

NO. 42079-1-II

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

STATE OF WASHINGTON, RESPONDENT

v.

COURTNEY LAMAR JONES, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Brian Tollefson

No. 10-1-03448-1

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**Brief of Respondent**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the defendant's conviction of attempted first degree assault should be affirmed where, when viewed in the light most favorable to the State, there is sufficient evidence from which a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
2. Whether the defendant has failed to show ineffective assistance of counsel where his trial counsel's decision not to request jury instructions regarding a lesser included offense can be characterized as a legitimate tactical decision.
3. Whether the trial court properly admitted the rifle marked as exhibit 25 into evidence where that rifle was identified as being the same rifle used by the defendant to commit the crimes charged in counts I and III.

B. STATEMENT OF THE CASE.

1. Procedure

On August 13, 2010, Courtney Lamar Jones, hereinafter referred to as the "defendant," was charged by information with attempted second degree assault with a firearm sentence enhancement in count I, and first-degree unlawful possession of a firearm in counts II and III. CP 1-2.

On January 5, 2011, the State filed an amended information in which it charged attempted first degree assault with two firearm enhancements and alleged an aggravating factor in count I, and first-

degree unlawful possession of a firearm in counts II and III. CP 24-26.

*See* RP 122-23.

The case was called for trial on April 5, 2011, RP 1, and the court heard a motion pursuant to CrR 3.5, at which Lakewood Police Investigator Jeff Martin, Officer Sean Conlon, and the defendant testified. RP 1-35, 45-120, 123-43. The court held that statements made by the defendant to Lakewood Police officers were admissible. RP 143-44, 153. *See* CP 93-97.

The court also heard motions in limine, RP 35-44, 150-241; 04/11/2011 RP 2-8. *See* CP 28-29. Among these motions was the defendant's motion to exclude the SKS rifle because he argued there was no evidence to show that this rifle was the same used by the defendant in the charged crimes. RP 229-300, 706-707, 865-72, 881. *See* CP 28-29. The deputy prosecutor noted that there was evidence that it was the same rifle. Specifically, forensic evidence indicated that "the SKS cartridges that were located on the scene [of the crimes at issue] had been cycled through the action of the assault rifle [he was seeking to introduce] and it left tool markings on it [i.e., the cartridges]." RP 233. The court denied the defendant's motion to exclude the rifle, and held that it would allow its admission for illustrative purposes, and possibly as substantive evidence depending on the foundational evidence. RP 239.

For purposes of the unlawful possession of firearm charges in counts II and III, the defendant stipulated that he had been previously convicted of a serious offense, and his written stipulation was admitted as exhibit 2. RP 8-10, RP 939-40.

The parties selected a jury, 04/11/11 RP 10-12; RP 145-50, and gave their opening statements. RP 252.

The State called Lakewood Police Department Investigator Sean Conlon, RP 252-347, Jacalyn Slager, RP 349-87, Lakewood Police Detective Darin Sale, RP 389-424, Lakewood Police Detective Bryan Johnson, RP 426-70, Danielle Green, RP 471-502, Cory Delanoy, RP 502-25, 670-85, David Ward, Jr., RP 526-625, Susan White, RP 625-38, Kayla Hartford, RP 642-70, Pamela Jaquez, RP 685-700, Lakewood Police Officer Jason Catlett, RP 701-09, 918-921, Pierce County Corrections Officer Rob Scollick, RP 723-35, Dianne McCann, RP 736-52, Racheal Stalnaker, RP 753-58, Dustin Kennon, RP 759-62, Kurtus Phillips, RP 769-828, and David Escobedo. RP 831-54.

The State then moved to admit the SKS rifle marked as exhibit 25. RP 855. The prosecutor argued, *inter alia*, that the weapon itself was distinctive in that it was “an assault rifle with collapsible stock, a pistol grip, [and] a banana clip,” and that Jacalyn Slager and David Ward, Jr. both identified the rifle marked as exhibit 25 as the rifle the defendant used in these crimes. RP 858-60. The court admitted the SKS rifle. RP 872.

The State then called Johan Schoeman, RP 874-909, and Investigator Jeff Martin, and rested. RP 921-81.

The defendant moved to dismiss the attempted first-degree assault charge for insufficient evidence. RP 984-1002. That motion was denied. RP 1002.

The defendant rested without calling any witnesses or presenting any evidence. RP 1002.

The parties then discussed jury instructions. RP 1009-44. Defense counsel noted that he had made a tactical decision and would not be proposing jury instructions regarding lesser-included offenses of attempted first-degree assault. RP 1011.

The parties gave closing arguments on April 26, 2011. RP 1046-85 (State's closing argument), RP 1086-99 (Defendant's closing argument), RP 1100-1108. (State's rebuttal argument).

On April 27, 2011, the jury returned verdicts of guilty to attempted first degree assault as charged in count I, and guilty to first degree unlawful possession of a firearm as charged in counts II and III. CP 35, 37, 39. RP 1121-22. The jury also returned special verdicts indicating that the defendant was armed with two firearms at the time of the commission of the attempted first degree assault in count I. CP 36, 38. RP 1121-22.

On April 28, 2011, the court found that substantial and compelling reasons existed which justified an exceptional sentence above the standard range for all counts, CP 90-92, and sentenced the defendant to 120 months

on count I, 102 months on counts II and III, and 72 months for the firearm sentence enhancements for a total of 222 months in total confinement. CP 76-89. RP 1138-40.

The defendant filed a timely notice of appeal the same day. CP 106; RP 1141.

## 2. Facts

In August, 2010, there was an ongoing dispute between the defendant and Edward Williams. RP 346-47, 645.

On August 11, 2010, Kayla Hartford, who had known the defendant for almost two years and bore his child, RP 643-44, RP 364, 378, called the defendant and told him that Williams was in a car that had tried to run her over. RP 645. Hartford indicated that she was stepping off the stairs of her apartment complex when a red car sped towards her, forcing her to move out of the way to avoid being hit. RP 644. Hartford never called the police about what she believed Williams did. RP 655.

Instead, she called the defendant to inform him of what had happened. RP 645. The defendant started yelling when she called. RP 645.

Jacalyn Slager testified that the defendant picked her up from her room at the Western Inn on South Tacoma Way on August 11, 2010. RP 354. He was driving an SUV and had one passenger, his then-current girlfriend, "Angel." RP 356.

When Slager got into the SUV, the defendant was talking on the phone with “somebody that he wanted to have a beef with.” RP 358. Slager testified that she believed the defendant was upset. RP 358. Slager testified that she got into the SUV because the defendant was going to give her a ride to a Wal-Mart store, RP 356, but that after the defendant’s telephone conversation, they did not go to the store. RP 359-60.

Instead, they picked up a man identified as “Little Homey,” or David Ward, Jr. RP 359-60. The defendant then stopped for a red light and told Slager to get behind the driver’s wheel of the SUV. RP 360-61. The defendant got into the backseat with Ward, while Slager and Angel occupied the front seats. RP 361. When the defendant got into the backseat, he pulled out a silver and black handgun and gave it to Ward. RP 361. Slager identified this handgun as the same one police later found on the floorboard of the SUV after the shooting. RP 361. *See* RP 265 (Conlon’s testimony). Slager had seen the defendant with this handgun before once or twice. RP 362.

After the defendant gave Ward the handgun, Slager was told to drive slowly to Hartford’s apartment at the intersection of Chicago and Lincoln. RP 364. Slager also testified that a woman named “Bri,” or Brianne Williams, who she identified as Williams’ “baby’s mom,” lived close to Hartford. RP 364.

The defendant appeared to be looking for someone as Slager drove to Hartford's residence. RP 365. When they drove by a group of men walking outside of Brianne Williams' apartment, the defendant said, "checkmate." RP 365-366,

Slager then drove the defendant to Hartford's apartment building, and the defendant got out of the vehicle and went to Kayla's apartment. RP 367. When he returned to the vehicle, less than sixty seconds later, the defendant had "the other gun." RP 367. Slager identified the "other gun" was the same rifle she had seen in a photograph stored on the defendant's cell phone, RP 367, 378, which she testified, matched the SKS rifle marked and admitted as exhibit 25 in this case. RP 363-64, 380. He then told his girlfriend, Angel, to get out of the vehicle. RP 368. Angel exited the SUV, leaving Slager driving, and the defendant and Ward in the backseat. RP 368.

As Slager pulled out of Hartford's apartment complex, the defendant again appeared to be looking for someone. RP 368. He rolled down his window and was looking out through the open window. RP 380. He told Slager to drive slowly past Brianne William's apartment. RP 368-69. Slager acknowledged in her testimony that she drove a vehicle for somebody inside that had the intentions of doing bodily harm to somebody else." RP 382-83. She thought that the defendant was looking for someone with his gun. RP 385.

However, they never made it that far, because someone shot at the SUV Slager was driving. RP 369. Slager testified that she put her head down on the steering wheel and inadvertently drove into a fence. RP 369.

After striking the fence, the defendant and David got out of the vehicle and ran. RP 370. Slager got out about five minutes later, and left the area because she did not want to get in trouble. 370-71.

At no point did the defendant ever tell Slager that they should call the police because Kayla was in danger, that they should hurry because she was in danger, or warn her of any potential danger. RP 369-70. She ultimately went back to her hotel room, and was joined there by the defendant that evening. RP 372.

Ward testified that on August 11, 2010, he was walking to his friend's residence in Lakewood when the defendant saw him and asked him if he wanted a ride. RP 532-33. The defendant was driving the Tahoe and had "Jackie" and another woman in the vehicle with him. RP 533. Ward testified that he got into the defendant's vehicle and that the defendant drove down Chicago, past "a group of people" and to Hartford's residence. RP 533, 535. Ward indicated that they stopped at a stoplight where Jackie got into the driver's seat and the defendant moved to the backseat. RP 534.

When they arrived at Hartford's residence, the defendant got out and went into her apartment. RP 540. Ward testified that he then saw a nine-millimeter handgun in the seat next to him, and picked it up. RP 541-

42. The defendant returned from Hartford's apartment with an assault rifle, RP 542-43, and cautioned the other woman, who was not driving, to exit the vehicle. RP 540. Ward identified the SKS assault rifle marked as exhibit 25 as the rifle the defendant had in the Tahoe. RP 543-44. *See* RP 600. Ward then watched as the defendant placed a magazine, which he described as a "banana" clip into that rifle. RP 544-45.

Once the defendant got back into the SUV with the assault rifle, they "rolled off" towards the Garden Park Apartments on Chicago, the same place at which the defendant had earlier been looking at the group of people on the side of the road. RP 546-47. Ward testified that he believed that the defendant was going to shoot at this group. RP 602. Ward knew that the defendant "had a beef" with a member of this group, though he did not "know the particulars." RP 602-03.

However, before they could find those people, someone started to shoot at the Tahoe. RP 551. Ward did not know the source of the gunfire. RP 551. Ward and the defendant ducked down and the Tahoe struck a tree. RP 551.

Ward testified that when the Tahoe crashed, he dropped the handgun, got out of the vehicle, and ran away. RP 551-52. According to Ward, the defendant ran with him, but maintained possession of the rifle. RP 551-52. They ran to Aretha Ford's apartment. RP 552. Kurtus Phillips and Courtney Smith were also at that apartment. RP 552. The defendant brought the assault rifle into that apartment. RP 552-53.

No one in the apartment considered calling 911 as a result of the shooting. RP 554. Both the defendant and Ward had cell phones, but at no point did the defendant tell Ward to call the police RP. 538-39. The defendant never told Ward that there was an emergency or that Kayla needed help. RP 539. The group of people that they passed on the road on the way to Kayla's residence never approached their vehicle or yelled at anyone in that vehicle. RP 538.

On August 11, 2010, Danielle Green was watching television with Corey Delanoy at her residence in the Garden Park Apartments, located in the area of Chicago and Lincoln. RP 472-74, 486, 504. She heard a shooting that sounded like it came from the first roundabout just down the street," RP 472-74, and exited her apartment to see Slager crash the Tahoe into a neighbor's fence. RP 474-75. She saw two men jump out of the Tahoe, RP 476. Green testified that one man exited the front of the vehicle and tossed what looked like a shotgun," or at least a long gun, to a man who exited the rear of the vehicle. RP 476-78.

Green testified that she did not know if it was a shotgun, but that it was "a longer gun." RP 478. Delanoy testified that it "looked more like a semiautomatic rifle," and resembled an AK47. RP 507-08. The man in front then started shooting a handgun at people in a red car. RP 477. According to Delanoy's original testimony, the man with the assault rifle

began firing that weapon at the red car. RP 509-11. However, when confronted with his earlier handwritten statement, Delanoy testified that the assault riled was never fired. RP 681.

The red car initially drove at the two men who exited the Tahoe, RP 512, and then drove away. RP 477, 481. The two men who had exited the Tahoe then ran after the red car on foot. RP 480-81.

Green came down to help the woman driving and saw her putting cell phones and pagers in her purse. RP 480. Green also saw a gun inside the Tahoe. RP 480. She testified that the woman who had been driving the Tahoe appeared to be panicking, saying something to the effect of “I can’t believe that they brought me into this.” RP 483.

Delanoy called 911. RP 515.

Susan White lived in the Tudor house Apartments in the area of Chicago and Lincoln on August 11, 2010. RP 625-26. Her apartment was on the first floor. RP 626. She testified that, on that day, she saw the defendant get out of a vehicle and run up the stairs of her apartment complex carrying a handgun. RP 627-28. White testified that the defendant was upstairs for a couple of minutes before he returned with “a shotgun or something like that,” or at least a long gun. RP 628-29. White testified that the SKS admitted into evidence in this case “could be” the same gun the defendant was carrying. RP 629.

The defendant then got back into his vehicle and a woman “jumped out.” RP 629. White was standing outside in a group of people watching this when someone in that group said that he or she had called the police. RP 630. The vehicle pulled out of the parking lot and drove up Chicago Avenue towards the Garden Park Apartments when White heard gunshots. RP 631.

White testified that she heard between 15 and 20 gunshots, RP 637, but could not tell where the shots were coming from and did not see anyone shooting. RP 631-32.

White walked out to the street to find that the SUV in which the defendant had been riding had crashed into the bushes. RP 633. White saw some shell casings and a cell phone on the street and noticed police officers who had responded. RP 634.

Pamela Jaquez was the manager of the Garden Park Apartments, located at 12874 Lincoln Avenue Southwest. RP 687. She was in her apartment when she heard the gunshots on August 11, 2010, and looked out her window to see the SUV crash into a fence or a lilac tree across the street. RP 688-89. She saw two men exit the vehicle and they ran up the street. One of them was carrying a black rifle. RP 693-94. Jaquez testified that the SKS rifled admitted as exhibit 25 looked absolutely like the rifle the man was carrying. RP 695-96.

Dianne McCann lived in an apartment complex on Chicago Avenue in Lakewood, Washington on August 11, 2010. RP 736-37. She

was playing cards outside with Racheal Stalnaker and Stalnaker's husband, Dustin Kennon, that evening when she saw people shooting. RP 737-38, 755. McCann testified that an SUV was heading in the direction of the Garden Park Apartments when two men came out from the apartment complex next to hers and began shooting at that SUV. RP 738-39. The Tahoe crashed, and its occupants got out. RP 739-40. McCann testified that three men and a woman exited the vehicle and that the men ran from the scene. RP 741.

Racheal Stalnaker also heard the shooting while playing cards. RP 755. When she turned to look, she saw an SUV pull up towards the road and two people run out and start shooting at it. RP 756. Stalnaker testified that someone inside the SUV returned fire. RP 756. She then jumped onto her three-month-old on the swing to shield him. RP 756.

Dustin Kennon also saw two people come out from behind a fence and start firing on the SUV. RP 761-62. The SUV tried to speed away, but crashed into a fence. RP 762. Kennon's attention then focused to getting his children away from the situation. RP 763.

On August 11, 2010, Lakewood Police Investigator Sean Conlon and Officer Martin responded to a report of shots being fired and a vehicle being struck in the 12800 block of Lincoln Avenue Southwest in Lakewood, Washington. RP 254-57, 262, 929. Conlon and Martin arrived

within a few minutes at the intersection of Lincoln and Chicago. RP 257, 930. That intersection forms a large traffic circle with apartment complexes on each corner of the intersecting streets. RP 257-58.

When officers arrived, they found a Chevrolet Tahoe parked on the east side of Chicago Avenue. RP 258. The Tahoe appeared to have crashed into a rock and had “multiple gunshot holes,” that is, five or six bullet holes, including bullet holes in its windshield. RP 258-59, 314, 930-31. The windows of the vehicle had been shot out and both passenger doors were open. RP 259, 931. Conlon saw a live 7.62 rifle round lying and a handgun on the front floorboard of the Tahoe. RP 259, 265. An SKS assault rifle fires a 7.62-caliber round. RP 331. Lying just outside the passenger-side of the Tahoe was a court document in the defendant’s name. RP 259.

Investigator Conlon moved further down Chicago and noticed about 15 spent .40-caliber shell casings. RP 259. They were “fairly bunched together,” in a roughly 15-foot circle. RP 315. Conlon indicated that .40-caliber rounds are typically fired by handguns. RP 314-15.

Conlon placed markers over the evidence he found and took photographs of the scene. RP 262-63.

Conlon interviewed Alisa Russell at the scene and she gave him a cell phone belonging to Edward Williams, which was found at the same location as the .40-caliber casings. RP 266. Williams was later charged with first degree assault and attempted murder for the shooting, with the

defendant here, David Ward, and Jacalyn Slager the listed victims. RP 267.

Martin interviewed Kayla Hartford, who he described as being very critical of the police responding to the shooting. RP 931-32, 960. Indeed, Hartford never asked for Martin's help or police assistance. RP 974. She never asked the police to protect her from Edward Williams. RP 975.

Officers later located the defendant at the Western Inn, which was about 2 to 2.5 miles from the shooting. RP 270-71, 940-41. Officer Martin called the defendant's room and the defendant agreed to come outside where he was read the *Miranda* warnings and taken into custody. RP 270-71, 321, 942. The defendant was taken to the Lakewood Police station and again read the *Miranda* warnings. RP 324-25.

Detective Bryan Johnson, the Lakewood Police Department Forensic Services Manager, assigned Detective Darin Sale to the scene to conduct forensics work on August 11, 2010, which included taking photographs of the scene. RP 396-99. Sale photographed a Wolf-brand, 7.62-caliber round found near the Tahoe SUV. RP 400, 420. That round was admitted into evidence as exhibit 20. RP 404. Sale testified that there was another 7.62-caliber round found inside the Tahoe. RP 420. Sale also found a court document, which bore the defendant's name in close proximity to the Tahoe. RP 405. He collected it, and it was admitted into evidence as exhibit 22. RP 404-05.

A couple hundred feet from the Tahoe, Sale found 18 .40-caliber casings, which he also collected. RP 406-08, 417-18.

On August 12, 2010, Detective Johnson accompanied Detective Sale to the scene to perform a crime scene reconstruction, and, on August 16, a bullet path analysis of the apparent bullet strikes to the Tahoe, which had been impounded. RP 431-33. That analysis showed that the bullets which struck the Tahoe had been fired from a location to the rear of the driver's side of the Tahoe. RP 433-37. Detective Johnson concluded that the bullets were fired from the area where the .40-caliber casings were found. Moreover, the bullet holes in the Tahoe were consistent with .40-caliber ammunition of the type found at the crime scene. RP 438-39.

Johnson searched the red Nissan and found a court document inscribed with the name Edward Malando Williams inside. RP 450-52.

Detective Johnson also found the silver and black, Smith & Wesson, nine-millimeter handgun floorboard and a Wolf-brand 7.62 by 39 cartridge on the front passenger floorboard, and collected them. RP 442-43, 453-54. The handgun was admitted into evidence at trial as exhibit 24. RP 443-45. There were nine rounds found within the magazine and one in the chamber of the handgun. RP 445-47. The 7.62 cartridge was admitted as exhibit number 21. RP 454-55.

After the shooting, the defendant left the SKS rifle in the apartment of a woman named "Julie." RP 664-65.

Conlon reviewed recorded telephone calls made by the defendant from the jail, and in one of those calls, heard the defendant and Hartford discuss the SKS rifle. RP 281-83.

Conlon testified that an SKS rifle matching the general description of the one the defendant discussed was recovered by Lakewood Police Officer Catlett, along with two magazines, one of which contained ammunition of the same brand as that found at the scene of the shooting here at issue. RP 304. That brand was Wolf ammunition, which has a distinctive gray casing as opposed to the more typical brass casing. RP 304.

Johan Schoeman, a forensic scientist with the Washington State Patrol Crime Laboratory in the firearm and toolmark section, examined the SKS rifle marked as exhibit 25, and found it to be fully operable. RP 875, 881-82, 897-98.

Schoeman testified that if one attempted to fire the SKS rifle with the safety engaged, the weapon would not discharge a bullet. RP 886. Moreover, if a person mistakenly believed that the effect of the engaged safety was a malfunction and continued to rack the slide, he or she would continue to eject unfired cartridges until the magazine was depleted. RP 887.

He noted that the SKS fired 7.62 by 39 caliber rounds, RP 878. Schoeman further testified that such rounds have a muzzle velocity approximately twice that of a standard nine millimeter-round, and that the

muzzle velocity was directly proportion to the “wounding effect” of the bullet. RP 891-93. In fact, the SKS fires a round that is larger than the M16, but smaller than the belt-fed M60. RP 896.

The cartridges admitted as State’s exhibits 20, 21, and 26 were all gray-colored, Wolf-brand cartridges. RP 901-903. Moreover, all had a lacquer applied to them. RP 901. Schoeman testified that because of the lacquer applied to these cartridges, insufficient markings were left during the firing process to determine whether the cartridges found in and around the Tahoe were indeed cycled through the SKS admitted as exhibit 25. RP 905-907.

Lakewood Police Investigator Martin tested the Smith & Wesson nine-millimeter pistol admitted as exhibit 24 and found it to be fully operable. RP 927-29.

The defendant agreed to an interview. RP 274, 324-25. The recorded interview was published to the jury. RP 945. The defendant admitted to being involved in the shooting at the intersection of Lincoln and Chicago, and to having a nine millimeter handgun and an SKS rifle in his possession at the time. RP 274-75, 980-81. He indicated that Jacalyn Slager and David Ward, or “Little David,” were with him and that they were looking for Edward Williams at the time of the shooting. RP 275. The defendant stated that Edward Williams started shooting at them, RP 275-76, apparently before they could find him. The defendant explained that he knew Williams through a relationship he had with the estranged

wife of Williams, Brianne. RP 276. The defendant told police, at some point in his interview, that he pointed a gun at Williams and was going to shoot him. RP 327.

C. ARGUMENT.

1. THE DEFENDANT'S CONVICTION OF ATTEMPTED FIRST DEGREE ASSAULT SHOULD BE AFFIRMED BECAUSE, WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE IS SUFFICIENT EVIDENCE FROM WHICH A RATIONAL TRIER OF FACT COULD HAVE FOUND THE ELEMENTS OF THE CRIME BEYOND A REASONABLE DOUBT.

In a criminal case, a defendant may challenge the sufficiency of the evidence before trial, at the end of the State's case in chief, at the end of all of the evidence, after the verdict, and on appeal. *State v. Lopez*, 107 Wn. App. 270, 276, 27 P.3d 237 (2001). "In a claim of insufficient evidence, a reviewing court examines whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,' 'viewing the evidence in the light most favorable to the State.'" *State v. Brockob*, 159 Wn.2d 311, 336, P.3d 59 (2006) (quoting *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). Thus, "[s]ufficient evidence supports a conviction when, viewing it in the light most favorable to the State, a rational fact finder could find the essential

elements of the crime beyond a reasonable doubt.” *State v. Cannon*, 120 Wn. App. 86, 90, 84 P.3d 283 (2004). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.* (quoting *State v. Myers*, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “Determinations of credibility are for the fact finder and are not reviewable on appeal.” *Brockob*, 159 Wn.2d at 336.

In the present case, in its instruction number 16, the trial court instructed the jury that:

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

- (1) That on or about the 11<sup>th</sup> day of August, 2010, the defendant, or an accomplice, did an act that was a substantial step toward the commission of assault in the first degree;
- (2) That the act was done with the intent to commit assault in the first degree; and
- (3) That the act occurred in the State of Washington.

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

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

CP 40-72 (instruction no. 16). *See* Appendix A, RCW 9A.36.011.

The court further instructed that “[a] substantial step is conduct that strongly indicates a criminal purpose and that is more than mere preparation,” CP 40-72 (instruction no. 9), and that “[a] person commits the crime of assault in the first degree when, with the intent to inflict great bodily harm, he or she assaults another with a firearm.” CP 40-72 (instruction no. 11). *See* Appendix A.

Because the defendant did not object to these instructions, *see* RP 1038-39, they became the law of the case. *See State v. Hickman*, 135 Wn.2d 97, 101, 954 P.2d 900 (1997).

Although the defendant argues that there was insufficient evidence of elements (1) and (2), and of absence of self-defense, Brief of Appellant, p. 9-16, the record demonstrates otherwise.

First, viewing the evidence in the light most favorable to the State, a rational fact finder could have found that, on August 11, 2010, the defendant took a substantial step toward the commission of assault in the first degree.

The evidence indicated that there was an ongoing dispute between the defendant and Edward Williams, RP 346-47, that, on the day of the shooting, Hartford, the mother of the defendant’s child, RP 643-44, called the defendant to tell him that Williams had tried to run her over with a car. RP 644-45, and that this upset Williams to the point that he was yelling. RP 358, 645.

It was in this context that the defendant did the following acts:

(1) he changed his plan from taking Slager to Wal-Mart to picking up David Ward, Jr., and arming him with a pistol. RP 356, 359-61, thereby gaining and arming an additional person;

(2) the defendant instructed Slager to drive slowly to Hartford's apartment, and appeared to be looking for someone until he saw a group of men walking outside of Williams' wife's apartment, at which time he said, "checkmate," RP 365-66;

(3) the defendant had Slager continue to Hartford's apartment, from which he retrieved an SKS assault rifle, RP 540-44, 362-67, 380, and placed a magazine, or "banana" clip, into that rifle, RP 544-45;

(4) the defendant then told his girlfriend, Angel, who was sitting in the front passenger seat of the SUV to get out, RP 368, 540, thereby eliminating the possibility that she would be injured in a coming firefight;

(5) the defendant had Slager drive out of the apartment complex and towards the area in which they had seen the group of men, RP 368-69;

(6) the defendant rolled down his window in the SUV, RP 380, and was looking for someone, RP 275, 382-83, 385, such that Ward believed that the defendant was looking to shoot one of the men in the group they had just passed. RP 602-03.

It was then that the defendant was interrupted by someone, perhaps Williams, opening fire on the SUV in which he was riding. RP 275-76, 369, 551.

Taken individually, a rational fact finder could find beyond a reasonable doubt that any one of these events was “conduct that strongly indicate[d] a criminal purpose and that [wa]s more than mere preparation,” CP 40-72 (instruction no. 9).

First, it would be reasonable to infer that by changing his point of destination from a store to the area where he believed Williams to be located and by then picking up and arming an additional member of his party with a firearm, the defendant indicated his purpose to find the man who had just assaulted his child’s mother, and assault him with a firearm. *See* CP 40-72 (instruction no. 11). Such conduct “strongly indicate[d] a criminal purpose and that [wa]s more than mere preparation,” CP 40-72 (instruction no. 9).

Second, it would be reasonable to infer that by driving slowly and looking in the area of Hartford’s apartment, the defendant was actually looking for Williams, until he found him in a group of men walking along the side of the road and said, “checkmate.” It would be reasonable to further infer that the defendant was conducting reconnaissance for an impending assault, from which he learned the location of Williams, the size of his party, and given that, the fact that he was going to need additional firepower. This is conduct which “strongly indicate[d] a criminal purpose and that [wa]s more than mere preparation,” CP 40-72 (instruction no. 9).

Third, a jury could reasonably infer that by immediately thereafter going to Hartford's apartment and retrieving an assault rifle, RP 540-44, 362-67, 380, the defendant was obtaining the additional firepower he needed to assault Williams. This, too, is conduct which "strongly indicate[d] a criminal purpose and that [wa]s more than mere preparation," CP 40-72 (instruction no. 9).

Fourth, a fact finder could reasonably infer that by telling his girlfriend, Angel, to get out before he drove off to confront Williams, RP 368, 540, that the defendant was making the final preparation for an impending assault by eliminating any possibility that his loved one would be injured in the coming firefight. Again, this is conduct which "strongly indicate[d] a criminal purpose and that [wa]s more than mere preparation," CP 40-72 (instruction no. 9).

Fifth, a jury could reasonably infer that by instructing Slager to drive out of the apartment complex and towards the area in which they had seen the group of men, RP 368-69, the defendant was actually launching his assault on Williams. This, too, is conduct which "strongly indicate[d] a criminal purpose and that [wa]s more than mere preparation," CP 40-72 (instruction no. 9).

Finally, it could be reasonably inferred that by rolling down his window in the SUV, RP 380, and, with assault rifle in hand, looking for someone as they approached the area in which he had seen Williams, RP 275, 382-83, 385, the defendant was then ready to open fire on and inflict

great bodily harm to Williams. Indeed, Ward believed that the defendant was looking to do just that. RP 602-03. This is certainly conduct which “strongly indicate[d] a criminal purpose and that [wa]s more than mere preparation,” CP 40-72 (instruction no. 9).

Because all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant, *State v. Salinas*, 119 Wn.2d 192, 201, these inferences must be drawn for purposes of this analysis. When they are, it becomes clear that a rational fact finder could have found that, on August 11, 2010, the defendant engaged in conduct which “strongly indicate[d] a criminal purpose and that [wa]s more than mere preparation,” CP 40-72. (instruction no. 9), and hence, that the defendant took a substantial step toward the commission of assault in the first degree.

Therefore, there was sufficient evidence of element (1). *See Cannon*, 120 Wn. App. at 90.

Moreover, viewing the evidence in the light most favorable to the State, a rational fact finder could have found the intent to commit first degree assault beyond a reasonable doubt.

As the defendant notes in his brief, “[e]vidence of intent ... is to be gathered from all of the circumstances of the case, including not only the manner and act of inflicting the wound, but also the nature of the prior relationship and any previous threats.” *State v. Ferreira*, 69 Wn. App. 465, 468-69, 850 P.2d 541 (1993)(quoting *State v. Woo Won Choi*, 55

Wn. App. 895, 906, 781 P.2d 505 (1989), *review denied*, 114 Wn.2d 1002, 788 P.2d 1077 (1990)); Brief of Appellant, p. 11.

In the present case, the evidence showed that there was an ongoing dispute between the defendant and Edward Williams, RP 346-47, and that, on the day of the incident, Hartford called the defendant to tell him that Williams had tried to run her over with a car. RP 644-45. The defendant was so upset that he started yelling into the phone when she told him this. RP 645.

Jacalyn Slager also testified that the defendant was upset. RP 358. She testified that she got into the SUV because the defendant was going to give her a ride to a Wal-Mart store, RP 356, but that after the defendant's telephone conversation, they did not go to the store. RP 359-60.

David Ward, Jr. testified that he, too was in the SUV with the defendant, RP 532-33, and that the defendant "had a beef" with a member of a group of men they drove past. RP 602-03. Ward testified that he believed that the defendant was going to shoot at this group. RP 602.

The defendant himself told police that he was looking for Edward Williams at the time of the shooting, RP 275, and that he pointed a gun at Williams and was going to shoot him. RP 327.

It would be reasonable to infer from the fact that Williams tried to kill the mother of the defendant's child, that when the defendant thereafter got angry, picked up a friend, armed him with a pistol, armed himself with an assault rifle, dropped off his current girlfriend, and went looking for

Williams, he did so because he intended to shoot Williams. Indeed, in this context, it would be reasonable to infer that the defendant performed the substantial steps in question with the intent to assault Williams with a firearm and inflict great bodily harm to him, that is, with the intent to commit assault in the first degree.

Because all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant, *Salinas*, 119 Wn.2d at 201, these inferences must be drawn. When they are, a rational fact finder could have found beyond a reasonable doubt that the defendant committed the substantial steps in question with the intent to commit assault in the first degree.

Therefore, there was sufficient evidence of element (2).

Finally, although the defendant argues that “the state failed to disprove the essential element of self-defense,” Brief of Appellant, p. 13-16, the record shows otherwise.

The court instructed the jury that

It is a defense to a charge of attempted assault in the first degree that the force attempted was lawful as defined by this instruction.

The attempt to use force upon or toward the person of another is lawful when attempted by a person who reasonably believes that he or she is about to be injured or by someone lawfully aiding a person who he or she reasonably believes is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under

the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force attempted by the defendant was not lawful. If you find that the State has not proved the absence of self defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to this charge.

CP 40-72 (instruction no. 17).

The court further instructed that

Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist, and (2) the amount of force used was reasonable to effect the lawful purpose intended.

CP 40-72 (instruction no. 18).

Because the defendant did not object to these instructions, *see* RP 1038-39, they became the law of the case. *See Hickman*, 135 Wn.2d 97, 101.

In the present case, the evidence showed that the defendant was driving a vehicle outside the area in which Williams was located, when he made the decision to change destinations, pick-up and arm an additional friend with a pistol, and actively search for Williams. RP 356, 359-61, 365-66. When he apparently found Williams in a group of men walking along the street and drove slowly past him, Williams did nothing, even though he enjoyed an apparent tactical advantage. RP 365-66, 538.

Indeed, at no point prior to the defendant picking up and arming Ward with a pistol, RP 356, 359-61, conducting surveillance on Williams, RP 365-66, arming himself with an assault rifle, RP 540-44, 362-67, 380, dropping off his current girlfriend, RP 368, 540, and going back to search for Williams, RP 368-69, with the apparent intent of shooting him with that assault rifle, RP 602-03, did Williams pose any threat to the defendant. *See* RP 252-981.

Under such circumstances, it would be reasonable to infer that the defendant was in no danger of being injured by Williams. Because all reasonable inferences from the evidence must be drawn in favor of the State, *Salinas*, 119 Wn.2d at 201, this inference must be drawn. When it is, a rational fact finder could find beyond a reasonable doubt that the attempt to use force upon Williams was not lawful because it was attempted by a person who could not have reasonably believed that he was about to be injured by Williams. *See* CP 40-72 (instruction no. 17).

Nor was this an instance of defense of others. Although, according to Hartford, Williams was inside a car that apparently tried to run her over, Williams never returned to Hartford's residence, or further threatened Hartford in any way. RP 644-69. Indeed, Hartford, despite having a telephone, never called the police because she was worried about Williams. RP 655. Not even when the police came to her, did she request their help or assistance with Williams. RP 974-75. In fact, she did not seem to so much as want police in the area. RP 931-32. Under these

circumstances, the defendant could not have been “lawfully aiding a person who he... reasonably believe[d] [wa]s about to be injured” or “preventing or attempting to prevent an offense against the person.” CP 40-72 (instruction no. 17). Therefore, again, there was sufficient evidence that the defendant’s attempted use of force was unlawful.

Indeed, given that the defendant was driving a vehicle, *see, e.g.*, RP 354, and had a cell phone in hand, *see, e.g.* RP 358, he could have simply driven out of the area or called the police if he felt that Williams posed a threat to himself or anyone else. Hence, a “reasonably effective alternative to the use of force appeared to exist,” CP 40-72 (instruction no. 18). As a result any use or threatened use of force by the defendant against Williams at that time would have been more than was necessary, CP 40-72 (instruction no. 18), and therefore, unlawful. CP 40-72 (instruction no. 17).

Therefore, there was sufficient evidence of the lack of self-defense and that the defendant’s attempted use of force was not lawful.

Hence, when viewed in the light most favorable to the State, there is sufficient evidence from which a rational trier of fact could have found the essential elements of the crime of attempted first-degree assault beyond a reasonable doubt, and the defendant’s conviction of that crime should be affirmed.

2. DEFENDANT HAS FAILED TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS TRIAL COUNSEL'S DECISION NOT TO REQUEST JURY INSTRUCTIONS PERTAINING TO A LESSER INCLUDED OFFENSE CAN BE CHARACTERIZED AS A LEGITIMATE TACTICAL DECISION.

“The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington constitution guarantee the right to effective assistance of counsel.” *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011); *State v. Yarbrough*, 151 Wn. App. 66, 89, 210 P.3d 1029, 1040-41 (2009); *State v. Johnston*, 143 Wn. App. 1, 177 P.3d 1127 (2007). A claim of ineffective assistance of counsel is reviewed *de novo*. *Yarbrough*, 151 Wn. App. at 89.

“Washington has adopted the *Strickland* test to determine whether a defendant had constitutionally sufficient representation.” *State v. Cienfuegos*, 144 Wn.2d 222, 25 P.3d 1011 (2001)(citing *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990)); *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). That test requires that the defendant meet both prongs of a two-prong test. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *See also, e.g., State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). “First, the defendant must show that counsel’s performance was deficient” and “[s]econd, the defendant must show that the deficient performance prejudiced the defense.” *Strickland*, 466 U.S. at 687;

*Cienfuegos*, 144 Wn.2d at 226-27. A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563, 571 (1996); *In Re Rice*, 118 Wn.2d 876, 889, 828 P.2d 1086 (1992); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). The first prong “requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland*, 466 U.S. at 687. Specifically, “[t]o establish deficient performance, the defendant must show that trial counsel’s performance fell below an objective standard of reasonableness.” *Johnston*, 143 Wn. App. at 16. “The reasonableness of trial counsel’s performance is reviewed in light of all the circumstances of the case at the time of counsel’s conduct.” *Id.*; *State v. Garrett*, 124 Wn.2d 504, 518, 881 P.2d 185 (1994). “Competency of counsel is determined based upon the entire record below.” *State v. Townsend*, 142 Wn.2d 838, 15 P.3d 145 (2001)(citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969).

“To prevail on a claim of ineffective assistance of counsel, the defendant must overcome a strong presumption that defense counsel was effective.” *Yarbrough*, 151 Wn. App. at 90. This presumption includes a strong presumption “that counsel’s conduct constituted sound trial strategy.” *Rice*, 118 Wn.2d at 888-89. “If trial counsel’s conduct can be

characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel.” *Yarbrough*, 151 Wn. App. at 90 (citing *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002), *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)).

With respect to the second prong, “[p]rejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed.” *Yarbrough*, 151 Wn. App. at 90. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Cienfuegos*, 144 Wn.2d at 229.

Although the defendant here alleges that his trial counsel was ineffective for failing to request lesser included offense instructions, Brief of Appellant, p. 16-26, the record shows otherwise.

While the defendant would have been entitled to jury instructions on second-degree assault, *see* Brief of Appellant, p. 17-18, this fact is irrelevant to an ineffective assistance of counsel analysis. Indeed,

a defendant who is entitled to lesser included instructions may choose to forgo such instructions. The salient question [thus] is not whether [the defendant] is entitled to such instructions but, rather, whether defense counsel was ineffective in forgoing such instructions.

*State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011).

Indeed, “[t]he inclusion or exclusion of lesser included offense instructions is a tactical decision for which defense attorneys require significant latitude.” *Grier*, 171 Wn.2d at 39.

*Strickland* begins with a ‘strong presumption that counsel’s performance was reasonable. To rebut this presumption, the defendant bears the burden of establishing the absence of any ‘conceivable legitimate tactic explaining counsel’s performance.

*Grier*, 171 Wn.2d 42. Thus, defense counsel is not ineffective for failing to request jury instructions on lesser included offenses where “an all or nothing approach was at least conceivably a legitimate strategy to secure an acquittal.” *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011).

In the present case, the defendant argued that, even were his actions not considered self-defense, his intent was “to go confront” Williams, not to shoot him. RP 1094. He supported this proposition by noting that he never fired a shot at Williams despite an apparent opportunity to do so. RP 1094.

Because the court instructed that “[a] person commits the crime of assault in the first degree when, with the intent to inflict great bodily harm, he or she assaults another with a firearm,” CP 40-72 (instruction no. 11), if a jury found that the defendant never intended to shoot Williams and never fired a shot at him, it could reasonably conclude that he was not guilty of attempted first-degree assault. Thus, the defendant’s “all or nothing

approach [was] at least conceivably a legitimate strategy to secure an acquittal.” *Grier*, 171 Wn.2d at 42-43.

Conversely, had the defendant requested lesser included instructions, given his concession that he was, in fact, looking to “confront” Williams with an assault rifle in hand, the jury would have had ample opportunity to convict him of some lesser form of assault, including the most serious offense of second degree assault. *See* RCW 9A.36.021(1)(c); RCW 9.94A.030(32)(b).

Indeed, as the defendant correctly contends, “[s]econd degree assault requires that the defendant intended to assault the victim and cause fear, but unlike first degree assault,” did not intend [to inflict great bodily harm.” Brief of Appellant, p. 17-18. Thus, if the jury had been instructed on second-degree assault and had chose to believe the defendant’s argument that he intended to “confront” Williams with the SKS rifle, but not to use it to inflict great bodily harm to Williams, that jury would have acquitted the defendant of first-degree assault, but convicted him of second-degree assault. In other words, by offering the lesser included offense instructions on second-degree assault, the defendant’s attorney would have insured that the defendant was convicted of a strike offense. *See* RCW 9.94A.030(32)(b).

Thus defense counsel here “reasonably could have believed that an all or nothing strategy was the best approach to achieve an outright acquittal.” *Grier*, 171 Wn.2d at 43. Indeed, given this situation, trial

counsel should be taken at his word that his decision not to offer “lesser included offense instructions [wa]s a tactical decision,” *Grier*, 171 Wn.2d at 39-43. *See* RP 1101. Because “trial counsel’s conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel.” *Yarbrough*, 151 Wn. App. at 90.

However, even assuming that trial counsel’s performance was deficient, Defendant has failed to establish prejudice. “Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed.” *Yarbrough*, 151 Wn. App. at 90.

However, as the Washington State Supreme Court recently held:

[a]ssuming, as this court must, that the jury would not have convicted [the defendant] of [the charged offense] unless the State had met its burden of proof, the availability of a compromise verdict would not have changed the outcome of [defendant]’s trial.

*Grier*, 171 Wn.2d 43-44.

Here, because the jury convicted the defendant of the charged offense of attempted first-degree assault, the availability of a compromise verdict of second-degree assault would not have changed the outcome of defendant’s trial. The jury would have simply convicted the defendant of attempted first-degree assault without reaching consideration of second-degree assault.

Defendant's attempts to distinguish the cases upon which *Grier* relied for this proposition, *see* Brief of Appellant, p. 23-24, even if considered effective, cannot distinguish *Grier* itself from the present case, or change the fact that it is binding Supreme Court precedent. Nor can they effect the underlying logic of its rule.

Thus, the defendant has also failed to establish prejudice.

As a result, he has failed to show ineffective assistance of counsel and his convictions should be affirmed.

3. THE TRIAL COURT PROPERLY ADMITTED THE RIFLE MARKED AS EXHIBIT 25 INTO EVIDENCE BECAUSE THAT RIFLE WAS IDENTIFIED AS BEING THE SAME RIFLE USED BY THE DEFENDANT TO COMMIT THE CRIMES CHARGED IN COUNTS I AND III.

Generally, relevant evidence is admissible. ER 402. "The threshold to admit relevant evidence is very low," and "[e]ven minimally relevant evidence is admissible." *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

ER 401 provides that

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

ER 401. “To be relevant, evidence must meet two requirements: (1) the evidence must have a tendency to prove or disprove a fact (probative value), and (2) that fact must be of consequence in the context of the other facts and the applicable substantive law (materiality).” *State v. Rice*, 48 Wn. App. 7, 12, 737 P.2d 726 (1987). “Relevant evidence encompasses facts that present both direct and circumstantial evidence of any element of a claim or defense.” *Rice*, 48 Wn. App. at 12. “Facts tending to establish a party’s theory of the case will generally be found to be relevant.” *Id.* (citing *State v. Mak*, 105 Wn. 2d 692, 703, 718 P.2d 407 (1986)).

In the present case, the defendant was charged, in count III, with first-degree unlawful possession of a firearm for his possession of a rifle. CP 24-26, 40-72. The court instructed the jury that among the elements that must be proven to convict the defendant of this count, was “[t]hat on or about the 11<sup>th</sup> day of August, 2010, the defendant knowingly had a firearm: to wit, a rifle, in his possession or control.” CP 40-72 (instruction no. 24). *See* Appendix A.

“A ‘firearm’ is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.” CP 40-72 (instruction no. 15); RCW 9.41.010(7). Although a firearm “need not be operable during the commission of a crime to constitute a ‘firearm,’” it must be proven to be

“a ‘gun in fact’ rather than a ‘toy gun.’” *State v. Raleigh*, 157 Wn. App. 728, 734, 238 P.3d 1211 (2010)(citing *State v. Faust*, 93 Wn. App. 373, 380, 967 P.2d 1284 (1998)).

Thus, for the jury to convict the defendant of count III, the State had to prove that the defendant possessed a firearm, which was a rifle and a “gun in fact” and not merely a “toy gun.”

Hence, the fact that the SKS rifle in question was a fully operable assault rifle and not a toy gun, was a fact of consequence because it was a fact that had to be proven to prove a charged crime. As a result, the “fully operable” SKS rifle marked as exhibit 25 had a tendency to prove a fact that was of consequence in the context of the other facts and the applicable substantive law. *See Rice*, 48 Wn. App. at 12.

Defendant was also charged with attempted first-degree assault. CP 24-26, 40-72. Among the elements that the State was required to prove to prove this charge was that Defendant “did an act that was a substantial step toward the commission of assault in the first degree” and that “the act was done with the intent to commit assault in the first degree.” CP 40-72 (instruction no. 16). *See* Appendix A. Because the jury was also instructed that “[a] person commits the crime of assault in the first degree when, with the intent to inflict great bodily harm, he or she assaults another with a firearm,” CP 40-72 (instruction 11), proof that the

defendant armed himself with a firearm would be a fact that would have a tendency to prove the fact that the defendant took a substantial step towards the commission of first-degree assault. Hence, proof that Defendant armed himself with the “fully operable” SKS rifle marked as exhibit 25 had a tendency to prove an element of count I. Therefore, the rifle had a tendency to prove a fact that was of consequence in the context of the other facts and the applicable substantive law. *See Rice*, 48 Wn. App. at 12.

As a result, the SKS rifle at issue was relevant and admissible, if authentic.

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

ER 901(a).

“The identification requirement has been met if sufficient proof is introduced to permit a reasonable trier of fact to find in favor of authentication or identification.” *State v. Danielson*, 37 Wn. App. 469, 471, 681 P.2d 1320 (1984).

One method of authenticating an item of evidence is “[t]estimony that a matter is what it is claimed to be.” ER 901(b)(1).

In the present case, Jacalyn Slager and David Ward, Jr., the only witnesses with the defendant at the time of the crimes at issue, both identified the SKS rifle marked as exhibit 25 as the rifle the defendant used in those crimes. RP 858-60.

Specifically, Ms. Slager testified as follows:

Q Did you know [the defendant] to have a rifle as well as that silver and black handgun?

A I had seen it.

Q And when you say you “had see it,” had you seen it with [the defendant]?

A I’ve seen it in a picture on his phone.

Q So a picture on [the defendant’s] cell phone?

A Yeah.

Q And then did you see that rifle later on, on August 11<sup>th</sup>, 2010?

A Yeah.

RP 362-63.

The deputy prosecutor then handed the SKS rifle marked as exhibit 25 to Slager, who testified that she thought that it was the same weapon that she had seen on the defendant’s phone:

Q Do you think that this was the weapon that you saw on [the defendant’s] phone?

A Yeah.

RP 363-64. Although Slager initially indicated that the rifle “looked different to me then,” RP 363, she later clarified that she meant that the rifle “wasn’t so close to me last time,” RP 380, and she confirmed that the SKS rifle marked and admitted as exhibit 25 was in fact the same rifle the

defendant used to commit the crimes at issue here:

Q Okay. But you do remember today after seeing that gun for less than a minute that this is in fact the same exact gun, is that correct? Is that your testimony?

A Yeah.

RP 380.

Mr. Ward also identified the SKS assault rifle entered into evidence as exhibit 25 was the rifle the defendant used to commit the crimes at issue here. RP 543-44. *See* RP 600. Specifically, he testified as follows:

Q When [the defendant] comes back from Kayla's apartment, did you notice whether or not he had anything else with him that he didn't have when he first left the vehicle?

A He did.

Q What did he have with him?

A An assault rifle.

Q I'm going to open this and ask you to peer inside, okay?

A Yeah, that's it.

RP 543-44.

Thus, the only two witnesses with the defendant at the time he committed the crimes here at issue identified that SKS rifle marked as exhibit 25 as the rifle used by the defendant to commit those crimes.

Because an item of evidence may be authenticated by “[t]estimony that a matter is what it is claimed to be,” ER 901(b)(1), the SKS rifle marked as exhibit 25 was properly authenticated under ER 901.

Because the defendant was charged with crimes in counts I and III which required proof of a firearm, the admission of that rifle had a tendency to prove a fact that was of consequence in the context of the other facts and the applicable substantive law. Hence, the rifle marked as exhibit 25 was also relevant under ER 401. *See State v. Rice*, 48 Wn. App. at 12.

Finally, although the defendant argues that there was a “highly prejudicial impact” from “introducing a rifle that had no established connection to the crime,” Brief of Appellant, p. 31, his argument is undercut by the irrefutable fact that the record demonstrates that the rifle at issue was the same one used by the defendant to commit the crimes charged in counts I and III.

Therefore, the rifle admitted as exhibit 25 was relevant under ER 401, not unduly prejudicial under ER 403, properly authenticated under ER 901, and thus, properly admitted under ER 402, and the defendant’s convictions should be affirmed.

D. CONCLUSION.

The defendant's conviction of attempted first degree assault should be affirmed because, when viewed in the light most favorable to the State, there is sufficient evidence from which a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Moreover, the defendant has failed to show ineffective assistance of counsel because his trial counsel's decision not to request jury instructions regarding a lesser included offense can be characterized as a legitimate tactical decision.

Finally, the trial court properly admitted the rifle marked as exhibit 25 into evidence because that rifle was identified as being the same rifle used by the defendant to commit the crimes charged in counts I and III.

Therefore, the defendant's convictions should be affirmed.

DATED: February 14, 2012.

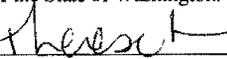
MARK LINDQUIST  
Pierce County  
Prosecuting Attorney



Brian Wasankari  
Deputy Prosecuting Attorney  
WSB # 28945

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the ~~appellant and appellant~~ c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2-14-12   
Date Signature

## **APPENDIX “A”**



10-1-03448-1 36297145 CTINJY 04-28-11



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 10-1-03448-1

vs.

COURTNEY LAMAR JONES

Defendant.

COURT'S INSTRUCTIONS TO THE JURY

DATED this 26<sup>th</sup> day of April, 2011.

*[Signature]*  
JUDGE

ORIGINAL

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; *the reasonableness of the witness's statements in the context of all of the other evidence*; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are *not evidence*. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, *either during trial or in giving these instructions*, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 3

The defendant is not required to testify. You may not use the fact that the defendant has not testified to infer guilt or to prejudice him in any way.

INSTRUCTION NO. 4

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 5

Certain evidence has been published in this case for only a limited purpose. The evidence consists of the video interviews of David Ward Jr. and Kurtis Phillips and may be considered by you only for the purpose of impeaching their testimony. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

INSTRUCTION NO. 6

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to the facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

INSTRUCTION NO. 7

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count

INSTRUCTION NO. 8

A person commits the crime of attempted assault in the first degree when, with the intent to commit that crime, he or she, or an accomplice, does any act that is a substantial step toward the commission of that crime.

INSTRUCTION NO. 9

A substantial step is conduct that strongly indicates a criminal purpose and that is more than mere preparation.

INSTRUCTION NO. 10

An assault is an intentional touching or striking of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

INSTRUCTION NO. 11

A person commits the crime of assault in the first degree when, with the intent to inflict great bodily harm, he or she assaults another with a firearm.

INSTRUCTION NO. 12

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

INSTRUCTION NO. 13

Great bodily harm means bodily injury that creates a probability of death, or that causes significant serious permanent disfigurement, or that causes significant serious permanent loss or impairment of the function of any bodily part or organ.

INSTRUCTION NO. 14

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

INSTRUCTION NO. 15

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

INSTRUCTION NO. 16

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

- (1) That on or about the 11th day of August, 2010, the defendant, or an accomplice, did an act that was a substantial step toward the commission of assault in the first degree;
- (2) That the act was done with the intent to commit assault in the first degree; and
- (3) That the act occurred in the State of Washington.

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

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

INSTRUCTION NO. 17

It is a defense to a charge of attempted assault in the first degree that the force attempted was lawful as defined by this instruction.

The attempt to use force upon or toward the person of another is lawful when attempted by a person who reasonably believes that he or she is about to be injured or by someone lawfully aiding a person who he or she reasonably believes is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to ~~the~~<sup>the</sup> person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force attempted by the defendant was not lawful. If you find that the State has not proved the absence of self defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to this charge.

INSTRUCTION NO. 18

Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist, and (2) the amount of force used was reasonable to effect the lawful purpose intended.

INSTRUCTION NO. 19

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he or she is being attacked to stand his or her ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

INSTRUCTION NO. 20

A person commits the crime of unlawful possession of a firearm in the first degree when he or she has previously been convicted or adjudicated guilty as a juvenile of a serious offense and knowingly owns or has in his or her possession or control any firearm.

INSTRUCTION NO. 21

A person knows or acts knowingly or with knowledge with respect to a fact when he or she is aware of that fact. It is not necessary that the person know that the fact is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

INSTRUCTION NO. 22

Possession means having a firearm in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item.

Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.

In deciding whether the defendant had dominion and control over an item, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the immediate ability to take actual possession of the item, whether the defendant had the capacity to exclude others from possession of the item, and whether the defendant had dominion and control over the premises where the item was located. No single one of these factors necessarily controls your decision.

INSTRUCTION NO. 23

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

- (1) That on or about the 11<sup>th</sup> day of August, 2010, the defendant knowingly had a firearm: to wit, a handgun, in his possession or control;
- (2) That the defendant had previously been convicted <sup>of</sup> a serious offense; and;
- (3) That the possession or control of the firearm occurred in the State of Washington.

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

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

INSTRUCTION NO. 24

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

- (1) That on or about the 11<sup>th</sup> day of August, 2010, the defendant knowingly had a firearm: to wit, a rifle, in his possession or control;
- (2) That the defendant had previously been convicted of a serious offense; and;
- (3) That the possession or control of the firearm occurred in the State of Washington.

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

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

INSTRUCTION NO. 25

It is a defense to the charge of unlawful possession of a firearm in the first degree that the unlawful possession was necessary under the circumstances.

Unlawful possession of a firearm in the first degree is necessary when all of the following elements are present:

- (1) The defendant reasonably believed he or another was under unlawful and present threat of death or serious bodily injury; and
- (2) The defendant did not recklessly place himself in a situation where he would be forced to engage in criminal conduct; and
- (3) The defendant had no reasonable legal alternative; and
- (4) There was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty as to this charge.

INSTRUCTION NO. 26

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 27

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, *that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.*

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. *Testimony will rarely, if ever, be repeated for you during your deliberations.*

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the judicial assistant. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and a verdict form for recording your verdict. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in the blank provided in the verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form to express your decision. The presiding juror must sign the verdict form and notify the judicial assistant. The judicial assistant will bring you into court to declare your verdict.

INSTRUCTION NO. 28

You will also be given special verdict forms for the crime of attempted assault in the first degree charged in count I. If you find the defendant not guilty of <sup>Attempted</sup> assault in the first degree, do not use the special verdict forms for count I. If you find the defendant guilty of this crime, you will then use the special verdict forms. In order to answer the special verdict forms "yes," all twelve of you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you do not unanimously agree that the answer is "yes" then the presiding juror should sign the section of the special verdict forms indicating that the answer has been intentionally left blank.

INSTRUCTION NO. 29

For the purposes of each of the special verdict forms, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime in Count I.

A person is armed with a firearm if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the firearm and the defendant or an accomplice. The State must also prove beyond a reasonable doubt that there was a connection between the firearm and the crime. In determining whether these connections existed, you should consider, among other factors, the nature of the crime and the circumstances surrounding the commission of the crime, including the location of the weapon at the time of the crime, and the type of weapon.

If one participant in a crime is armed with a firearm, all accomplices to that participant are deemed to be so armed, even if only one firearm is involved.

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

# PIERCE COUNTY PROSECUTOR

## February 14, 2012 - 4:39 PM

### Transmittal Letter

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Case Name: St. v. Jones

Court of Appeals Case Number: 42079-1

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Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

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Sender Name: Therese M Kahn - Email: [tnichol@co.pierce.wa.us](mailto:tnichol@co.pierce.wa.us)

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