

No. 300340 - III

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

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STATE OF WASHINGTON,  
Respondent

and

DON LOVELL,  
Appellant

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BRIEF OF APPELLANT DONALD DOUGLAS LOVELL

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## **A. ASSIGNMENTS OF ERROR**

1. The Superior Court of Walla Walla County, State of Washington, erred in refusing to allow the defendant's expert, Dr. Ronald Fleck, to testify that within a reasonable medical certainty or probability the complaining witness, Patricia L. March, is an alcoholic, based upon her level and pattern of drinking hard alcohol which has existed for some time. [RP 505-06].
2. The Superior Court of Walla Walla County, State of Washington, further erred in rejecting defendant's offer of proof on the basis of relevancy and, thereby, refusing to allow Dr. Fleck to testify that alcoholics commonly suffer from either blackouts or amnesia, or possibly both, from alcohol consumption, as well as amnesic syndrome that can result from malnourishment and vitamin deficiency, which is common to alcoholics, and that such neurological ailments negatively impact an alcoholic's ability to accurately recollect events both in terms of that person's short- and long-term memories. [RP 498, 500-01, 504-05].
3. In turn, the Superior Court of Walla Walla County, State of Washington, also erred in subsequently failing to grant defendant's May 4, 2011, motion for new trial with respect to Count II, assault in the second degree-domestic violence [strangulation] of the third amended information based upon the court's refusal at trial to allow defendant to examine Dr. Fleck in the areas of alcoholism as referenced above. [RP 498, 500-01, 504-05, 505-06; CP 147-50].
4. The Superior Court of Walla Walla County, State of Washington, erred on April

23, 2011, in accepting the verdict of the jury wherein the defendant, DONALD DOUGLAS LOVELL, was found guilty of the crime as charged in the January 3, 2011, third amended information of plaintiff, State of Washington, to wit: Count II - assault in the second degree-domestic violence [strangulation][RCW 9A.36.021(1)(g) and RCW 10.99.020]. [RP 734-38;CP 132-33].

5. Finally, the Superior Court of Walla Walla County, State of Washington, erred in entering its "Domestic Violence Protection Order," "Judgment and Sentence," "Warrant of Commitment," and other related decisions on May 17, 2011, based upon the jury verdict in this case. [Sentencing RP 760; CP 158-73].

#### **B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the defendant's constitutional rights to present a viable defense on his own behalf, and to effectively respond to the allegations of the State, as guaranteed under the state and federal constitutions, were violated by the erroneous evidentiary rulings of the Superior Court of Spokane County, State of Washington, which precluded and unduly restricted the ability of the accused, DONALD DOUGLAS LOVELL, to present certain expert testimony of Dr. Ronald Fleck on the negative effects of complaining witness's alcoholism upon the accuracy of her short- and long-term memory processes, and which evidence bore directly upon the credibility of the complaining witness's testimony concerning her belated claim she had been "strangled" by the defendant during

the incident on August 24, 2009, and as alleged by the prosecution in Count II: assault in the second degree-domestic violence [strangulation][RCW 9A.36.021(1)(g) and RCW 10.99.020]. [Assignments of Error Nos. 1 through 5].

2. Whether, in terms of these same erroneous evidentiary rulings at trial, the Superior Court likewise violated the defendant's constitutional right to a jury trial under the provisions of both the state and federal constitutions by having invaded the sole province of the jury to determine the veracity of a witness when it deprived said trier of fact of Dr. Fleck's testimony concerning the negative neurological effects of complaining witness's alcoholism upon her short- and long-term memory processes, and which evidence bore directly upon the complaining witness's recollection and testimony regarding her belated claim she had been strangled by the defendant during the incident on August 24, 2009, and as alleged by the prosecution in Count II: assault in the second degree-domestic violence [strangulation][RCW 9A.36.021(1)(g) and RCW 10.99.020]. [Assignments of Error Nos. 1 through 5].

### **C. STATEMENT OF THE CASE**

1. Factual Background. During the summer of 2008, the complaining witness, Patricia L. March, and the defendant, DONALD DOUGLAS LOVELL, met through a mutual friend, Jason K. Spencer, and began a relationship. [RP 195-96]. Starting in the winter of 2008, the relationship became more and more acrimonious and

tumultuous, and eventually led to a number of physical altercations, beginning in May or June 2009, where one or both parties was the aggressor. [RP 202, 205, 206, 211]. An on-going issue between the couple was Mr. LOVELL's belief that Ms. March was having an affair with Mr. Spencer. [RP 201-02, 210-11, 213].

During this same time, Ms. March began drinking more heavily in order to cope with the situation and to avoid going "ballistic." [RP 200, 249]. This eventually led to her consuming a gallon of hard alcohol a week. She would begin drinking when she first woke until she went to bed in the evening. [RP 200, 239-40, 241, 249, 445]. During this same time, she was being treated for depression and taking Prozac. [RP 212, 428].

Ms. March began drinking rum and water in the morning hours of August 23, continued to drink thereafter while at work, and ended sometime prior to going to bed. [RP 239-40]. Sometime during the evening of August 23, 2009, the couple were together at Ms. March's home at 602 East Chestnut, in Walla Walla, Walla Walla County, State of Washington, when Mr. LOVELL allegedly flew into a rage, and threw a glass on the living room floor which broke and, as a result, a shard of glass hit and slashed Ms. March's leg. [RP 214-15, 253, 352-53, 530]. Eventually, he calmed down, apologized for losing his temper, and helped Ms. March bandage her leg. [RP 215, 254]. She then went to bed around 10:00 p.m. [RP 215-16].

Sometime during the early morning hours of August 24, Mr. LOVELL came into the bedroom and woke her. [RP 217-18]. He allegedly demanded "sex" and she

did not want to have relations at that time. [RP 217-18]. As he was allegedly attempting to turn her from her side, Ms. March struck Mr. LOVELL in the jaw, knocking him from the bed, and an altercation ensued. [RP 218-19].

Sometime later, Mr. LOVELL fell asleep and she left the house to call "911" from a neighbor's residence across the street. [RP 219-220]. This was around 3:00 a.m. [RP 222-23]. The "911" tape was subsequently played for the jury, and jurors later asked if the jury could be provided a transcript of the tape because it was difficult to understand. [RP 224, 228-29]. The request was denied by the court. [RP 244, 228-29].

When police and paramedics arrived on the scene, they noticed right off that Ms. March was highly intoxicated. [RP 314]. Mr. LOVELL later testified that she was already intoxicated, she became intoxicated around 1:30 or 2:00 the previous afternoon on August 23. [RP 564].

Police eventually woke Mr. LOVELL, who was also intoxicated, took him from the bedroom, and placed him in custody as the alleged primary aggressor. [RP 314, 318]. This was notwithstanding the fact that he claimed that he was only defending himself, and Ms. March had been the aggressor in terms of her slugging him in the jaw and biting him repeatedly. [RP 315, 580]. In essence, she had "gone crazy" and had assaulted him first. [RP 322-23].

Initially, Ms. March only claimed she had been assaulted, "head butted" or hit in the face. [RP 311-12, 314, 322-23, 325, 328, 391, 392, 409, 531-35]. Her injuries

were described by paramedics as non-life-threatening. [RP 534-35].

Throughout this event, Ms. March has consistently stated she never lost consciousness. [RP 421]. However, several days or weeks after the incident, she began claiming to police and her health care provider, Dr. Lauri Renee Larson, that she had been choked, strangled and raped by Mr. LOVELL during this early morning altercation on August 24, 2009. [RP 340, 346-47, 354-55, 358, 364-65, 392-93].

In fact, when reviewing the emergency room notes on September 3, 2009, concerning Ms. March's treatment in August, Dr. Larson noted that there was no mention of her being "raped" or "forcible sex," and no indication that there had been any "strangulation, choking or grabbing of the neck" during the August 24 incident. [RP 405-06, 409, 420, 421, 422, 430]. At trial, Mr. LOVELL in fact denied Ms. March's belated allegations in this regard. [RP 583].

As Dr. Larson acknowledged later at trial, the examining ER physician, Dr. Fredenberg, had noted on that date that Ms. March's "neck is supple, full range of movement [with] no tenderness." [RP 421, 422, 424-25]. Ultimately, during trial, the court itself reflected on the fact that Ms. March had been less than timely in terms of disclosing the alleged incidents of rape and strangulation on August 24. [RP 458].

2. Procedural History. By way of a third amended information, the Plaintiff, State of Washington, charged Mr. LOVELL on January 3, 2011, with Count I - Assault in violation of protection order [RCW 26.50.110(4) and RCW 10.99.020], Count II -

Assault in the second degree [strangulation] [RCW 9A.36.021(1)(g) and RCW 10.99.020], Count III - Harassment Domestic Violence [RCW 9A.46.020(1)(a)(i) and (2)(b)(ii), and RCW 10.99.020], Count IV - Harassment [RCW 9A.46.020(1)(a)(i) and (2)(b)(ii)], and Count V - Rape in the second degree [RCW 9A.44.050(1)(a) and RCW 26.50.110(2)]. [CP 82-85]. The first three and fifth counts pertained to the August 24, 2009, incident concerning the complaining witness, Patricia L. March, whereas the fourth count pertained to Jason K. Spencer. [CP 82-85].

Trial commenced on April 25, 2011. [RP 20, et seq.]. At the close of the prosecution's opening case, the defendant, DONALD DOUGLAS LOVELL, moved to dismiss count IV pertaining to the harassment charge associated with the alleged victim, Jason K. Spencer. [RP 454-55]. The motion was granted by the Court, while a similar pro forma motion to dismiss all other Counts, as well, was denied. [RP 456-57, 457, 457-58].

At the conclusion of the case, the jury entered its verdicts, finding the defendant, Mr. LOVELL, "guilty" of the charges set forth in Counts I and II, but "not guilty" of the remaining charges of harassment and rape in the second degree in Counts III and V, respectively.

On May 4, 2011, Mr. LOVELL filed a post-trial motion for arrest of judgment as to Count I, and for a new trial with respect to Count II, for which he was convicted. [CP 147-50]. As to Count II, assault in the second degree-domestic violence [strangulation], his principal argument was that the court had abused its

discretion when refusing to allow defense counsel to examine his expert, Dr. Ronald Fleck, in the certain areas of alcoholism concerning Patricia L. March's inability to accurately recall events due to possible alcoholic blackouts, as well as intermittent amnesic syndrome which is associated with malnourishment and vitamin deficiency. [RP 548, 500-01, 504-05, 505-06; CP 149-50]. In relation to this proffered testimony of Dr. Fleck, Dr. Larson, the complaining witness's family physician, had acknowledged that Ms. March had been consistently losing weight over the course of her treatment from June 8 through September 17, 2009. [RP 432-33, 434-35]. This post-trial motion as to count II was denied by the Superior Court.

At sentencing on May 17, 2011, the Superior Court "arrested" judgment on Count I [CP 161], and sentenced the accused to fourteen [14] months imprisonment on the only remaining conviction as to Count II, assault in the second degree. [CP 164]. This appeal followed. [CP 173-74]. Additional facts are set forth below as they pertain to a particular issue and argument.

#### **D. STANDARD OF REVIEW**

Errors of law involving evidentiary matters, including those of a constitutional magnitude, are reviewed de novo. See, State v. Horrace, 144 Wn.2d 386, 392, 28 P.3d 753 (2001); see also, State v. Cauthron, 120 Wn.2d 879, 887, 846 P.2d 502 (1993); State v. Dunn, 125 Wn.App. 582, 105 P.3d 1022 (2005). Also, the failure or refusal of the trial court to either follow or apply the governing law constitutes a manifest abuse of discretion. State v. Robinson, 79 Wn.App. 386, 902 P.2d 652 (1995). In a criminal case, an error of constitutional magnitude is presumed prejudicial and requires reversal on appeal unless the prosecution establishes, by way of other evidence in the case, that such error was harmless beyond a reasonable doubt. State v. Spotted Elk, 109 Wn.App. 253, 261, 34 P.3d 906 (2001); see also, State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997); State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994).

#### **E. ARGUMENT**

The defendant's constitutional rights to present a viable defense on his own behalf, and to effectively respond to the allegations of the State, as guaranteed under the corresponding provisions of the State and Federal Constitutions, were violated by the erroneous evidentiary ruling of the Superior Court concerning the subject testimony of Dr. Ronald Fleck on the issue of the complaining witness's alcoholism and the negative effects this would have on her memory processes [RP 504-05, 505-

06], insofar as said rulings prevented the accused, DONALD DOUGLAS LOVELL, from establishing for the trier of fact the lack of credibility of complaining witness due to her inability to accurately recollect the events which occurred on August 24, 2009. [Issue No. 1].

At trial, the Superior Court would not allow the defendant to present the expert testimony of Dr. Ronald Fleck that within a reasonable medical certainty or probability, the complaining witness, Patricia L. March, is an alcoholic based upon the level and daily pattern of her drinking habit which has existed for several years. [RP 505-06]. In fact, Ms. March had herself openly admitted to her health care provider, Lauri Renee Larson, that she is an "alcoholic." [RP 244-45].

During the same bench conference, the court also denied the defendant the right to examine Dr. Fleck as to the impact drinking has upon an alcoholic's cognitive skills and ability to accurately recall and remember events. [RP 504-05]. The court deemed this evidence "irrelevant" without any further explanation or going into any analysis or application of the provisions of governing expert testimony under Rules 702 through 705 of the Washington Rule of Evidence [ER].

This was notwithstanding the fact that the defendant made an offer of proof by way of Dr. Fleck's proffered testimony showing the relevancy of this evidence in terms of explaining why the complaining witness, Ms. March, and her belated claim that she was "strangled or choked" on August 24, 2009, should not be deemed credible or trustworthy by the trier of fact. [RP 500-01]. This evidence of possible

alcoholic blackouts and amnestic syndrome [RP 500-01], when coupled with Dr. Fleck's testimony that any perceived injury to the complaining witness's neck could not, within a reasonable medical certainty or probability, be consistent with any squeezing of the neck, choking or strangulation [RP 489-94, 522-24], would have clearly "assist[ed] the trier of fact" in both understanding the actual cause of this particular injury to the neck, as well as providing the jury with the proper means by which to accurately judge Ms. March's credibility and veracity in terms of her belated claim of strangulation. See, ER 702.

Such expert evidence is clearly contemplated as being admissible under ER 702. In this regard, Dr. Fleck explained, both before and after defendant's offer of proof, that the "hematoma" which was found on Ms. March's neck was instead consistent with a blow or striking action rather than some other force, such as choking, to the left anterior area of Ms. March's neck. [RP 489-94, 522-24]. As pointed out by the defendant in his post-trial motion as to Count II, there was nothing in terms of physical evidence to suggest otherwise. [CP 149-50].

As to Dr. Fleck's proffered testimony which the court refused to allow [RP 500-01, 504-05, 505-06], this evidence would have clarified for the jury why the complaining witness might have falsely or mistakenly accused Mr. LOVELL of strangulation well after the date of the incident. In this regard, the record is clear that, during deliberations, the jurors were struggling with the issue of whether Ms. March had been strangled in terms of the court's instructions. [RP 733-34; CP 112-

13, 131]. Clearly, the proffered evidence of Dr. Fleck which was rejected by the court might have "assisted the jury" in this regard. Id. See, ER 702. As discussed below, there should be no question whatsoever that appellant's five [5] assignments of error are well-taken and for the following reasons:

1. Errors are of a constitutional magnitude. It is the contention of the appellant that the foregoing challenged rulings of the Superior Court which deprived the trier of fact of this relevant evidence--explaining the reason for the lack of credibility associated with Ms. March's belated and unsubstantiated claim that she was strangled--violated the defendant's constitutional rights to present a viable defense on his own behalf, and to be able to effectively respond to the criminal allegations of the plaintiff, STATE OF WASHINGTON, brought against him in Count II of the third amended information. In effect, the Court's rulings deprived the jury of the complete and entire picture surrounding the unsubstantiated claim of the complaining witness that she was choked by the accused, see, Wash.St.Const., Art. I, § 21; U.S.Const., amend. 6 and 14; and, further, prejudicially restricted Mr. LOVELL's ability of to defend himself in an otherwise "he said . . . she said . . ." situation. See, Wash.St.Const., Art. I, § 3; U.S.Const., amend. 6 and 14. As more artfully stated, the Superior Court's preclusion of the proffered testimony of Dr. Fleck "unfairly curtailed the defendant's ability to present a logical explanation for the victim's claims and testimony." State v. Carver, 37 Wn.App. 122, 125, 678 P.2d 842, review denied, 101 Wn.2d 1019 (1984).

a. Violation of due process. From a due process standpoint, a criminal defendant has an unqualified, constitutional right to present all admissible evidence in his defense. See, State v. Clark, 78 Wn.App. 471, 477, 678 P.2d 842, review denied, 128 Wn.2d 1004 (1995); State v. Rehak, 67 Wn.App. 157, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022 (1993); accord, State v. Thomas, 150 Wn.2d 821, 857, 93 P.3d 970 (2004); State v. Hudlow, 99 Wn.2d 659, P.2d 514 (1983); see also, Wash.St.Const., Art.I, §3; U.S. Const., amend 5 and 14. In this vein, ER 402 expressly provides that evidence shall be deemed admissible when, as expressed under ER 401, it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Here, there can be no question that the foregoing evidence, which was either prohibited or otherwise restricted by the Superior Court, met the requirements of ER 402 and 401. Such evidence makes it more likely or probable that the claims of the complaining witness associated with Count II, i.e. "strangulation," were untrue and based upon the less-than-sound memory of the complaining witness. Surely, the jury shall have been entitled to consider this additional, proffered evidence bearing upon Patricia L. March's faulty memory and, consequently, her lack of credibility.

b. Violations of right of confrontation and compulsory process. From a right of confrontation standpoint, when evidence is by its very nature

"exculpatory," such as Dr. Fleck's testimony concerning the ramification of Patricia L. March's alcoholism, that evidence is clearly relevant and material to the issue of an accused's guilt or innocence. Therefore, he has an unqualified constitutional right to present such evidence to the trier of fact. See generally, Chambers v. Mississippi, 410 U.S. 284, 35 L.Ed.2d 297, 93 S.Ct. 1038 (1973); see also, Taylor v. Illinois, 484 U.S. 400, 98 L.Ed.2d 798, 108 S.Ct. 646 (1988); Gomez v. Greer, 896 F.2d 252 (7th Cir. 1990). To deprive a criminal defendant of the opportunity to present such evidence not only impinges upon his constitutional right to have his fate determined by a jury of his peers, it equally deprives him of the right to compulsory process which includes and encompasses his constitutional right to present a viable defense on his own behalf. See generally, State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976); State v. Roberts, 80 Wn.App. 342, 350, 908 P.2d 892 (1996).

2. Such errors warrant reversal in this case. Given the foregoing legal considerations, the decision of the Superior Court to exclude the proffered testimony of Dr. Fleck [RP 504-55, 505-06] was clearly an error of constitutional magnitude. Because, on this appeal, the prosecution cannot prove that the resulting prejudice to Mr. LOVELL was harmless beyond a reasonable doubt, the conviction, judgment and sentence entered against him on this final remaining charge, under Count II of the third amended information, should now be reversed on this appeal. State v. Spotted Elk, 109 Wn.App. 253, 261, 34 P.3d 906 (2001); see also, State v.

Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997); State v. Russell, 125 Wn.2d 24, 94, 882 P.2d 747 (1994); RAP 12.2.

3. The constitutional rights of the appellant, DONALD DOUGLAS LOVELL, as guaranteed under the State and Federal Constitutions, were similarly violated insofar as the Superior Court's rulings barring inquiry on the issues associated with the complaining witness's alcoholism and the neurological negative impact thereof on her ability to accurately recollect events had the net effect of invading the province of the jury by essentially embracing and vouching for the veracity of the complaining witness, as well as the guilt of the accused, by depriving the trier of fact of this relevant and critical exculpatory evidence which bore directly on the issue of her credibility and trustworthiness. [Issue No. 2].

Furthermore, the right of the accused to a trial by a jury of his peers, rather than the Court, was implicated by the challenged, erroneous rulings of the Superior Court.

4. Violation of right to a jury trial. The nature of the subject trial court rulings concerning Dr. Fleck's testimony as to Patricia L. Marsh's alcoholism, as well as the negative neurological impact such alcoholism would have had on her ability to accurately recall and describe events of August 24, 2009, had the net effect of invading the province of the jury which is solely responsible for determining the credibility of witnesses as well as the guilt of the accused. United States v. Young, 470 U.S. 1, 18-19, 84 L.Ed.2d 1, 105 S.Ct. 1038 (1985); United States v. Velarde, 214

F.3d 1204, 1211 (10th Cir. 2000); United States v. Charley, 189 F.3d 1251, 1266-1267 (10th Cir. 1999); Snowden v. Singletary, 135 F.3d 732 (11th Cir.), cert. denied, 525 U.S. 963, 119 S.Ct. 405, 142 L.Ed.2d 329 (1998); United States v. Binder, 769 F.2d 595, 602 (9th Cir. 1985); United States v. Samara, 643 701, 705 (10th Cir. 1981); State v. Black, 109 Wn.2d 336, 348-49, 745 P.2d 12 (1987); State v. Demery, 100 Wn.App. 416, 997 P.2d 420 (2000); State v. Florczak, 76 Wn. App. 55, 74, 882 P.2d 199 (1994), review denied, 126 Wn.2d 1010 (1995); State v. Jones, 71 Wn.App. 798, 813, 863 P.2d 85, review denied, 124 Wn.2d 1018 (1994); State v. Alexander, 64 Wn.App. 147, 882 P.2d 1250 (1992); see also, Lambright v. Stewart, 220 F.3d 1022 (9th Cir. 2000); United States v. Binder, supra. By depriving the trier of fact of this highly relevant medical evidence, the jury could otherwise assume Ms. March's short and long term memory processes were intact and that she could, in fact, be considered credible and her testimony trustworthy in terms of her belated claim the defendant had strangled her during the drunken, tumultuous and acrimonious events of August 24, 2009.

By implication, the refusal to allow Dr. Fleck's proffered testimony was likewise equal or analogous to an impermissible opinion by the court on the guilt of the accused and the trustworthiness of Ms. March's testimony. Jones, at 813; State v. Maule, 35 Wn.App. 287, 293, 667 P.2d 96 (1983). In essence, the court removed the issue of Ms. March's credibility entirely from the table. Id. Had the trier of fact been afforded the opportunity to reflect on the proffered testimony of Dr. Fleck on

matters pertaining to the effects of alcoholism upon Ms. March's memory processes, the jury may well have reached a different verdict as to Count II, as it did with respect to its finding of "not guilty" on Counts III and V. See generally, United States v. Azure, 801 F.2d 336, 340-41 (8th Cir. 1986).

Simply put, in this unique set of circumstances, the "relevancy" and "weight to be given the proffered medical evidence" of Dr. Fleck should have been left to the jury alone to decide, rather than the Court. The challenged and erroneous evidentiary rulings of the Superior Court, therefore, constitute a clear and indisputable violation of the accused's right to a jury determination of the facts at issue including, but not limited to, the right to have all relevant facts bearing on the veracity of Ms. March available to it during deliberation, as is guaranteed by the State and Federal Constitutions. Id.; see also, Wash.St.Const., Art. I, § 21; U.S.Const., amend. 6 and 14.

5. This further error warrants reversal. Once again, the plaintiff, STATE OF WASHINGTON, cannot demonstrate that this additional constitutional error was harmless before a reasonable doubt. State v. Spotted Elk, 109 Wn.App. 253, 261-62, 34 P.3d 906 (2001); see also, State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997); State v. Russell, 125 Wn.2d 24, 94, 882 P.2d 747 (1994). Hence, the conviction, judgment and sentence entered by the Superior Court, and which pertained to Count II of the third amended information, should now be reversed on this appeal. RAP 12.2.

## F. CONCLUSION

Based upon the foregoing points and authorities, the appellant, DONALD DOUGLAS LOVELL, respectfully requests that the judgment and sentence which was entered in error by the Superior Court of Walla Walla County, State of Washington, on May 17, 2011, be reversed by this court on appeal and, further, that the criminal charge of assault in the second degree be ordered dismissed with prejudice.

DATED this 3<sup>rd</sup> day of May, 2011.

Respectfully submitted:



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