

NO. 44233-7-II

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

STATE OF WASHINGTON, RESPONDENT

v.

KIMBER LEWIS, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Frank Cuthbertson

No. 11-1-02322-4

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**Response Brief**

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**Table of Contents**

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.....1

    1. Did the trial court properly admit defendant's prior convictions under ER 609? ..... 1

    2. When viewing the evidence in the light most favorable to the State, was the evidence sufficient for the jury to find that defendant and Mr. Hunter were household members? .....1

B. STATEMENT OF THE CASE. .....1

    1. Procedure.....1

    2. Facts .....2

C. ARGUMENT.....4

    1. AFTER CONDUCTING A BALANCING TEST ON THE RECORD, THE TRIAL COURT PROPERLY DETERMINED THAT DEFENDANT'S PRIOR CONVICTIONS WERE ADMISSIBLE UNDER ER 609.....4

    2. WHEN DEFENDANT AND MR. HUNTER TESTIFIED THAT THEY LIVED TOGETHER FOR OVER A MONTH AND A HALF PRIOR TO THE INCIDENT, THE EVIDENCE WAS SUFFICIENT FOR THE JURY TO FIND THAT DEFENDANT AND MR. HUNTER WERE HOUSEHOLD MEMBERS.....10

D. CONCLUSION. .....13

## Table of Authorities

### State Cases

<i>Brown v. Spokane County Fire Protection Dist. No. 1</i> , 100 Wn.2d 188, 669 P.2d 571 (1983) .....	9
<i>Seattle v. Gellein</i> , 112 Wn.2d 58, 61, 768 P.2d 470 (1989).....	11
<i>State v. Alexis</i> , 95 Wn.2d 15, 16-19, 621 P.2d 1269 (1980) .....	5, 6, 8
<i>State v. Barrington</i> , 52 Wn. App. 478, 484, 761 P.2d 632 (1987), <i>review denied</i> , 111 Wn.2d 1033 (1988) .....	11
<i>State v. Bourgeois</i> , 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).....	9
<i>State v. Camarillo</i> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990).....	11
<i>State v. Casbeer</i> , 48 Wn. App. 539, 542, 740 P.2d 335, <i>review denied</i> , 109 Wn.2d 1008 (1987).....	11
<i>State v. Delmarter</i> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980).....	11
<i>State v. Gibson</i> , 32 Wn. App. 217, 220, 646 P.2d 786 (1982).....	5
<i>State v. Holbrook</i> , 66 Wn.2d 278, 401 P.2d 971 (1965).....	11
<i>State v. Jones</i> , 101 Wn.2d 113, 121-122, 677 P.2d 131 (1984), <i>overruled on other grounds by State v. Brown</i> , 111 Wn.2d 124, 761 P.2d 588 (1988) .....	5
<i>State v. Joy</i> , 121 Wn.2d 333, 338, 851 P.2d 654 (1993).....	11
<i>State v. Mabry</i> , 51 Wn. App. 24, 25, 751 P.2d 882 (1988).....	11
<i>State v. McCullum</i> , 98 Wn.2d 484, 488, 656 P.2d 1064 (1983).....	10
<i>State v. Ray</i> , 116 Wn.2d 531, 545, 806 P.2d 1220 (1991).....	9
<i>State v. Rivers</i> , 129 Wn.2d 697, 704-705, 921 P.2d 495 (1996).....	6
<i>State v. Salinas</i> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) .....	11

<i>State v. Smith</i> , 106 Wn.2d 772, 780, 725 P.2d 951 (1986).....	9
<i>State v. Thomas</i> , 150, Wn.2d 821, 871, 83 P.3d 970 (2004).....	9
<i>State v. Turner</i> , 29 Wn. App. 282, 290, 627 P.2d 1323 (1981).....	11

**Statutes**

RCW 10.99.020(3) .....	12
RCW 10.99.020(5)(a).....	11

**Rules and Regulations**

ER 609 .....	1, 4, 6, 8, 9
ER 609(a)(1).....	5, 6, 9

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

1. Did the trial court properly admit defendant's prior convictions under ER 609?
2. When viewing the evidence in the light most favorable to the State, was the evidence sufficient for the jury to find that defendant and Mr. Hunter were household members?

B. STATEMENT OF THE CASE.

1. Procedure

On June 8, 2011, the State charged Kimber Lewis, defendant, with one count of first degree assault with deadly weapon and domestic violence sentencing enhancements. CP 1. Defendant's jury trial was held on August 21, 2012, before the Honorable Frank Cuthbertson. 8/21/12 RP 52. Defendant was found guilty as charged. CP 70-73; 8/23/12 RP 4. On November 26, 2012, defendant was sentenced to a total of 234 months in custody, plus an additional 36 months of community custody with 538 days credit for time served, as well as standard legal financial obligations. CP 85, 87-88; 11/26/12 RP 13. Defendant timely filed a Notice of Appeal on November 26, 2012. CP 98-110.

At trial, the State argued for the admission of defendant's prior convictions under ER 609. 8/22/12 RP 158-160. After balancing the

prejudice of the convictions with their probative value on the record, the court allowed the State to adduce evidence of defendant's two third degree domestic violence assault convictions from 2003 and 2004, and disallowed the State to bring in evidence of his two convictions for violation of domestic violence court orders from 2005. 8/22/12 RP 164-166.

## 2. Facts

In June 2011, Lori Sands, William Hunter, and defendant lived together in an apartment at 10810 Lakeview Avenue Southwest in Lakewood, Washington. 8/21/12 RP 100-101, 139, 183. The apartment was leased to Ms. Sands who invited Mr. Hunter, her ex-fiancé, and defendant to live with her. 8/21/12 RP 139. Prior to the date of the incident, Mr. Hunter had been living there for about a month and a half and defendant had been renting his room for nine months. 8/21/12 RP 100-101, 139-140; 8/22/12 RP 183-185, 190, 195

On June 7, 2011, defendant and Mr. Hunter got into an argument over Mr. Hunter's presence at the apartment. 8/21/12 RP 102-104; 8/23/12 RP 190. Ms. Sands asked defendant multiple times to move out, but defendant refused asserting that he was also paying rent. 8/21/12 RP 102-104; 8/22/12 RP 190. Upset that defendant refused to leave, Mr. Hunter banged on defendant's bedroom wall and told defendant that he would throw his things out. 8/21/12 RP 107; 8/22/12 RP 188-189. Defendant got his machete as Mr. Hunter was showering. 8/22/12 RP 201. As Mr. Hunter came out of the bathroom, defendant told Mr. Hunter, "I got you," and

began attacking Mr. Hunter with the machete. 8/21/12 RP 108; 8/22/12 RP 201. Mr. Hunter fell back into the bathroom as defendant attacked him, first falling onto the toilet and then into the bathtub. 8/21/12 RP 110-114. Defendant repeatedly attacked Mr. Hunter with the machete, striking him in the sternum as he lay in the bathtub screaming in pain. 8/21/12 RP 114-115.

Four other people were at the apartment when the attack occurred: Ms. Sands, Tashanda Reynolds, Edward Smith, and Steven Roth. 8/21/12 RP 145; 8/22/12 RP 174. Mr. Smith testified that he heard the argument between defendant and Mr. Hunter, and that he saw defendant go toward Mr. Hunter with the machete. 8/22/12 RP 170-171. Ms. Sands also heard the argument between defendant and Mr. Hunter. 8/21/12 RP 141-142. She testified that after she heard a scream, she ran to the bathroom and saw defendant with a machete standing over Mr. Hunter who lay bleeding in the bathtub. 8/21/12 RP 141-142. She also testified that defendant walked back to his bedroom, put the machete down by the closet, and went outside. 8/21/12 RP 142. Ms. Sands brought Mr. Hunter a towel, tried to calm him down, and found someone to call the police. 8/21/12 RP 144.

Officers Johnson, Dier, and Figueroa of the Lakewood City Police Department responded to the scene. 8/21/12 RP 84, 86. Officer Johnson testified that on arrival, he saw several people standing in the parking lot of the apartment screaming and yelling in chaos and panic. 8/21/12 RP 85-86. Officer Johnson found Mr. Hunter leaning against a wall in the bathtub

covered in blood with his feet hanging over the edge and his arm wrapped in a towel. 8/21/12 RP 86-87. Officer Dier testified that the bathroom was covered in blood, and that Mr. Hunter appeared to be in lots of pain and pale from blood loss. 8/21/12 RP 58-59. Officer Dier detained defendant in the parking lot, and was told by defendant that he had "had enough" from Mr. Hunter and "lost it" after Mr. Hunter threatened to throw his things out. 8/21/12 RP 57, 61-62. Defendant was then taken to jail by Officer Figueroa. 8/21/12 RP 64.

C. ARGUMENT.

1. AFTER CONDUCTING A BALANCING TEST ON THE RECORD, THE TRIAL COURT PROPERLY DETERMINED THAT DEFENDANT'S PRIOR CONVICTIONS WERE ADMISSIBLE UNDER ER 609.

Evidence of a defendant's prior convictions are admissible under ER 609, which states in relevant part:

(a) **General Rule.** For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) **Time Limit.** Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the

date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

In sum, a prior felony conviction is admissible to impeach a witness's credibility if its probative value outweighs the prejudicial impact. ER 609(a)(1). To make this determination, the trial court must additionally consider and weigh the following factors, known as the *Alexis* factors: (1) the length of the defendant's criminal record; (2) the remoteness of the prior conviction; (3) the nature of the prior crime; (4) the age and circumstances of the defendant; (5) the centrality of the credibility issue; and (6) the impeachment value of the prior crime. *State v. Alexis*, 95 Wn.2d 15, 16-19, 621 P.2d 1269 (1980); *State v. Jones*, 101 Wn.2d 113, 121-122, 677 P.2d 131 (1984), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988). To ensure a meaningful balancing process, the trial court must state on the record the factors that favor admission or exclusion. *Jones*, 101 Wn.2d at 122-123.

The court may admit evidence of a defendant's prior convictions to rebut a claim of self-defense. *See State v. Gibson*, 32 Wn. App. 217, 220, 646 P.2d 786 (1982) (holding that the State was allowed to impeach defendant with his prior convictions because his credibility was a central issue). The decision to admit prior convictions under ER 609(a)(1) lies within the sound discretion of the trial court. *Alexis*, 95 Wn.2d at 16.

Rulings made under ER 609 are reviewed for an abuse of discretion. *State v. Rivers*, 129 Wn.2d 697, 704-705, 921 P.2d 495 (1996).

- a. The trial court conducted the proper balancing test on the record.

Here, the trial court properly determined that defendant's prior convictions were admissible under ER 609. The State sought to admit evidence of defendant's two domestic violence assault convictions from 2003 and 2004 as well as his two domestic violence court order violations from 2005. 8/22/12 RP 158-159. After carefully balancing the prejudice of the prior convictions with their probative value, the court found that the domestic violence court order violations were inadmissible, and that the domestic violence assault convictions were admissible under ER 609(a)(1). 8/22/12 RP 164-166. In making this determination, the court stated on the record the reasons in accordance with the *Alexis* factors that favored admission and exclusion of the respective evidence. The court gave the following ruling in admitting defendant's convictions:

As to defendant, this is a lot tougher because none of the crimes, the four crimes and the -- within the period are crimes of dishonesty. However, as indicated by the prosecuting attorney, Ms. Ahrens, the Court can consider the probative value of other offenses that are punishable by a year or more in jail.

The idea of 609 is, basically, by court rule creating a way to attack the credibility of a witness. I'm concerned in this case that the violation of domestic violence protection order doesn't really address his credibility, and I think that that is potentially more prejudicial than it's probative.

I'm also concerned that regarding the Domestic Violence, Assault in the Third Degree, that those things -- while they are fairly -- occurred six years -- six or seven years before the offense in question, by categorizing those just as violent felonies, I think that probably caused more - - causes more prejudice and speculation. Jurors might think that those violent felonies were also Assault in the First Degree and impeaching him on his convictions for Assault in the Third Degree, I believe to be extremely prejudicial, and I believe that in this case, the prejudice outweighs the probative value. There is almost no way, even with the limiting instruction to make it clear, that that information isn't offered as evidence of his propensity to engage in domestic violence assaults.

What makes it difficult is that the defendant has put at issue his state of mind and this whole notion of self-defense. Given his history, the fact that he has been convicted of assaults in the past, raises issues about how credible those concerns should be. Anyway, after balancing both sides, I'm going to allow the State to ask about the [Domestic Violence] Assault in the Third Degree convictions in '03 and '04. I believe they're probative.

8/22/12 RP 163-166.

Defendant argues that the trial court erred in determining that his prior convictions were admissible because the prejudice outweighs their probative value. Brief of Appellant at 8. This claim fails as the court found that the similar nature of the prior crime and the evidence of his prior convictions directly addressed the credibility of his self-defense claim.

As defendant raised a claim of self-defense, his credibility was a central issue at trial. The court ruled that the evidence was admissible because it was probative as to the credibility of defendant's claim of self-

defense. The court articulated its reason for finding that the prior convictions were probative stating that “[w]hat makes it difficult is that the defendant has put at issue his state of mind and this whole notion of self-defense. Given his history, the fact that he has been convicted of assaults in the past, raises issues about how credible those concerns should be.” 8/22/12 RP 165-166. There is no abuse of discretion as this is a valid reason per case law.

In addition, the record shows that the court thoroughly applied the *Alexis* factors before coming to its determination. The court addressed the remoteness of the prior convictions, noting that they occurred six to seven years ago, as well as the length of defendant’s criminal record, the centrality of the credibility issue, and the impeachment value of the prior crime. The record clearly reflects the court’s awareness of the requirements of ER 609, its conclusion that the evidence was more probative than prejudicial, and that the ER 609 requirements had been satisfied pursuant to the *Alexis* factors. As such, this Court should dismiss defendant’s claim and affirm his conviction.

- b. Any error would have been harmless due to the overwhelming evidence against defendant's necessity claim.

The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall,

overwhelming evidence as a whole. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). See *State v. Thomas*, 150, Wn.2d 821, 871, 83 P.3d 970 (2004). “An error in admitting evidence that does not result in prejudice to the defendant is not grounds for reversal. *Brown v. Spokane County Fire Protection Dist. No. 1*, 100 Wn.2d 188, 196, 669 P.2d 571 (1983).

An erroneous ruling under ER 609(a)(1) is reviewed under the nonconstitutional harmless error standard. *State v. Ray*, 116 Wn.2d 531, 545, 806 P.2d 1220 (1991). Thus an erroneous ER 609 ruling is not reversible error unless the court determines that “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *Ray*, 116 Wn.2d at 546, 806 P.2d 1220 (quoting *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)).

In the instant case, the State does not concede that the trial court improperly admitted evidence of defendant’s prior convictions. However, any error would have been harmless because there is no reasonable probability that the jury would have found him not guilty by reason of necessity had the trial court barred testimony of his prior convictions. While defendant admitted from the outset that he committed the crime and focused entirely on a claim of self-defense, the evidence against his claim was overwhelming. Defendant admitted that he got the machete, attacked Mr. Hunter, and placed the machete back in the closet. 8/22/12 RP 201-203. Defendant claimed that he did so because Mr. Hunter threatened him

and Tashanda Reynolds. 8/22/12 RP 191, 197. Contrary to his claim however, Mr. Hunter was attacked as he came out of the shower wearing nothing but boxers. 8/21/12 RP 109. In addition, Mr. Smith testified that he did not hear Mr. Hunter threaten defendant or Ms. Reynolds when he overheard their argument, and that Mr. Hunter did not have any weapons on him. 8/22/12 RP 173-175. Further, defendant never told police officers that Mr. Hunter threatened him. 8/22/12 RP 204. He only stated that he had had enough and that he lost it after Mr. Hunter told him that he was going to throw his things out. 8/21/12 RP 62. Given the overwhelming evidence against defendant, there is no reasonable probability that the outcome would have been different had the court determined that defendant's prior convictions were inadmissible. As any possible error in admitting the evidence would have been harmless, this Court should dismiss defendant's claim and affirm his conviction.

2. WHEN DEFENDANT AND MR. HUNTER TESTIFIED THAT THEY LIVED TOGETHER FOR OVER A MONTH AND A HALF PRIOR TO THE INCIDENT, THE EVIDENCE WAS SUFFICIENT FOR THE JURY TO FIND THAT DEFENDANT AND MR. HUNTER WERE HOUSEHOLD MEMBERS.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle*

*v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the appellant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

Pursuant to 10.99.020(5)(a), a person is guilty of domestic violence when they commit the crime of assault against one family or household member. "Family or household members" means...adult persons who are

presently residing together or who have resided together in the past..."  
RCW 10.99.020(3).

Here, the State presented sufficient evidence for a rational trier of fact to find that defendant and Mr. Hunter were "household members" within the meaning of RCW 10.99.020(3). Defendant and Mr. Hunter testified that they lived at 10810 Lakeview Avenue Southwest in Lakewood, Washington. 8/22/12 RP 183. Ms. Sands, whose name was on the lease of the apartment, testified that defendant and Mr. Hunter stayed with her at the apartment. 8/21/12 RP 139. Defendant testified that he lived with Ms. Sands for nine months prior to the incident, that he had his own bedroom, and that he paid rent. 8/22/12 RP 184. Mr. Hunter testified that he had been living with Ms. Sands, his former fiancé, for a month and a half prior to the incident. 8/21/12 RP 100-101.

Q. Do you ever stay at [Ms. Sands'] home?

A. Yes, ma'm

Q. How often would you say you stayed at her home back in 2011, in June or so?

A. In June, so it would have been a month-and-a-half, in between that.

8/21/12 RP 100-101.

Although defendant claims that there is insufficient evidence that Mr. Hunter lived at the apartment, his claim fails as Mr. Hunter testified that he lived there for a month and a half. Brief of Appellant at 11; 8/21/12 RP 100-101. Ms. Sands and defendant also testified that Mr. Hunter was living there. 8/21/12 RP 139-140; 8/22/12 RP 196. Ms. Lewis

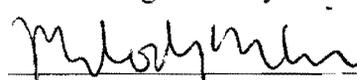
and Mr. Hunter had been asking defendant to leave for a month and a half. 8/21/12 RP 102-104; 8/22/12 RP 190. As all three residents of the apartment testified that Mr. Hunter and defendant both lived at the apartment, there was sufficient evidence for the jury to find defendant guilty of the domestic violence sentencing enhancement. As such, this Court should dismiss defendant's claim.

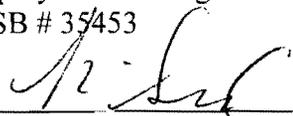
D. CONCLUSION.

The trial court properly determined that defendant's prior convictions were admissible. Notwithstanding the appropriate ruling, any error would have been harmless due to the overwhelming evidence against defendant. The State also presented sufficient evidence for the jury to find that defendant and Mr. Hunter lived together for purposes of the domestic violence sentencing enhancement. For the reasons stated above, the State respectfully requests that this Court affirm his conviction and sentence.

DATED: July 5, 2013.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail of 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.

7.5.13 Theresa Kar  
Date Signature

# PIERCE COUNTY PROSECUTOR

## July 05, 2013 - 2:06 PM

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