

29008-5-III & 29331-9-III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

BRYCE K. DeGAGNE, APPELLANT

---

CONSOLIDATED WITH:

IN RE PERSONAL RESTRAINT OF

BRYCE K. DeGAGNE

---

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

---

BRIEF OF RESPONDENT

AND

RESPONSE TO PERSONAL RESTRAINT PETITION

---

STEVEN J. TUCKER  
Prosecuting Attorney

Mark E. Lindsey  
Deputy Prosecuting Attorney  
Attorneys for Respondent

County-City Public Safety Building  
West 1100 Mallon  
Spokane, Washington 99260  
(509) 477-3662

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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in denying defendant's CrR 7.8(c) motion for a new trial based on newly discovered evidence.

II.

ISSUES PRESENTED

1. Did the trial court err in ruling on the merits of defendant's CrR 7.8(b)(2) motion for a new trial?

III.

STATEMENT OF THE CASE

For the purposes of this appeal only, the State accepts the defendant's Statement of the Case.

IV.

ARGUMENT

- A. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN REVIEWING AND DENYING DEFENDANT'S CrR 7.8(b)(2) MOTION FOR A NEW TRIAL.

The defendant claims the trial court abused its discretion in denying his CrR 7.8(b)(2) motion for a new trial based upon newly discovered evidence based upon the provisions of CrR 7.8(c)(2) and (3).

Defendant filed a CrR 7.8(b)(2) motion for a new trial. CP 43-71 (defendant's notice of pro-se appearance). Defendant's pleadings consistently reference that this motion is a motion for a new trial. Throughout the pleadings defendant couches his claims and arguments in terms of the standard of review applicable to motions for a new trial brought pursuant to CrR 7.8(b)(2) based upon alleged newly discovered evidence.

“...trial testimony supports the following facts supporting this New Evidence that would change the result...These facts are not for the weight of credibility determinations or, for the purpose of impeachment but, are in light of the new evidence, makes a threshold showing the outcome would have been different had the evidence of fraudulent police report been heard...

CP 46 (defendant's brief in support of CrR 7.8(b)(2) motion for a new trial). Defendant cited the trial court to the holding in *In re the Pers. Restraint of Lord*, 123 Wn.2d 296, 868 P.2d 835 (1994), to acknowledge the threshold of proof defendant had to satisfy to qualify for the relief requested pursuant to CrR 7.8(b)(2). CP 48.

In *Lord*, the Supreme Court ruled that to support a motion for a new trial:

The defendant must show that the evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before

trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching.

*Lord*, 123 Wn.2d at 319-320.

CrR 7.8(b) provides, in pertinent part:

On motion and upon such terms as are just, the court may relieve a party from a final judgment,...for the following reasons:...(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5.

CrR 7.8(b)(2). Defendant cites *State v. Smith*, 144 Wn. App. 860, 184 P.3d 666 (2008) as supportive of his position that the trial court failed to satisfy the requirements of CrR 7.8(c)(2) and (3) in denying his motion for a new trial.

In *Smith*, the trial court found the defendant's CrR 7.8 motion to vacate the judgment untimely under RCW 10.73.090 and dismissed the motion. The appellate court vacated the trial court's order and remanded the proceedings because it found that the trial court lacked authority under the amended version of CrR 7.8(c)(2) to dismiss the motion as untimely under RCW 10.73.090. The appellate court ruled:

"Under this new rule, the superior court does not have authority to dismiss a CrR 7.8 motion if it is untimely under RCW 10.73.090. Instead, the superior court must transfer the

motion to this court for consideration as a personal restraint petition.

Here, the trial court specifically found that the defendant's motion was not untimely under RCW 10.73.090, hence it was not mandated by CrR 7.8(c)(2) to transfer the motion to this Court. Accordingly, the trial court exercised its discretion to review the evidence and rule on the motion for a new trial. The trial court committed no error.

Defendant contends that the trial court is bound by CrR 7.8(c)(2) to specifically enter findings that either the defendant has made a substantial showing that he is entitled to relief or that resolution of the motion will require a factual hearing. Nothing in CrR 7.8(c)(2) mandates that a trial court reviewing a CrR 7.8 motion enter findings as suggested by defendant herein. Here, the Order Denying the Motion reflects that the trial court carefully considered its task in light of the requirements of CrR 7.8(c)(2).

The reasonable inference from the Order is that the trial court first made the threshold finding that the motion was not time barred by the provisions of RCW 10.73.090. Next, the trial court considered whether defendant had made a substantial showing that he was entitled to relief or that resolution of the motion required a factual hearing. The reasonable inference from the trial court's Order is that it followed the provisions of CrR 7.8(c)(2) in rendering its decision. Once the trial court had complied

with the requirements of CrR 7.8(c)(2) there was no need to consider CrR 7.8(c)(3).

Once the trial court found defendant's motion was not time barred, it was mandated to analyze the viability of the "newly discovered evidence" that was the basis for the motion. The trial court then analyzed the defendant's proffered evidence and found that it did not qualify as "newly discovered evidence" under the standard set out in *In re Pers. Restraint of Lord, supra*. Specifically, that the evidence was discovered since the trial and could not have been discovered before trial by the exercise of due diligence. CP 41-42.

Additionally, defendant proffered as "newly discovered evidence" the declaration by Michael Davis which merely related hearsay statements by the victim, Mr. Tracy, to Mr. Davis. At best, the proffered evidence would impeach the credibility of the victim's testimony, so it is not "newly discovered evidence" as contemplated by the rules and the case law interpreting same.

Finally, defendant contends that merely converting this appeal to a personal restraint petition is not a viable remedy. This position is counterintuitive since defendant's call for strict adherence to the provisions of CrR 7.8(c)(2) would have resulted in the trial court transferring the motion to this Court as a PRP. At some point, CrR 7.8(c) must be analyzed

with a practical eye towards why it even exists if it effectively mandates that the trial court transfer all motions for a new trial to this Court for decision.

## PRP RESPONSE

### I. AUTHORITY FOR RESTRAINT OF PETITIONER

The petitioner is currently incarcerated with the Washington State Department of Corrections pursuant to a judgment and sentence imposed on jury verdicts finding him guilty of one count of first degree robbery with a deadly weapon enhancement and one count of first degree burglary with a deadly weapon enhancement in Spokane County Superior Court file number 07-1-03157-1. *See* Appendix A.

### II. STATEMENT OF THE CASE

In August 2007, Petitioner/defendant Bryce K. DeGagne was charged by Information with one count of first degree robbery with enhancements and one count of first degree burglary with enhancements alleged to have occurred on July 23, 2007 and one count of first degree robbery with enhancements alleged to have occurred on July 29, 2007. *See* Appendix B. On February 5, 2008, Petitioner/defendant was convicted by a jury of count I - first degree burglary with a deadly weapon enhancement

and count II - first degree robbery with deadly weapon enhancement, yet acquitted of count III. Appendices A, C, D (general verdict forms and special verdicts forms).

On March 7, 2008 the trial court imposed standard range sentences then added deadly weapon enhancements thereto pursuant to the verdicts rendered by the jury. Appendix A. Defendant filed a direct appeal of his convictions. On November 3, 2009 this Court affirmed defendant's convictions and sentencing enhancements. Appendix E. On April 8, 2010 defendant filed a CrR 7.8(c) motion for a new trial with the Superior Court alleging "newly discovered evidence." On April 23, 2010 the Superior Court denied defendant's motion and defendant appealed that decision to this Court. (cause #29331-9-III)

This Court consolidated this PRP (#29331-9-III) with the appeal (#29008-5-III) and directed the State to file a consolidated response thereto.

### III. STATEMENT OF DISPUTED FACTS

Except as set forth above, respondent denies all other allegations made by petitioner.

### IV. ISSUES PRESENTED

- (1) Has petitioner satisfied the heavy burden of showing actual and substantial prejudice to qualify for relief?

- (2) Did the trial court properly instruct the jury that it needed to reach verdicts on the charged offenses separately beyond a reasonable doubt?
- (3) Did the trial court properly instruct the jury regarding the essential elements of the charged offenses?

V. ARGUMENT

A. THE PETITIONER HAS FAILED TO SATISFY THE REQUISITE BURDEN OF SHOWING PREJUDICE.

*Standard of Review*

The standard of review for a PRP is well-settled. A PRP alleging constitutional error must meet the heavy burden of demonstrating "actual and substantial prejudice" in order to obtain relief. *In re Haverty*, 101 Wn.2d 498, 504, 681 P.2d 835 (1984); *In re Hews*, 99 Wn.2d 80, 86, 660 P.2d 263 (1983); *In re Hagler*, 97 Wn.2d 818, 650 P.2d 1103 (1982); *In re Rice*, 118 Wn.2d 876, 884, 828 P.2d 1086, *certiorari denied* 113 S. Ct. 421 (1992). Allegations unsupported by persuasive reasoning are not sufficient to meet the threshold burden of proof that is necessary to attack a judgment or sentence. *State v. Brune*, 45 Wn. App. 354, 363, 725 P.2d 454 (1986), *review denied* 110 Wn.2d 1002 (1988).

The petitioner must demonstrate by a preponderance of the evidence that the constitutional error caused him actual and substantial prejudice.

*In re St. Pierre*, 118 Wn.2d 321, 328, 823 P.2d 492 (1992). If the petitioner does not demonstrate actual prejudice, the petition will be dismissed. *In re Grisby*, 121 Wn.2d 419, 423, 853 P.2d 901 (1993).

Actual prejudice must be proven by the petitioner even for constitutional errors that can never be considered harmless on direct appeal. *In re St. Pierre, supra* at 328-329. Relief will only be granted if the constitutional error had substantial and injurious effect or influence in determining the verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993).

In contrast, an even higher standard applies when dealing with allegations of *non-constitutional* error. To obtain review of such an error in a PRP, defendant must show that the "claimed error constitutes a fundamental defect which inherently results in a complete miscarriage of justice." *In re Cook*, 114 Wn.2d 802, 812, 792 P.2d 506 (1990).

These restrictions on relief in a PRP exist because of significant policy considerations. "Collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders." *In re Hagler, supra* at 824. As a PRP is no substitute for an appeal, the standards for review in a PRP are significantly higher than on appeal. Here, defendant failed to object to the

trial court instructing the jury in the manner that he now claims was constitutionally deficient.

B. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY THAT IT NEEDED TO REACH VERDICTS ON THE CHARGED OFFENSES SEPARATELY BEYOND A REASONABLE DOUBT.

Petitioner claims that the trial court failed to properly instruct the jury regarding its need to be unanimous, yet petitioner has misconstrued the trial court's instructions to the jury. The Information charged defendant with three separate crimes, two of which occurred on the same date. The jury acquitted defendant of one of the offences, yet found him guilty of the other two offenses. The jury further found that defendant was armed with a deadly weapon (the baton) during the commission of the convicted crimes, yet found that defendant was not armed with a firearm. Here, the trial court instructed the jury:

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.

Appendix F (instruction #2). A jury is presumed to follow the trial court's instructions. *State v. Yates*, 161 Wn.2d 714, 763, 168 P.3d 359 (2007), *cert. denied*, 128 S. Ct. 2964 (2008). Clearly, the jury understood the instructions and applied same to the evidence admitted at trial to reach its verdicts. The fact that the jury found defendant was armed with a deadly weapon, yet not

the firearm is entirely consistent with the evidence that defendant wielded the baton while his co-defendant wielded the firearm during the offenses committed on July 23<sup>rd</sup>. Appendix D (special verdicts forms A2 and B2). The jury verdicts support the reasonable inference that they carefully followed the trial court's instructions.

Finally, petitioner contends that the trial court's instructions failed to advise the jury that it had to be unanimous as to the deadly weapon that was used to commit the offenses charged out of the July 23<sup>rd</sup> incident. Again, the verdicts reflect that the jury had to find beyond a reasonable doubt that the defendant/petitioner wielded a deadly weapon during the incident to even find him guilty of either of count I or II. The verdicts reflect that the jury concluded that the evidence only supported one result, that defendant was armed with a deadly weapon, not a firearm. Accordingly, petitioner has not satisfied his threshold burden and does not qualify for the relief requested.

Here, Defendant/petitioner denied the trial court the opportunity to correct the instructions, yet now claims that the trial court committed an error of constitutional magnitude for which he is entitled to relief.

C. THE TRIAL COURT PROPERLY INSTRUCTED  
THE JURY REGARDING THE ESSENTIAL  
ELEMENTS OF THE CHARGED OFFENSES.

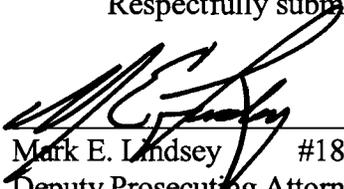
Petitioner claims that the trial court violated his due process rights by allowing conviction without proof of the essential elements of the charged crimes. Petitioner does not claim that the trial court omitted any essential element of the charged offenses, rather, that the instructions failed to specify that the jury be unanimous that defendant used a deadly weapon as defined in either of the two definitions found in the instructions packet. Once again, it is important to note that petitioner did not afford the trial court the opportunity to address this claimed instructional error to thereby correct the alleged error. Nevertheless, petitioner has misconstrued how the instructions permitted the jury to consider and utilize the two definitions. Here, the evidence before the jury was that defendant and his co-defendant each was armed with a “deadly weapon” as defined by the two instructions. Appendix F (instructions #13 and 14). There was no question that defendant wielded the knife while co-defendant wielded the gun. Hence, the jury found defendant guilty of the underlying offenses because he was armed with the knife and answered the special verdict forms accordingly. The jury found defendant was armed with a deadly weapon, but not with a firearm for purposes of the sentencing enhancements. Appendix D. Petitioner’s claim that the jury

was confused by the definitions is negated by the special verdicts rendered herein. There was no error.

VI. CONCLUSION

For the reasons stated, the trial court's order denying defendant's motion for a new trial should be affirmed and the petition should be dismissed.

Respectfully submitted this 5<sup>TH</sup> day of January, 2011.

  
\_\_\_\_\_  
Mark E. Lindsey #18272  
Deputy Prosecuting Attorney  
Attorney for Respondent

# APPENDIX A

COURT COSTS \_\_\_\_\_  
 VICTIM ASSESS 500  
 RESTITUTION 260  
 FINE \_\_\_\_\_  
 ATTY FEES \_\_\_\_\_  
 SHERIFF COSTS \_\_\_\_\_  
 METH \_\_\_\_\_  
 DNA FEE \_\_\_\_\_  
 CRIME LAB \_\_\_\_\_  
 OTHER COSTS \_\_\_\_\_

\$760

**FILED**  
**MAR 07 2008**  
 THOMAS R. FALLQUIST  
 SPOKANE COUNTY CLERK

**SUPERIOR COURT OF WASHINGTON  
 COUNTY OF SPOKANE  
 STATE OF WASHINGTON**

	)	No.	07-1-03157-1
	)	PA#	07-9-29128-0
Plaintiff,	)	RPT#	CT I - II: 109-07-0210992
	)	RCW	CT I: 9A.52.020(1)(A)-F
v.	)		(9.94A.602) (#17701)
	)		CT II: 9A.56.200 (1)(A)-F
BRYCE K. DEGAGNE	)		(9.94A.602) (#68325)
WM 06/20/87	)	FELONY JUDGMENT AND SENTENCE (FJS)	
	)	[ X ] Prison [ ] RCW 9.94A.712 Prison Confinement	
Defendant.	)	[ ] Jail One Year or Less [ ] RCW 9.94A.712	
	)	Prison Confinement	
SID: 023075637	)	[ ] First Time Offender	
	)	[ ] Special Sexual Offender Sentencing Alternative	
	)	[ ] Special Drug Offender Sentencing Alternative	
	)	[ X ] Clerk's Action Required, para 4.5 (SDOSA),	
	)	4.7 and 4.8 (SSOSA) 4.1, 5.2, 5.3, 5.6 and 5.8	

**I. HEARING**

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

**II. FINDINGS**

There being no reason why judgment should not be pronounced, the Court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 2-4-08  
by [ ] plea [X] jury verdict [ ] bench trial of:

Count No.: I **FIRST DEGREE BURGLARY**  
 RCW 9A.52.020(1)(A)-F (9.94A.602) (#17701)  
 Date of Crime July 23, 2007  
 Incident No. 109-07-0210992

Count No.: II **FIRST DEGREE ROBBERY**  
 RCW 9A.56.200 (1)(A)-F (9.94A.602) (#68325)

FELONY JUDGMENT AND SENTENCE (JS) **08901950-1** PAGE 1  
 (RCW 9.94A.500, .505)(WPF CR 84.0400 (7/2007))

\$10, 6-6-08  
 \$25, upon RIS

Doc

Date of Crime July 23, 2007  
Incident No. 109-07-0210992

(If the crime is a drug offense, include the type of drug.)  
as charged in the ~~Amended~~ Information.

[ ] Additional current offenses are attached in Appendix 2.1.

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

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

[ ] The defendant engaged, agreed, offered, attempted, solicited another, or conspired to engage a victim of child rape or child molestation in sexual conduct in return for a fee in the commission of the offense in Count \_\_\_\_\_. RCW 9.94A.\_\_\_\_\_

[ ] The offense was predatory as to Count(s) \_\_\_\_\_. RCW 9.94A.836.

[ ] The victim was under 15 years of age at the time of the offense in Count(s) \_\_\_\_\_ RCW 9.94A.837.

[ ] The victim was developmentally disabled, mentally disordered, or a frail elder or vulnerable adult at the time of the offense in Count(s) \_\_\_\_\_ RCW 9.94A.838, 9A.44.010.

[ ] The defendant acted with **sexual motivation** in committing the offense in Count(s) \_\_\_\_\_. RCW 9.94A.835

[ ] This case involves **kidnapping** in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.

[ ] The defendant used a **firearm** in the commission of the offense in Count(s) \_\_\_\_\_. RCW 9.94A.602, 9.94A.533.

The defendant used a **deadly weapon other than a firearm** in committing the offense in Count(s) I and II. RCW 9.94A.602, 9.94A.533.

[ ] Count \_\_\_\_\_, **Violation of the Uniform Controlled Substances Act (VUCSA)**, RCW 69.50.401 and RCW 69.50.435 took place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, in a public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.

[ ] The defendant committed a crime involving the manufacture of methamphetamine including its salts, isomers, and salts of isomers, **when a juvenile was present in or upon the premises of manufacture** in Count(s) \_\_\_\_\_. RCW 9.94A.605, RCW 69.50.401, RCW 69.50.440.

[ ] The defendant committed [ ] **vehicular homicide** [ ] **vehicular assault** proximately caused by driving a vehicle while under the influence of intoxicating liquor or drug or by the operating a vehicle in a reckless manner. The offense is, therefore, deemed a violent offense. RCW 9.94A.030

- The defendant has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.
- The crime charged in Count(s) \_\_\_\_\_ involve(s) **domestic violence**. **RCW 10.99.020.**
- Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):
  
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 **CRIMINAL HISTORY: (RCW 9.94A.525):**

Crime	Date of Crime	Crime Type	Adult or Juv	Place of Conviction	Sent. Date
THEFT 1	111205	NV	A	SPOKANE CO, WA	090506
MAL. MIS. 3	112903	MISD.	J	SPOKANE CO, WA	042104
<i>PCS w/ Ent-Deliver</i>	<i>5-12-07</i>	<i>NV</i>	<i>A</i>	<i>Spokane Co, WA</i>	<i>1-14-08</i>
<i>1<sup>st</sup> Burg</i>	<i>6-3-06</i>	<i>NV</i>	<i>A</i>	<i>Spokane Co, WA</i>	<i>1-14-08</i>
<i>Trafficing 1<sup>o</sup></i>	<i>6-5-06</i>	<i>NV</i>	<i>A</i>	<i>Spokane Co, WA</i>	<i>1-14-08</i>
<i>Trafficing 1<sup>o</sup></i>	<i>6-5-06</i>	<i>NV</i>	<i>A</i>	<i>Spokane Co, WA</i>	<i>1-14-08</i>

*\* counts as 2 pts for 1<sup>st</sup> Burglary*

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

2.3 **SENTENCING DATA:**

CT NO	Offender Score	Seriousness Level	Standard Range (not including enhancements)	Plus enhancements*	Total Standard Range (including enhancements)	Maximum Term
<i>I</i>	<i>08</i>	<i>VII</i>	<i>77-102 mo.</i>	<i>24 months</i>	<i>125-150 mo.</i>	<i>20 yrs/650k</i>
<i>II</i>	<i>07</i>	<i>IX</i>	<i>87-116 mo</i>	<i>24 months</i>	<i>135-164 mo.</i>	<i>20 yrs/850k</i>

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

[ ] Additional current offense sentencing data in Appendix 2.3.

For violent offenses, most serious offenses, or armed offenders, recommended sentencing agreements or plea agreements are [ ] attached [ ] as follows:

2.4 [ ] **EXCEPTIONAL SENTENCE:** The Court finds substantial and compelling reasons that justify an exceptional sentence:  
[ ] within [ ] below the standard range for Count(s)\_\_\_\_.  
[ ] above the standard range for Count(s) \_\_\_\_.  
[ ] The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.  
[ ] Aggravating factors were [ ] stipulated by the defendant, [ ] found by the court after the defendant waived jury trial, [ ] found by jury by special interrogatory.  
Findings of fact and conclusions of law are attached in Appendix 2.4. [ ] Jury's special interrogatory is attached. The Prosecuting Attorney [ ] did [ ] did not recommend a similar sentence.

2.5 **ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.** The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753  
[ ] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753): \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**III. JUDGMENT**

3.1 The defendant is **GUILTY** of the Counts and Charges listed in paragraph 2.1 and Appendix 2.1

3.2 [ X ] The defendant is found **NOT GUILTY** of Counts III

[ ] The Court **DISMISSES** Counts \_\_\_\_\_

**IV. SENTENCE AND ORDER**

**IT IS ORDERED:**

4.1 Defendant shall pay to the Clerk of this Court  
JASS CODE

RTN/RJN \$ 260 Restitution to: see schedule  
 \$ \_\_\_\_\_ Restitution to: \_\_\_\_\_  
 \$ \_\_\_\_\_ Restitution to: \_\_\_\_\_  
(Name and Address address may be withheld and provided confidentially to Clerk's Office)

PCV \$500.00 Victim Assessment RCW 7.68.035  
 \$ \_\_\_\_\_ Domestic Violence Assessment RCW 10.99.080 *waived by court*

CRC ~~\$200.00~~ Court costs, including: RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190  
 Criminal Filing fee \$ \_\_\_\_\_ FRC  
 Witness costs \$ \_\_\_\_\_ WFR  
 Sheriff service fees \$ \_\_\_\_\_ SFR/SFS/SFW/SRF  
 Jury demand fee \$ \_\_\_\_\_ JFR  
 Extradition costs \$ \_\_\_\_\_ EXT  
 Other \_\_\_\_\_ \$ \_\_\_\_\_

PUB \$ \_\_\_\_\_ Fees for court appointed attorney RCW 9.94A.760  
 WRF \$ \_\_\_\_\_ Court appointed defense expert and other defense costs RCW 9.94A.760

FCM/MTH \$ \_\_\_\_\_ Fine RCW 9A.20.021; [ ] VUCSA chapter 69.50 RCW, [ ] VUCSA  
 additional fine deferred due to indigency RCW 69.50.430

MTH \$ \_\_\_\_\_ Meth/Amphetamine Cleanup Fine, \$3000. RCW 69.50.440,  
 69.50.401(a)(1)(ii)

CDF/LDV \$ \_\_\_\_\_ Drug enforcement fund of \_\_\_\_\_ RCW 9.94A.760

FCD/NTF/SAD/SDI

CLF \$ \_\_\_\_\_ Crime lab fee [ ] suspended due to indigency RCW 43.43.690  
 \$ \_\_\_\_\_ Felony DNA collection fee of \$100 [ ] not imposed due to hardship RCW  
 43.43.7541  
 \$ \_\_\_\_\_ Emergency response costs (Vehicular Assault, Vehicular Homicide only,  
 \$1,000 maximum) RCW 38.52.430  
 \$ \_\_\_\_\_ Other costs for: \_\_\_\_\_

\$ 760<sup>00</sup> TOTAL RCW 9.94A.760

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

[ ] RESTITUTION. Schedule attached.

[ ] Restitution ordered above shall be paid jointly and severally with:  
 NAME of other defendant CAUSE NUMBER (Victim Name) (Amount\$)

RJN

- The Department of Corrections or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8)
- All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by the DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$ 10 per month commencing 6-6-08 RCW 9.94A.760. *increasing to \$25 per month upon release.*

The defendant SHALL report to the Spokane County Superior Court Clerk's Office immediately after sentencing if out of custody or within 48 hours after release from confinement if in custody. The defendant is required to keep an accurate address on file with the Clerk's Office and to provide financial information when requested by the Clerk's Office. The defendant is also required to make payments on the legal-financial obligations set by the court. **Failure to do any of the above will result in a warrant for your arrest.** RCW 9.94A.760(7)(b).

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

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

- 4.1b  Electronic Monitoring Reimbursement. The defendant is ordered to reimburse \_\_\_\_\_ (name of electronic monitoring agency) at \_\_\_\_\_, for the cost of pretrial electronic monitoring in the amount of \$ \_\_\_\_\_.

4.2 DNA TESTING. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754 **FAILURE TO REPORT FOR TESTING MAY BE CONSIDERED CONTEMPT OF COURT.**

HIV TESTING. The defendant shall submit to HIV testing. RCW 70.24.340 **FAILURE TO REPORT FOR TESTING MAY BE CONSIDERED CONTEMPT OF COURT.**

- The victim, based upon their request, shall be notified of the results of the HIV test whether negative or positive. (Applies only to victims of sexual offenses under RCW 9A.44.) RCW 70.24.105(7)

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

Domestic Violence No-Contact Order or Anti-Harassment No-Contact Order or Sexual Assault Protection Order is filed with this Judgment and Sentence.

4.4 OTHER \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

4.4 OTHER

- Report as directed to the Community Corrections Officer.
- Notify that officer before moving or changing employment.
- Maintain employment or training.
- No use/possession of non-prescribed controlled substances, legend drugs, drug paraphernalia, or alcohol. *et*
- Evaluation for substance abuse and comply with any recommended treatment.
- Monitoring to ensure compliance.
- The defendant is prohibited from going to the following location: \_\_\_\_\_

- No use/possession of any dangerous weapons.
- No use/possession of: \_\_\_\_\_
- Submit to a mental health evaluation and comply with any recommended treatment, including but not limited to taking all prescribed medications.

No criminal law violations.

OTHER: No contact with co-defendant, Antonio Rodriguez.

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

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

137 (months) on Count No. D ;  
149 (months) on Count No. II ;  
\_\_\_\_\_ (months) on Count No. \_\_\_\_\_.

The confinement time on Count(s) \_\_\_\_\_ contain(s) a mandatory minimum term of \_\_\_\_\_.

The confinement time on Count \_\_\_\_\_ includes \_\_\_\_\_ months as enhancement for { } firearm  deadly weapon  sexual motivation  VUCSA in a protected zone  manufacture of methamphetamine with juvenile present  sexual conduct with a child for a fee.

Actual number of months of total confinement ordered is: 149 months

All counts shall be served concurrently, except for the portion of those counts for which there is an enhancement as set forth in Section 2.3, and except for the following counts which shall be served consecutively: \_\_\_\_\_

The sentence herein shall run consecutively with the sentence in cause number(s) 07166544-8 but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.589.

Confinement shall commence immediately unless otherwise set forth here: \_\_\_\_\_

(b) CONFINEMENT. RCW 9.94A.712 (Sex Offenses only): The defendant is sentenced to the following term of confinement in the custody of the DOC:

Count \_\_\_\_\_ minimum term \_\_\_\_\_ maximum term \_\_\_\_\_

Count \_\_\_\_\_ minimum term \_\_\_\_\_ maximum term \_\_\_\_\_

(c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: \_\_\_\_\_

4.6  COMMUNITY PLACEMENT is ordered as follows: Count \_\_\_\_\_ for \_\_\_\_\_ months; Count \_\_\_\_\_ for \_\_\_\_\_ months; Count \_\_\_\_\_ for \_\_\_\_\_ months.

[ ] **COMMUNITY CUSTODY** for count(s) \_\_\_\_\_, sentenced under RCW 9.94A.712, is ordered for any period of time the defendant is released from total confinement before the expiration of the maximum sentence.

**COMMUNITY CUSTODY** is ordered as follows:

Count I for a range from 18 to 36 months;  
Count II for a range from 18 to 36 months;  
Count \_\_\_\_\_ for a range from \_\_\_\_\_ to \_\_\_\_\_ months;

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

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

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

While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while in community custody; (6) pay supervision fees as determined by DOC; and (7) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC; (8) for sex offenses, submit to electric monitoring if imposed by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders not sentenced under RCW 9.94A.712 may

be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

- The defendant shall not consume any alcohol.
- Defendant shall have no contact with: \_\_\_\_\_

- Defendant shall remain  within  outside of a specified geographical boundary, to wit: \_\_\_\_\_

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

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

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

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

- Other conditions: 500 4.4

For sentences imposed under RCW 9.94A.712, other conditions, including electronic monitoring, may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than 7 working days.

4.7  **WORK ETHIC CAMP.** RCW 9.94A.690, RCW 72.09.410. The court finds that defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.8 **OFF LIMITS ORDER** (Known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections: \_\_\_\_\_

## V. NOTICES AND SIGNATURES

- 5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this judgment and sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090
- 5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to ten years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purposes of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court is authorized to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for the purposes of his or her legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).
- 5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606
- 5.4 **RESTITUTION HEARING.**  
[ ] Defendant waives any right to be present at any restitution hearing (sign initials):  
\_\_\_\_\_
- 5.5 **COMMUNITY CUSTODY VIOLATION.** (a) If you are subject to a first or second violation hearing and DOC finds that you committed the violation, you may receive as a sanction up to 60 days of confinement per violation. RCW 9.94A.634.  
(b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.737(2).
- 5.6 **FIREARMS.** You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's license, identicard, or comparable identification, to the Department of Licensing along with the date of conviction or commitment). RCW 9.41.040, 9.41.047.

**Cross off if not applicable:****5.7 SEX AND KIDNAPPING OFFENDER REGISTRATION. RCW 9A.44.130, 10.01.200.**

1. **General Applicability and Requirements:** Because this crime involves a sex offense or kidnapping offense involving a minor as defined in RCW 9A.44.130, you are required to register with the sheriff of the county of the state of Washington where you reside. If you are not a resident of Washington, but you are a student in Washington, or you are employed in Washington or you carry on a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.
2. **Offenders Who Leave the State and Return:** If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within three business days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry out a vocation in Washington, or attend school in Washington, you must register within three business days after starting school in this state or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections.
3. **Change of Residence Within State and Leaving the State:** If you change your residence within a county, you must send signed written notice of your change of residence to the sheriff within 72 hours of moving. If you change your residence to a new county within this state, you must send signed written notice of your change of residence to the sheriff of your new county of residence at least 14 days before moving and register with that sheriff within 24 hours of moving. You must also give signed written notice of your change of address to the sheriff of the county where last registered within 10 days of moving. If you move out of Washington State, you must send written notice within 10 days of moving to the county sheriff with whom you last registered in Washington State.
4. **Additional Requirements Upon Moving to Another State:** If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph within the new state within 10 days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. You must also send written notice within 10 days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.
5. **Notification Requirement When Enrolling in or Employed by a Public or Private Institution of Higher Education or Common School (k-12):** If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier. If you become employed at a public or private institution of higher education, you are required to notify the sheriff for the county of your residence of your employment by the institution within 10 days of accepting employment or by the first business day after beginning to work at the institution, whichever is earlier. If your enrollment or employment at a public or private institution of higher education is terminated, you are required to notify the sheriff for the county of your residence of your termination of enrollment or employment within 10 days of such termination. If you attend, or plan to attend, a public or private school regulated under

Title 28A RCW or chapter 72.40 RCW, you are required to notify the sheriff of the county of your residence of your intent to attend the school. You must notify the sheriff within 10 days of enrolling or 10 days prior to arriving at the school to attend classes, whichever is earlier. The sheriff shall promptly notify the principal of the school

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

**7. Reporting Requirements for Persons Who Are Risk Level II or III:** If you have a fixed residence and you are designated as a risk level II or III, you must report, in person, every 90 days to the sheriff of the county where you are registered. Reporting shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. If you comply with the 90-day reporting requirement with no violations for at least 5 years in the community, you may petition the superior court to be relieved of the duty to report every 90 days.

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

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

5.9 If you are or become subject to court-ordered mental health or chemical dependency treatment, you must notify DOC and you must release your treatment information to DOC for the duration of your incarceration and supervision. RCW 9.94A.562.

5.10 OTHER: \_\_\_\_\_  
 \_\_\_\_\_

DONE in Open Court in the presence of the defendant this 7 day of March, 2008.

Robert D Austin  
JUDGE Print name: **ROBERT D. AUSTIN**

Rachel E Sterett  
RACHEL E. STERETT  
Deputy Prosecuting Attorney  
WSBA# 27141

Robert R Cossey  
ROBERT R. COSSEY  
Attorney for Defendant  
WSBA# 16481

Bryce K Degagne  
BRYCE K. DEGAGNE  
Defendant

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

Defendant's signature: Bryce K Degagne

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

Interpreter signature/Print name: \_\_\_\_\_

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

**WITNESS** my hand and seal of the said Superior Court affixed this date: \_\_\_\_\_  
Clerk of said County and State, by: \_\_\_\_\_, Deputy Clerk

**IDENTIFICATION OF DEFENDANT**

SID No. 023075637

Date of Birth 06/20/1987

(If no SID take fingerprint card for State Patrol)

FBI No. 600689KC5

Local ID No. 0325801

JUDGMENT AND SENTENCE (Felony) (JS)  
(RCW 9.94A.110,.120)(WPF CR 84.0400 (7/2007))

PCN No.

Other

DOB 06/20/1987

Alias name

Race:

Ethnicity:

Sex:

Asian/Pacific Islander

Black/African-American

Caucasian

Hispanic

Male

Native American

Other: \_\_\_\_\_

Non-hispanic

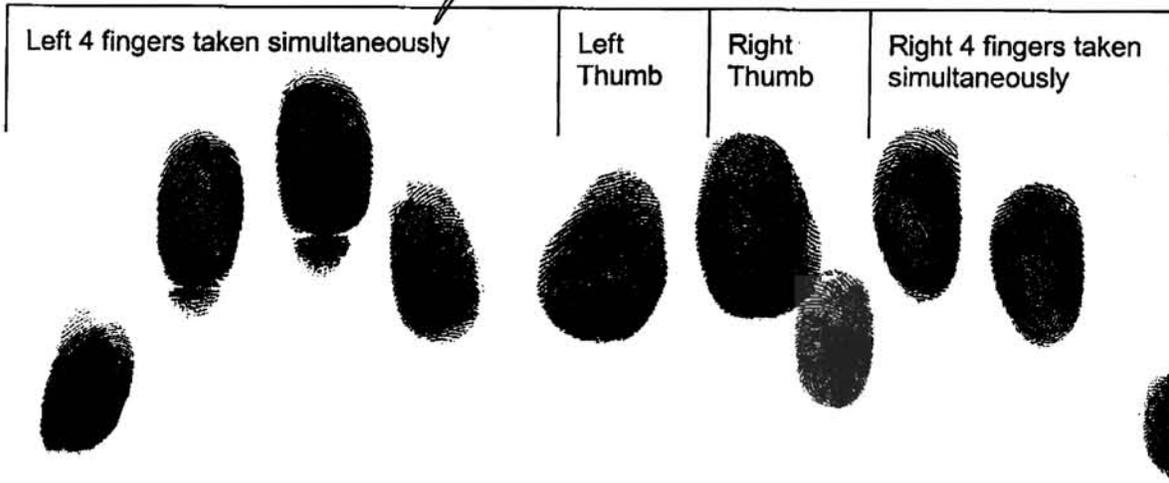
Female

**FINGERPRINTS** I attest that I saw the same defendant who appeared in Court on this document affix his or her fingerprints and signature thereto.

**THOMAS R. FALLQUIST, County Clerk**

Clerk of the Court: Mary V. King, Deputy Clerk. Dated: March 7, 2008

DEFENDANT'S SIGNATURE: [Signature]



# APPENDIX B

**FILED**

**AUG 08 2007**

**THOMAS K. FALLQUIST  
SPOKANE COUNTY CLERK**

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SPOKANE**

STATE OF WASHINGTON )

Plaintiff, )

v. )

**BRYCE K. DEGAGNE** )

**WM 06/20/87** )

**ANTONIO JOSEPH RODRIGUEZ** )

**WM 09/08/87** )

Defendant(s). )

INFORMATION )

(INFO) )

No. )

**07103157-1**

RACHEL E. STERETT )

Deputy Prosecuting Attorney )

PA# 07-9-29128-0 )

RPT# CT I - II: 109-07-0210992 )

CT III: 109-07-0218099 )

RCW CT I: 9A.52.020(1)(A)(B)-F )

(9.94A.602) (#17701) )

CT II: 9A.56.200 (1)(A)-F )

(9.94A.602) (#68325) )

CT III: 9A.56.200 (1)(A)-F )

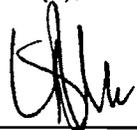
(9.94A.602) (#68325) )

Comes now the Prosecuting Attorney in and for Spokane County, Washington, and charges the defendant(s) with the following crime(s):

COUNT I: FIRST DEGREE BURGLARY, committed as follows: That the defendants, BRYCE K. DEGAGNE and ANTONIO JOSEPH RODRIGUEZ, in the State of Washington, on or about July 23, 2007, with intent to commit a crime against a person or property therein, did enter and remain unlawfully in the building of RICHARD O. TRACY, located at 2424 N. Cherry, #111, and in entering and while in such building and in immediate flight therefrom, the defendants or another participant in the crime, was armed with an expandable baton and a pistol, a deadly weapon, and did assault RICHARD O. TRACY, a person therein, and the defendants being at said time armed with a deadly weapon other than a firearm under the provisions of RCW 9.94A.602 and 9.94A.533(4) (an expandable baton), and the defendants being at said time armed with a firearm under the provisions of 9.94A.602 and 9.94A.533(3) (a pistol),

COUNT II: FIRST DEGREE ROBBERY, committed as follows: That the defendants, BRYCE K. DEGAGNE and ANTONIO JOSEPH RODRIGUEZ, in the State of Washington, on or about July 23, 2007, with the intent to commit theft, did unlawfully take and retain personal property, that the defendants did not own, from the person and in the presence of RICHARD O. TRACY, against such person's will, by use or threatened use of immediate force, violence or fear of injury to said person or the property of said person or the person or property of another, and in the commission of and immediate flight therefrom, the defendants were armed with a deadly weapon, an expandable baton and a pistol, and inflicted bodily injury upon RICHARD O. TRACY, and the defendants being at said time armed with a deadly weapon other than a firearm under the provisions of RCW 9.94A.602 and 9.94A.533(4) (an expandable baton), and the defendants being at said time armed with a firearm under the provisions of 9.94A.602 and 9.94A.533(3) (a pistol),

COUNT III: FIRST DEGREE ROBBERY, committed as follows: That the defendants, BRYCE K. DEGAGNE and ANTONIO JOSEPH RODRIGUEZ, in the State of Washington, on or about July 29, 2007, with the intent to commit theft, did unlawfully take and retain personal property, that the defendants did not own, from the person and in the presence of TRACY L. FORDER, against such person's will, by use or threatened use of immediate force, violence or fear of injury to said person or the property of said person or the person or property of another, and in the commission of and immediate flight therefrom, the defendants were armed with a deadly weapon, a pistol, and inflicted bodily injury upon TRACY L. FORDER, and the defendants being at said time armed with a firearm under the provisions of 9.94A.602 and 9.94A.533(3),

 20635

Deputy Prosecuting Attorney  
WSBA #27141

<b>DEFENDANT INFORMATION:</b>	BRYCE K. DEGAGNE	
Address: 1403 S. WARREN RD., SPOKANE VALLEY, WA 99037-9625		
Height: 5'10"	Weight: 200	Hair: Red
Eyes: Bro	DOL #: DEGAG-BK-131L0	State: WA
SID #: 023075637	DOC #:	FBI NO. 600689KC5

# APPENDIX C

**FILED**  
**FEB 05 2008**  
THOMAS R. FALLOQUIST  
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON	)	
	)	
Plaintiff,	)	No. 07-1-03157-1
	)	
v.	)	VERDICT FORM A
	)	
BRYCE K. DEGAGNE,	)	
Defendant.	)	

We, the jury, find the defendant, BRYCE K. DEGAGNE,  
Guilty of the crime of 1<sup>ST</sup> DEGREE BURGLARY  
(write in not guilty or guilty)  
as charged COUNT I.

DATE: 02/04/08

  
\_\_\_\_\_  
Presiding Juror

**FILED**

**FEB 05 2008**

**THOMAS R. FALLQUIST  
SPOKANE COUNTY CLERK**

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON	)	
	)	
Plaintiff,	)	No. 07-1-03157-1
	)	
v.	)	VERDICT FORM B
	)	
BRYCE K. DEGAGNE,	)	
Defendant.	)	

We, the jury, find the defendant, BRYCE K. DEGAGNE,

Guilty of the crime of 1<sup>ST</sup> DEGREE ROBBERY  
(write in not guilty or guilty)

as charged COUNT II.

DATE: 02/04/08

  
\_\_\_\_\_  
Presiding Juror

**FILED**  
**FEB 05 2008**  
THOMAS R. FALLQUIST  
SPOKANE COUNTY CLERK

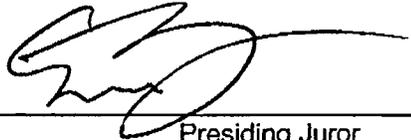
IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON	)	
	)	
Plaintiff,	)	No. 07-1-03157-1
	)	
v.	)	VERDICT FORM C
	)	
BRYCE K. DEGAGNE,	)	
Defendant.	)	

We, the jury, find the defendant, BRYCE K. DEGAGNE,  
Not Guilty of the crime of 1<sup>ST</sup> DEGREE ROBBERY  
 (write in not guilty or guilty)  
 as charged COUNT III.

DATE: 02/04/08

  
 \_\_\_\_\_  
 Presiding Juror

# APPENDIX D

**FILED**  
**FEB 05 2008**  
THOMAS R. FALLOQUIST  
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 BRYCE K. DEGAGNE, )  
 Defendant. )

No. 07-1-03157-1  
SPECIAL VERDICT FORM A1

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

QUESTION: Was the defendant, BRYCE DEGAGNE, armed with a deadly weapon at the time of the commission of the crime 1<sup>ST</sup> DEGREE BURGLARY in COUNT 1?

ANSWER: yes  
(Write "yes" or "no")

DATE: 02/04/08

  
\_\_\_\_\_  
Presiding Juror

**FILED**  
**FEB 05 2008**  
THOMAS R. FALLQUIST  
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON	)	
	)	
Plaintiff,	)	No. 07-1-03157-1
	)	
v.	)	SPECIAL VERDICT FORM B1
	)	
BRYCE K. DEGAGNE,	)	
Defendant.	)	

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

QUESTION: Was the defendant, BRYCE DEGAGNE, armed with a deadly weapon at the time of the commission of the crime 1<sup>ST</sup> DEGREE ROBBERY in COUNT II?

ANSWER: yes  
(Write "yes" or "no")

DATE: 02/04/08

  
\_\_\_\_\_  
Presiding Juror

**FILED**  
**FEB 05 2008**

**THOMAS R. FALLQUIST**  
**SPOKANE COUNTY CLERK**

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON )

Plaintiff, )

v. )

BRYCE K. DEGAGNE, )

Defendant. )

No. 07-1-03157-1

SPECIAL VERDICT FORM A2

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

QUESTION: Was the defendant, BRYCE K. DEGAGNE, armed with a firearm at the time of the commission of the crime 1<sup>ST</sup> DEGREE BURGLARY in COUNT 1?

ANSWER:

NO

(write "yes" or "no")

DATED: 02/04/08

  
\_\_\_\_\_  
Presiding Juror

**FILED**

**FEB 05 2008**

**THOMAS R. FALLQUIST  
SPOKANE COUNTY CLERK**

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON )

Plaintiff, )

v. )

BRYCE K. DEGAGNE, )

Defendant. )

No.07-1-03157-1

SPECIAL VERDICT FORM B2

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

QUESTION: Was the defendant, BRYCE K. DEGAGNE, armed with a firearm at the time of the commission of the crime 1<sup>ST</sup> DEGREE ROBBERY in COUNT II?

ANSWER:

NO

(write "yes" or "no")

DATED:

02/04/08

  
\_\_\_\_\_  
Presiding Juror

**FILED**

**FEB 05 2008**

**THOMAS R. FALLQUIST  
SPOKANE COUNTY CLERK**

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON )

Plaintiff, )

v. )

BRYCE K. DEGAGNE, )

Defendant. )

No. 07-1-03157-1

SPECIAL VERDICT FORM C2

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

QUESTION: Was the defendant, BRYCE K. DEGAGNE, armed with a firearm at the time of the commission of the crime 1<sup>ST</sup> DEGREE ROBBERY in COUNT III?

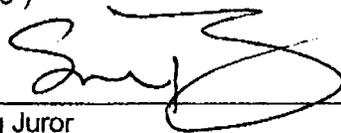
ANSWER: \_\_\_\_\_

*NO*

(write "yes" or "no")

DATED: 02/04/08

\_\_\_\_\_  
Presiding Juror



# APPENDIX E

FILED

FILED

DEC 17 2009

DEC 16 2009

THOMAS R. FALLQUIST  
SPOKANE COUNTY CLERK

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

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

STATE OF WASHINGTON,  
Respondent,

v.

BRYCE K. DEGAGNE,  
Appellant.

**MANDATE**

No. 27458-6-III

Spokane County No. 07-1-03157-1

**COURT ACTION REQUIRED**

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

*Affirmed In Part  
Remanded In Part*

This is to certify that the Opinion of the Court of Appeals of the State of Washington, Division III, filed on November 3, 2009 became the decision terminating review of this court in the above-entitled case on December 3, 2009. The cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the Opinion.

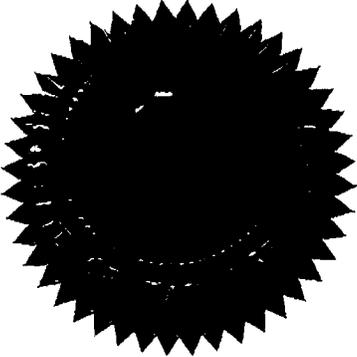
**Court Action Required:** The sentencing court or criminal presiding judge is to place this matter on the next available motion calendar for action consistent with the Opinion.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Spokane, this 16th day of December, 2009.

  
\_\_\_\_\_  
Commissioner of the Court of Appeals, State of Washington  
Division III

- cc: Bryce K. DeGagne
- William D. Edelblute
- Andrew J. Metts
- Hon. Annette S. Plese
- (Hon. Robert D. Austin's case)
- Hon. Maryann C. Moreno, Presiding Judge
- Indeterminate Sentence Review Board
- Department of Corrections

089019501 



*De*

*Hon. Austin*

**FILED**

**FILED**

**DEC 17 2009**

**NOV - 3 2009**

**THOMAS R. FALLQUIST  
SPOKANE COUNTY CLERK**

In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

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

<b>STATE OF WASHINGTON,</b>	)	<b>No. 27458-6-III</b>
	)	
<b>Respondent,</b>	)	
	)	<b>Division Three</b>
<b>v.</b>	)	
	)	
<b>BRYCE K. DEGAGNE,</b>	)	<b>UNPUBLISHED OPINION</b>
	)	
<b>Appellant.</b>	)	

KULIK, J. — Bryce DeGagne appeals the offender score allocated to his convictions for first degree burglary and first degree robbery. He asserts the crimes constituted the same criminal conduct under RCW 9.94A.589. He also appeals the court's imposition of a no contact order between himself and Tracy Forder, the alleged victim of the robbery for which Mr. DeGagne was acquitted. At sentencing, Mr. DeGagne acknowledged his offender score. The State concedes the no contact order was entered in error. We affirm the sentence and vacate the no contact order regarding Ms. Forder.

No. 27458-6-III  
*State v. DeGagne*

### FACTS

On July 23, 2007, Richard Tracy was asleep in the living room of his apartment after returning from working a night shift. Mr. Tracy awoke when two uninvited individuals entered his home. Mr. Tracy recognized one of the individuals as Bryce DeGagne. Mr. Tracy greeted Mr. DeGagne and got up to get a drink from his kitchen. The other individual, later identified as Antonio Rodriguez, held a gun to Mr. Tracy's face, hit him in the back of the head with the gun, and threw him down on an air mattress. Mr. DeGagne asked Mr. Tracy where he kept his money and Mr. Tracy denied having any. Mr. DeGagne hit Mr. Tracy repeatedly on the back of the legs with a police baton.

Mr. Tracy heard the two men debating about what items they should take from the apartment and discussing whether they should shoot Mr. Tracy. Mr. DeGagne and Mr. Rodriguez then left the apartment with Mr. Tracy's X-box, iPod, DVDs, video games, watch, cell phone, and \$130 in cash. Mr. Tracy was punched in the face and suffered bruises on his legs, a concussion, and an injured lip.

After Mr. Tracy talked with police about the incident, Sergeant Robert Sherar spoke with Mr. DeGagne on August 6, 2007. Mr. DeGagne admitted stealing the items from Mr. Tracy's apartment and acknowledged hitting Mr. Tracy with the baton. Police arrested Mr. DeGagne and charged him with one count of first degree burglary and one

No. 27458-6-III  
*State v. DeGagne*

count of first degree robbery against Mr. Tracy, and one count of first degree robbery stemming from a separate incident involving Tracy Forder.

A jury found Mr. DeGagne guilty of first degree burglary and first degree robbery with deadly weapon enhancements, but acquitted him of the robbery charge involving Ms. Forder.

At the sentencing hearing on March 7, 2008, Mr. DeGagne and his attorney signed the understanding of defendant's criminal history, without objection. Mr. DeGagne's offender score for the burglary conviction was an 8, with a sentencing range of 125 to 150 months, and a 7 for the robbery conviction, with a sentencing range of 135 to 164 months. Mr. DeGagne verbally acknowledged, and agreed to, the offender scores during the sentencing hearing, without objection.

Mr. DeGagne was sentenced to 137 months' confinement, with 18 to 36 months' community custody, for his burglary conviction, and 149 months' confinement, with 18 to 36 months' community custody, for his robbery conviction to run concurrently. The court ordered Mr. DeGagne to have no further contact with Richard Tracy and Tracy Forder for the remainder of his life.

No. 27458-6-III  
*State v. DeGagne*

#### ANALYSIS

*Same Criminal Conduct.* RCW 9.94A.589(1)(a) provides that when a defendant is sentenced for two or more current offenses, “the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score,” unless the court determines that the current offenses encompass the “same criminal conduct.” If two or more current offenses encompass the same criminal conduct, then the offenses are counted as one crime in calculating the offender score. RCW 9.94A.589(1)(a). “Same criminal conduct” is defined as “crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). All three elements must be present for multiple offenses to be considered the same criminal conduct. *State v. Dolen*, 83 Wn. App. 361, 364, 921 P.2d 590 (1996). A trial court’s determination of what constitutes “same criminal conduct” for the purpose of calculating an offender score will be reversed “only for an abuse of discretion or misapplication of the law.” *Id.*

To determine whether two crimes encompass the same criminal intent, this court reviews the “objective criminal purpose behind each crime,” rather than the “particular *mens rea* element of the particular crime.” *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990). Courts also look at whether the objective criminal purpose “changed

No. 27458-6-III  
*State v. DeGagne*

from one crime to the next.” *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987). An example of this analysis can be found in *State v. Anderson* where the court determined that the crimes of escape and assault encompassed the same criminal intent, where the assault was committed to effectuate the defendant’s escape. *State v. Anderson*, 72 Wn. App. 453, 463-64, 864 P.2d 1001 (1994). The defendant’s intent, throughout both crimes, was to escape custody. *Id.*

In the present case, Mr. DeGagne committed the crimes of burglary and robbery. The objective criminal purpose of robbery, as determined by the courts, is to “acquire property.” *Dunaway*, 109 Wn.2d at 216. In regard to the burglary conviction, a necessary element of first degree burglary is that the accused must unlawfully enter a building *with intent* to commit a crime. RCW 9A.52.020. Mr. DeGagne entered Mr. Tracy’s home unlawfully with the intent to commit a robbery. The objective criminal purpose behind his commission of the crime was to acquire property from Mr. Tracy. It can be concluded, in this case, that the two crimes committed by Mr. DeGagne encompassed the same criminal intent.

The facts also show that the crimes were committed in the same place, Mr. Tracy’s apartment, and at the same time, on the morning of July 23, 2007. It is also clear that the victim of both crimes was Mr. Tracy. Therefore, since Mr. DeGagne’s commission of

No. 27458-6-III  
*State v. DeGagne*

burglary and robbery in the first degree concerned the same criminal intent, were committed at the same time and place, and involved the same victim, the two crimes encompass the “same criminal conduct” for purposes of Mr. DeGagne’s sentencing. Under normal circumstances, Mr. DeGagne’s current convictions would not be factored into either of his offender scores, and this case would be remanded for resentencing.

However, Mr. DeGagne waived his right to appeal this issue. Generally, “a defendant cannot waive a challenge to a miscalculated offender score.” *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). Nevertheless, a “waiver can be found where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion.” *Id.*; *see also In re Pers. Restraint of Shale*, 160 Wn.2d 489, 494, 158 P.3d 588 (2007). Courts have also determined that the issue of “same criminal conduct . . . involves both factual determinations and the exercise of discretion.” *Id.* at 495.

In *State v. Nitsch*, 100 Wn. App. 512, 997 P.2d 1000 (2000), the defendant argued for the first time on appeal that the crimes that he committed constituted the same criminal conduct under former RCW 9.94A.400, recodified as RCW 9.94A.589 (LAWS OF 2001, ch. 10, § 6). The Court of Appeals determined that Mr. Nitsch waived his right to bring this issue on appeal because he affirmatively acknowledged his offender score

No. 27458-6-III  
*State v. DeGagne*

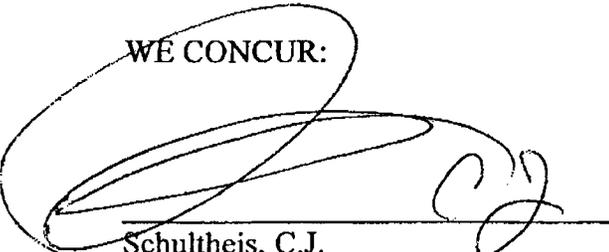
(2009).

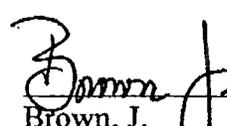
In the current case, the jury acquitted Mr. DeGagne of the crime in which Ms. Forder was the alleged victim. Therefore, a no contact order cannot be imposed with regard to Ms. Forder. Additionally, there is no evidence to suggest that Ms. Forder should fall within a specified class under the statute, such as a relative or close friend of a victim. Further, the State concedes the no contact order was not reasonably related to Mr. DeGagne's conviction.

We affirm the trial court's calculation of Mr. DeGagne's offender score, but remand for vacation of the no contact order concerning Ms. Forder.

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

  
Kulik, J.

WE CONCUR:  
  
Schultheis, C.J.

  
Brown, J.

ch. 231, § 56, effective August 1, 2009).

# APPENDIX F

**FILED**  
**FEB 05 2008**  
THOMAS R. FALLQUIST  
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR SPOKANE COUNTY

State of Washington, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 Bryce K. Degagne, )  
 )  
 Defendants, )

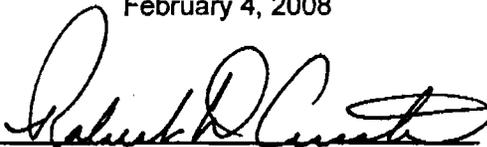
NO. 2007-1-03157-1

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COURTS INSTRUCTIONS TO THE JURY

---

February 4, 2008

  
Judge Robert D. Austin

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 may 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.

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. 3.

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 the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

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. 4

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 5

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness information, together with the factors already given you for evaluating the testimony of any other witness.

INSTRUCTION NO. 6.

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 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.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

INSTRUCTION NO. 7.

A person commits the crime of robbery in the first degree when in the commission of a robbery or in immediate flight therefrom he or she is armed with a deadly weapon or displays what appears to be a firearm or other deadly weapon or inflicts bodily injury.

INSTRUCTION NO. 8.

A person commits the crime of robbery when he or she unlawfully and with intent to commit theft thereof takes personal property from the person or in the presence of another against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person or to that person's property or to the person or property of anyone. The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, in either of which cases the degree of force is immaterial.

INSTRUCTION NO. 9.

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

- (1) That on or about July 23, 2007, the defendant unlawfully took personal property from the person or in the presence of another;
- (2) That the defendant intended to commit theft of the property;
- (3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person or to that person's property or to the person or property of another;
- (4) That force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking;
- (5)
  - (a) That in the commission of these acts or in immediate flight therefrom the defendant was armed with a deadly weapon; or
  - (b) That in the commission of these acts or in the immediate flight therefrom the defendant displayed what appeared to be a firearm or other deadly weapon; or
  - (c) that in the commission of these acts or in the immediate flight therefrom the defendant inflicted bodily injury;
- (6) That any of these acts occurred in the State of Washington.

If you find from the evidence that elements (1), (2), (3), (4), and (6), and any of the alternative elements (5)(a), (5)(b), or (5)(c), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (5)(a), (5)(b), or (5)(c), has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), (4), (5), or (6), then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 10.

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

- (1) That on or about July 29, 2007, the defendant unlawfully took personal property from the person or in the presence of another;
- (2) That the defendant intended to commit theft of the property;
- (3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person or to that person's property or to the person or property of another;
- (4) That force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking;
- (5)
  - (a) That in the commission of these acts or in immediate flight therefrom the defendant was armed with a deadly weapon; or
  - (b) That in the commission of these acts or in the immediate flight therefrom the defendant displayed what appeared to be a firearm or other deadly weapon; or
  - (c) that in the commission of these acts or in the immediate flight therefrom the defendant inflicted bodily injury;
- (6) That any of these acts occurred in the State of Washington.

If you find from the evidence that elements (1), (2), (3), (4), and (6), and any of the alternative elements (5)(a), (5)(b), or (5)(c), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (5)(a), (5)(b), or (5)(c), has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), (4), (5), or (6), then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 11.

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

INSTRUCTION NO. 12.

Theft means to wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services.

INSTRUCTION NO. 13.

A firearm, whether loaded or unloaded, is a deadly weapon.

INSTRUCTION 14.

Deadly weapon also means any weapon, device, instrument, substance, or article, which under the circumstances in which it is used, attempted to be used, or threatened to be used is readily capable of causing death or substantial bodily harm.

INSTRUCTION NO. 15.

Bodily injury, physical injury or bodily harm means physical pain or injury, illness or an impairment of physical condition.

INSTRUCTION NO. 16.

A person commits the crime of burglary in the first degree when he or she enters or remains unlawfully in a building with intent to commit a crime against a person or property therein, and if, in entering or while in the building or in immediate flight therefrom, that person or an accomplice in the crime is armed with a deadly weapon or assaults any person.

INSTRUCTION NO. 17.

To convict the defendant of the crime of burglary in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 23rd day of July 2007, the defendant entered or remained unlawfully in a building;
- (2) That the entering or remaining was with intent to commit a crime against a person or property therein;
- (3) That in so entering or while in the building or in immediate flight from the building the defendant or an accomplice in the crime charged was armed with a deadly weapon or assaulted a person; and
- (4) That the acts occurred in the State of Washington.

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

On the other hand, if, after weighing all 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. 18.

Building, in addition to its ordinary meaning, includes any dwelling. Building also includes any other structure used mainly for lodging of persons.

Each unit of a building consisting of two or more units separately secured or occupied is a separate building.

INSTRUCTION NO. 19.

A person enters or remains unlawfully in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.

INSTRUCTION NO. 20

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

An assault is also 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.

An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury

INSTRUCTION NO. 21

A person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein. This inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given.

INSTRUCTION NO. 22.

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 the 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. 23

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. For this purpose, use the form provided in the jury room. 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 bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted into evidence, these instructions and ^verdict forms 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 each 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(s) to express your decision. The presiding juror must sign the verdict form(s) and notify the bailiff. The bailiff will bring you into court to declare your verdict.

INSTRUCTION NO. 24

You will also be given special verdict forms for the crimes charged in counts I, II, and III. If you find the defendant not guilty of these crimes do not use the special verdict forms. If you find the defendant guilty of these crimes, you will then use the special verdict forms and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict forms "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If any one of you has a reasonable doubt as to the question, you must answer "no". If you unanimously have a reasonable doubt as to this question, you must answer "no".

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON, )  
 )  
 Respondent, ) No. 29008-5-III  
 v. )  
 )  
 BRYCE K. DeGAGNE, )  
 )  
 Appellant, )  
 )  
 In re: Personal Restraint ) No. 29331-9-III  
 Petition of )  
 ) CERTIFICATE OF MAILING  
 BRYCE K. DeGAGNE, )  
 )  
 Petitioner, )

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I certify under penalty of perjury under the laws of the State of Washington that on January 5, 2011, I mailed a copy of Respondent's Brief and Response to Personal Restraint Petition addressed to:

David N. Gasch  
Attorney at Law  
PO Box 30339  
Spokane WA 99223

and to:

Bryce K. Degagne  
DOC #314393  
1313 North 13<sup>th</sup> Ave  
Walla Walla WA 99362

1/5/2011

(Date)

Spokane, WA

(Place)



(Signature)