

COA NO. 49910-0-II  
(cons. w/ 49914-2-II)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

CARL E. HOGAN,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Bryan E. Chushcoff, Judge

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The evidence is insufficient to convict appellant of unlawful possession of a firearm.

2. The court erred in entering these findings of fact:<sup>1</sup>

a. "At the time defendant carried the gun from the bedroom and out of the house, it was in his hands and therefore in his actual possession." 2CP 25 (FF XV).

b. "Traci Johnson testified that the barrel of a gun was visible when defendant carried it out of the house and that she knew it was a gun." 2CP 24 (FF XIII).

3. The court erred in entering this conclusion of law: "The defendant, Carl Everett Hogan, is guilty beyond a reasonable doubt of the crime of Unlawful Possession of a Firearm in the First Degree, in that, on May 28, 2015, defendant knowingly had in his possession or under his control a firearm after having been previously convicted of Burglary in the Second Degree, a serious offense." 2CP 26 (CL III).

4. The court erred in failing to order a competency evaluation, in violation of RCW 10.77.060 and due process.

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<sup>1</sup> The written findings of fact and conclusions of law are attached as appendix A.

5. The court miscalculated the offender score by including a prior conviction that washed out.

6. Appellant received ineffective assistance of counsel at sentencing, in violation of the Sixth Amendment to the United States Constitution, when his attorney agreed to the offender score.

**Issues Pertaining to Assignments of Error**

1. Whether the State failed to prove beyond a reasonable doubt that appellant actually possessed a firearm, where the evidence showed no more than passing control amounting to momentary handling?

2. Where defense counsel's assessment supported by facts demonstrated a reason to doubt appellant's competency, did the trial court err in failing to order a competency evaluation as mandated by RCW 10.77.060 and due process?

3. Whether the prior federal conviction washed out of the offender score because, not being clearly comparable to a Washington offense, it was the equivalent of a class C felony with a washout period of five years?

4. In the alternative, whether trial counsel provided ineffective assistance at sentencing in agreeing to the erroneous offender score that included the washed out federal conviction?

**B. STATEMENT OF THE CASE**

**1. Procedural History**

Under cause number 15-1-05148-4, the State charged Carl Hogan with possession of a stolen vehicle and bail jumping. 1CP<sup>2</sup> 2-3. Under cause number 16-1-00047-1, the State charged Hogan with first degree unlawful possession of a firearm and fourth degree assault. 2CP 1-2. The two cases tracked one another. 1RP<sup>3</sup> 3. Hogan was screened for Mental Health Court. 2RP 3-4; 1CP 57-59. Ultimately, both cases were tried to the bench. 5RP 4-6; 1CP 5; 2CP 4.

**2. Trial - Stolen Vehicle and Bail Jumping Charges**

Chhan Kdep owned a 1999 Toyota Camry. 5RP 75-76. He loaned the car to his father, Sarith Kdep. 5RP 77. Sarith's brother, Patrick Kdep, testified that he and Sarith were at their mother's house when the car was stolen. 5RP 92-93, 98.<sup>4</sup> The car was parked in the street. 5RP 99-100. At some point, Sarith said he had to go somewhere. 5RP 101. The car was warming up outside. 5RP 101. Sarith left the house and then came back, saying the car was gone. 5RP 102-04. Patrick looked outside, saw

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<sup>2</sup> This brief cites to the clerk's papers designated under 15-1-05148-4 as "1CP" and the clerk's papers designated under 16-1-00047-1 as "2CP."

<sup>3</sup> This brief cites to the verbatim report of proceedings as follows: 1RP – 3/10/16; 2RP – 5/23/16; 3RP – 6/20/16; 4RP - 10/12/16; 5RP – three consecutively paginated volumes consisting of 12/6/16, 12/7/16, 12/12/16; 6RP – 12/13/16; 7RP – 1/13/17.

<sup>4</sup> Sarith was in Cambodia at the time of trial and did not testify. 5RP 93.

the car was missing, and called the police. 5RP 101-02. Tacoma police officer Billman spoke with Patrick about the stolen vehicle. 5RP 61-65, 70. Patrick filled out a vehicle theft form. 5RP 66. Billman entered the information into a stolen vehicle database used by law enforcement. 5RP 70-71.

Two days later, on December 22, 2015 at around 11:20 p.m., Deputy Hardesty was on patrol in Tacoma when he noticed a Toyota Camry traveling in front of him. 5RP 45-46. He ran the license plate number through a computer database and discovered the vehicle was reported stolen. 5RP 48. It was Chhan Kdep's car. 5RP 55-58. Hardesty followed for a few blocks and then pulled in behind the vehicle when it parked at a 7-11 store. 5RP 48-49. Hardesty initiated a stop. 5RP 50. Three people were in the car. 5RP 50. Hogan was the driver. 5RP 50-51. According to Hardesty, Hogan said he got the vehicle 20 minutes earlier and had no idea why he was stopped. 5RP 52, 59. Hogan told Hardesty that got the car from his "homeboy," referring to him as "White Boy Ghost" and "White Boy Jason," at the Calico Hotel. 5RP 52-54. The Calico Hotel is about 20 blocks away from the 7-11. 5RP 59. Hogan said he paid \$50 for the car. 5RP 54. He asked Hardesty to check the vehicle registration, but Hardesty declined to do so because he did not have a warrant. 5RP 55, 59.

Scott Polito testified on behalf of the defense. Polito worked with disabled veterans as a music therapist. 5RP 194. He met Hogan in that capacity, and the two stayed in contact. 5RP 194. Polito testified that he gave Hogan a ride to purchase a car in the afternoon on December 21 at the Calico Cat hotel. 5RP 194-95, 203, 210. He did not see the car but was there when the negotiation took place. 5RP 195. Polito helped with negotiations because Hogan wanted a lower price than was being offered. 5RP 204-05. Hogan paid \$250. 5RP 196, 206. Polito did not see a bill of sale. 5RP 205-06, 208.

Hogan testified that he purchased the Camry at the Calico Cat. 5RP 142, 176. Hogan denied telling police he paid \$50 for the car. 5RP 142. He paid \$250 for the car, describing it as a "clunker." 5RP 143, 171. The Kelly Blue Book trade-in value for the car was \$304 to \$719, with a car in okay condition listed at \$512.<sup>5</sup> 5RP 145.

Hogan also denied telling police that he had bought it 20 minutes before being stopped. 5RP 153. He told police he bought the car the day before. 5RP 153-54. He identified Jason ("White Boy Ghost") as the person he bought the vehicle from on December 21. 5RP 146, 183.

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<sup>5</sup> Hardesty described the car as in decent condition overall. 5RP 57. Chhan said it was in fair condition, and he paid \$1500 for it in 2015. 5RP 76-77.

Hogan identified Exhibit 4 as the bill of sale, and it was admitted into evidence. 5RP 143, 183. The bill of sale listed the full name of "Jason Shively." Ex. 4. Hogan said Jason was in prison at the time of trial. 5RP 146. Based on rumor, Hogan described Jason as a guy who broke into cars at night "and he was like some type of leader or something like that." RP 146,158. He had known Jason for six or seven months. 5RP 158. He knew him "in a different manner." 5RP 159. Hogan thought Jason was the actual owner of the vehicle. 5RP 146. He did not think Jason stole the vehicle. 5RP 146. At the time of purchase, Hogan did a VIN check online to verify the vehicle was not reported as stolen. 5RP 146-47.

When stopped, Hogan told police to look in the glove compartment for the bill of sale, but they didn't look for it. 5RP 143, 157. He didn't have a chance to retrieve it himself because guns were drawn on him, and he was never in contact with the car again. 5RP 157. He had his own property in the car, including Christmas gifts. 5RP 158. When asked to explain how he came into possession of the bill of sale for trial, Hogan explained that when Kdep got the car back, he gave the property inside to Ghost's family. 5RP 157-58. From what Hogan understood, "the dad and Jason had a deal going." 5RP 172. "The whole transaction was a family transaction. They are family." 5RP 158. Hogan retrieved the bill of sale

from Lindsey Reed, his and Jason's friend. 5RP 172. Reed told him that she knew the guy who owned the vehicle, and he gave her the property inside. 5RP 172-73, 175.

The State called Lisa Fuerbach from the prosecutor's office as a rebuttal witness. 5RP 212. Fuerbach ran a criminal history check and was unable to find any conviction information for "Jason Shively." 5RP 217.

Sean Waite, a deputy prosecuting attorney, testified regarding the bail jumping charge. 5RP 106. The original information charging Hogan with possession of a stolen vehicle was admitted into evidence. 5RP 110-12; Ex. 5. A court order dated December 24, 2015 established his conditions of release. 5RP 111-12; Ex. 6. A bail bond document dated December 24, 2015 was also admitted into evidence. 5RP 112-13; Ex. 7. A scheduling order dated January 7, 2016 set an upcoming court date on January 28, 2016 at 8:30 a.m. 5RP 114-17; Ex. 8. A bench warrant issued on January 28. Ex. 10, 11. The deputy prosecutor testified to his practice of requesting a bench warrant when a defendant fails to show up. 5RP 121-22. Hogan did not respond when his name was called that morning. 5RP 122-23; Ex. 9.

Hogan testified that the signature on the scheduling order could be his. 5RP 148-49, 159. He denied receiving a copy of the order. 5RP 149, 163. He had a Veterans Affairs (VA) appointment on January 28 at 9 a.m.

for high blood pressure and mental health. 5RP 151, 162-63. He received VA benefits for a traumatic brain injury. 5RP 164. He was wounded while serving in the military. 5RP 164. Hogan suffered from post traumatic stress disorder, bipolar disorder and schizophrenia. 5RP 165. He has memory problems as a result. 5RP 165. His attorney had previously called him the day before a court date, but did not do so for the January 28 court date. 5RP 168-69. He found out about the January 28 court date the day after, when his attorney called him and told him he missed the hearing. 5RP 151-52, 159. He was present at all the other court dates. 5RP 152-53.

### **3. Trial - Firearm Possession Charge**

Rachel Hogan is Carl Hogan's wife. 6RP 48-49, 62. According to Rachel, they were living together as of May 2015. 6RP 71, 83. Rachel's mother, Traci Johnson, testified that she was present on May 28, 2015 when Hogan came home and got into an argument with Rachel. 6RP 48-51. Hogan and Rachel scuffled on the porch. 6RP 51. Rachel ended up in Johnson's lap; she did not see what caused this to happen. 6RP 51-52. Hogan went in the house to get some of his things and move them to his car. 6RP 51, 53-54. Johnson saw Hogan "carry out something long that was wrapped in a kid's blanket." 6RP 54. She could not tell what it was at the time. 6RP 54. Rachel started wrestling with him, trying to take it

away. 6RP 55. "It never made it in the car." 6RP 55. Rachel yelled for Johnson to call the police, and she did. 6RP 55-56. Rachel took the item and put it on the porch. 6RP 55. At this point Johnson saw the barrel of a rifle poking out one end of the blanket. 6RP 55-56.

When Deputy Tevis arrived, Rachel pointed out a sheet that had items wrapped in it on the porch. 6RP 30. It contained a rifle and two magazines. 6RP 30. Hogan had been previously convicted of a "serious offense." Ex. 5, 6.

Rachel gave a different version of events in some respects. She testified that she did not recall being pushed by Hogan. 6RP 63. She stood up during the argument and tripped on a chair and started to fall backwards. 6RP 63-64. Hogan did not hit her. 6RP 64. She told her mother not to call the police. 6RP 68.

That night, Rachel told Hogan to leave the house because they had gotten into an argument about another woman. 6RP 67. He took out some bags of clothes. 6RP 67. After he left, Rachel went into their shared bedroom to pack up the rest of his things so that he did not have to come back in the house. 6RP 67-68, 84, 86. On his side of the closet, she discovered a rifle wrapped in a sheet. 6RP 68, 84. Rachel did not know it was in the house. 6RP 68. She took the gun out of the closet and put it on the porch. 6RP 81, 84, 88. She did not want the gun in the house, and

turned it over to police. 6RP 68, 85. According to Rachel, Hogan never had a gun in his possession. 6RP 69. She never saw him with a gun. 6RP 70, 90. To her knowledge, Hogan did not know the gun was in the house. 6RP 70. Hogan did not say he wanted the gun. 6RP 70. She denied taking the gun from him. 6RP 71. Rachel denied that they fought over the gun on the porch. 6RP 69.

Rachel's stepson is 28-year-old Carl Jr. 6RP 64-65. Carl Jr. did not live in the house, but visited and at times left his personal possessions there. 6RP 65. Rachel testified that the gun belonged to her stepson or his friend. 6RP 69. She found this out when her stepson came back for the gun. 6RP 70. She later simply testified "[i]t was his son's gun." 6RP 85.

Hogan testified that he had been staying at his wife's house at the time but was living in Oxford House for treatment for about 45 days. 6RP 93-94, 101. He was not living in the house. 6RP 95. He went over to the house on May 28 to tell her what happened in court on the matter involving the other woman. 6RP 97-98. He left by 3 in the afternoon. 6RP 99. He was not there that night. 6RP 99.

He used a closet outside the bedroom door; all his belongings were in there. 6RP 95. He was taking the last of his belongings out. 6RP 102. He did not go into the bedroom closet. 6RP 95. He had not been in the bedroom "for who knows how long." 6RP 96.

He denied assaulting his wife. 6RP 93. He took his clothes out of the closet, put them in his vehicle and drove off to Oxford House. 6RP 94. He never had possession of a gun. 6RP 93. He did not know a gun was in the house. 6RP 9-943. He did not take the gun outside the house or have a physical altercation with his wife over it. 6RP 93.

#### **4. Outcome and Sentencing**

The court found Hogan guilty of first degree unlawful possession of a firearm and acquitted him of fourth degree assault. 2CP 26. In the other case, the court found Hogan guilty of possession of a stolen vehicle and bail jumping. 1CP 34-35. Hogan was sentenced for both cases at the same hearing. 7RP 4. The court imposed a total of 43 months in the stolen vehicle/bail jumping case and 68 months in the firearm possession case, with the sentences under both cases to run concurrently. 1CP 15; 2CP 13. Hogan appeals in both cases. 1CP 36-48; 2CP 27-38.

#### **C. ARGUMENT**

##### **1. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE UNLAWFUL POSSESSION OF A FIREARM CONVICTION BECAUSE THE STATE FAILED TO PROVE THE ELEMENT OF POSSESSION.**

The State failed to prove the "possession" element of the firearm possession charge because the evidence at most showed passing control of

another's firearm that was only a momentary handling. The conviction must therefore be reversed.

Due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Evidence is sufficient to support a conviction only if, after viewing the evidence and all reasonable inferences in a light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

To sustain a conviction following a bench trial, this Court must determine whether (1) the evidence supports the findings of fact; (2) the findings of fact support the conclusions of law; and (3) the conclusions of law support the judgment. State v. Enlow, 143 Wn. App. 463, 467, 178 P.3d 366 (2008). Substantial evidence must support the findings of fact. State v. Stevenson, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). Unchallenged findings of fact are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Conclusions of law are reviewed de novo. Stevenson, 128 Wn. App. at 193. Further, the sufficiency of the

evidence is a question of constitutional law reviewed de novo. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

A person is guilty of first degree unlawful possession of a firearm if the person knowingly has in his possession or control a firearm after having previously been convicted of a serious offense as defined by chapter 9.41 RCW. RCW 9.41.040(1)(a); State v. Hartzell, 156 Wn. App. 918, 944, 237 P.3d 928 (2010). Possession is the challenged element on appeal. Possession can be actual or constructive. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Actual possession requires personal, physical custody. State v. George, 146 Wn. App. 906, 919-20, 193 P.3d 693 (2008). Constructive possession means the defendant has dominion and control over the firearm. State v. Chouinard, 169 Wn. App. 895, 899, 282 P.3d 117 (2012), review denied, 176 Wn.2d 1003, 297 P.3d 67 (2013).

The trial court did not find Hogan constructively possessed the firearm. Instead, the court found he actually possessed it: "At the time defendant carried the gun from the bedroom and out of the house, it was in his hands and therefore in his actual possession." 2CP 25 (FF XV). In light of the sufficiency of evidence standard, Hogan does not challenge the finding that he had the gun in his hands. He does, however, challenge the

determination that he was in "actual possession" of the gun for purposes of establishing the "possession" element of the crime.<sup>6</sup>

The State must establish "actual control." State v. Staley, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). "Actual possession means physical custody of an item but does not include 'passing control which is only a momentary handling.'" State v. Davis, 182 Wn.2d 222, 237, 340 P.3d 820 (2014) (Stephens, J., dissenting)<sup>7</sup> (quoting Callahan, 77 Wn.2d at 29). "Passing" is "the act of one that passes" or "having a brief duration." Davis, 182 Wn.2d at 237 n.3 (quoting Webster's Third New Int'l Dictionary 1651 (2002)).

In determining possession, "consideration should be given to the ownership of the item, as ownership can carry the right of dominion and control with it." Davis, 182 Wn.2d at 237 (citing Callahan, 77 Wn.2d at 31). The uncontroverted evidence was that Hogan's son, or the son's friend, owned the firearm. 6RP 69-70, 85. While the State is entitled to

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<sup>6</sup> The court also found "Traci Johnson testified that the barrel of a gun was visible when defendant carried it out of the house and that she knew it was a gun." 2CP 24 (FF XIII). Hogan challenges this finding as inaccurate. Johnson testified she saw the barrel of a rifle poking out one end of the blanket after Rachel put the item on the porch, not when Hogan carried it out of the house. 6RP 55-56. That being said, the inaccuracy of when Johnson saw the gun does not appear germane to the sufficiency of evidence analysis advanced on appeal.

<sup>7</sup> The dissenting opinion in Davis, which garnered five votes, is actually the majority decision on the sufficiency of evidence issue. Davis, 182 Wn.2d at 224.

all favorable inferences in a challenge to the sufficiency of the evidence, appellate courts are not required to ignore unfavorable facts. Davis, 182 Wn.2d at 235. Equally important, the trial court did not find Hogan owned the firearm. "In the absence of a finding on a factual issue we must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue." State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). The lack of ownership is a factor cutting against the possession element.

The trial court's findings do not specify how long Hogan had the gun in his hands. And "when considering 'momentary handling' during an actual possession inquiry, the quality of the control matters more than the duration of the control." Davis, 182 Wn.2d at 237. The quality of the control in this case is poor. Hogan attempted to secure possession, but failed. Hogan's wife took the gun away from him. All in all, Hogan had only passing possession of another's firearm and so the State failed to prove the possession element of the crime. The court therefore erred in concluding the State proved Hogan was guilty of this crime beyond a reasonable doubt. 2CP 26 (CL III).

Convictions must be reversed for insufficient evidence where, viewing the evidence in a light most favorable to the State, no rational trier of fact could have found the elements of the crime established beyond a

reasonable doubt. Hundley, 126 Wn.2d at 421-22. Hogan's conviction must therefore be reversed and the charge dismissed with prejudice. State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003) (setting forth remedy where insufficient evidence supports conviction).

**2. THE COURT VIOLATED HOGAN'S STATUTORY AND CONSTITUTIONAL RIGHTS IN FAILING TO ORDER A COMPETENCY EVALUATION DESPITE THERE BEING A REASON TO DOUBT COMPETENCY.**

Whenever there is reason to doubt competency, the trial court must order an evaluation under RCW 10.77.060. In determining whether there is reason to doubt competency, a trial court must give considerable weight to defense counsel's opinion and take facts into account supporting that opinion. The trial court abused its discretion in failing to order a competency evaluation as required by RCW 10.77.060 and due process because it failed to follow the controlling legal standard and the circumstances otherwise show a reason to doubt competency.

**a. Defense counsel raised a competency concern but the judge rejected it.**

After both sides rested their respective cases in the first trial, defense counsel told the judge "my client is telling me that he does not understand what is going on here. I don't know." 5RP 220. Hogan said he did not "remember a lot of it. It has been so long ago." 5RP 220.

Counsel said, "You were just telling me you don't know what is going on here, correct?" 5RP 220. Hogan responded "I'm not following. I'm not – I mean, I can't follow." 5RP 220-21. He said, "I can't remember shit." 5RP 221.

Defense counsel requested a continuance to have Hogan mentally evaluated at Western State. 5RP 221. The judge told counsel to talk to Hogan during the lunch recess to see if he could clear up any confusion Hogan might be experiencing. 5RP 221. After the lunch recess, counsel told the judge he was trying to decide what to do. 5RP 221. "I have serious questions as to whether he is competent to stand trial." 5RP 221. It was very "late in the game," but counsel didn't know Hogan had a social security payee and a VA payee for not being able to handle his affairs. 5RP 221-22. Now Hogan told him that he did not remember this and that, which was possible because "he didn't provide me with the witness list until late." 5RP 222. Counsel reported that Hogan thought he was competent. 5RP 222. The judge noted trial was basically completed. 5RP 222. Counsel said, "I think it is too late." 5RP 222. The judge pointed out competency could be raised at any moment until the trial is actually completed. 5RP 222.

The prosecutor chimed in, saying defense counsel called his client to the stand to testify, and if a person is not competent to stand trial, that

person is not competent to testify. 5RP 222. The judge pointed out competency can be a moving target. 5RP 223. It appeared to the judge that Hogan had a factual understanding of the charges against him and a general understanding of the criminal process. 5RP 223. According to the judge, Hogan's testimony reflected an ability to give a factual account of what happened. 5RP 223. As far as he could tell, Hogan was able to communicate effectively with counsel and identify potential witnesses. 5RP 224. The judge was confident Hogan was competent based on his trial testimony. 5RP 225. The judge said he was unsure whether there was "actually a motion" because counsel was not sure what to do, but told him "it is my sense that the defendant is competent at this point." 5RP 225. Counsel responded, "That's enough." 5RP 225.

Later that day, during the court's oral findings, defense counsel argued Hogan had serious mental problems that affect his memory. 5RP 271. "Throughout my defense of him, we keep trying to schedule appointments. He doesn't remember things. The witness list – you wouldn't believe how many times we tried to get it from him. We had Scott [Polito] show up the day of trial." 5RP 271. Counsel continued: "I don't think he realizes the significance of things. I really think he has memory problems, bad memory problems." 5RP 271.

The judge said "[t]hat could be, but I don't know that it rises to the level of competence." 5RP 272. Referring to the bail jumping charge, counsel said he did not think Hogan "remembers anything day-to-day" and has "serious memory problems," which would explain why he did not show up for the January 28 court date. 5RP 273. The judge said "I don't know. I don't have any medical testimony about that." 5RP 273. Counsel said "we probably should get some." 5RP 273. The judge noted his observations of Hogan's testimony, that he was capable of responding to questions and dexterous enough to change his story to accommodate inconsistencies. 5RP 274.

Later on, in the course of addressing the written findings and conclusions on guilt before sentence was imposed on the 2015 and 2016 cause numbers, defense counsel told the judge "We don't want you to sign 15 or 16 today. I definitely believe that Mr. Hogan is unable to properly assist his attorney in his defense. I think he has severe mental problems, which I do not believe that he is competent to stand trial. I know it is a little bit late. During the trial, I did say that to the court." 7RP 13. Counsel reported he "was just presented his VA records, two thousand pages of them. During the end of the trial, I found out that he had a payee on his benefits from the VA. He was not determined to be competent to handle his own affairs by the VA. I think it is imperative that he goes to

Western State and has a mental evaluation prior to the court entering any – sentencing him." 7RP 13-14.

The judge asked if there was something new about Hogan's situation. 7RP 14. Counsel answered "[t]he fact that he had a payee." 7RP 14. The judge said that was not new information, as Hogan had a payee before trial. 7RP 14. The judge continued: "He has already been evaluated. At this point in time, he had been evaluated as to whether he was competent." 7RP 14. Counsel reminded the judge that Hogan had not been evaluated. 7RP 14. The judge noted that counsel had earlier indicated that he did not think Hogan was competent. 7RP 14.

The judge said the way Hogan testified and responded to questions was not delusional. 7RP 14-15. His responses "may have been inventive, but not for purposes of having lost touch with reality, but may have been invented because he was consciously aware of what his legal perils were and was attempting to evade them." 7RP 15. Counsel insisted his client was not competent. 7RP 15. The judge disagreed. 7RP 15.

The prosecutor said if counsel had a real reason to doubt competency, he could have brought it up at the time of trial. 7RP 15-16. Defense counsel noted he did raise the issue. 7RP 16. The judge agreed, but "I found that it had no merit, and I still think it has no merit unless something has changed between that time and now." 7RP 16. Counsel

said he had 2000 pages of documents. 7RP 16. The judge responded that he did not know the contents of those documents, but reiterated Hogan's testimony did not demonstrate that he was mentally impaired. 7RP 16. Further, the reception of VA benefits did not by itself establish he was incompetent "for all purposes." 7RP 16-17. The judge was "not seeing or hearing anything new. Mr. Hogan today is obviously aware of what is going on." 7RP 17. Counsel moved for an evaluation under chapter 10.77 RCW. 7RP 17. The judge said "Unless you have some new information, the fact that he as a VA history is not necessarily illuminating to me." 7RP 17-18. Counsel answered "History, no. The fact that he has a payee on it, and they determined he was not competent to handle his own financial affairs. I think it's very important." 7RP 18. Hogan noted his wife served as his guardian ad litem. 7RP 18. Nothing further was said on the competency issue. The judge addressed the written findings and conclusions on guilt and then proceeded to the sentencing phase of the hearing. 7RP 18.

**b. Due process requires the court to follow mandatory evaluation procedures whenever there is a reason to doubt competency.**

No incompetent person may be tried, convicted, or sentenced for the commission of an offense so long as the incapacity continues. State v. Wicklund, 96 Wn.2d 798, 800, 638 P.2d 1241 (1982). The conviction of

an accused while incompetent violates the due process right to a fair trial. Pate v. Robinson, 383 U.S. 375, 378, 385, S. Ct. 836, 15 L. Ed. 2d 815 (1966); U.S. Const. amend. XIV; Wash. Const. art. 1, § 3.

Competency requires the accused to have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and to assist in his defense with "a rational as well as factual understanding of the proceedings against him." In re Pers. Restraint of Fleming, 142 Wn.2d 853, 861-62, 16 P.3d 610 (2001) (citing Dusky v. United States, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960)) (internal quotation marks omitted). "The two-part test for legal competency for a criminal defendant in Washington is as follows: (1) whether the defendant understands the nature of the charges; and (2) whether he is capable of assisting in his defense." Fleming, 142 Wn.2d at 862.

The failure to observe procedures adequate to protect competency is a denial of due process. State v. O'Neal, 23 Wn. App. 899, 901, 600 P.2d 570 (1979) (citing Pate, 383 U.S. 3; Drope v. Missouri, 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975)). "Chapter 10.77 RCW provides such a procedure." State v. Heddrick, 166 Wn.2d 898, 904, 215 P.3d 201 (2009). "Whenever . . . there is reason to doubt [a defendant's] competency, the court on its own motion or on the motion of any party

shall either appoint or request the secretary to designate at least two qualified experts or professional persons, one of whom shall be approved by the prosecuting attorney, to examine and report upon the mental condition of the defendant." RCW 10.77.060(1)(a). "[S]o long as a defendant maintains a challenge to competency, the chapter 10.77 RCW procedures are mandatory to satisfy due process." Heddrick, 166 Wn2d at 909.

The determination of a reason to doubt competency is different from an actual determination of competency. City of Seattle v. Gordon, 39 Wn. App. 437, 442, 693 P.2d 741, review denied, 103 Wn.2d 1031 (1985). Whether there is a reason to doubt competency is a threshold determination. Gordon, 39 Wn. App. at 442. Under the "reason to doubt" standard, "the ultimate question for the trial court is whether there is a 'factual basis' to doubt the defendant's competence." State v. Woods, 143 Wn.2d 561, 605, 23 P.3d 1046, cert. denied, 534 U.S. 964, 122 S. Ct. 374, 151 L. Ed. 2d 285 (2001). Courts consider a variety factors in determining competence, including the defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and the statements of counsel. Fleming, 142 Wn.2d at 863. Since the lawyer has "the closest contact with the defendant," the court must give considerable weight to the lawyer's representations regarding the client's

competency and ability to assist in his defense. State v. Israel, 19 Wn. App. 773, 779, 577 P.2d 631 (1978) (quoting Drope, 420 U.S. at 177 n.13).

**c. Defense counsel's opinion and supporting facts establish a reason to doubt competency.**

A determination of whether there is reason to doubt the defendant's competency is within the trial court's sound discretion. State v. Lord, 117 Wn.2d 829, 900, 822 P.2d 177 (1991). A court necessarily abuses its discretion by denying a criminal defendant's constitutional rights. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009).

The issue is whether the court erred in failing to order a competency evaluation. If a reason to doubt competency existed, the court necessarily erred in failing to order a competency evaluation pursuant to RCW 10.77.060. Courts must consider the input of defense counsel when making this determination. Drope, 420 U.S. at 177 n.13 ("Although we do not . . . suggest that courts must accept without question a lawyer's representations concerning the competence of his client . . . an expressed doubt in that regard by one with the closest contact with the defendant . . . is unquestionably a factor which should be considered."). Trial courts in Washington must not only consider defense counsel's opinion but also give it "considerable weight." State v. Harris, 122 Wn. App. 498, 505, 94 P.3d 379 (2004). The trial court failed to comply with this settled legal

standard and abused its discretion in not recognizing sufficient facts existed to show a reason to doubt competency.

Defense counsel's expressed doubt about a client's competency must have a factual basis. Lord, 117 Wn.2d at 901. Facts support counsel's concern here. They include: (1) Hogan had been diagnosed with schizophrenia (5RP 165); (2) he had a VA payee and a guardian ad litem to handle his affairs (5RP 121-22, 7RP 13-14, 18); (3) he had severe mental problems that affected his memory, including difficulty identifying witnesses for his defense (5RP 222, 271, 273); and (4) Hogan reported he did not understand what was going on and could not follow the proceedings. 5RP 220-21. There need only be a factual basis to doubt competency in order to trigger the mandatory evaluation requirements of RCW 10.77.060. Woods, 143 Wn.2d 561, 605; State v. Marshall, 144 Wn.2d 266, 279, 27 P.3d 192 (2001). There was reason to doubt Hogan's ability to understand the proceedings and assist in his defense based on counsel's opinion and facts supporting that opinion. Defense counsel was in a unique position to offer an opinion on Hogan's competence based on personal contact outside the courtroom. Counsel believed Hogan was "unable to properly assist his attorney in his defense." 7RP 13.

The Washington Supreme Court has concluded a defendant need not be able to help with trial strategy to be competent. State v. Ortiz, 104

Wn.2d 479, 483, 706 P.2d 1069 (1985), cert. denied, 476 U.S. 1144, 106 S. Ct. 2255, 90 L. Ed. 2d 700 (1986). But an ability to rationally assist is a basic requirement of competency. Marshall, 144 Wn.2d at 281. A defendant must be able to "communicate effectively with defense counsel." Cooper v. Oklahoma, 517 U.S. 348, 368, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996). A defendant must have "the present mental ability meaningfully to participate in his defense." Johnson v. Estelle, 704 F.2d 232, 237 (5th Cir. 1983), cert. denied, 465 U.S. 1009, 104 S. Ct. 1006, 79 L. Ed. 2d 237 (1984). To this end, the defendant should be able to follow the evidence and discuss it with counsel. Hansford v. United States, 365 F.2d 920, 924 (D.C. Cir. 1966).

The role of defense counsel in determining the competency of his client is unique. The attorney represents his client, but he is also an officer of the court. Israel, 19 Wn. App. at 779. Defense counsel had the closest contact with Hogan and was in the best position to know whether Hogan could assist with his defense. In determining whether there is a reason to doubt competency, the trial court must give "considerable weight" to defense counsel's opinion. Id. The trial court necessarily abuses its discretion when its decision is based on an erroneous view of the law or application of an incorrect legal analysis. Dix v. ICT Group, Inc., 160 Wn.2d 826, 833, 161 P.3d 1016 (2007). The judge abused his discretion

in declining to order a competency evaluation and finding no reason to doubt competency because did not give the considerable weight to defense counsel's opinion that his client was incompetent. Instead, the judge placed considerable reliance on the manner in which Hogan testified. This is a factor for the court to consider, but it is not the whole picture. "Mental illness is often a fluid situation with the condition of the afflicted changing repeatedly over time." State v. Lawrence, 166 Wn. App. 378, 396, 271 P.3d 280 (2012). Unlike the judge, defense counsel is able to interact and observe the client outside of the courtroom. This is why considerable weight must be given to defense counsel's opinion on competency.

There need only be a legitimate reason to doubt competency in order to trigger the mandatory evaluation requirements of RCW 10.77.060, not a necessary doubt. Marshall, 144 Wn.2d at 279. There was a reason to doubt Hogan's ability to understand the proceedings or assist in his defense based on counsel's opinion and facts supporting that opinion. There were enough facts to prompt a reasonable person to have a legitimate doubt as to Hogan's competency. The court abused its discretion in failing to order a competency evaluation given the facts known to the court regarding Hogan's mental state as well as defense counsel's opinion that his client may be incompetent. The failure to follow

mandatory evaluation procedures under RCW 10.77.060 where there is reason to doubt competency requires reversal. Marshall, 144 Wn.2d at 280.

**3. THE PRIOR FEDERAL OFFENSE WAS THE EQUIVALENT OF A WASHINGTON CLASS C FELONY AND THEREFORE WASHED OUT OF THE OFFENDER SCORE.**

Hogan's 1993 federal conviction washed out because it is the equivalent of a class C felony in Washington, not a class B felony, and Hogan committed no crimes resulting in conviction for a five-year period while in the community. The court therefore erred in using this offense in the offender score. If defense counsel is found to have waived the issue by affirmatively agreeing to the offender score, then Hogan received ineffective assistance of counsel. Either way, the error merits relief. His case must be remanded for resentencing.

**a. The federal offense is not clearly comparable to a Washington offense.**

The judgment and sentence as well as the "statement of prior record and offender score" describe Hogan's 1993 federal offense as "use of telephone to facilitate/conspiracy to distribute cocaine." 1CP 9, 11; 2CP 6, 10. That paperwork lists the federal offense as a class B felony that contributes one point to the offender score. Id. Defense counsel agreed to the offender score calculation. 7RP 26. No one talked about

whether the federal offense is comparable to a class B Washington offense. At the tail end of sentencing, the prosecutor inquired as to whether counsel was going to sign the "criminal history stipulation," referring to the "statement of prior record and offender score." 7RP 38. Hogan said "No, it's not accurate." 7RP 38. The judge said no one had identified any inaccuracy. 7RP 38. When the judge asked counsel "are you aware of anything in his criminal history that is not indicated --," counsel responded "No, Your Honor." 7RP 38. Hogan jumped in: "You said that the things on here is not on here because they washed off. How do I have eight points? I don't get it. What just happened?" 7RP 38. His protest was ignored.

In computing the offender score, "[f]ederal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute." RCW 9.94A.525(3).

The prosecution bears the burden of proving the comparability of out-of-state convictions. In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 876, 880, 123 P.3d 456 (2005). "Absent a sufficient record, the

sentencing court is without the necessary evidence to reach a proper decision, and it is impossible to determine whether the convictions are properly included in the offender score." State v. Ford, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999).

The comparability of foreign convictions to Washington crimes is a question of law reviewed de novo. State v. Beals, 100 Wn. App. 189, 196, 97 P.2d 941 (2000). First, it must be determined whether the foreign offense is legally comparable. State v. Thiefault, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). The trial court must compare the elements of the foreign offense with the elements of potentially comparable Washington crimes as defined on the date the foreign crime was committed. In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). Offenses are not legally comparable if the elements are not identical or if the Washington statute defines the offense more narrowly than does the foreign statute. Ford, 137 Wn.2d at 479; Lavery, 154 Wn.2d at 255-56. If the foreign offense's elements are broader or different than Washington's elements, precluding legal comparability, it must then be determined whether the offense is factually comparable. Thiefault, 160 Wn.2d at 415.

Hogan's 1993 federal offense is listed in the judgment and sentence and criminal history statement as "use of telephone to facilitate/conspiracy to distribute cocaine." 1CP 9, 11; 2CP 6, 10. The federal criminal statute

at issue is 21 U.S.C. § 843(b), which makes it "unlawful for any person knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter." The acts "constituting a felony" under this statute encompass a variety of drug-related offenses, including conspiracy to distribute cocaine. 21 U.S.C. § 841(a)(1) (unlawful to distribute controlled substance); 21 U.S.C. § 846 (conspiracy). The term "communication facility" includes a telephone. 21 U.S.C. § 843(b).

A federal offense must be treated as a class C felony if it is not "clearly comparable" to a Washington offense. RCW 9.94A.525(3). The federal offense of using "any communication facility in committing or in causing or facilitating" certain drug crimes is not clearly comparable to any offense under Washington law. There is no Washington offense that criminalizes the use of a telephone or other "communication facility" to engage in illegal drug activity. No such offense was identified below and undersigned counsel cannot find one. The two offenses are legally incomparable. The two offenses are not factually comparable. Nothing in the record shows what the facts are in relation to the federal offense. Because Hogan's federal conviction for using a telephone to commit the crime of conspiracy to distribute cocaine is not clearly comparable to a

Washington offense, it is scored as if it were a class C felony. RCW 9.94A.525(3).

**b. As the equivalent of a class C felony, the federal conviction washed out of Hogan's offender score.**

Offender score calculations are reviewed de novo. State v. Cross, 156 Wn. App. 568, 587, 234 P.3d 288 (2010), review granted and remanded on other grounds, 172 Wn.2d 1009, 260 P.3d 208 (2011). RCW 9.94A.525(2)(c) governs when class C felony convictions may be included in the offender score. That statute provides "class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction." RCW 9.94A.525(2)(c). The statute contains a "trigger" clause, which identifies the beginning of the five-year period, and a "continuity/interruption" clause, which sets forth the substantive requirements a person must satisfy during the five-year period. State v. Ervin, 169 Wn.2d 815, 821, 239 P.3d 354 (2010). Any offense committed after the trigger date that results in a conviction resets the five-year clock. Ervin, 169 Wn.2d at 821. The State bears the burden of proving prior

criminal history for the purpose of calculating the offender score under the wash out provision. Cross, 156 Wn. App. at 586-87; Cadwallader, 155 Wn.2d at 875-76, 880.

The federal offense at issue is from 1993. The face of the judgment and sentence (and the statement on criminal history) show that this offense washed out. 1CP 8-9, 11; 2CP 5-6, 10. There is more than a five-year period where Hogan did not commit any criminal offenses. All of the other prior offenses for class C felonies were deemed to have washed out of Hogan's offender score, and they all took place after the federal offense at issue. 1CP 9; 2CP 6.

At the sentencing hearing, the prosecutor recited the federal offense as part of Hogan's criminal history but there was no discussion on whether it washed out of the offender score. 7RP 23. This is almost certainly due to the fact that the offense is listed as a class B felony in the paperwork. If it was truly a class B felony, then it does not wash out because Hogan did not spend ten years in the community without committing a crime. RCW 9.94A.525(2)(b). But as argued above, it is actually the equivalent of a class C felony. Neither the court, the prosecutor, nor Hogan's counsel realized this. Hogan's prior federal conviction washed out and should not have been included in his offender

score because he did not commit any crime resulting in a conviction for a period of five years in the community.

"[A] conviction that has washed out is not relevant to the calculation of an offender score." State v. Moeurn, 170 Wn.2d 169, 176, 240 P.3d 1158 (2010). The offender score for each of the current convictions in both cases lowers by one point once the federal offense is properly determined to have washed out. See RCW 9.94A.510 (sentencing grid setting forth standard ranges based on seriousness level of offense); RCW 9.94A.515 (seriousness level of VII for first degree unlawful possession of firearm; III for bail jumping; II for possession of stolen vehicle); RCW 9.94A.525(7) (prior non-violent felonies count as one point where present conviction is for non-violent offense). This case must be remanded for resentencing with a lower offender score. State v. Wilson, 170 Wn.2d 682, 691, 244 P.3d 950 (2010) (resentencing is remedy for miscalculated offender score).

**c. The error in the offender score is not waived for appeal.**

Defense counsel agreed to the offender score. 7RP 26, 38. Hogan objected at sentencing on the basis of washout, but the court relied on counsel's position without attempting to get to the bottom of Hogan's concern. 7RP 38. Hogan's objection was sufficient to put the court on

notice that something was wrong with the offender score in terms of washout.

Even if Hogan's pro se objection is not deemed effective, a defendant cannot agree to a sentence in excess of the authority provided by statute. In re Personal Restraint of Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002). "[W]aiver can be found where the alleged error involves an agreement to the facts, later disputed, or where the alleged error involves a matter of trial court discretion." Goodwin, 146 Wn.2d at 874. But a defendant cannot waive a challenge to a miscalculated offender score when the miscalculation is based on legal error. Id.; Wilson, 170 Wn.2d at 688. As set forth above, the court failed to follow statutory requirements in calculating the offender score. The inclusion of a washed out conviction in the offender score is a legal error that cannot be waived for appeal. Goodwin, 146 Wn.2d at 867, 875-76; Cadwallader, 155 Wn.2d at 874-75.

A stipulation to facts, such as the comparability of an out-of-state offense, can constitute waiver in some circumstances. Cadwallader, 155 Wn.2d at 874-75 (citing State v. Ross, 152 Wn.2d 220, 226-27, 229-32, 95 P.3d 1225 (2004)). But here, the issue of comparability was not even addressed. Defense counsel stipulated to the offender score, but did not stipulate to any fact connected with comparability. A defendant's

affirmative acknowledgment of his offender score does not relieve the State of its burden of proving the comparability of foreign offenses. State v. Lucero, 168 Wn.2d 785, 789, 230 P.3d 165 (2010). There is no waiver because Hogan's attorney did not "affirmatively acknowledge" that his federal conviction was comparable to a Washington class B felony. Lucero, 168 Wn.2d at 789. Moreover, Hogan objected to his offender score, even if his attorney did not. Under these circumstances, the issue is not waived for appeal.

**d. In the alternative, defense counsel provided ineffective assistance in agreeing to the offender score.**

If trial counsel's affirmative agreement to the offender score is deemed to waive the issue for appeal despite Hogan's pro se objection, then counsel provided ineffective assistance. Every criminal defendant is guaranteed the constitutional right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. amend. VI; Wash. Const. art. I § 22. Sentencing is a critical stage of a criminal proceeding at which a defendant is entitled to the effective assistance of counsel. Gardner v. Florida, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977). Defense counsel is ineffective

where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687.

Counsel was deficient in agreeing to an erroneous offender score. There is no conceivable legitimate tactic in agreeing to a sentence in excess of statutory authority. The deficiency prejudiced Hogan by subjecting him to a longer sentence based on the erroneous offender score.

While any objection to a foreign conviction's inclusion may be waived by affirmative acknowledgement that it was properly included, it is ineffective assistance of counsel to make such an acknowledgment when the foreign conviction is not legally comparable and the State has failed to prove factual comparability. In Thiefault, the Supreme Court held defense counsel provided ineffective assistance of counsel by failing to object to the sentencing court's erroneous determination that a Montana conviction was comparable. Thiefault, 160 Wn.2d at 412, 417. Defense counsel's failure to object was deficient because the Montana attempted robbery statute is broader than its Washington counterpart and the record contained insufficient documentation to establish the Montana conviction was factually comparable. Id. at 417. Counsel's deficient performance was prejudicial because "[a]lthough the State may have been able to obtain a continuance and produce the information to which Thiefault pleaded guilty, it is equally as likely that such documentation may not have

provided facts sufficient to find the Montana and Washington crimes comparable[.]" Id.

As in Thiefault, the foreign offense for which Hogan was convicted was not legally comparable to a Washington offense and the record does not establish the federal offense was factually comparable. Counsel's agreement to the offender score was therefore deficient. Counsel's deficient performance was also prejudicial because the improperly calculated offender score increased the standard range sentences. Remand for resentencing is required.

**D. CONCLUSION**

For the reasons stated, Hogan requests (1) his convictions be reversed; (2) his case be remanded for resentencing.

DATED this 27<sup>th</sup> day of July 2017

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

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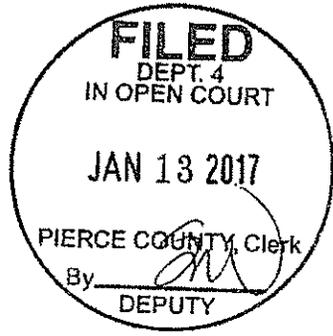
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# APPENDIX A

0058



16-1-00047-1 48241344 FNFL 01-17-17



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO.: 16-1-00047-1

vs.

CARL EVERETT HOGAN,

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW  
RE: BENCH TRIAL

Defendant.

THIS MATTER having come on before the Honorable Bryan Chushcoff, Judge of the above entitled court, for bench trial on the 13<sup>th</sup> day of December, 2016, the defendant having been present and represented by attorney Gary Wallis, and the State being represented by Deputy Prosecuting Attorney Dione Hauger, and the court having observed the demeanor and heard the testimony of the witnesses and having considered all the evidence and the arguments of counsel and being duly advised in all matters, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

I.

That on January 5, 2016, an Information was filed charging the defendant with Unlawful Possession of a Firearm in the First Degree and Assault in the Fourth Degree.

II.

ORIGINAL

1 According to defendant's account of the alleged assault between he and his wife, Rachel  
2 Hogan, the entire incident was fabricated by Rachel and her mother, Traci Johnson. Defendant's  
3 version is that it just did not happen. In asserting that it did not happen, defendant wants to rely  
4 on Rachel Hogan.

5 III.

6 Rachel Hogan's account is not that the entire incident was fabricated.

7 IV.

8 Exhibits 7 and 8 are Rachel Hogan's statements to law enforcement the night that the  
9 incident occurred. Exhibit 7 was admitted but will only be used for impeachment purposes, not  
10 as substantive evidence. Exhibit 8 was used purely for impeachment purposes. The court can  
11 convict on substantive evidence only.

12 V.

13 From the testimony of the witnesses, it is clear that there was an argument between  
14 defendant and Rachel Hogan. *The argument occurred at their residence at 25907 54th Ave.*  
15 substantive evidence is Rachel Hogan's testimony that during the argument, she got up and *Court E.,*  
16 tripped. There is no evidence of a touching by defendant or that any touching, if it occurred, was *in Graham,*  
17 not accidental. *Pierce Co.,*  
*WA.*

18 VI.

19 Rachel Hogan did end up in her mother, Traci Johnson's lap, however Traci did not see  
20 any touching or pushing or how Rachel ended up in her lap.

21 VII.

22 Neither Rachel Hogan nor Traci Johnson knew that there was a gun inside the residence  
23 before May 28, 2015.  
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## VIII.

1 Following the argument with Rachel Hogan, defendant went into the house to get his  
2 personal belonging.

## IX.

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5 Traci Johnson testified a scuffle occurred between defendant and Rachel and that the  
6 scuffle was over the gun. Rachel Hogan denied that any scuffle occurred.

## X.

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8 It is irrefutable that there was a gun. The only two ways that the gun got on the porch  
9 was when Rachel Hogan went to get defendant's belongings and found the gun or when  
10 defendant went to get his belongings and brought the gun out of the residence where he was  
11 seen carrying it by Traci Johnson and Rachel Hogan.

## XI.

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13 By Rachel Hogan's account, she did not know the police were coming. This casts doubt  
14 on her testimony. There are other reasons to doubt Rachel's testimony as she testified that she  
15 did not know her mother had called the police.

## XII.

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17 Defendant may have known police were on the way which is why he retrieved the gun  
18 from the bedroom.

## XIII.

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21 Traci Johnson testified that the barrel of a gun was visible when defendant carried it out  
22 of the house and that she knew it was a gun. It is not reasonable to believe that Rachel did not  
23 know defendant was carrying a gun out of the house as she would not bother to struggle over the  
24  
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gun if she did not know it was a gun. Rachel Hogan therefore knew that the item defendant was carrying out of the house was a gun.

XIV.

The rifle remained on the porch because Rachel Hogan took it from defendant. There is no other reason.

XV.

At the time defendant carried the gun from the bedroom and out of the house, it was in his hands and therefore in his actual possession. Defendant attempted to put the gun in his car because he was trying to secure his possession, including the firearm.

XVI.

The rifle was test fired by Adam Anderson, a forensic investigator with the Pierce County Sheriff's Department. The weapon was fired three times using live rounds of ammunition. The weapon functioned as it was designed to and sent projectiles down the barrel. The firearm was a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

XVII.

Prior to May 28, 2015, defendant had previously been convicted of Burglary in the Second Degree, as serious offense.

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law.

CONCLUSIONS OF LAW

I.

That the Court has jurisdiction of the parties and subject matter.

II.

That all relevant events or at least one element of the crime occurred in Pierce County.

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III.

That defendant, Carl Everett Hogan, is guilty beyond a reasonable doubt of the crime of Unlawful Possession of a Firearm in the First Degree, in that, on May 28, 2015, defendant knowingly had in his possession or under his control a firearm after having been previously convicted of Burglary in the Second Degree, a serious offense.

IV.

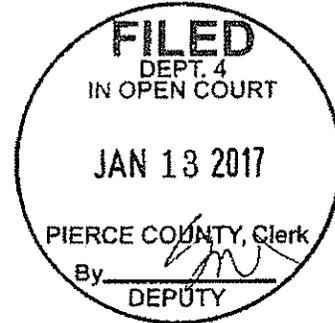
Defendant is not guilty ~~beyond a reasonable doubt~~ of Assault in the Fourth Degree.

DONE IN OPEN COURT this 13<sup>th</sup> day of January, 2017.

*[Signature]*  
\_\_\_\_\_  
JUDGE

Presented by:

*[Signature]*  
\_\_\_\_\_  
Dione J. Hauger, WSB #25104  
Deputy Prosecuting Attorney



Approved as to Form:

*[Signature]*  
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Gary Wallis, WSB # 031  
Attorney for Defendant

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**NIELSEN, BROMAN & KOCH P.L.L.C.**

**July 28, 2017 - 11:08 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 49910-0  
**Appellate Court Case Title:** State of Washington, Respondent v. Carl E. Hogan, Appellant  
**Superior Court Case Number:** 15-1-05148-4

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