vest during the chase. We review the trial court's admissibility determinations for abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). A trial court abuses its discretion when it bases its decision on untenable or unreasonable grounds. *State v. Partee*, 141 Wn. App. 355, 361, 170 P.3d 60 (2007). Longan shows no such abuse of discretion and his argument fails.

Seventh, citing *State v. Brown*, 100 Wn. App. 104, 995 P.2d 1278 (2000), Longan argues the trial court erred by imposing consecutive firearm sentencing enhancements. But after *Brown*, the legislature clarified that all firearm enhancements "run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements." RCW 9.94A.533(3)(e). The trial court did not err in running the multiple firearm enhancements consecutive to Longan's base sentence and consecutive to each other.

Eighth, Longan argues that the trial court denied him his right to a public trial by questioning a potential juror in the hallway during voir dire. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 812, 100 P.3d 291 (2004). But the trial court did not close the courtroom, as the judge did in *Orange*. He conducted the questioning of the potential juror in the hallway, which

was just as open to the public as was the courtroom. Longan does not show that he was denied his right to a public trial.

Ninth, Longan argues that his trial counsel was ineffective because he did not allow Longan to testify in his own behalf. But he presents no evidence that he desired to testify in his own behalf or that his trial counsel prevented him from doing so. He fails to show ineffective assistance of counsel.

Tenth, Longan argues that his trial counsel was ineffective because he told the jury that there would be enough evidence for the jury to find Longan guilty of some crimes. But admitting lesser crimes in an effort to gain acquittals on the greater crimes was a tactical decision. Such tactical decisions cannot be challenged as ineffective assistance of counsel. *State v. Mak*, 105 Wn.2d 692, 731, 718 P.2d 407 (1986).

Eleventh, Longan argues that the trial court erred in not hearing motions brought by Longan's mother, his purportedly attorney-in-fact. But Longan presents no legal basis for the trial court to consider motions brought by a person other than the defendant or his counsel.

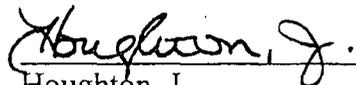
Twelfth, Longan argues that cumulative error denied him his right to a fair trial. But he shows no error, and his argument fails.

No. 37942-2-II

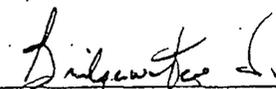
The State presented sufficient evidence of Longan's culpability for all three counts of first degree assault. His SAG arguments are meritless.

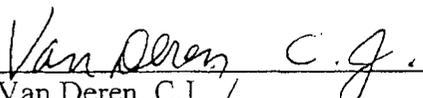
Affirmed.

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.


Houghton, J.

We concur:


Bridgewater, J.


Van Deren, C.J. /

Mai

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OCT 22 2009

COWLITZ COUNTY
PROSECUTING ATTORNEY

07- ✓
431-6

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DANIEL RAYMOND LONGAN, Appellant.

No. 37942-2-II

[Handwritten signature]

ORDER
DENYING MOTION FOR
RECONSIDERATION

Appellant Daniel Longan, through counsel and pro se, has moved for reconsideration of the court's unpublished opinion filed on August 25, 2009. Upon review, we deny the motion for reconsideration as the only potential issue raised is more appropriately brought as a Personal Restraint Petition.

IT IS SO ORDERED.

DATED this 20th day of October, 2009.

Van Deren, C.J.
Van Deren, C.J.

Houghton, J.
Houghton, J.

Bridgewater, J.
Bridgewater, J.

4/10/10

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 DANIEL RAYMOND LONGAN,)
)
 Petitioner.)
)
)
)
)
)
)
)

NO. 83820-8

ORDER

C/A NO. 37942-2-II

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Department I of the Court, composed of Chief Justice Madsen and Justices C. Johnson, Sanders, Owens and J. Johnson, considered at its March 30, 2010, Motion Calendar, whether review should be granted pursuant to RAP 13.4(b), and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 30th day of March, 2010.

For the Court

Madsen, C.J.
 CHIEF JUSTICE

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FILED
SUPERIOR COURT

2010 APR 19 P 1:20

COWLITZ COUNTY
RONI A. BOOTH, CLERK

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DANIEL RAYMOND LONGAN,

Appellant.

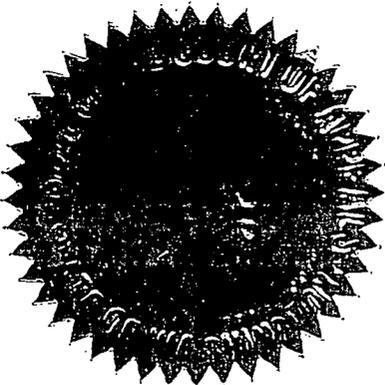
No. 37942-2-II

MANDATE

Cowlitz County Cause No.
07-1-00431-6

The State of Washington to: The Superior Court of the State of Washington
in and for Cowlitz County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on August 25, 2009 became the decision terminating review of this court of the above entitled case on March 30, 2010. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.



IN TESTIMONY WHEREOF, I have hereunto set
my hand and affixed the seal of said Court at
Tacoma, this 14th day of April, 2010.

Clerk of the Court of Appeals,
State of Washington, Div. II

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Page 2
Mandate 37942-2-II

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Hon. Stephen Warning
Cowlitz Co Superior Court Judge
312 SW 1st Avenue
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SUPERIOR COURT

2007 SEP 12 A 8 44

COWLITZ COUNTY
RONI A. BOOTH, CLERK

[Signature]

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

STATE OF WASHINGTON,)

Plaintiff,)

-vs.-)

Daniel R. Longan,)

Defendant.)

No. 07.1.00431.6

**PROSECUTOR'S STATEMENT
OF DEFENDANT'S CRIMINAL
HISTORY**

Crime	Sentencing Date	Adult or Juv. Crime	Date of Crime	Type of Crime
-------	-----------------	---------------------	---------------	---------------

- ① Sol. VVCSA delivery 7.27.01 A 3.6.01 King 01.1.1822.8
 - ② Forgery 7.2.01 4.10.01 King 01.1.2748.1
 - ③ VVCSA poss 11.26.03 10.5.03 Clark 03.1.1999.2
 - ④ UPF 2° 4.27.05 3.3.05 Clark 05.1.699.4
 - ⑤ Elude 5.2.07 3.20.07 Columbia Co OR 071107
 - ⑥ +1 point (on community custody @ time of offense)
- Pending Res Burg + MM3° in Clark Co 06.1.2242.4
- 10/06 DWLS X 3°, 1/00 DWLS, 5/00 DWLS X 2, 6/00 weapons violation
- 5/01 Felon in poss body armor (OR)

*Prior convictions counted as one offense in determining the offender score (RCW 9 94A 360(11))

9.7.07

Date

Approved by *[Signature]* 25869

SUSAN I. BAUR, WSBA 15221
Prosecuting Attorney

Prosecutor's Statement of

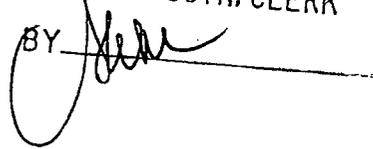
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SUPERIOR COURT

2009 FEB -4 P 5:36

COWLITZ COUNTY
RONI A. BOOTH, CLERK

BY 

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

HEATHER LEE VANHOOSER,

Defendant.

No. 07-1-00430-8

Felony Judgment and Sentence (FJS)

Prison RCW 9.94A.712 Prison Confinement

Jail One Year or Less RCW 9.94A.712 Prison Confinement

First-Time Offender

Special Sexual Offender Sentencing Alternative

Special Drug Offender Sentencing Alternative

Clerk's Action Required, para 4.5 (DOSA), 4.7 and 4.8 (SSOSA) 4.15.2, 5.3, 5.6 and 5.8

SID: WA21204727

If no SID, use DOB: 9-10-1976

09 9 00348 0 

I. Hearing

1.1 The court conducted a sentencing hearing this date; the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.
 2/4/2009

II. Findings

There being no reason why judgment should not be pronounced, in accordance with the proceedings in this case, the court **Finds:**

2.1 **Current Offenses:** The defendant is guilty of the following offenses, based upon

guilty plea to the amended information jury-verdict bench trial: *12-10-2008*

Count	Crime	RCW	Date of Crime
I	ASSAULT IN THE FIRST DEGREE WITH A FIREARM ENHANCEMENT	RCW 9A.36.011(1)(a), 9.94A.602, 9.94A.533(3)	3-2-2007
II	ASSAULT IN THE FIRST DEGREE	RCW 9A.36.011(1)(a)	3-2-2007

Additional current offenses are attached in Appendix 2.1.

The **burglary** in Count _____ involved a theft or intended theft.

The jury returned a special verdict or the court made a special finding with regard to the following:

The defendant is a sex offender subject to indeterminate sentencing under **RCW 9.94A.712**.

The defendant engaged, agreed, offered, attempted, solicited another, or conspired to engage a victim of child rape or child molestation in sexual conduct in return for a fee in the commission of the offense in Count _____. RCW 9.94A.533(9).

The offense was predatory as to Count _____, RCW 9.94A.836.

*Felony Judgment and Sentence (FJS)
(RCW 9.94A.500, .505)(WPF CR 84.0400 (4/2008))*

48 G-1

- The victim was under 15 years of age at the time of the offense in Count _____ RCW 9.94A.837.
- The victim was developmentally disabled, mentally disordered, or a frail elder or vulnerable adult at the time of the offense in Count _____. RCW 9.94A.838, 9A.44.010.
- The defendant acted with **sexual motivation** in committing the offense in Count _____. RCW 9.94A.835.
- This case involves **kidnapping** in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.
- The defendant used a **firearm** in the commission of the offense in Count I. RCW 9.94A.602, 9.94A.533.
- The defendant used a **deadly weapon other than a firearm** in committing the offense in Count _____ RCW 9.94A.602, 9.94A.533.
- Count _____, **Violation of the Uniform Controlled Substances Act (VUCSA)**, RCW 69.50.401 and RCW 69.50.435, took place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.
- The defendant committed a crime involving the manufacture of methamphetamine, including its salts, isomers, and salts of isomers, when a **juvenile was present in or upon the premises of manufacture** in Count _____ RCW 9.94A.605, RCW 69.50.401, RCW 69.50.440.
- The defendant committed **vehicular homicide** **vehicular assault** proximately caused by driving a vehicle while under the influence of intoxicating liquor or drug or by operating a vehicle in a reckless manner. The offense is, therefore, deemed a violent offense. RCW 9.94A.030.
- The defendant has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.
- The crime(s) charged in Count _____ involve(s) **domestic violence**. RCW 10.99.020.
- The offense in Count _____ was committed in a **county jail or state correctional facility**. RCW 9.94A.533(5).
- Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589): NONE.
- Other current convictions listed under different cause numbers used in calculating the offender score are (1st 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						
2						
3						
4						
5						

- Additional criminal history is attached in Appendix 2.2.
- The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.
- The following prior offenses require that the defendant be sentenced as a **Persistent Offender** (RCW 9.94A.570):

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

The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

2.3 Sentencing Data:

Count No.	Offender Score	Seriousness Level	Standard Range (not including enhancements)	Plus Enhancements*	Total Standard Range (including enhancements)	Maximum Term
I	1	XII	120 – 160 months	(F) 60 months	180 – 220 months	Life & \$20,000 fine
II	1	XII	120 – 160 months	N/A	120 – 220 months	Life & \$20,000 fine

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, see RCW 46.61.520, (JP) Juvenile present, (SM) Sexual motivation, RCW 9.94A.533(8), (SCF) Sexual conduct with a child for a fee, RCW 9.94A.533(9).

Additional current offense sentencing data is attached in Appendix 2.3.

For violent offenses, most serious offenses, or armed offenders, recommended sentencing agreements or plea agreements are attached as follows: The State recommended the defendant be sentenced to 180 months in prison, 24-48 months community custody, substance abuse evaluation and treatment.

2.4 Exceptional Sentence. The court finds substantial and compelling reasons that 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 defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

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

III. Judgment

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

3.2 The defendant is found NOT GUILTY of Counts _____.

The court DISMISSES Counts _____.

IV. Sentence and Order

It is Ordered:

4.1a The defendant shall pay to the clerk of this court:

JASS CODE

RTN/RJN	\$ 200 ⁰⁰	Restitution to: _____ (Name and Address--address may be withheld and provided confidentially to Clerk of the Court's office.)	
PCV	\$ 500 ⁰⁰	Victim assessment	RCW 7.68.035
	\$ _____	Domestic Violence assessment up to \$100	RCW 10.99.080
CRC	\$ 1245 ⁰⁰	Court costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190	
		Criminal filing fee \$ 200 ⁰⁰	FRC
		Witness costs \$ _____	WFR
		Sheriff service fees \$ 895 ⁰⁰	SFR/SFS/SFW/WRF
		Jury demand fee \$ _____	JFR
		Extradition costs \$ _____	EXT
		Incarceration fee \$ 150 ⁰⁰	JLR
		Other \$ _____	
PUB	\$ _____	Fees for court appointed attorney	RCW 9.94A.760
WFR	\$ _____	Court appointed defense expert and other defense costs	RCW 9.94A.760
FCM/MTH	\$ _____	Fine RCW 9A.20.021; <input type="checkbox"/> VUCSA chapter 69.50 RCW, <input type="checkbox"/> VUCSA additional fine deferred due to indigency RCW 69.50.430	
CDF/LDI/FCD NTF/SAD/SDI	\$ _____	Drug enforcement fund of Cowlitz County Prosecutor	RCW 9.94A.760
MTH	\$ _____	Meth/Amphetamine Clean-up fine \$3000. RCW 69.50.440, 69.50.401(a)(1)(ii).	
CLF	\$ _____	Crime lab fee <input type="checkbox"/> suspended due to indigency	RCW 43.43.690
	\$ 100 ⁰⁰	Felony DNA collection fee <input type="checkbox"/> not imposed due to hardship	RCW 43.43.7541
RTN/RJN	\$ _____	Emergency response costs (for incidents resulting in emergency response and conviction of driving, flying or boating under the influence, vehicular assault under the influence, or vehicular homicide under the influence, \$1000 max.)	RCW 38.52.430
	\$ _____	Urinalysis cost	
	\$ _____	Other costs for: _____	
	\$ 2045 ⁰⁰	Total	RCW 9.94A.760

The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

shall be set by the prosecutor.

is scheduled for _____.

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

	<u>Name of other defendant</u>	<u>Cause Number</u>	<u>(Amount-\$)</u>
RJN	<u>DANIEL R. LONGAN</u>	<u>07-1-00431-6</u>	<u>\$200</u>

[] 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 of the court and on a schedule established by the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$ 50.00 per month commencing _____ . RCW 9.94A.760.

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).

[] The court finds that the defendant has the means to pay, in addition to the other costs imposed herein, for the cost of incarceration and the defendant is ordered to pay such costs at the rate of \$50 per day, unless another rate is specified here: _____ . (JLR) RCW 9.94A.760.

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

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 **DNA Testing.** The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

[] **HIV Testing.** The defendant shall submit to HIV testing. RCW 70.24.340.

4.3 **No Contact:** The defendant shall not have contact with _____ (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for _____ years (not to exceed the maximum statutory sentence).

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

The defendant shall not use, own or possess any **firearm** or ammunition while under the supervision of the Department of Corrections. RCW 9.94A.120.

[] The firearm, to wit: _____ is forfeited to _____, a law enforcement agency.

4.4 **Other:** _____

6-5

4.5 Confinement Over One Year. The court sentences the defendant to total confinement as follows:

- (a) **Confinement.** RCW 9.94A.589. A term of total confinement in the custody of the Department of Corrections (DOC):

180 months on Count I _____ months on Count _____
120 months on Count II _____ months on Count _____
_____ months on Count _____ months on Count _____

The confinement time on Counts I & II contains a mandatory minimum term of 5 YEARS.

The confinement time on Count I includes 60 months a firearm enhancement.

The court finds that the serious offenses in Counts I and II did not arise from separate and distinct conduct, for the purposes of RCA 9.94A.589(1)(b). Therefore, all counts shall be served concurrently, except for the portion of those counts for which there is an enhancement as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____.

Actual number of months of total confinement ordered is: 180

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

but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.589.

Confinement shall commence immediately unless otherwise set forth here: _____.

- (b) **Confinement.** RCW 9.94A.712 (Sex Offenses only): The court orders the following term of confinement in the custody of the DOC:

Count _____ minimum term _____ maximum term _____
Count _____ minimum term _____ maximum term _____

- (c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely in regard to these offenses. RCW 9.94A.505(6). The jail shall compute time served unless the credit for time served prior to sentencing is specifically set forth here by the court: The defendant shall received credit for time served in the Cowlitz County and Columbia County (Oregon) jails since March 2, 2007

4.6 Community Placement or Community Custody. The court orders community placement or community custody as follows:

Community Placement: Count _____ for _____ months;
Count _____ for _____ months; Count _____ for _____ months.

Community Custody for count(s) _____, sentenced under RCW 9.94A.712, for any period of time the defendant is released from total confinement before the expiration of the maximum sentence.

Community Custody:

Count I: for a range from 24 to 48 months.

Count II: for a range of 24 – 48 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 offenses 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. 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 as required by DOC to confirm compliance with the orders of the court; (8) for sex offenses, submit to electronic monitoring if imposed by DOC; and (9) abide by any additional conditions imposed by DOC under RCW 9.94A.720. 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.

The defendant shall have no contact with: _____

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

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

The defendant shall participate in the following crime-related treatment or counseling services: substance abuse evaluation and treatment.

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: _____

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.

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. 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

V. Notices and Signatures

- 5.1 Collateral Attack on Judgment.** If you wish to petition or move 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, you must do so 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.** If you committed your offense prior to July 1, 2000, you 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. If you committed your offense on or after July 1, 2000, the court shall retain jurisdiction over you, for the purpose of your compliance with payment of the legal financial obligations, until you have completely satisfied your obligation, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). **You are required to contact the Cowlitz County Collections Deputy, 312 SW First Avenue, Kelso, WA 98626 (360) 414-5532 with any change in address and employment or as directed. Failure to make the required payments or advise of any change in circumstances is a violation of the sentence imposed by the Court and may result in the issuance of a warrant and a penalty of up to 60 days in jail.** The clerk of the court has authority to collect unpaid legal financial obligations at any time while you remain under the jurisdiction of the court for purposes of your legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).
- This crime involves a Rape of a Child in which the victim became pregnant. The defendant shall remain under the court's jurisdiction until the defendant has satisfied support obligations under the superior court or administrative order, up to a maximum of twenty-five years following defendant's release from total confinement or twenty-five years subsequent to the entry of the Judgment and Sentence, whichever period is longer.
- 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 (DOC) 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.760 may be taken without further notice. RCW 9.94A.7606.
- 5.4 Restitution Hearing.**
 I waive any right to be present at any restitution hearing (sign initials): _____.
- 5.5 Community Custody Violation.**
(a) If you are subject to a first or second violation hearing and DOC finds that you committed the violation, you may receive as a sanction up to 60 days of confinement per violation. RCW 9.94A.634.
(b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.737(2).
- 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 clerk of the court 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.
- 5.8** Count I and II are felonies in the commission of which you used a motor vehicle. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke your driver's license. RCW 46.20.285.
- 5.9** If you are or become subject to court-ordered mental health or chemical dependency treatment, you must notify DOC and you must release your treatment information to DOC for the duration of your incarceration and supervision. RCW 9.94A.562.

5.10 IF AN APPEAL IS PROPERLY FILED AND APPEAL BOND POSTED, THE DEFENDANT WILL REPORT TO THE DEPARTMENT OF CORRECTIONS, WHO WILL MONITOR THE DEFENDANT DURING THE PENDENCY OF THE APPEAL, SUBJECT TO ANY CONDITIONS IMPOSED BY DOC AND/OR INCLUDED IN THIS JUDGMENT & SENTENCE AND SPECIFICALLY NOT STAYED BY THE COURT.

5.11 Other: _____

Done in Open Court and in the presence of the defendant this date: February 4, 2009



Judge/Hon. Stephen Warning



Deputy Prosecuting Attorney
WSBA No. 29869
MICHELLE L. SHAFFER



Attorney for Defendant
WSBA No. 33299
SHANNON CONNALL



Defendant
HEATHER LEE VANHOOSER

Voting Rights Statement: I acknowledge that my right to vote has been lost due to felony conviction. 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: _____

Heather VanHouser

I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the _____ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

Interpreter signature/Print name: _____

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

Witness my hand and seal of the said Superior Court affixed this date: 10-27-11.

Clerk of the Court of said county and state, by: *[Signature]*, Deputy Clerk

Identification of the Defendant

SID No. WA21204727
(If no SID take fingerprint card for State Patrol)

Date of Birth: 9-10-1976

FBI No. 695539CC1

Local ID No. _____

PCN No. _____

Other _____

Alias name, DOB: _____

Race:

Asian/Pacific Islander Black/African-American Caucasian
 Native American Other: _____

Ethnicity:

Hispanic Male
 Non-Hispanic Female

Fingerprints: I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto.

Clerk of the Court, Deputy Clerk, J. Bell Dated: 2-4-09

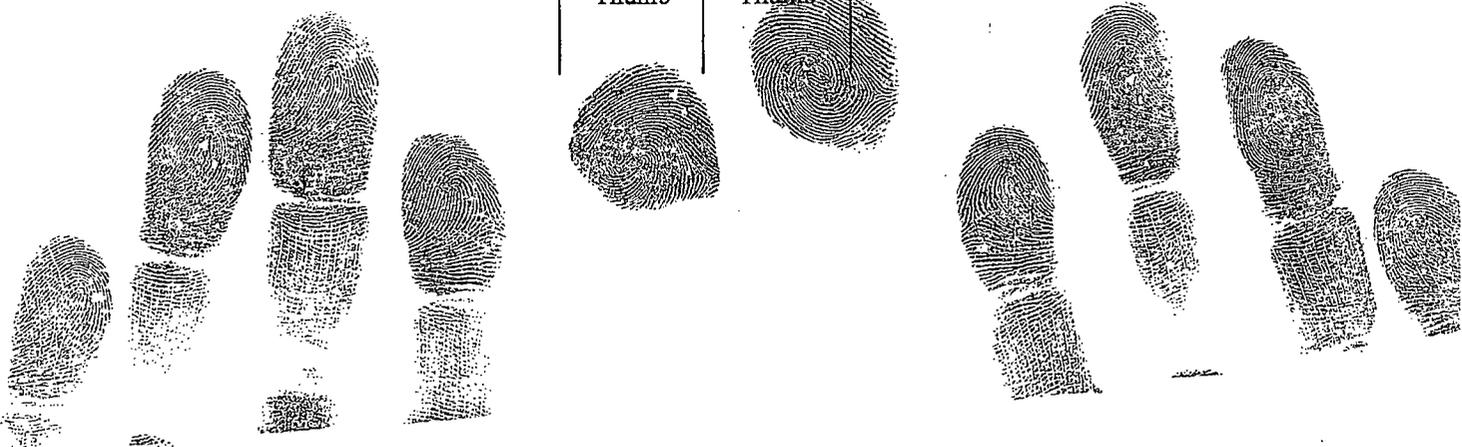
The defendant's signature: Heather VanHousen

Left four fingers taken simultaneously

Left Thumb

Right Thumb

Right four fingers taken simultaneously



APPENDIX H

RCW 2.36.100. Excuse from service--Reasons--Assignment to another term--Summons for additional service--Certification of prior service

(1) Except for a person who is not qualified for jury service under RCW 2.36.070, no person may be excused from jury service by the court except upon a showing of undue hardship, extreme inconvenience, public necessity, or any reason deemed sufficient by the court for a period of time the court deems necessary.

(2) At the discretion of the court's designee, after a request by a prospective juror to be excused, a prospective juror excused from juror service for a particular time may be assigned to another jury term within the twelve-month period. If the assignment to another jury term is made at the time a juror is excused from the jury term for which he or she was summoned, a second summons under RCW 2.36.095 need not be issued.

(3) When the jury source list has been fully summoned within a consecutive twelve-month period and additional jurors are needed, jurors who have already served during the consecutive twelve-month period may be summoned again for service. A juror who has previously served may only be excused if he or she served at least two weeks of juror service within the preceding twelve months. An excuse for prior service shall be granted only upon the written request of the prospective juror, which request shall certify the terms of prior service. Prior jury service may include service in superior court, in a court of limited jurisdiction, in the United States District Court, or on a jury of inquest.

APPENDIX I

GR 28. JURY SERVICE POSTPONEMENT, EXCUSAL, AND DISQUALIFICATION

(a) Scope of rule. This rule addresses the procedures for postponing and excusing jury service under RCW 2.36.100 and 2.36.110 and for disqualifying potential jurors under RCW 2.36.070 (basic statutory qualifications).

(b) Delegation of authority to postpone, excuse, or disqualify.

(1) The judges of a court may delegate to court staff and county clerks their authority to disqualify, postpone, or excuse a potential juror from jury service.

(2) Any delegation of authority under this rule must be written and must specify the criteria for making these decisions.

(3) Judges may not delegate decision-making authority over any grounds for peremptory challenges or challenges for cause that fall outside the scope of this rule.

(c) Grounds for postponement of service.

(1) Postponement of service for personal or work-related inconvenience should be liberally granted when requested in a timely manner.

(2) Postponement shall be to a specified period of time within the twelve-month period pursuant to RCW 2.36.100(2).

(d) Grounds for excusal from service.

(1) Excusal from jury service shall be limited and shall be allowed only when justified by the criteria established in RCW 2.36.100(1) and 2.36.110.

(e) Grounds for disqualification of potential jurors. [Reserved. See RCW 2.36.070.]

APPENDIX J

ER 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of Accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) *Character of Victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) *Character of Witness.* Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

APPENDIX K

ER 803. HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

(a) **Specific Exceptions.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) *Present Sense Impression.* A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) *Excited Utterance.* A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) *Then Existing Mental, Emotional, or Physical Condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) *Statements for Purposes of Medical Diagnosis or Treatment.* Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) *Recorded Recollection.* A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) *Records of Regularly Conducted Activity.* [Reserved. See RCW 5.45.]

(7) *Absence of Entry in Records Kept in Accordance With RCW 5.45.* Evidence that a matter is not included in the memoranda, reports, records,

or data compilations, in any form, kept in accordance with the provisions of RCW 5.45, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) *Public Records and Reports*. [Reserved. See RCW 5.44.040.]

(9) *Records of Vital Statistics*. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) *Absence of Public Record or Entry*. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) *Records of Religious Organizations*. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) *Marriage, Baptismal, and Similar Certificates*. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) *Family Records*. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, tattoos, engravings on urns, crypts, or tombstones, or the like.

(14) *Records of Documents Affecting an Interest in Property*. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if

the record is a record of a public office and an applicable statute authorized the recording of documents of that kind in that office.

(15) *Statements in Documents Affecting an Interest in Property.* A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) *Statements in Ancient Documents.* Statements in a document in existence 20 years or more whose authenticity is established.

(17) *Market Reports, Commercial Publications.* Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) *Learned Treatises.* To the extent called to the attention of an expert witness upon cross examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) *Reputation Concerning Personal or Family History.* Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of a person's personal or family history.

(20) *Reputation Concerning Boundaries or General History.* Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) *Reputation as to Character.* Reputation of a person's character among his associates or in the community.

(22) *Judgment of Previous Conviction.* Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of 1 year, to prove any fact essential to sustain the judgment, but not including, when offered by the prosecution in a criminal case for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) *Judgment as to Personal, Family, or General History, or Boundaries.* Judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation

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

In re the Personal Restraint)	NO. 41505-4-11
Petition of)	Cowlitz County No.
)	
)	
)	CERTIFICATE OF
)	MAILING
DANIEL RAYMOND LONGAN,)	
)	
Petitioner.)	
<hr style="width: 30%; margin-left: 0;"/>		

I, Michelle Sasser, certify and declare:

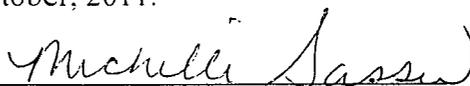
That on the 28th day of October, 2011, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing a Response to Personal Restraint Petition addressed to the following parties:

DANIEL LONGAN
DOC # 827885
COYOTE RIDGE CORR. CENTER
GA-23-4L
P.O. BOX 769
CONNELL, WA 99326-0769

COURT OF APPEALS, DIVISION II - CLERK
950 BROADWAY, SUITE 300
TACOMA, WA 98402

I certify under penalty of perjury pursuant to the laws of the State
of Washington that the foregoing is true and correct.

Dated this 28th day of October, 2011.



Michelle Sasser